D.A. 11-29-93 047

IN THE SUPREME COURT OF FLORIDA

TIMOTHY BOUTWELL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Case No. 81,613

PETITIONER'S REPLY BRIEF ON THE MERITS

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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 symbols will be used:

R = Record on Appeal

RB = Respondent's Brief

STATEMENT OF THE CASE AND FACTS

Petitioner will rely on the statement in his brief on the merits.

SUMMARY OF ARGUMENT

Petitioner will rely on the summary in his brief on the merits.

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.

The state claims it is "clear that the gravamen" of section 322.34(3) 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." RB at 4. Petitioner suggests however that nothing about the issue before the court can be fairly described as "clear;" it is because the unit of prosecution here is unclear that this case is before the court.

As Petitioner initially argued, the offense of driving with a suspended license has traditionally been treated as a single continuing offense both in Florida, and other states as well, as demonstrated by Hallman v. State, 492 So. 2d 1136 (Fla. 2d DCA 1986) and cases cited in the initial brief. The state responds that the anti-Carawan[1] statute[2] changes that result. But while that statute addresses punishments for multiple separate offenses, it did nothing to modify or redefine what had previously been interpreted as the unit of prosecution for driving with a suspended license. Nor does merely adding a new subsection to 322.34 redefine the essence of the offense addressed by that statute. Surely if either statute was aimed at modifying the holding in

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[1] Carawan v. State, 515 So. 2d 161 (Fla. 1987).

[2] 775.021, Fla. Stat. (1987).

Hallman, the legislature would not have done so in such an obscure fashion.

As Petitioner argued in the district court, the fact that the legislature used only a negligence requirement in subsection 3 is further evidence that the legislature did not intend to create some new or different offense here, merely that it considered a death or serious injury to enhance the already existing regulatory offense of driving with a suspended license. The legislature would of course be presumed to know that in State v. Winters, 346 So. 2d 991 (Fla. 1977), and State v. Joyce, 361 So. 2d 406 (Fla. 1978), this Court made clear that simple acts of negligence cannot support criminal penalties. If the focus of section 322.34 is to protect each individual who is hurt as a result of a defendant's driving, then to be constitutional the standard for the crime cannot be one of simple negligence. Indeed in State v. Smith, 18 Fla. L. Weekly D2056 (Fla. 2d DCA Sept. 17, 1993), the second district declared 322.34(3) to be unconstitutional on that basis. Thus, if the state's argument here is correct, Petitioner has been convicted four times based on an unconstitutional statute.

The district court's decision below suggests that the parties injured in accidents need protection. Petitioner agrees. In expressing its concern for protecting each "victim" separately, the district court could see no basis under Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), rev. denied, 547 So. 2d 1210 (Fla. 1989), for treating the offense of driving with a suspended license with injury differently from driving under the influence of alcohol with injury. But the basis for treating the crimes differently is in the nature of the crime: driving while intoxicated is reckless or

culpable conduct, State v. Smith, 18 Fla. L. Weekly at 2057 citing Baker v. State, 377 So. 2d 17 (Fla. 1979), whereas the announced standard in section 322.34(3) is mere negligence. Further, accident victims already have both the protection of existing criminal and civil laws. A person who negligently injures another may be sued under tort law. A person who injures or kills another by driving in a grossly or culpable negligent way faces the criminal penalties for culpable negligence, vehicular homicide, or manslaughter. He cannot however be criminally punished for four felony counts of driving with a suspended license. Petitioner's multiple convictions must therefore be 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to Edward L. Giles, Assistant Attorney General, Elisha Newton Dimick Building, Room 240, 111 Georgia Avenue, West Palm Beach, Florida 33401 this 18 day of October, 1993.

Cherry Grant

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