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IN THE SUPREME COURT OF FLORIDA

D.A. 11-29-93

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TIMOTHY BOUTWELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 81,613

PETITIONER'S BRIEF ON THE MERITS

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

CHERRY GRANT
Assistant Public Defender
Attorney for Timothy Boutwell
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 260509

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PRELIMINARY STATEMENT

Petitioner was the defendant in the Criminal Division of the Circuit Court of the Nineteenth Judicial Circuit, In and For Indian River County, Florida and the appellant in the Fourth District Court of Appeal. Respondent was the prosecution and the appellee below.

In the brief, the parties will be referred to as they appear before this Honorable Court.

The following symbol will be used:

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner was charged in an eight count information with four counts of DUI resulting in injury or property damage in violation of Florida Statute 316.193(1) and (3)(c)(1), and four counts of driving while license suspended with serious injury in violation of Florida Statute 322.24(3) (R 70-72). All eight counts arose as the result of one automobile accident which occurred December 22, 1991, when Petitioner struck a car with four occupants in a head-on collision (R 4, 55-57). Petitioner's blood alcohol level was ".175% legal and .25% medical." (R 55). His driver's license was suspended at the time of the accident (R 4).

Petitioner pled no contest to the eight counts as charged in the information and was adjudged guilty on each (R 4, 95-97). Disputes involving the first four counts have been resolved by the district court and are no longer relevant here. Boutwell v. State, 18 Fla. L. Weekly D796, 797 (Fla. 4th DCA March 24, 1993). With regard to the four counts of driving while license suspended with serious injury, Petitioner was sentenced to five years imprisonment for count 5, two consecutive years imprisonment followed by three years probation for count 6, five years consecutive probation for count 7, and five more years consecutive probation for count 8 (R 129-131, 110-121).

Petitioner filed a timely notice of appeal to the Fourth District Court of Appeal (R 134). In that appeal he argued that driving while license suspended with multiple injuries arising from a single incident (accident) is only a single violation of section 322.24(3), Florida Statutes (1991), and that his multiple convic-

tions violate double jeopardy principles. The court rejected his argument and found the multiple convictions proper. 18 Fla. L. Weekly at D796. Petitioner sought and was granted conflict review by this Court.

SUMMARY OF ARGUMENT

Appellant was charged with four counts of driving while license suspended when he had an accident which injured four people. Driving while license suspended causing serious personal injury is a continuing offense, therefore only a single violation may be charged for one incident. Multiple convictions violate double jeopardy principles. It was therefore fundamental error to convict and sentence Appellant for four counts arising out of one incident.

ARGUMENT

THE COURT REVERSIBLY ERRED IN CONVICTING AND SENTENCING PETITIONER FOR FOUR COUNTS OF DRIVING WHILE LICENSE SUSPENDED BECAUSE HIS ACTIONS WERE A SINGLE CONTINUING OFFENSE AND THEREFORE A SINGLE VIOLATION OF THE STATUTE.

Petitioner hit a car with four occupants on December 22, 1991, injuring all four. At the time, Petitioner's driver's license was suspended. In addition to DUI with injury or property damage charges,[1] Petitioner was charged in counts 5-8 of the information with driving while his license was suspended or revoked causing serious bodily injury to another human being contrary to 322.24(3), Fla. Stat. (1991). He entered pleas of no contest to the court and was sentenced consecutively for all counts. The issue to be resolved here is the unit of prosecution provided for by section 322.24(3) which states:

> Any person whose driver's license has been canceled, suspended, or 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 driver's 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, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

If, as Petitioner contends, this offense is a single continuing offense, then the trial court's imposition of multiple convictions and sentences for a single offense violates double jeopardy principles and is thus fundamental error.

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[1] Disputes involving these charges were resolved by the district court.

"A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an uninterrmittent force, however long a time it may occupy." United States v. Midstate Horticultural Co., 306 U.S. 161, 166, 59 S. Ct. 412, 414, 83 L. Ed. 563 (1939), quoting Armour Packing Co. v. U.S., 8 Cir., 153 F. 1, 5-6, 14 L.R.A., N.S., 400 (1907).

Courts have applied the "continuing offense" concept to most traffic offenses.[2] Hallman v. State, 492 So. 2d 1136, 1138 (Fla. 2d DCA 1986). For instance, in Hallman a defendant was driving with a suspended license. He was involved in an accident but left the scene. He was later discovered asleep behind the wheel of his car which was stopped at an intersection in a different town a few miles away from the accident. Hallman received two citations for driving with a suspended license but the second district vacated one, finding that the offense was a continuing one subject to only a single prosecution. 492 So. 2d at 1138. See also State v. Licari, 43 A. 2d 450 (Conn. 1945) (only one count of DUI where defendant drove car into traffic stanchion and then led police on 6-10 minute chase); People v. Dillingham, 249 NE. 2d 294 (Ill. 2d

[2] The concept is not unique to traffic offenses however, and in fact far predates them. In re Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887) involved three indictments covering distinct yearly time periods against a defendant based on a continuous cohabitation with seven women. In concluding that three charges were impermissible the court relied on Crepps v. Durden, 2 Cowper's Reports 640, 98 Eng. Rep. 1283 (K.B. 1777), wherein a defendant was charged four times with "...exercis(ing) any worldly labor, business or work...on the Lord's day..." for selling four loaves of bread to various customers. One charge per loaf was deemed inappropriate despite the fact that they were sold to four separate "victims" as it were. See also Bell v. U.S., 349 U.S. 81, 75 S. Ct. 620, 99 L. Ed. 905 (1955) (transporting two women across state lines in violation of the Mann Act was a single offense).

