IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs.

LAURENTINO BRAVO SALAZAR,

Respondent.

Case No. 87,010

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent was the defendant at trial and the appellant in the Fourth District Court of Appeal. Petitioner was the prosecution and the appellee.

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

STATEMENT OF THE CASE AND FACTS

Respondent accepts the statement of the case and facts filed by Petitioner.

SUMMARY OF ARGUMENT

Respondent was involved in a traffic accident in which one man was killed and three others injured. For this single act of driving while intoxicated, he was adjudicated and sentenced for six DUI crimes. The imposition of multiple sentences was erroneous.

Florida Statute 316.193 creates the crime of driving while intoxicated. A review of that statute shows its unified intent to subject defendants to increasing penalties depending on the severity of the particular circumstances of the driving incident. It does not however demonstrate any intent to treat a single driving episode as multiple offenses. Further, treating DUI as a single continuing offense is consistent with this Court's holding in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994), wherein the court found that a defendant could not be convicted of four counts of driving while his license was suspended even though he injured four people in a traffic accident. That incident involved a single act on the part of the defendant and the fact that more than one person was injured was happenstance. As the district court in its decision here partially recognized, the same rationale applies equally to DUI offenses. The error is fundamental because multiple convictions violate principles of double jeopardy. The duplicative convictions must be vacated.

ARGUMENT

POINT I

THE TRIAL COURT VIOLATED DOUBLE JEOPARDY PRINCIPLES IN ADJUDICATING AND SENTENCING RESPONDENT FOR MULTIPLE COUNTS OF DUI BECAUSE RESPONDENT'S ACTIONS WERE A SINGLE CONTINUING OFFENSE AND THEREFORE A SINGLE VIOLATION OF THE STATUTE.

Respondent, while intoxicated, drove his car into another car causing an accident in which Juquin Martinez was killed, Jesus Martinez, Juan Martinez, and Urgarte Eustigoio were injured, and damage was done to the property of Al Packer Ford and Pedro Salazar, owner of the truck carrying the Martinez family. Respondent entered no contest pleas straight to the court on each charge. He was adjudged guilty of DUI manslaughter, a conviction not being challenged here. He was also adjudged guilty and separately sentenced for five other DUI offenses: one DUI with serious injury, two DUI's with injury, and two DUI's with property damage. The district court affirmed the manslaughter conviction, one count of DUI with serious injury,[1] and one count of DUI with property damage. Salazar v. State, 20 Fla. L. Weekly D2431 (Fla. 4th DCA Nov. 1, 1995). It vacated the two misdemeanor DUI's involving nonserious injury and one of the two DUI's involving property damage. Id. Before this Court Respondent seeks to additionally vacate the DUI with serious injury and the remaining DUI with property damage.

Florida Statute 316.193 provides:

> (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

[1] Respondent did not challenge that conviction in the district court but challenges it here based on the dissent in Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995), a case currently pending before this Court.

control of a vehicle within this state and:

(a) The person is under the influence of alcoholic beverages...when affected to the extent that his normal faculties are impaired; or

(b) The person has a blood or breach alcohol level of 0.08 percent or higher.

(2)(a) Except as provided in paragraph (b), subsection (3), or subsection (4), any person who is convicted of a violation of subsection (1) shall be punished:
1. By a fine of:
a. Not less than $250 or more than $500 for a first conviction.
b. Not less than $500 or more than $1,000 for a second conviction.
c. Not less than $1,000 or more than $2,500 for a third conviction; and
2. By imprisonment for:
a. Not more than 6 months for a first conviction.
b. Not more than 9 months for a second conviction.
c. Not more than 12 months for a third conviction.

(b) Any person who is convicted of a fourth or subsequent violation of this section is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084; however, the fine imposed for such fourth or subsequent violation shall be not less than $1,000.

3. Any person:
(a) Who is in violation of subsection (1);
(b) Who operate a vehicle; and
(c) Who, by reason of such operation, causes;
1. Damage to the property or person of another is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
2. Serious bodily injury to another, as defined in s. 316.1933, is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.
3. The death of any human being is guilty of DUI manslaughter, a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

The issue to be resolved here is the unit of prosecution provided for by this statute. If, as Respondent contends, this offense is a single continuing offense, then the trial court's imposition of multiple convictions and sentences for a single offense violates double jeopardy principles and is fundamental error.

"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).

