IN THE SUPREME COURT OF FLORIDA

CASE NO. **86,019**

THE STATE OF FLORIDA

Petitioner,

-vs-

WILLIAM R. WOODRUFF,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

The undisputed facts are stated by the Third District as follows:

> Defendant was arrested on July 4, 1993, and issued the following tickets: two for DUI with serious injury, two for DUI with property damage and one for driving with a suspended license. Defendant pled not guilty; the matter was set for trial in county court. The court clerk then transferred the tickets to circuit court. Neither party requested a transfer, and the record does not reveal how the transfer was effected. On August 4, the state filed an information in circuit court charging defendant with felony DUI, two counts of DUI property damage and one count each of DUI personal damage, DUI impairment and driving with a suspended license; these charges arose from the same incident as the tickets. The cases were never consolidated.
>
> The speedy trial period on the tickets ran on October 4. On October 15, defendant filed a Notice of Expiration of Speedy Trial in county court. The State took no action within the window period. Fla.R.Crim.P. 3.191(p)(3). Defendant filed a motion to discharge the tickets.
>
> On November 18, Defendant filed a motion in circuit court to dismiss the information on double jeopardy grounds. On December 3, the State nolle prossed the tickets. On December 17, the court granted defendant's motion to dismiss. (Footnote omitted.)

(A. 2-3).

The Third District affirmed the trial court's dismissal of the information on double jeopardy grounds. The Third District held that the Respondent was discharged forever from the county court charges since he had them properly

dismissed for a speedy trial violation. The Third District then held that double jeopardy precluded the State from maintaining the felony DUI charge because it found that felony DUI is not a different offense than misdemeanor DUI. The Court found that the elements of both offenses are the same because the only difference between the two offenses is the severity of punishment. (A. 3).

The Third District rejected the State's argument that the misdemeanor speedy trial rule could not bar a subsequent felony charge. This rejection was based on this Court's decision, Reed v. State, 649 So.2d 227 (Fla. 1995). (A. 3).

The State's motion for rehearing was denied. This Court's jurisdiction was sought and obtained.

QUESTION PRESENTED

WHETHER THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CHARGE OF FELONY DUI ON DOUBLE JEOPARDY GROUNDS WHERE THE RESPONDENT WAS DISCHARGED UNDER THE SPEEDY TRIAL RULE FOR MISDEMEANOR DUI EMANATING FROM THE SAME COURSE OF CONDUCT AS THE FELONY DUI AND WITHOUT A FINDING THAT THE FELONY DUI WAS FILED TO THWART THE SPEEDY TRIAL RULE

SUMMARY OF THE ARGUMENT

The Third District affirmed the trial court's granting of Respondent's motion to dismiss the charges based on double jeopardy. The Third District held that the speedy trial discharge of the misdemeanor DUI charge barred a subsequent prosecution of the felony DUI charge because both offenses were the same.

This holding is erroneous on two grounds. First, a speedy trial discharge operates as a prosecution bar as to those offenses that could have been brought with the barred offenses. Here, since the felony DUI charge could not have been brought in county court with the misdemeanor charge the felony charge can not be barred by a misdemeanor speedy trial discharge. Second, felony DUI is a substantive offense greater in degree than misdemeanor DUI, containing a different essential element therefrom. As such, it is not an identical offense of misdemeanor DUI and double jeopardy does not bar a subsequent prosecution for felony DUI.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING THE MOTION TO DISMISS THE CHARGE OF FELONY DUI ON DOUBLE JEOPARDY GROUNDS WHERE THE RESPONDENT WAS DISCHARGED UNDER THE SPEEDY TRIAL RULE FOR MISDEMEANOR DUI EMANATING FROM THE SAME COURSE OF CONDUCT AT THE FELONY DUI AND WITHOUT A FINDING THAT THE FELONY DUI WAS FILED TO THWART THE SPEEDY TRIAL RULE

In the instant case, the Third District has held that a speedy trial discharge of a misdemeanor charge forever bars the State from pursuing felony charges that arise out of the same incident. The State submits that this holding is erroneous on two grounds. First, a misdemeanor speedy trial discharge cannot operate to bar a subsequent felony prosecution because under the speedy trial rule a discharge only prohibits a subsequent prosecution for those offenses that could have been brought with the discharged misdemeanor. Since felony DUI is a substantive offense it can not charged in county court and therefore its not barred by a misdemeanor speedy trial discharge. Second, since a felony DUI charge is a separate substantive offense from a misdemeanor DUI, double jeopardy alone can not prohibit the felony prosecution when the misdemeanor prosecution has been speedy trial discharged.

