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IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,613

TIMOTHY BOUTWELL,

Petitioner,

vs.

STATE OF FLORIDA

Respondent.

****

ON APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FOURTH DISTRICT

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ANSWER BRIEF OF RESPONDENT

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PRELIMINARY STATEMENT

Respondent was the prosecution and Petitioner the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, in and for Indian River County, Florida. Petitioner was the Appellant and Respondent the Appellee in the Fourth District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Respondent may also be referred to as the State.

The following symbols will be used:

"R"	Record on Appeal
"PB"	Petitioner's Brief on Merits

All emphasis has been added by Respondent unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

Subject to the additions and clarifications as set forth in the argument portion of this brief which are necessary to resolve the narrow legal issue presented upon appeal, the State accepts Petitioner's "Statement of the Case and Facts" as a reasonably accurate portrayal of the legal events and the evidence adduced below.

SUMMARY OF ARGUMENT

While there was only one accident on the date in question, there were four separate injuries resulting in four discrete crimes against the person. Separate convictions and sentences are appropriate for each person injured and do not violate double jeopardy principles, where the Legislature intended injuries to the person to be treated differently from offenses which solely involve the unlawful operation of a motor vehicle.

ARGUMENT

THE TRIAL COURT DID NOT ERR IN CONVICTING AND SENTENCING APPELLANT TO FOUR COUNTS OF DRIVING WHILE LICENSE SUSPENDED WHERE THERE WERE FOUR SEPARATE INJURIES CONSTITUTING FOUR SEPARATE CRIMES

While there was only one accident on the date in question, there were four separate injuries resulting in four discrete crimes against the person. Separate convictions and sentences are appropriate for each person injured and do not violate double jeopardy principles, where the Legislature intended injuries to the person to be treated differently from offenses which solely involve the unlawful operation of a motor vehicle.

Respondent's position here, and in the court below, is that the Florida Legislature enacted § 322.34(3) Fla. Stat.[1] for a different purpose than that of § 322.34(1). Subsection (3) reads as follows:

> (3) Any person whose driver's license has been revoked pursuant to s. 316.655, s. 322.26(8), s. 322.27(2), or s. 322.28(2) or (5) and who operates a motor vehicle while his license is canceled, suspended, or revoked and who by careless or negligent operation thereof causes the **death of or serious bodily injury to another human being** [emphasis supplied], is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

It is clear that the gravamen of this particular subsection is the death or serious injury to another human being as opposed to the unlawful operation of a motor vehicle which is the directive of the other subsections of § 322.34. This does not appear to

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[1] Petitioner refers to this as § 322.24, but the quoted sections, and the charged sections, refer to § 322.34.

have been considered in the case relied upon by Petitioner: Wright v. State, 592 So. 2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So. 2d 457 (Fla. 1992). Wright relied upon an earlier case, Hallman v. State, 565 So. 2d 1329 (Fla. 2d DCA 1986), see Wright, at 1126, to determine somewhat incongruously that while the defendant could be convicted of four counts of driving under the influence with injury where there was one accident under § 316.193(3)(c) he could be convicted of only one count of driving with a license suspended under Hallman.

This is clearly error. As pointed out by Petitioner (PB 9), Subsection 3 of § 322.34 did not exist at the time that Hallman was decided. Subsection 3 was added by the Legislature in 1988. See Laws of Florida, 1988, c. 88-381, s. 69. Again as pointed out by Petitioner, the "legislature is presumed to know how statutes have been interpreted, and indeed, when it disagrees with a court interpretation has then changed the statute to make its intent clear". State v. Vikhlyantse, 602 So. 2d 636 (Fla. 2d DCA 1992).

Contrary to the allegations of Petitioner, (PB 10) this is precisely what the Legislature has done to clarify its intent regarding multiple punishments. In Carawan v. State, 515 So. 2d 161 (Fla. 1987), the Florida Supreme Court construed § 775.021 Fla. Stat. (1987) as a rule of statutory construction, noting that in the absence of any express statement of legislative intent "the rule of lenity contained in section 775.021(1) and our common law requires that the court find that multiple punishments are impermissible." Id. The Florida Legislature

thereafter reacted to Carawan by amending § 775.021(4). Subsection (b) was added by Ch. 88-131, § 7, Laws of Florida and reads in pertinent part as follows:

> (b) The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and **not to allow the principle of lenity as set forth in subsection (1) to determine legislative intent...**[emphasis supplied]