Courts have applied the "continuing offense" concept to most traffic offenses.[2] Hallman v. State, 492 So. 2d 1136, 1138 (Fla. 2d DCA 1986). For instance, in Hallman a defendant was driving with a suspended license (DUS). He was involved in an accident but left the scene. He was later discovered asleep behind the wheel of his car which was stopped at an intersection in a different town a few miles away from the accident. Hallman received two citations for driving with a suspended license but the second district vacated one, finding that the offense was a continuing one subject to only a single prosecution. 492 So. 2d at 1138. See also State v. Licari, 43 A. 2d 450 (Conn. 1945) (only one count of DUI where defendant drove car into traffic stanchion and then led police on 6-10 minute chase); People v. Dillingham, 249 N.E. 2d 294 (Ill. 2d DCA 1969) (only one count of driving while license suspended where defendant eluded first officer who attempted to stop him and led second officer on 100 mph chase); Boyle v.

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[2] The concept is not unique to traffic offenses however, and in fact far predates them. In re Snow, 120 U.S. 274, 7 S. Ct. 556, 30 L. Ed. 658 (1887) involved three indictments covering distinct yearly time periods against a defendant based on a continuous cohabitation with seven women. In concluding that three charges were impermissible the court relied on Crepps v. Durden, 2 Cowper's Reports 640, 98 Eng. Rep. 1283 (K.B. 1777), wherein a defendant was charged four times with "...exercis(ing) any worldly labor, business or work...on the Lord's day..." for selling four loaves of bread to various customers. One charge per loaf was deemed inappropriate despite the fact that they were sold to four separate "victims" as it were. See also Bell v.U.S., 349 U.S. 81, 75 S. Ct. 6 20, 99 L. Ed. 905 (1955) (transporting two women across state lines in violation of the Mann Act was a single offense); Johnson v. Morgenthau, 505 N.E. 2d 240 (N.Y. 1987) (defendant charged with unlawful possession of firearm February 5 in one count and February 11 in another was single continuing defense; dual prosecution barred).

State, 241 Ind. 565, 170 N.E. 2d 802 (Ind. 1960) (single offense of DUI though it included a hit-and-run accident in the midst of the offense).

The principle of continuing offenses was clearly adopted in Florida by this Court in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994). There a defendant was involved in a single traffic accident which injured four people. Upon his plea of guilty he was convicted of four counts of DUS with serious injury. This Court ruled that despite the multiple injuries, only a single count of DUS could be sustained, explaining:

> 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[3] that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.

631 So. 2d at 1095. In so holding, this Court analogized to the decision of the fourth district in James v. State, 567 So. 2d 59 (Fla. 4th DCA 1990), rev. dismissed 576 So. 2d 288 (Fla. 1991), holding that it was error to convict for two counts of burglary with battery when only one entry had been proven. See also Hoag v. State, 511 So. 2d 401 (Fla. 5th DCA), rev. denied 518 So. 2d 1278 (Fla. 1987) (leaving accident scene where one person killed and four injured was single offense), Miles v. State, 418 So. 2d 1072 (Fla. 5th DCA 1982) (failure to appear in court for two charges was single statutory violation).

Just as driving while one's license is suspended is a continuing offense, so too is driving while intoxicated, as recognized by the court in Michie v. State, 632 So. 2d 1106

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[3] Wright v. State, 592 So. 2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So. 2d 457 (Fla. 1992).

(Fla. 2d DCA 1994)[4]. The result should not be different in DUI cases involving injury to either persons or property. Although petitioner urges that the offense becomes a "static" one whenever an injury occurs, the Supreme Courts of California and Indiana explain the fallacy of that reasoning. In Wilkoff v. Superior Court, 696 P. 2d 134 (Cal. 1985), the court faced the question here, whether one instance of driving under the influence which causes injury to several persons is chargeable as one count of driving under the influence or as several. 696 P. 2d at 135. Ms. Wilkoff, driving drunk, made an improper lane change which resulted in a four car collision causing the death of one person and the injury of five others.

