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SUPREME COURT OF FLORIDA

KEVIN O'NEILL,

Appellant,

vs. Case No. 86,869

STATE OF FLORIDA,

Appellee.
_____/

PETITIONER'S REPLY BRIEF ON THE MERITS

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POINT I

THE FIFTH DISTRICT ERRED IN HOLDING THAT THE DEFENDANT WOULD BE SENTENCED TO AN EXTENDED TERM AS AN HABITUAL FELONY OFFENDER PURSUANT TO SECTION 775.084, FLORIDA STATUTES (1991)

The State alleges that O'Neill's argument that using his prior "misdemeanor" conviction as a "felony" conviction is based on an erroneous premise. The State argues that O'Neill's prior conviction has not been transformed into a felony as under the habitual offender statute the classification is meaningless. Although the classification may be meaningless to the State, it carries grave consequences to Kevin. Further, the State's argument overlooks the fact that section 775.084 is entitled "habitual **felony** offenders and habitual violent **felony** offenders." Consequently, under the clear title of the statute the legislature was concerned with defendants who were habitual felony offenders. Kevin does not fit within that classification because he pled to a misdemeanor that is now being classified as a felony in order to classify Kevin as an habitual felony offender. Kevin submits that such violates due process and is an *ex post facto* law because a misdemeanor was in fact reclassified as a felony in order to habitualize Kevin as an habitual felony offender.

The Florida legislature obviously meant for defendants who commit repeated felonies receive an extended term of imprisonment. Although Kevin does have an extended record, a review of his record clearly shows that he is not an habitual felony offender. This Court can take judicial notice of the fact that there is a grave

difference between pleading to a misdemeanor and pleading to a felony. Kevin pled to the South Carolina possession of cocaine offense because it was a misdemeanor. To now use that misdemeanor as a felony, qualified offense or not, to habitualize Kevin as an habitual felony offender in order to allow the court to impose an extended term of imprisonment deprives Kevin of the due process of law that should be accorded him.

The State alleges that the penalties for the two crimes are substantially similar to Florida's statute that prohibits the actual constructive possession of a controlled substance, including cocaine. However, the State has overlooked the fact that the penalty associated with a felony and the penalty associated with a misdemeanor are significantly different. For instance, voting privileges are not taken away from a defendant convicted of a misdemeanor but are for a convicted "felon."

It only seems logical that an out-of-state conviction is not to be scored, in the guideline scoring context, if there is no analogous or parallel Florida criminal statute, *Bell v. State*, 21 Fla.L.Weekly D607 (2d DCA March 8, 1996), then the same must be said when habitualizing a defendant as an habitual felony offender. The State summarily disposes of Kevin's argument in a footnote by declaring that the specific categorization of the offense is very important in sentencing guideline cases. The same must be said when a defendant is exposed to an extended term of imprisonment as an habitual felony offender. If in the out-of-state conviction categories, a defendant cannot be sentenced to a greater sentence

by increasing the sentencing guidelines, then surely the same must hold true under section 775.084(1)(a), Florida Statutes (1991).

The case relied on by the State, *Tillman v. State*, 609 So.2d 1295, 1297 (Fla. 1992), for the proposition that a foreign conviction does not need to be labeled a felony for the conviction to trigger habitualization in Florida, differs vastly from the instant case in one important aspect: the defendant in *Tillman* did not enter a plea to a misdemeanor that was subsequently re-labeled as a felony for habitualization purposes. The feature that sets Kevin's case apart from others is the fact that he pled to a misdemeanor because it was a misdemeanor. He would have gone to trial if the charge had been a felony. (See attached letter of Kevin's attorney that represented him for the 1988 South Carolina conviction attached as Appendix A). In *Pace v. State*, 20 Fla.L.Weekly D2563 (1st DCA Nov. 14, 1995), the court held that it was reversible error to impose an habitual offender sentence for a misdemeanor. Although the court in *Pace* was not dealing with an out-of-state crime, the same holding should be had in the instant case.