In Reed v. State, 649 So.2d 227 (Fla. 1995) the defendant was arrested for armed robbery and two counts of leaving the scene of an accident involving

personal injuries. The State then filed an information in circuit court charging the defendant with the two third degree felonies of leaving the scene of an accident involving personal injuries. See §316.027 Florida Statutes 1991. Thereafter the State nol-prossed these charges. Subsequently, 245 days after arrest, the State filed a new information charging the defendant with numerous felonies arising out of the armed robbery and the State eventually added the two counts of leaving the scene of an accident involving personal injury. This Court, citing State v. Agee, 622 So.2d 473 (Fla. 1993), held that the defendant was entitled to a speedy trial discharge on all charges. This Court recognized that Agee was directly on point as to the two traffic charges that were nol-prossed and refiled after the speedy trial period expired. As to the charges that were not previously filed but arose from the same conduct or criminal episode, the robbery and kidnaping, this Court held that speedy trial started to run from the date of arrest for the two traffic offenses. Therefore, this Court held that all felonies that could have been filed arising from the conduct which caused the traffic offenses were subject to speedy trial discharge after the State nol-prossed the first information.

The Reed decision clearly leaves intact the rule of law which states that the expiration of speedy trial on a lesser included misdemeanor with its shorter time frame does not bar prosecution on a greater felony offense. Nesworthy v. State, 648 So.2d 259 (Fla. 5th DCA 1994). The Court in Spurlock v.

Cycmanick, 584 So.2d 1015 (Fla. 5th DCA 1991) succinctly explained the rationale for the rule of law that a speedy trial discharge on a lesser included misdemeanor charge does not bar a prosecution for a felony offense which is grounded upon the same conduct or criminal episode when the latter prosecution is filed within 175 days following arrest. The speedy trial time-barred defense operates to bar prosecution only for the crimes as specified in Florida Rule of Criminal Procedure 3.191(n). This rule provides:

> Rule 3.191 Speedy Trial
>
> (n) *Discharge from Crime; Effect.* Discharge from a crime under this rule shall operate to bar prosecution of the crime charged and of all other crimes on which trial has not commenced nor conviction obtained nor adjudication withheld and that were or might have been charged as a result of the same conduct or criminal episode as a *lesser degree or lesser included offense.* (Emphasis added).

The foregoing rule specifically bars prosecution only for the crime charged and any other crimes which might have been charged as a result of the same conduct or criminal episode as a lesser degree or lesser included offense. Neither expressly or impliedly does this rule bar prosecution for greater degree crimes which might have been charged as a result of the same conduct or criminal episode.

The State submits that this Court's decision in Reed is consistent with Rule 3.191(n) Fla.R.Crim.P. inasmuch as Reed only barred prosecution of all

felonies which arose from the speedy trial barred felony. This holding is in consonance with the Agee rule which only bars those offenses which could have been brought with the speedy trial barred charge.. Applying these principles hereto it is clear that the State could not have brought forth the felony DUI charge when it filed the misdemeanor DUI charge. Therefore, the speedy trial discharge of the misdemeanor DUI charge can not bar the prosecution of the felony DUI charge.

The Third District attempted to circumvent the foregoing rule of law by holding that for double jeopardy purposes felony DUI was the same offense as misdemeanor DUI. The Court recognized this Court's holding in State v. Rodriguez, 575 So.2d 1262 (Fla. 1991) which held that felony DUI was a new substantive offense from misdemeanor DUI. However, the Third District still found that the two offenses were the same for double jeopardy purposes. This holding was based on the erroneous reasoning that since the sole difference between the offenses, the number of prior DUI convictions, are to be determined only by the trial judge after the jury convicts for misdemeanor DUI the offenses are the same.