> Our analysis begins with the recognition that a charge of multiple counts of violating a statute is appropriate only where the actus reus prohibited by the statute--the gravamen of the offense--has been committed more than once. The act prohibited by section 23153 is the act of driving a vehicle while intoxicated and, when so driving, violating any law relating to the driving of a vehicle. In *Lobaugh*[5] the court found that this act was committed only once, since there was only one driving incident, despite the fact that injuries to several persons were proximately caused thereby. The emphasis in *Lobaugh* was on the act constituting the gravamen of the offense since, as we have said, the number of times the act is committed determines the number of times the statute is violated: "The unlawful act denounced by the Vehicle Code is the 'mere act of driving a vehicle upon a public highway while intoxicated'; the act is either a misdemeanor or a felony, depending on whether personal injuries result therefrom. The felony section simply 'graduate[s] the punishment according to the [more serious] consequences of the forbidden act.' (*People v. Lobaugh, supra,* 18 Cal. App. 3d at pp. 79-80, 95 Cal. Rptr. 547, citations omitted, brackets in original.) The concurring opinion of Justice Sims further pointed out that "[t]he question of 'bodily injury' is only of materiality in that

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[4] Michie was charged with DUI with serious injury but convicted of simple DUI. In State v. Lamoureux, 660 So. 2d 1063 (Fla. 2d DCA 1995), rev. pending 86,670,the court limited the Michie holding to simple DUI and reversed a pretrial dismissal of multiple DUI counts involving serious injury.

[5] People v. Lobaugh, 18 Cal. App. 2d 75, 95 Cal. Rptr. 547 (1971).

> it aggravates the offense [from a misdemeanor to a felony]. The fact that there are several victims cannot transform the single act into multiple offenses." (*Id.*, at p. 84, 95 Cal. Rptr. 547, italics in original.)

Likewise, the courts in Indiana have ruled it improper, and a double jeopardy violation, to impose multiple sentences on a defendant who drives while intoxicated resulting in multiple deaths or injuries. Walker v. State, 582 N.E. 2d 877 (Ind. App. 3 Dist. 1991), Kelly v. State, 527 N.E.2d 1148 (Ind. App.), aff'd. 539 N.E. 2d 25 (Ind. 1988).

The analysis of both these courts is consistent with the analysis in Boutwell because, like the DUS cases, DUI also involves a single act on the part of the defendant, namely his drunk driving. "The actus reus of the offense does not include bodily injury. Rather where bodily injury *proximately results* from the prohibited act, the offense is elevated from a misdemeanor to a felony." 696 P. 2d at 139 (emphasis in original). Compare "In the instant case it was fortuitous that four persons were injured as a result of Boutwell's negligent driving instead of only one." 631 So. 2d at 1095.

Petitioner's approach, with repeated references to victims and sympathy for them, is to treat DUI as a battery statute. The same argument was offered to and rejected by this Court in Boutwell. After all, there were also two victims in James v. State, supra, but still only one act of burglary. James demonstrates the fallacy of petitioner's claim that double jeopardy is limited to the Blockburger[6] analysis. Naming separate persons as victims did not create separate crimes in James or Boutwell and it does not create separate crimes here. See also Hoag, supra. As Boutwell and the other cases demonstrate, a Blockburger analysis is not the end all and be all; indeed it is a completely unsatisfactory analysis in many circumstances. For instance, the elements of first and second degree murder and manslaughter each have an element the other does

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

not, see §§ 782.04 and 782.07, Fla. Stat., but that does not mean a person can be convicted for each offense in a single homicide. Likewise DUI manslaughter and vehicular homicide. See Houser. Merely adding or changing name does not in all cases add a different element.

What Petitioner does not explain is why the statute here should not be construed like the similar DUS statute. Both prohibit persons from driving under certain circumstances and both increase the punishment based on any harm done during the single act of driving. In each case a defendant may be held liable[7] for all the damage he does, but mere circumstances do not and should not convert his single criminal action into multiple offenses. See Boutwell, 631 So. 2d at 1095, Wilkoff, 696 P. 2d at 139. Petitioner characterizes this result as "absurd." But the person who drinks, drives, and injures one person is neither more nor less culpable than the person who drinks, drives, and hits a bus injuring 20 people. Does petitioner really contend that there is no end to the number of crimes which can arise from a single traffic accident? And should the first person be subject to no more than five years in prison but the second be subject to 100 years? As the court obviously recognized in Boutwell, the moral culpability of both drivers is the same, thus the legal culpability should have a finite limit, namely one conviction with an increasing penalty from no accident to injury/damage accident to serious injury accident to the maximum of 15 years if someone is killed. Such a result cannot fairly be described as absurd.