Another circumstance that compels a ruling by this Court that the 1988 South Carolina conviction should not be re-classified to a felony is the fact that, although Kevin may have a long record that consists of eighteen (18) arrests, charged with four (4) separate crimes, and convicted of seven (7) misdemeanors, all of those centered around Kevin's alcohol and drug problem. None of the offenses were offenses that involved another person such as

robbery, battery, *etc.*, but instead were drug-related offenses or traffic offenses. Although Kevin perhaps deserves to have his driver license permanently revoked in order to keep him off the highway, he is not the type of individual that needs to be locked up to protect citizens other than citizens on the highway.

Pursuant to the statute in effect today, Kevin could not be habitualized as section 775.084(1)(a)3. declares that if one of the two prior felony convictions relates to the purchase or the possession of a controlled substance, then the defendant cannot be sentenced to an extended term of imprisonment. There is no question but that the 1988 South Carolina conviction related to the possession of a controlled substance, *i.e.*, cocaine. In fact, the expressed intent of the Florida legislature negates against Kevin being habitualized. Section 775.084(1), Florida Statutes (1995), states that the legislature's finding is that a substantial and disproportionate number of serious crimes are committed in Florida by a relatively small number of repeat and violent felony offenders, commonly known as career criminals. Some states have enacted habitual traffic offenders statutes and, no doubt, Kevin would qualify as a repeat traffic offender. However, Kevin is not the type of person that the Florida legislature was targeting when it enacted section 775.084.

Contrary to the State's allegation that Kevin has been through alcohol rehabilitation in the past, this simply is not the case. (R.983). In fact, his father specifically testified that Mr. O'Neill wished that Kevin had been able to have gotten help before

something like the instant accident occurred but that was never advised. (*Id.*).

The only public that needs protection from Kevin is the motoring public. The instant case is indeed tragic in that it resulted in the deaths of two police officers. However, sentencing Kevin as an habitual felony offender does nothing to rectify that tragedy. What would help to rectify the tragedy is to sentence Kevin for crimes that resulted from that tragic accident and allow him to serve the sentence and then be released in order that he may help to support the families of those two police officers. Kevin is receiving the help he needs by attending Alcoholics Anonymous meetings. That is what Kevin needs, not an extended term of imprisonment.

POINT II

THE TRIAL COURT ERRED IN FAILING TO EXCLUDE BLOOD ALCOHOL TEST RESULTS BASED ON LACK OF PROBABLE CAUSE TO REQUIRE THE DRAWING OF THE BLOOD SAMPLE AGAINST THE DEFENDANT'S WILL

The State initially argues that the instant issue lies beyond the scope of the certified question and need not be addressed by this Court. The State cited to *Goodwin v. State*, 634 So.2d 157 (Fla. 1994). However, this Court has repeatedly held that once it accepts jurisdiction over a cause, then it may decide any issue presented. *Feller v. State*, 637 So.2d 911 (Fla. 1994).

Probable cause:

The State relies on John Futch's testimony as well as the testimony of the nurse/paramedic who drew O'Neill's blood. However, the nurse/paramedic's testimony prior to trial and at trial differed so dramatically that Kevin's trial counsel was considering submitting her case to the State Attorney for perjury charges.

The State then argues that O'Neill's argument that Futch saw nothing inconsistent with a simple accident victim is refuted by Futch's testimony. However, contrary to the State's allegation, an accident victim can suffer from slurred speech and have glassy, watery eyes. Those could result from a head injury.

The State then declares that Futch reasonably believed that O'Neill was under the influence of alcoholic beverages at the time of the accident based not only on his observations but information he received from other officers at the scene. However, at the time Officer Futch requested the blood draw from Mr. O'Neill, no other

law enforcement officer had made any observations or communicated the same to him regarding the odor of alcohol or impairment of the defendant. (Tr.849-61).

