IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

HAROLD COOPER,

Respondent.

_____/

CASE NO. 82,024

5TH DCA NO. 92-1175

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
FIFTH DISTRICT OF FLORIDA

INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

BARBARA ARLENE FINK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0874736
210 N. Palmetto Avenue
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR THE PETITIONER

TABLE OF CONTENTS

PAGES:

TABLE OF AUTHORITIES

CASES: PAGES:

OTHER AUTHORITIES

STATEMENT OF THE CASE AND FACTS

On January 16, 1992, the defendant was convicted by a jury of the following crimes: 1. Driving Under the Influence Manslaughter. (R. 762). 2. Driving Under the Influence Serious Bodily Injury. (R. 763). 3. Driving Under the Influence Property Damage. (R. 764). 4. Driving While License Suspended or Revoked Causing a Death. (R. 765). 5. Grand Theft Motor Vehicle. (R. 765).

At trial the fiancee of the deceased victim testified that when he met the defendant on the night of the fatal accident, the defendant did not seem intoxicated in that he did not stumble when walking or slur his words when speaking. (R. 70 - 71). In contrast, the bartender who had refused to serve the defendant indicated Cooper was speaking incoherently and sleeping at the bar. (R. 84).

The officer who encountered the defendant at the hospital said he ordered blood samples because the defendant smelled as if he had been drinking alcoholic beverage. (T. 151 - 166). The State's toxicology/chemistry expert reported he was unable to determine the defendant's condition at the time of the accident. (R. 183 - 191).

The State's accident reconstructionist said that in an effort to determine the specific nature of the collision, he had examined the scene and interviewed witnesses. (R. 221 - 223). He opined the defendant was so intoxicated his normal facilities were impaired, and that caused him to run off the road and collide with the victims. (R. 240).

The defense objected to the accident reconstruction expert expressing an opinion about the defendant's state of intoxication at the time of the accident. (R. 241). In overruling the objection the court said evidence of impairment was offered by other witnesses at trial, and the expert was basing his opinion on the evidence. (R. 241 - 242).

On direct appeal to the Fifth District Court of Appeal, the defense argued (1) the trial court erred by allowing the accident reconstructionist to testify that the defendant was intoxicated and (2) the trial court erred by convicting and sentencing the defendant for both DUI manslaughter and DWLS manslaughter when one death resulted from the accident.

The district court of appeal affirmed in part but agreed with the defense contention that the legislature did not intend to punish a single death under two different statutes. In so doing, the court acknowledged conflict with Wright v. State, 592 So. 2d 1123 (Fla. 3rd DCA 1991), quashed on other grounds, 600 So. 2d 457 (Fla. 1992), and certified the following question:

> WHETHER A DEFENDANT CAN BE CONVICTED AND SENTENCED FOR BOTH THE OFFENSE OF DUI MANSLAUGHTER AND THE OFFENSE OF DRIVING WHILE LICENSE SUSPENDED AND CARELESSLY OR NEGLIGENTLY CAUSING THE DEATH OF ANOTHER HUMAN BEING WHERE THERE IS ONLY A SINGLE DEATH.

This appeal follows.

SUMMARY OF ARGUMENT

The conduct of driving with a suspended license differs from that of driving while intoxicated. Although but one death resulted from the accident, the court is limited to looking at only the evidence tending to prove the violation. It may not look to the number of victims involved. Consequently, the trial court properly convicted the defendant of driving with a license suspended causing the death of a human being and DUI manslaughter.

ARGUMENT

CONVICTION AND SENTENCE FOR BOTH DRIVING UNDER THE INFLUENCE MANSLAUGHTER AND DRIVING WITH LICENSE SUSPENDED MANSLAUGHTER IS PROPER.

Pursuant to § 775.021(4)(b)Fla. Stat. (1991):

> The intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction.

Exceptions to the rule of construction include offenses requiring identical elements of proof, offenses which are degrees of the same offense, and offenses which are lesser offenses. Instantly, the defendant was convicted of driving under the influence resulting in death and of driving with license suspended resulting in death. Each is a separate offense requiring different elements of proof.

