FILED
SID J. WHITE
DEC 13 1993
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

v. Case No. 82,482

ROBERT N. SMITH,

Appellee.

ON DISCRETIONARY REVIEW FORM THE DISTRICT COURT OF APPEAL FOR THE SECOND DISTRICT STATE OF FLORIDA

BRIEF OF APPELLANT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Robert N. Smith (hereinafter Appellee) was charged per amended information on September 9, 1991, for the commission of the following crimes: a) DUI Manslaughter pursuant to Section 782.07, Florida Statutes (1991) and b) Driving with Suspended License Causing Death or Injury pursuant to Section 322.34(3), Florida Statues (1991) (R. 26,27).

On September 8, 1992, a Motion to Dismiss Information was heard by the court (R. 1 through 21). Appellee argued that count 2, Driving with Suspended License Causing Death or Injury, was unconstitutionally vague, overbroad and indefinite because it criminalizes mere negligence (R. 2, 190, 191). The trial court opined that, "I just don't think there's anything that says they (the Legislature) can make simple negligence a criminal act" (R. 21). The court ruled, by the addition of carelessness and negligence to the statute, they've made criminal a simple act of negligence (R.21). The trial court granted the Motion to Dismiss on September 15, 1992). It is upon the trial court's ruling that this appeal comes to the Second District Court of Appeal. The Notice of Appeal was timely filed by the State of Florida on September 23, 1992 (R. 196).

On September 17, 1993, the district court issued its opinion affirming the decision of the trial court. The Second District found the statute to be unconstitutionally vague. The State

filed a timely notice of appeal on the grounds that the district court declared the statute constitutionally invalid. This appeal follows.

SUMMARY OF THE ARGUMENT

Section 332.34(3) is not unconstitutionally vague merely because it applies the well known negligence standard as the measure of conduct to which is attached criminal liability. When one couples this standard with the requirement that the defendant/motorist must also have driven on a suspended license, we are left with a statute no different from any of those that couple the commission of a substantive crime with other conduct that yields a new substantive crime.

ARGUMENT

ISSUE

WHETHER SECTION 322.34(3), FLORIDA STATUTES IS UNCONSTITUTIONALLY VAGUE, OVERBROAD AND INDEFINITE?

Relying on such decisions as State v. Winters, 346 So. 2d 991 (Fla. 1977) and State v. Joyce, 361 So. 406 (Fla. 1978) the Second District decided that Section 332.34(3), Florida Statutes (1991) is unconstitutionally vague because negligence is an unacceptable standard by which to punish, as criminal, the act of driving and killing someone while their license is under suspension. The State does not agree that the negligence standard is too vague to apprise a motorist of proscribed conduct or that the legislature cannot criminalize "mere negligence", especially when coupled with the crime of driving on a suspended license.

As illuminated in the dissenting opinion in Winters, Justice Boyd felt that this Court had found Section 827.05, Florida Statutes to be unconstitutionally vague because the negligence standard for proscribed conduct did not sufficiently apprise the public of what conduct is to be deemed criminal. In Joyce, this Court disapproved of statutes that criminalize simple negligence and indicated its approval of those that contain some element of scienter. Appellant, essentially, agrees with Justice Boyd that the negligence standard is sufficiently precise and that the legislature can indeed criminalize it.

"Where a statute is so vague as to make criminal an innocent act, a conviction under it cannot be sustained. Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840 (1947). Therein, the court found that, in a statute aimed at curbing the publication of "deeds of bloodshed, lust or crime" the mere publication of material relating to, for example, a war, might be subject to criminal punishment. Such cannot be said of 332.34(3). Surely, driving a car in a negligent manner so as to kill someone all the while sporting a suspended drivers license can hardly be likened to the publication of a history book complete with pictures of, say, the Battle of the Bulge. Thus, the instant statute cannot fall into the category of statues that criminalize purely innocent conduct.

Working from the position that 332.34(3) does not seek to criminalize innocent conduct, the next step is to determine whether the negligence standard sufficiently apprises the public of conduct that is subject to criminal punishment. Although the Second District found the two parts of the statute to be no safe harbor for its constitutional attack, at least one aspect of the statute is crystal clear. Everyone can understand what a suspended drivers license is. Thus, that standard is not at all in constitutional dispute. The negligence standard was recited by this Court in Winters:

> Negligence is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in doing something that a

> reasonably careful person would not do under like circumstances or in failing to do something that a reasonably careful person would do under like circumstances.

"The vice of vagueness in criminal statutes is the treachery they conceal in determining what persons are included or what acts are prohibited". United States v. Cardiff, 344 U.S. 174, 73 S.Ct. 189, 97 L.Ed. 200 (1952). Given that this Court has no difficulty in reciting the tried and true negligence standard, there is utterly no question that a breach of a duty of reasonable care to someone who may be in the path of a hurtling automobile is a standard that can and has been easily understood for many years. That the negligence standard has been so universally recognized and oft applied should lead to the conclusion that it is, if anything, one of the most ascertainable standards of conduct. Unlike the situation in Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971) where "annoying" someone while picketing on a sidewalk was the only standard mentioned and was therefore found to be "unascertainable", the instant negligence standard has deep roots in English law and has been the subject of countless scholarly dissertations and judicial opinions. Therefore, it is indeed beyond reason to classify the negligence standard as constitutionally "unascertainable".