This holding totally misinterprets Rodriguez and, in turn, this Court's decision in State v. Harris, 356 So.2d 315 (Fla. 1978). In Rodriguez, this Court held that the combined existence of three or more prior DUI convictions is an

element of the substantive offense of felony DUI. This conclusion flowed from Harris wherein this Court found that the legislature had determined that a third or subsequent conviction for petit theft is the separate, substantive offense of felony petit theft and not simply an enhanced penalty. This Court then exercised its power to tailor a procedure to allow the State to prove the existence of the prior convictions without adversely affecting a defendant's constitutionally guaranteed presumption of innocence. This was accomplished by requiring the proof of prior convictions to be made after conviction of petit theft and only to the trial judge. Finally, since proof of the prior convictions is an essential element of the crime of felony petit theft, said element must be noticed and proved beyond a reasonable doubt. See also Gayman v. State, 616 So.2d 17 (Fla. 1993) (Double jeopardy clauses of United States and Florida Constitutions were not violated by trial court's reclassifying petitioners' current petit theft offense as felony petit theft, based on two prior petit theft convictions, and then enhancing petitioners' felony sentence pursuant to habitual felony offender statute since felony petit theft was a substantive crime and not a penalty enhancement.)

Applying the foregoing rationale to felony DUI this Court in Rodriguez concluded that the existence of three or more prior DUI convictions is an essential fact constituting the substantive offense of felony DUI. This Court then adopted the Harris procedure for proving the prior DUI convictions and

stated:

> Moreover, the logic supporting our jurisdictional holding above also supports the conclusion that three prior DUI convictions combine as an essential a element of felony DUI. The circuit court has jurisdiction only because the offense is a felony. It is a felony only by virtue of the fact that the defendant has been convicted of three or more prior DUI violations. It follows that because this is essential to the definition of the crime of felony DUI, it is an essential element that must be noticed and proved beyond a reasonable doubt. Art. I, §§ 9, 16, Fla. Const.

Rodriguez v. State, supra, 575 So.2d at 1265.

In accordance with the foregoing, felony DUI is a substantive crime distinct from misdemeanor DUI. Felony DUI is a greater offense than misdemeanor DUI because it has the additional essential element of the proof of the prior convictions. As such, felony DUI is not the same offense for double jeopardy purposes as misdemeanor DUI and therefore a speedy trial discharge for the lesser included offense of misdemeanor DUI does not automatically bar a subsequent prosecution for the greater offense of felony DUI. State v. McDonald, 538 So.2d 1352 (Fla. 2nd DCA 1989).

In McDoanld, the defendant was arrested and charged with misdemeanor petit theft and resisting arrest without violence. Eventually these charges were discharged on speedy trial grounds. Thereafter, the State filed an information

in circuit court charging the defendant with felony petit theft and resisting arrest without violence. The defendant then moved for speedy trial discharge and the circuit court granted the motion. The Second District affirmed the circuit court dismissal of the misdemeanor resisting arrest without violence charge on the ground that the speedy trial discharge of that charge in county court barred a subsequent prosecution for the same offense or any others arising from the same criminal episode that was under the jurisdiction of the county court. As to the felony petit theft charge, the Court reversed and held that the speedy trial barred misdemeanor petit theft charge could not be used to bar the subsequent prosecution of the felony petit theft charge under the rationale that the thwarted misdemeanor prosecutions should not act to place the defendant in any better position than had those charges never been filed. The Second District did recognize that the subsequent felony prosecution could be dismissed upon a showing that the enhanced theft charge was brought in bad faith or was merely a subterfuge designed solely to invoke the jurisdiction of a higher court in order to seek a conviction for the speedy trial barred lesser included misdemeanor offense. See also State v. Johnson, 479 So.2d 279 (Fla. 2nd DCA 1985).

Based on the foregoing analysis, the instant decision of the Third District is clearly erroneous since felony DUI is a greater offense than misdemeanor DUI and its prosecution can not be barred by a misdemeanor speedy trial discharge absent a showing that the felony charge was instituted in bad faith. Therefore

the instant decision should b quashed with directions to reinstate the felony DUI prosecution.

CONCLUSION

Based on the foregoing, Petitioner submits that the instant decision expressly and directly conflicts with those cited herein and respectfully requests this Court quash the Third District's decision.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **AMY D. RONNER**, Attorney for Respondent, 16400 N.W. 32nd Avenue, Miami, Florida 33054 on this 31 day of October , 1995.

MICHAEL J. NEIMAND
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

CASE NO. **86,019**

THE STATE OF FLORIDA,

Petitioner,

vs.

