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IN THE SUPREME COURT OF FLORIDA

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CLERK, SUPREME COURT

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GREGORY R. LAMOUREAUX)

Petitioner)

vs.)

Case No. 86,670

STATE OF FLORIDA)

Respondent)

PETITIONER'S BRIEF ON THE MERITS

KAREN S. BEAVIN
SPARKMAN & QUINN
P.O. Box 7128
Naples, Florida 33941
(941) 643-6263
Florida Bar 0797261

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PRELIMINARY STATEMENT

Petitioner was the Defendant at the trial court level and the Appellee in the Second District Court of Appeal. Respondent was the Prosecution and the Appellant.

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

STATEMENT OF THE CASE AND FACTS

Petitioner, GREGORY R. LAMOUREAUX, was involved in one traffic accident in which the two people in the other vehicle were seriously injured. (R 1-4). The State Attorney charged Petitioner with two counts of DUI with serious bodily injury in violation of section 316.193 Florida Statutes, and one count of driving with a suspended license in violation of section 322.34(3), Florida Statutes. (R 5-6). Subsequently, an amended information was filed charging Petitioner with the two counts of DUI with serious bodily injury; the State dismissed the driving while license suspended charge as it was discovered the Petitioner's license was not suspended. (R 36-37).

Petitioner moved to dismiss one count of DUI with serious bodily injury based upon this Court's decision in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994) and the Second District Court of Appeal's decision in Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994). The Motion to Dismiss was heard and the Honorable Donald E. Pellecchia, Circuit Judge, agreed with Petitioner that Boutwell and Michie prohibited convictions of two counts of DUI with serious bodily injury which resulted from one incident or driving episode. (R 10-11). The Court dismissed count two of the information.

The Respondent, the State of Florida, appealed to the Second District Court of Appeal. In a written opinion, the Appellate Court agreed with the Respondent and reversed the trial court

holding that Boutwell and Michie do not prohibit more than one conviction for DUI with serious bodily injury based upon a single driving episode.

Petitioner made a timely appeal and this Court has accepted jurisdiction.

SUMMARY OF ARGUMENT

Petitioner was involved in a single traffic accident in which two (2) people were seriously injured. Based upon the District Court's ruling, Petitioner now faces two counts of DUI with serious bodily injury despite the fact that he was involved in only one accident/driving episode. The reinstatement of the second count of DUI with serious bodily injury subjects Petitioner to double sentencing and punishment as a result of one criminal episode in violation of the principles of double jeopardy.

Through Florida Statute 316.193, the Florida Legislature has created the crime of driving under the influence. Similar to the crime of driving while license suspended, Florida Statute 322.34, the legislature has created enhancements to the base offense of DUI given the happening of certain facts and circumstances. As the severity of the circumstances increases (no injury or property damage, to injury or property damage, to serious injury to death)* the severity of the penalties increases. Neither statute creates numerous offenses out of one driving episode.

This Court's holding in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994) and the Second District Court of Appeal's holding in Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994) are consistent

* Or no prior offenses to numerous offenses, F.S. 316.193 (2)(a) and (b)

with the legislative intent of the two driving related statutes. To hold otherwise would create multiple convictions for the same crime, which arose from a single incident, violating the Constitutionally protected principles of double jeopardy.

It is extremely unfortunate that more than one person was injured as a result of Petitioner's single driving episode, however there is, based upon the DUI statute itself, only one crime of driving under the influence with the degree of the crime and the penalties increased as a result of the multiple injuries.

The rationale of Boutwell and Michie should extend to DUI with serious bodily injury cases to avoid fundamental error. Subjecting Petitioner to two counts of DUI with serious bodily injury as a result of one driving episode/accident violates the principles of double jeopardy. The District Court's ruling must be vacated and the second count of the information must be dismissed.

ARGUMENT

POINT I

THE APPELLATE COURT'S RULING VIOLATES DOUBLE JEOPARDY PRINCIPLES BY SUBJECTING PETITIONER TO PROSECUTION AND PUNISHMENT FOR MULTIPLE COUNTS OF DUI AS A RESULT OF A SINGLE CONTINUING OFFENSE AND THEREFORE A SINGLE VIOLATION OF THE DUI STATUTE.

The Appellate Court erred in reversing the trial court and reinstating count two of the information. Petitioner now faces two counts of DUI with serious bodily injury. While allegedly intoxicated, Petitioner was involved in a single traffic accident in which two people were seriously injured.

The trial court properly interpreted and applied the holdings of Boutwell v. State, 631 So. 2d 1094 (Fla. 1994) and Michie v. State, 631 So. 2d 1106 (Fla. 2d DCA 1994) to Petitioner's case. Boutwell addresses Florida Statute 322.34, specifically the consequences of driving with a suspended license and causing serious bodily injury to others. Michie addresses Florida Statute 316.193 and the consequences of driving under the influence and being involved in a single accident.

Boutwell was convicted of four (4) counts of driving while license suspended with serious injuries, F.S. 322.34(3), after being involved in one (1) accident which injured four (4) persons.