Moreover, just because there may be difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not

automatically render a statue unconstitutional for indefiniteness. Arnett v. Kennedy, 416 U.S. 134, 94 S.Ct. 633, 40 L.Ed.2d 15 (1974); United States v. Hariss, 347 U.S. 612, 74 S.Ct. 808, 98 L.Ed. 989 (1953); Jordan v. DeGeorge, 341 U.S. 223, 71 S.Ct. 703, 95 L.Ed. 886 (1950). Under the instant statute, it is highly improbable that the state would choose to arbitrarily enforce it because of its ostensibly vague negligence standard. After all, in any given motor vehicle crash resulting in death, an officer trained in traffic homicide is called in to determine whether a driver's negligence may have been at fault. The report, more than any one thing, is the impetus behind the issuance of an information. Though the state may not ultimately win at a jury trial, such cannot possibly mean that the statute was unconstitutionally applied to a marginal case as a result of a vague standard of conduct. If such were the case, then virtually any acquittal would lead to the inescapable conclusion that the statute under which an acquitted defendant was charged was, from the outset, unconstitutionally vague. Surely, the negligence standard cannot be read to sanction the prosecution of people who have done nothing to bring them within the ambit of the statute.

Although the Second District decried the lack of connection between driving on a suspended license and the negligent conduct resulting in death, the Supreme Court indicates that such a causal connection may not be the stroke of constitutional death. In Lewis v. United States, 445 U.S. 55, 100 S.Ct. 915, 63 L.Ed.2d

198 (1980) the High Court held valid a federal statute which made it a separate crime for a felon to possess a firearm. The argument placed before the Court by Lewis was that the statute was unconstitutional because the underlying felony conviction may be invalid, for various reasons, thus criminalizing innocent conduct. In the instant case, the Second District reasoned that the attendant misdemeanor crime of driving on a suspended license may not be causally connected to the act of negligence. They missed the point. In Lewis, there is no causal connection between a person's felonious status and the possession of a firearm. The crime of possession can be prosecuted even if the underlying felony is argued to be somehow infirm. Herein, even if there is no causal connection between the suspended license status and the negligence, the statute which couples the two does not fail the constitution merely because there is no link between the suspension and the negligent act. In Lewis, it was no doubt Congress's intent prohibit possibly dangerous felons from carrying around the instrumentality of a crime. In this case, it was the legislature's intent to punish more severely those drivers who have manifested poor driving conduct by virtue of a suspended license to suffer a greater penalty when their negligence results in death. The argument that someone may be equally as negligent without having suffered a license suspension can also be applied to the Lewis situation where an individual may be just as much of a danger for possessing a gun even though they have not been convicted of a felony. It just so happens,

however, that people who have suspended driver's licenses are deemed more apt to be negligent drivers, even though instances can be found where such is not the case. Likewise, there can be found felons who pose no risk of danger to anyone by merely possessing a firearm. Thus the Second District's "cause" argument fails in light of Lewis.

The "cause-in-fact" argument fails for yet another reason. The district court, in a footnote, indicated that this court in Magaw v. State, 537 So.2d 564 (Fla. 1989) required a causal connection between the manner of driving and the victim's death. Such is true. However, this Court never said that there must be a link between the intoxication and the victim's death. In any given DUI manslaughter situation, the argument can, and is often made, that the alleged impairment did not cause the driving conduct that resulted in the death. The same identical argument can be advanced herein. The suspended license may not have caused the negligent driving conduct resulting in death. Yet, the DUI manslaughter statute still stands, constitutionally speaking. So should 332.34(3).

We are not dealing here with a statute that imposes strict liability for mere negligence or an act malum prohibitum. It does not criminalize the mere act of negligently killing someone with a car. It criminalizes, to the level of a felony, the negligent killing of another while driving on a suspended license. The state is, under the negligence standard, implicitly required to prove that the death occurred as a proximate cause of

the defendant's negligent operation of the motor vehicle. That the state need not demonstrate that the suspended license caused the negligence is not a reason to declare the statute constitutionally defective. 332.23(3), like many other statutes, simply criminalizes an act, whose standard is the elements of negligence, when that act occurs in the presence of yet another substantive crime. See, generally, Baker v. State, 377 So.2d 17 (Fla. 1979). Essentially, this statute is no different than, say, felony murder. Unless this Court is willing to invalidate many such "connective" statutes by virtue of the instant case, there is no reason not to uphold the constitutionality of the instant statute.

CONCLUSION

Based on the above and foregoing reasons, arguments and authorities, the decision of the district court below must be reversed and the case remanded to the trial court for further prosecution.

Respectfully submitted,

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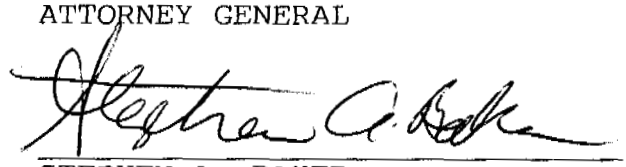

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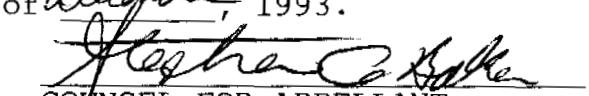
CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing has been furnished by U.S.Mail to Robert D. Rosen, Public Defender's Office, P.O. Box 9000-Drawer PD, Bartow, Florida 33830 this 10th day of December, 1993.



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