WILLIAM R. WOODRUFF,

Respondent.
_____/

APPENDIX

ROBERT A. BUTTERWORTH
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lesser-included offense of burglary with a battery. This is a correct statement of the law, and we affirm on this point. *Watson v. State*, 646 So.2d 288 (Fla. 2d DCA 1994); *Bradley v. State*, 540 So.2d 185 (Fla. 5th DCA 1989).

[2] The court did err, however, in instructing the jury about the number of batteries for which the defendant could be convicted. In discussing the lesser-included offense of battery, the court told the jury:

> In this case there are two alleged victims and if you find that the defendant is not guilty of burglary and committing battery or burglary alone, you will then next consider whether the defendant is guilty of committing a battery, a simple battery upon either Debra (sic) Bronson or Kelly Fritz or both of them.

The verdict form allowed the jury to find Bronson guilty of a battery of Deborah Bronson and guilty of a battery of Kelly Fritz. The jury in fact found him guilty of both of these crimes.

[3] A defendant cannot be convicted for two lesser-included offenses under a single charge. *Rhames v. State*, 473 So.2d 724 (Fla. 1st DCA 1985), *review denied*, 494 So.2d 205 (Fla.1986). The information here charged only one count of burglary with a battery. The trial court, therefore, erred in instructing the jury that it could convict Bronson of two batteries and providing a verdict form that permitted two such convictions. Accordingly, we affirm his conviction for one misdemeanor battery and reverse his conviction for the other. We remand to the trial court with instructions to strike one of the battery convictions and to resentence Bronson based on the remaining conviction.

Affirmed in part, reversed in part and remanded.

ALTENBERND and QUINCE, JJ., concur.

The STATE of Florida, Appellant,

v.

William R. WOODRUFF, Appellee.

No. 94-309.

District Court of Appeal of Florida, Third District.

April 19, 1995.

Rehearing Denied May 31, 1995.

Defendant filed motion to dismiss information charging him with felony driving under the influence (DUI), two counts of DUI property damage, and one count each of DUI personal damage, DUI impairment, and driving with suspended license. The Circuit Court, Dade County, Scott J. Silverman, J., granted motion, and state appealed. The District Court of Appeal, Baskin, J., held that: (1) defendant was forever discharged from county court charges when defendant filed appropriate motions for discharge after speedy trial period ran on those misdemeanor ticket offenses; (2) neither offense of misdemeanor DUI nor offense of felony DUI contained statutory element that other offense did not, and, thus, they did not constitute separate offenses under statutory double jeopardy bar and for purposes of *Blockburger* double jeopardy test; and (3) given that offenses were identical, trying defendant on felony charge after his discharge on misdemeanor charge would violate express prohibition of speedy trial rule.

Affirmed.

1. Criminal Law ⇐577.16(1)

As matter of law, defendant was forever discharged from county court charges where, after speedy trial period ran on those misdemeanor ticket offenses, defendant filed appropriate motions for discharge. West's F.S.A. RCrP Rule 3.191(p)(3).

2. Criminal Law ⇐619

Consolidation of charges may be authorized by only the trial judge upon proper

motion of party. West's F.S.A. RCrP Rule 3.151.

3. Criminal Law ⇐619

Consolidation of county court and circuit court charges had not been effected, even though court clerk had transferred county court charges to circuit court, where neither state nor defendant filed motion to consolidate, and clerk had no authority to consolidate. West's F.S.A. RCrP Rule 3.151.

4. Criminal Law ⇐303.10

State's nolle prosequi with respect to county court charges was a nullity, where state failed to bring defendant to trial within ten days of hearing on notice of expiration of speedy trial period, but only later nolle prossed the misdemeanor traffic tickets. West's F.S.A. RCrP Rule 3.191(p)(3).

5. Double Jeopardy ⇐92

Double jeopardy barred state from prosecuting defendant for offenses discharged in county court on grounds that speedy trial period had run. U.S.C.A. Const.Amend. 5.

6. Double Jeopardy ⇐142

Misdemeanor driving under the influence (DUI) and felony DUI did not constitute separate offenses for purposes of Florida statutory double jeopardy bar and *Blockburger* double jeopardy test, where neither offense contained statutory element that other offense did not; although proving existence of three prior DUI convictions is essential element of felony DUI offense, sole distinguishing factor between misdemeanor and felony is severity of punishment. U.S.C.A. Const.Amend. 5; West's F.S.A. §§ 316.193, 775.021(4)(b).