Interpreting §775.021(4) in State v. McCloud, 557 So. 2d 939 (Fla. 1991), the Florida Supreme Court determined that the defendant could be convicted and sentence for both sale and possession of the same cocaine, for the statute "precludes the court from examining the evidence to determine whether the defendant possessed and sold the same quantum of cocaine such that possession is a lesser-included offense of sale in any one case." McCloud, 577 So. 2d 941 (Fla. 1991); State v. V. V. A., 577 So. 2d 941 (Fla. 1991). Sub judice, McCloud bars the court from examining the evidence to determine if the defendant killed the same victim while DUI and while driving with license suspended. The court may look only to the elements of each crime to determine if both were proven at trial, and they were.

In Wright v. State, 592 So. 2d 1123 (Fla. 3rd DCA 1991) quashed on other grounds, 600 So. 2d 457 (Fla. 1992), the defendant was convicted of both DUI causing serious injury and driving with a suspended license causing serious injury. There were four victims. The court determined that the defendant could be sentenced for four DUI injuries, but for only one DWLS injury. Nonetheless, the court upheld convictions on both charges. Wright, 592 So. 2d 1126. This conviction was affirmed for a second time after remand. Wright v. State, 603 So. 2d 624, 625 (Fla. 3rd DCA 1992).

In reversing the instant case, the district court of appeal noted the reasoning in Wright was rejected by Boutwell v. State, 18 Fla. L. Weekly D796 (Fla. 4th DCA Mar. 24, 1993). While this is true, it is only partly true. The Boutwell court rejected the reasoning that DWLS injury could result in only one conviction even if there were multiple victims. This determination does not diminish the State's position whatsoever, for it says the Wright court did not go far enough in convicting the defendant. Instantly the State is attempting to uphold convictions for two distinct crimes against one victim as was done in Wright. Under the reasoning of Boutwell, the State could convict for DWLS resulting in death and DUI manslaughter for each of multiple victims. See United States v. Dixon, 7 Fla. L. Weekly Fed. S599 (June 28, 1993); Williams v. Dugger, 7 Fla. L. Weekly Fed. D285 (So. Dist. Fla. July 15, 1993).

In reversing the trial court convictions, the district court reasoned that a single death cannot result in dual crimes. The

crimes instantly, however, do pass the test of Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932). Furthermore, with the codification of legislative intent contained in §775.021(4)(b) Fla. Stat. (1988), the rule of lenity as expressed in Ladner v. United States, 358 U.S. 169, 3 L. Ed. 2d 199, 79 S. Ct. 299 (1958) does not apply. Had the legislature intended lenity in these two offenses, it would have so stated as it did in §812.025 Fla. Stat. (1991), which prohibits dual convictions for both theft and dealing in stolen property in connection with one scheme or course of conduct. Absent a similar statute addressing the instant offenses, the trial court propertly convicted the defendant of multiple crimes against the deceased, even though both crimes resulted in her death. See Murphy v. State, 578 So. 2d 410 (Fla. 4th DCA 1991); Collins v. State, 577 so. 2d 986 (Fla. 4th DCA 1991); Cave v. State, 578 So. 2d 946 (Fla. 1st DCA 1991).

CONCLUSION

Based on the aforestated points and legal authorities, the Petitioner, THE STATE OF FLORIDA, respectfully requests this Court vacate the decision of the district court below and affirm the conviction and sentence of the trial court.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Barbara Arlene Fink

BARBARA ARLENE FINK
ASSISTANT ATTORNEY GENERAL
Fla. Bar #0874736
210 N. Palmetto Ave.
Suite 447
Daytona Beach, FL 32114
(904) 238-4990

COUNSEL FOR THE PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing INITIAL BRIEF ON THE MERITS has been furnished by U. S. Mail to Michael W. Doyle, C/O Mitchell & Canina, P.A., 930 S. Harbor City Blvd., Suite 500, Melbourne, FL 32901, on this 13th day of September, 1993.

Barbara Arlene Fink

BARBARA ARLENE FINK
ASSISTANT ATTORNEY GENERAL