DCA 1969) (only one count of driving while license suspended where defendant eluded first officer who attempted to stop him and led second officer on 100 mph chase); Boyle v. State, 241 Ind. 565, 170 N. E. 2d 802 (Ind. 1960) (single offense of DUI though it included a hit-and-run accident in the midst of the offense). In Wright v. State, 592 So. 2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So. 2d 457 (Fla. 1992), a defendant was driving with a suspended license when he hit a bus, injuring four people on the bus. He was convicted for four violations of section 322.24(3), the suspended license section involved in the instant case as well. Relying on Hallman, the third district reversed the multiple convictions finding:

> ...the above facts justify only a single conviction and sentence for driving with a suspended license. Defendant's action was a single continuing offense and thus a single violation of section 322.24.

592 So. 2d at 1126.

Sub judice, the fourth district declined to follow the third's lead in Wright. Though Hallman makes no reference to any subsection of 322.24, the Boutwell court suggests it involved a violation of subsection 1 of the statute and that the result would have been different had subsection 3 been involved.[3] 18 Fla. L. Weekly at D796. The court then chose to rely instead on another second district case, Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), rev. denied, 547 So. 2d 1210 (Fla. 1989), a case involving not a suspended license but a DUI with injuries. As its rationale,

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[3] There was no such subsection at the time Hallman was decided.

the court in Boutwell states that subsections (1) and (3) of section 322.24 deal with two different crimes. 18 Fla. L. Weekly at D796. To support that claim the court refers to that portion of Florida Statute 775.021(4)(a) which provides a separate offense is "that which requires proof of an element that the other does not * * * ." Id. Of course what the court left out was the rest of the sentence: "...without regard to the accusatory pleading or the proof adduced at trial." 775.021(4)(a), Fla. Stat. (1991). Part (b) of the same statute however clarifies that multiple convictions cannot exist for lesser included offenses. 775.021(4)(b)(3), Fla. Stat. (1991).

Florida statute 322.24 creates a single crime prohibiting driving while one's license is suspended or revoked. See State v. Slaughter, 574 So. 2d 218 (Fla. 1st DCA 1991) (one indication of legislative intent is the title of the statute). The degree of the offense and punishment increases depending upon its particular circumstances: (1) simply driving is a second degree misdemeanor, a second offense is a first degree misdemeanor, (2) a first offense if revoked for habitual traffic offenses is a first degree misdemeanor, (3) negligently causing the death or serious injury to another is a third degree felony, and (4) driving a commercial vehicle is a first degree misdemeanor. Not only does this scheme indicate a unified treatment of this driving offense, subsection (1) is obviously a necessarily lesser included offense of subsection (3), not a "different" crime. (DUI and driving with a suspended license are the "different" crimes involved here.) If merely naming a different injured person were sufficient to make the elements of the offense different, then if a person burglarized

a home and battered or assaulted three different persons in the course thereof, he/she could be convicted of three counts of burglary with assault. See 810.02(2), Fla. Stat. (1991). Of course we know that result is prohibited. Troedel v. State, 462 So. 2d 392 (Fla. 1984); James v. State, 567 So. 2d 59 (Fla. 4th DCA 1990).

It is the legislature, not the prosecutor by his/her pleadings which establishes the permissible unit of prosecution. As Petitioner has demonstrated, driving with a suspended license had traditionally been considered a single continuing offense, not one which can be divided into separate offenses based on the particulars of what occured during the driving episode. Nothing in Florida Statute 322.24(3) evinces a clear directive to treat subsection 3 differently for that purpose than the other subsections of the statute. Subsection 3 was added by the legislature in 1988, well after the second district court's interpretation in Hallman. Laws of Florida 1988, c. 88-381, s. 69. 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); Henry v. State, 581 So. 2d 928 (Fla. 3d DCA 1991). Despite the court's conclusion in Hallman that driving with a suspended license is a continuing offense, the legislature's later amendment merely added to the existing statute an additional penalty for serious injury or death; hardly a clear chance justifying a new interpretation of the statute.

Further, Florida Statute 775.021(1) has long provided "when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorable to the accused." This well-known "rule of lenity" was explained by the Supreme Court in U.S. v. Universal C.I.T. Credit Corp.:

> When choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

344 U.S. 218, 221-222, 73 S. Ct. 227, 229, 97 L. Ed. 260 (1952). Hence, if the legislature fails to expressly create separate or multiple offenses, neither the executive branch, through the prosecutor, nor the judicial branch, through the courts, may usurp legislative authority by assuming the power to charge, convict, or punish cumulatively. At worst, the unit of prosecution for section 322.24(3) is ambiguous; it must therefore be interpreted in the way most favorable to the citizen accused. See Ogletree v. State, 525 So. 2d 967 (Fla. 1st DCA 1988).

Though Petitioner pled no contest to the four charges, the error was fundamental because it violates the prohibition against double jeopardy. Menna v. New York, 423 U.S. 61, 96 S. Ct. 421, 46 L. Ed. 2d 195 (1975); Arnold v. state, 578 So. 2d 515 (Fla. 4th DCA 1991); Lundy v. State, 596 So. 2d 1167 (Fla. 4th DCA 1992); Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990). Petitioner's convictions for counts 6, 7, and 8 must be vacated and his sentences for those offenses set aside.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Petitioner respectfully requests this Court reverse the decision of the Fourth District Court of Appeal and order that three of his four convictions for driving with a suspended license be vacated.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

Cherry Grant

CHERRY GRANT
Assistant Public Defender
Attorney for Timothy Boutwell
Criminal Justice Building/6th Floor
421 3rd Street
West Palm Beach, Florida 33401
(407) 355-7600
Florida Bar No. 260509

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Joan Fowler, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 9 day of September, 1993.

Cherry Grant

CHERRY GRANT
Assistant Public Defender