The Florida Supreme Court held:

"It is evident that section 322.34(3) does no more than enhance the penalty for driving with a suspended license in cases where the driver through the careless or negligent operation of his vehicle causes death or serious bodily injury. If the violation of section 322.34(1) in a single driving episode can be only one offense, the violation of section 322.34(3) in a single driving episode should be considered as one offense. We agree with Wright that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident." Boutwell at 1095.

The Boutwell court, continuing with the single driving episode/single accident/single crime analysis, distinguished that case from a case of two sexual batteries committed upon two persons at the same time and place, and a robbery of 13 persons at the same time which constituted 13 robberies, by saying that there was an intent to commit separate crimes in each of those cases. Boutwell at 1095.

It is undisputed that Mr. Lamoureux was involved in one driving episode with one accident. There was no intent to commit numerous crimes.

Michie v. State, 632 So. 2d 1106 (Fla. 2nd DCA 1994), extends Boutwell to DUI cases. Michie was charged with two counts of DUI serious bodily injury after two people were injured in one accident. Apparently, the jury did not find that the people were

seriously injured, however, they found Michie guilty of two counts of DUI.

Florida Statute Section 316.193(3) states:

- (3) Any person:
 - (a) Who is in violation of section (1);
 - (b) Who operates a vehicle; and
 - (c) Who by reason of such operation, causes:
 - 1. Damage to the property or person is guilty of a misdemeanor of the first degree, (emphasis added)
 - 2. Serious bodily injury to another.....is guilty of a felony of the third degree.

The facts of Michie are not clear as to whether the jury disregarded the seriousness of the injuries reducing Michie's crime from a third degree felony to a first degree misdemeanor as described in 316.193(3)1, or if the jury disregarded all injury. Florida Statute 316.193(3)1 does not describe or disqualify any particular type of injury, nor does it say the injury must be more than a scratch.

Either way, the Michie court, like the Boutwell court, held that traffic offenses such as driving under the influence and driving with a suspended license are "continuing offenses" permitting a single conviction per episode. Michie at 1108. Applying the concept of continuing offense to traffic offenses is not a new concept. "A continuing offense is a continuous, unlawful act or series of acts set on foot by a single impulse and operated by an unintermittent 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).

In Boutwell, the four victims suffered serious bodily injury, but Boutwell could only be convicted of one count of driving while license suspended. Florida Statute 322.34(3) states:

- (3) Any person whose driver's license has been canceled suspended, or revoked pursuant to Florida Statute 316.655, 322.26(8), s 322.27(2), or s. 322.28(2) 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.

The driving while license suspended statute and the driving under the influence statute are written in the same manner with similar enhancement factors. The structure of both Florida Statute 316.193(3)2 and Florida Statute 322.34(3) are the same. As determined in Boutwell and Michie, the crime is in the driving, not in the number of injuries. Also see Hallman v. State, 492 So. 2d 1136 (Fla. 2d 1986). Both statutes require one event to occur before raising the degree of the crime because of injury. To be convicted of driving while license suspended with serious bodily injury, (1) the driver's license, at the time of the driving, must be suspended or canceled; (2) the driving must be careless or negligent to; and (3) cause serious bodily injury to another. For

a conviction of DUI serious bodily injury, the driver (1) must be under the influence of alcohol to the extent his normal facilities are impaired or have a blood alcohol of .08 percent or higher; (2) be driving a vehicle; and (3) cause serious bodily injury to another.

It is not logical to convict someone of one count of driving while license suspended where there are two people injured in one accident, yet to convict someone of two counts of DUI where two people are injured in one accident. If either statute were meant to create multiple crimes for multiple injuries, the statute would so state. If the statutes were intended to create multiple crimes, then it is the legislature's job to change the statutes. It is well settled in Florida that statutes must be given their plain meaning construed most favorably to the accused where there is confusion or ambiguity. Florida Statute 775.021(1). Courts must not read into a statute what the legislature does not require.

The sentencing guidelines and scoresheets take into consideration the number of victims and the extent of the injuries. A defendant receives additional points for each additional victim and more points depending upon the seriousness of each injury, slight, moderate or severe.

The trial court properly dismissed count two of the Information. Based upon the facts alleged in the booking sheet and


the current state of the law, Mr. Lamoureaux can only be subjected to one count of DUI with serious bodily injury. To hold otherwise would violate the constitutionally protected principle of double jeopardy.

CONCLUSION

The trial court properly dismissed Count Two of the Information. Florida Statute 316.193, like Florida Statute 322.34, makes the act of driving under particular circumstances the crime. The added factor of serious bodily injury to another, no matter how many others, merely enhance the consequences of the initial act of driving creating a more stringent punishment and not a separate crime. Count two of the information should be dismissed to avoid subjecting Petitioner to double jeopardy.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Patricia E. Davenport, Assistant Attorney General, Westwood Center, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607, by U. S. Mail delivery on this 16th day of Feb., 1996.


KAREN S. BEAVIN
SPARKMAN & QUINN
P. O. Box 7128
Naples, Florida 33941
Tel. No. (813)643-6263
Florida Bar No. 0797261