7. Double Jeopardy ⇐51

Technically, jeopardy did not attach upon dismissal of charge on speedy trial grounds, where no jury was sworn, and no evidence was taken on discharged offense. U.S.C.A. Const.Amend. 5.

8. Criminal Law ⇐577.16(2)

When offenses of misdemeanor driving under the influence (DUI) and felony DUI were identical, trying defendant on felony DUI charge after discharge of misdemeanor DUI charge under speedy trial rule would violate express prohibition of rule. West's F.S.A. RCrP Rule 3.191(p)(3).

Robert A. Butterworth, Atty. Gen., and Paul M. Gayle–Smith, Asst. Atty. Gen., for appellant.

Bennett H. Brummer, Public Defender, and Amy D. Ronner, Sp. Asst. Public Defender, and Al A. DiCalvo and Jorge L. Pereira, Certified Legal Interns, for appellee.

Before NESBITT, BASKIN and GERSTEN, JJ.

BASKIN, Judge.

The state appeals an order dismissing the information against Defendant on double jeopardy grounds. We affirm.

Defendant was arrested on July 4, 1993, and issued the following tickets: two for DUI with serious injury, two for DUI with property damage and one for driving with a suspended license. Defendant pled not guilty; the matter was set for trial in county court. The court clerk then transferred the tickets to circuit court. Neither party requested a transfer, and the record does not reveal how the transfer was effected. On August 4, the state filed an information in circuit court charging defendant with felony DUI, two counts of DUI property damage and one count each of DUI personal damage, DUI impairment and driving with a suspended license; these charges arose from the same incident as the tickets. The cases were never consolidated.

The speedy trial period on the tickets ran on October 4. On October 15, defendant filed a Notice of Expiration of Speedy Trial in county court. The state took no action within the window period. Fla.R.Crim.P. 3.191(p)(3). Defendant filed a motion to discharge the tickets.

On November 18, Defendant filed a motion in circuit court to dismiss the information on double jeopardy grounds. On December 3,

the state nolle prossed the tickets.[1] On December 17, the court granted defendant's motion and dismissed the information.

[1–4] As a matter of law, defendant is forever discharged from the county court charges. After the speedy trial period ran on the misdemeanor ticket offenses, defendant filed appropriate motions for discharge. The state's nolle prosequi was a nullity because the state took no action pursuant to Rule 3.191(p)(3) after the notice of expiration of speedy trial period was filed.[2] Rule 3.191(p)(3) provides that a defendant not brought to trial within 10 days of a hearing on a notice of expiration of speedy trial "shall be forever discharged from the crime."

[5, 6] Double jeopardy bars the state from prosecuting defendant for the offenses discharged in county court. The tickets charged defendant with misdemeanor DUI in violation of section 316.193, Florida Statutes (1991), and the information charged defendant with a felony DUI violation of section 316.193, Florida Statutes (1991). Because neither offense contains a statutory element that the other offense does not, they do not constitute separate offenses as defined in section 775.021(4)(b), Florida Statutes (1993), and the *Blockburger*[3] test is not met; both offenses are identical.

Section 316.193 defines only one type of DUI offense,[4] *see Collins v. State*, 578 So.2d 30 (Fla. 4th DCA 1991), punished with increasing severity in successive violations. *Jackson v. State*, 634 So.2d 1103, 1106 (Fla. 4th DCA 1994) (en banc) (statutory scheme requires increased punishment "based on the number of times the defendant drives under the influence"). The elements of proof of both felony and misdemeanor DUI offenses are identical.

Although proving the existence of three prior DUI convictions is an essential element of felony DUI offense, *State v. Rodriguez*, 575 So.2d 1262 (Fla.1991), the sole distinguishing factor between the misdemeanor and the felony is the severity of punishment prescribed by section 316.193(2). *See Rodriguez*, 575 So.2d at 1266 ("if a defendant charged with felony DUI elects to be tried by jury, the court shall conduct a jury trial on the elements of the single incident of DUI at issue.... If the jury returns a guilty verdict as to that single incident of DUI, the trial court shall conduct a separate proceeding without a jury to determine, in accord with general principles of law, whether the defendant had been convicted of DUI on three or more prior occasions."). Hence, the offenses fall under the section 775.021(4)(b)1. double jeopardy bar for "Offenses which require identical elements of proof."