Quite interestingly, the nurse/paramedic testified in her deposition that Kevin's eyes did not appear dilated, and even at trial stated that Mr. O'Neill's behavior did not seem accurate with a .22 blood level. She also did not observe any alcoholic container in Kevin O'Neill's truck nor did she smell the odor of alcohol in the truck. Buonocore obviously changed her testimony due to her dislike of defense attorneys. Her statement during trial that defense attorneys have gotten away with things before and she was not about to allow that to happen in the instant case supports Kevin's position that her change of testimony from deposition to trial was the deliberate changing of the facts to suit the State.

Miranda:

The State argues that obtaining physical evidence of a blood sample from a defendant does not violate his privilege against self-discrimination, nor does it require the reading of *Miranda* warnings or the presence of counsel. However, while that statement may be correct as far as it goes, it is made clear by the Florida supreme court in *Brackin v. Boles*, 452 So.2d 540, 543 (Fla. 1984), that the taking of a blood sample for chemical testing from a defendant without his consent, where there was probable cause for the officer to believe that defendant was under the influence of intoxicating liquor does not violate the defendant's constitutional

rights. The *Brackin* court cited to *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). As set forth *supra*, there was no probable cause for the officer to believe that Kevin was under the influence of intoxicating liquor.

Kevin would point out that because the trial court specifically found there was no probable cause to arrest Kevin then it seems to follow logically that there was no probable cause to believe that Kevin was intoxicated.

Next, the State argues out of both sides of its mouth. Although the State previously argued that Kevin was just a simple accident victim, the State now argues that because of the possible injuries to O'Neill (he had blood on his arms from small cuts of glass), that the State law enforcement personnel were justified in not giving Kevin a field sobriety test. (Answer Brief at p.27-28).

The State also argues that there was no police misconduct as the standard policy was followed in the instant case. (Answer Brief at p.28). Kevin would only pose the question of whether or not it is the police officers' policy to always snatch an accident victim from their vehicle at gun point, place him in handcuffs and then place him in the back of a Satellite Beach Police Department patrol car when that person has been injured in the automobile accident. The State is arguing the facts differently depending upon the position that it is advocating at any one particular time.

POINT III

THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE THE ALCOHOL TEST RESULTS BECAUSE THERE WAS AN INDICATION OF PROBABLE TAMPERING WITH THE VIAL

The State argues that Buonocore was recalled to clarify her testimony and that in the recall she specifically recalled that some of the tubes she used in her experience contained liquid and some contained a powder. The State then argues that this nullifies O'Neill's argument that there was something wrong with the tubes because the tubes contained a liquid. However, the State's expert witness, Barry Funck, stated under oath that the Becton Dickinson blood kit which is used by the law enforcement officers is very reliable and that powder is used strictly for law enforcement purposes. Consequently, Buonocore's alleged clarification only supports Kevin's position that the vacutainer vial which held Kevin's blood specimen had in some way been tampered with.

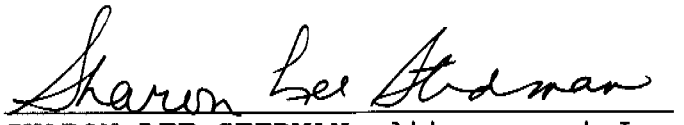
It is also interesting to note that the State has not even addressed the fact that the swab was missing from the sealed blood collection kit, as well as its packaging.

The error in admitting the blood test results could not be deemed harmless. There was no field sobriety test given, Kevin's condition was consistent with being in a serious automobile accident, and Buonocore's deposition testimony negated a finding of inebriation. No matter what the crime Kevin was charged with, he is still entitled to due process of law and a fair trial. He was denied both when evidence of the test result was submitted to the jury when the blood test had been tampered with.

CONCLUSION

Based on the foregoing arguments and authorities cited therein, the appellant respectfully requests that this Honorable Court reverse the judgment and sentence below.

Respectfully submitted



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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 Kristen Davenport, Assistant Attorney General, 444 Seabreeze Blvd., 5th Floor, Daytona Beach, Florida 32118, this 3rd day of April, 1996.

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