Application of the reasoning of Boutwell, Hallman, and Michie to all DUI offenses is supported by the wording of section 316.193, Fla. Stat. (1993), because the statutory provision is worded in terms that the injury, damage, or death simply determines the

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[7] Such liability includes restitution to all injured parties, see 775.089, Fla. Stat. (1993), and an increasing guideline range depending on the number of persons injured. See 3.702(5) and 3.990, Fla. R. Crim. P. Of course civil liability can also follow.

severity of the penalty, not the number of offenses. The degree of the offense and punishment increases depending upon its particular circumstances. The statute cannot be read without distortion to indicate otherwise; it shows no intent that multiple convictions be entered. Compare Jackson v. State, 634 So. 2d 1103 (Fla. 4th DCA 1994), en banc, (multiple DUI's arising from single incident cannot be combined to revoke driver's license per section 322.28, Fla. Stat.); Cooper v. State, 621 So. 2d 729 (Fla. 5th DCA 1993), approved 634 So. 2d 1074 (Fla. 1994).

This issue has been decided to the contrary by the courts in Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), rev. denied 547 So. 2d 1210 (Fla. 1989), and Wright v. State, supra, cases decided well before Boutwell and more recently in State v. Lamoureux, supra, Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995), and Wick v. State, 651 So. 2d 765 (Fla. 3d DCA 1995). It is faulty reasoning of these cases, which allow multiple DUI convictions in a single episode, that then leads to the unnecessarily convoluted analysis in cases such as Jackson v. State, supra, wherein the court must reach to arrive at the correct result.[8] The source of the problem can at least partially be attributed to one sentence from Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985): "...DWI manslaughter is not merely an enhancement of penalty for driving while intoxicated." The issue in Houser was whether a person could be twice sentenced for a single death, not how the DWI (now DUI) statute should be interpreted. Yet that statement, which is arguably nothing more than dicta, was then lifted and placed into an entirely different context in Pulaski. While the result in Houser was certainly correct, Judge Harris in his dissent in Melbourne offers a far more consistent and logical rationale: DUI manslaughter is and should be treated as the ultimate enhancement of a

[8] The legislature did not mean to revoke driver's licenses based on the happenstance consequence of one episode of diving under the influence because the legislature never intended one driving incident to result in more than one DUI conviction to begin with.

DUI, (thus allowing only one DUI conviction for each driving episode,) and all other deaths which might occur during the DUI episode should be charged under homicide statutes. 655 So. 2d at 130-132. Compare McHugh v. State, 36 So. 2d 786 (Fla. 1948) (in death of his two children, defendant charged with DUI manslaughter for one and manslaughter by culpable negligence for the other), People v. McFarland, 765 P. 2d 493 (Cal. 1989) (when legislature removed DUI manslaughter from vehicle code and placed it in penal code, intent to separately punish as homicide rather than DUI was demonstrated.)

As petitioner correctly suggested he would, Respondent further urges that if the court finds any ambiguity in the meaning of section 316.193, then Florida Statute 775.021(1) has long provided "when the language [of a statute] is susceptible of differing constructions, it shall be construed most favorable to the accused." This well-known "rule of lenity" was explained by the Supreme Court in U.S. v. Universal C.I.T. Credit Corp.:

> When choice has to be made between two readings of what conduct Congress had made a crime, it is appropriate, before we choose the harsher alternative, to require Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.

344 U.S. 218, 221-222, 73 S. Ct. 227, 229, 97 L. Ed. 260 (1952). Hence, if the legislature fails to expressly create separate or multiple offenses, neither the executive branch, through the prosecutor, nor the judicial branch, through the courts, may usurp legislative authority by assuming the power to charge, convict, or punish cumulatively. At worst, the unit of prosecution for section 316.193 is ambiguous; it must therefore be interpreted in the way most favorable to the citizen accused. See Ogletree v. State, 525 So. 2d 967 (Fla. 1st DCA 1988).

Though Respondent pled no contest to the charges, the error was fundamental because it violates the prohibition against double jeopardy. Menna v. New York, 423 U.S. 61, 96 S. Ct. 421, 46 L. Ed. 2d 195 (1975); Arnold v. State, 578 So. 2d 515 (Fla. 4th DCA 1991); Lundy v. State, 596 So. 2d 1167 (Fla. 4th DCA 1992); Kurtz v. State, 564 So. 2d 519 (Fla. 2d DCA 1990).

If this Court adopts the analysis of Judge Harris in Melbourne, Respondent's convictions for counts 2, 3, 5, 6 and 7 must be vacated and his sentences for those offenses set aside. In the alternative, counts 3, 5, 6, and 7 must be vacated.

CONCLUSION

Based on the foregoing arguments and the authorities cited therein, Respondent respectfully requests this Court to partially affirm decision of the fourth district but to quash that portion which allowed convictions for DUI with serious injury and DUI with property damage, and to remand this cause for the trial court to vacate the duplicative judgments and sentences.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier to John Tiedemann, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401-2299 this 29 day of January, 1996.

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