[7, 8] The state correctly asserts that, technically, jeopardy did not attach because no jury was sworn, and no evidence was taken on the discharged offense. "However, since the discharge under the [speedy trial] rule is for failure of state action to timely prosecute, such discharge by the clear language of the rule would rate as an estoppel against prosecution of defendant for the same offenses from which he has been previously discharged." *Rawlins v. Kelley*, 322 So.2d 10, 13 (Fla.1975).[5] Where, as here, the

1. Contrary to the state's representation at oral argument, the state did not nolle prosse the tickets before the speedy trial period expired. (T–3, 6).

2. The state's argument that the charges were consolidated is without merit. Consolidation may be authorized by only the trial judge upon the proper motion of a party. *Ashley v. State*, 265 So.2d 685 (Fla.1972); Fla.R.Crim.P. 3.151. Neither the state nor the defendant filed a motion to consolidate. The court clerk's transfer of the case did not effect a consolidation, and the clerk had no authority to consolidate the cases.

3. *Blockburger v. United States*, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932).

4. Section 316.193, Florida Statutes (1991) provides, in part:

> (1) A person is guilty of the offense of driving under the influence and is subject to punishment as provided in subsection (2) if such person is driving or in actual physical control of a vehicle within this state and:
>
> (a) The person is under the influence of alcoholic beverages ...; or
>
> (b) The person has a blood or breath alcohol level of 0.10 percent or higher.

5. We agree with defendant that the holding in *Nesworthy v. State*, 648 So.2d 259 (Fla. 5th DCA 1994), is not binding on this issue, in view of the supreme court's subsequent pronouncement in *Reed v. State*, 649 So.2d 227 (Fla.1995).

two offenses are identical, trying defendant on the same charge discharged under the speedy trial rule would violate the express prohibition of the rule.

Dismissal affirmed.

1

Aida ARCHILLA and Luis R. Archilla, her husband, Appellants,

v.

PRESIDENT SUPERMARKET, INC., a Florida corporation, Appellee.

No. 94–1097.

District Court of Appeal of Florida, Third District.

April 19, 1995.

An Appeal from the Circuit Court for Dade County; Ronald Friedman, Judge.

Perse & Ginsberg and Todd R. Schwartz, Marcos Gonzalez–Balboa, Miami, for appellants.

Timothy W. Ross, Miami, Sheila W. Moylan, Coconut Grove, for appellee.

Before BASKIN, LEVY and GODERICH, JJ.

PER CURIAM.

Plaintiffs appeal a directed verdict entered in defendant's favor after the jury had returned a verdict for plaintiffs. We reverse.

The trial court improperly directed a verdict: the record contains sufficient evidence to support the jury's verdict. *Woods v. Winn Dixie Stores, Inc.*, 621 So.2d 710 (Fla. 3d DCA 1993); *Perry v. Red Wing Shoe Co.*, 597 So.2d 821 (Fla. 3d DCA 1992); *Salam v. Benmelech*, 590 So.2d 1008 (Fla. 3d DCA 1991). The testimony describing the conditions causing plaintiff's fall was sufficient to generate a reasonable inference of constructive notice in support of the jury's verdict. *Woods*, 621 So.2d at 711. The trial court improperly substituted its judgment for the jury's findings, and erred in setting aside the jury's verdict.

Reversed and remanded for entry of judgment in accordance with the verdict.

2

Daniel V. COSTANZO, Appellant,

v.

PIK N' RUN # 4 and Crawford & Company (Travelers), Appellees.

No. 94–1145.

District Court of Appeal of Florida, First District.

April 21, 1995.

Rehearing Denied June 7, 1995.

Claimant appealed from final order of Joseph E. Willis, Judge of Compensation Claims (JCC) denying his claim for temporary total, temporary partial or wage loss benefits from April 14, 1993 through May 13, 1993. The District Court of Appeal, Davis, J., held that: (1) testimony of employer's undisclosed witness was not properly admitted as rebuttal evidence; (2) there was competent substantial evidence to support conclusion that claimant voluntarily limited his income by failing to call employer until April 20 concerning position which was scheduled to begin on April 15, and thus order denying benefits for period from April 14th to April 20th would be affirmed; and (3) order denying benefits from April 20, 1993 through May 13, 1993 would be reversed, since it was based on error in relying upon substance of testimony of undisclosed witness and undisclosed exhibit related to that testimony without first deciding whether testimony should have been admitted, not as rebuttal or im-