Even before the adoption of this language, Florida Courts have recognized a distinction of felony crimes against individual human beings as opposed to other crimes. See for instance, State v. Brandt, 460 So. 2d 444 (Fla. 5th DCA 1984), pet. for rev. den. 467 So. 2d 999 (Fla. 1985), holding that two batteries committed by a defendant which occurred at the same location in the same time period did not equate them to the same crime, since there were two different victims. Also see, Palmer v. State, 416 So. 2d 878 (Fla. 4th DCA 1982), affirmed in part rev. in part, 438 So. 2d 1 (Fla. 1983), in which the defendant robbed a funeral parlor, and mourners who were present during a wake. The court in Palmer upheld the conviction of the defendant for thirteen robbery counts. This is clearly distinguishable from the cases of Troedel v. State, 462 So. 2d 392 (Fla. 1984) and James v. State, 567 So. 2d 59 (Fla. 4th DCA 1990), cited by Petitioner (PB 9), in which those courts were dealing with an enhancement factor to the crime of burglary. The court in Troedel, properly reasoned that an enhancement factor caused by the actions of the defendant could not transform one burglary into two since there was only one entry. A different crime committed against different individuals could clearly result in more than one crime. See Brandt, supra.

In terms of motor vehicle accidents, this is also a recognized principle in other states. See for instance 7A Am. Jur. 2d (Rev.), Automobiles & Highway Traffic, § 391 stating in part:

> Most courts hold that there are as many separate and distinct offenses as there are persons injured or killed by the unlawful operation of a motor vehicle, so that successive prosecutions may be instituted against the person who committed the unlawful act without violating the rule against double or former jeopardy.

See also State v. Timms, 505 A.2d 1132 (R.I. 1986) and Galvin v. State, 655 P.2d 155 (Nev. 1982).

Despite previous holdings regarding crimes against individuals, as in Palmer and Brandt, the Florida Courts have been more reluctant when it comes to crimes involving motor vehicles than many other states. However, this is not entirely unknown here. In Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), rev. den. 547 So. 2d 1210 (Fla. 1989), the defendant sought to argue that although two individuals were injured, there was only one accident and that separate convictions and sentences for driving under the influence where injuries occur was improper. The court acknowledeged that it had previously held that driving under the influence may be a "continuing offense", but went on to distinguish it from driving under the influence **with injuries** [emphasis supplied]. The court described the difference as follows:

> Turning to the statute under which appellant was charged [316.193(3) Fla. Stat.], the distinguishing factor between this offense of D.U.I. is the fact someone was injured. This, like death sustained in the course of a D.U.I. manslaughter, "is not merely an enhancement of

> penalty for driving while intoxicated," but a discrete crime against the person and thus an instant offense. [citing Hauser v. State, 474 So. 2d 1193 (Fla. 1985) for support]. We believe separate convictions and sentences are appropriate for each person injured by the intoxicated driver.

Pulaski at 194. Other states have come to the same conclusions regarding their statutes. In Commonwealth v. Meehan, 14 Mass. App. 1028, 442 N.E. 43 (1982), that court dealt with its own version of the D.U.I. with injuries statute. The question before the Massachusetts appellate court was put as follows:

> ...the double jeopardy clause of the Fifth Amendment to the United States Constitution prohibits punishing a person twice for the same offense, but that clause imposes few limitations on the legislative power to define offenses. The decisive question, therefore, is whether the Legislature intended that each death constitue a separate offense where a person, by reason of operation of a motor vehicle in violation of G.L. c. 90, § 24G, causes the deatrh of more than one person in a single automobile accident.

That court went on to consider as a factor, that Massachusetts courts traditionally allowed multiple punishments where more than one death was caused by the criminal conduct. However, that court went on to consider that:

> the Legislature has expressly provided for punishment of any violation of § 24G which causes the death of "another person." The deliberate use of these words signifies a legislative determination, [citation omitted] that the gravamen of the offense is the killing of a human being as distinguished from unlawful operation of a motor vehicle. We conclude that the Legislature intended that each death caused in one accident in violation of § 24G could be prosecuted and punished thereunder as a separate offense.

Likewise, the court below recognized a distinction between § 322.34 as it existed at the time Hallman was decided and § 322.34 after the adoption of subsection 3, dealing with "death or or

serious bodily injury to another human being". See Boutwell v. State, 18 Fla. L. Weekly D796, also referring to Pulaski at 797. By adopting subsection 3, in 1988, the Florida Legislature clearly indicated an intention that each injury should be punished separately, and the appellate court below properly upheld the trial court's determination of four separate convictions under § 322.34(3) Fla. Stat. (1991) for four separate injuries.

CONCLUSION

WHEREFORE, based upon the foregoing argument and authorities cited herein, Respondent respectfully requests that the decision of the Fourth District Court of Appeal be **AFFIRMED.**

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by courier to: CHERRY GRANT, Assistant Public Defender, Counsel for the Appellant, Criminal Justice Building, 6th Floor, 421 3rd Street, West Palm Beach, Fl. 33401, this 27th day of September, 1993.

Edward L. Giles

Of Counsel