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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

vs. Case No. 87, 010

LAURENTINO BRAVO SALAZAR,

Respondent.

****

ON PETITION FOR CERTIORARI REVIEW

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PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Petitioner was the prosecution in Circuit Court for the Fifteenth Judicial Circuit and the appellee in the Fourth District Court of Appeal. Respondent was the defendant in the trial court and the appellant in the Fourth District.

In this brief, the parties will be referred to as they appear before this Court, except that Petitioner may also be referred to as "the State."

The following symbols will be used:

AB = Respondent's Answer Brief

R = Record on Appeal

STATEMENT OF THE CASE AND FACTS

Petitioner relies on the Statement of Case and Facts set out in the Initial Brief, and makes the following additions:

The police report and presentence investigation report allege that Respondent was traveling in excess of 100 m.p.h. at the time he swerved into the next lane and collided with the other vehicle (R. 5, 134). The prosecutor represented in the factual basis to the trial court that Respondent was traveling at approximately 100 m.p.h., and at least in excess of 85 m.p.h., for the off duty officer who had been following Respondent could not keep up with him because his car could not go beyond 85 m.p.h. (R. 60).

SUMMARY ARGUMENT

The trial judge properly entered four distinct dispositions upon respondent for injuring the person or damaging the property of four different victims while driving under the influence of alcohol. Section 316.193(3), Florida Statutes, does not simply serve to enhance the penalty for the act of drunk driving where injury or death results from a related accident. Rather, the injury or death is the focus of the statute. The language of the statute suggests that the legislature intended, therefore, that a defendant be prosecuted for each victim injured or killed in a drunk driving accident. The majority of districts have interpreted the statute to mean such. And, other states have held that a defendant may be convicted of multiple offenses arising from a single drunk driving accident where there are multiple victims.

ARGUMENT

THE TRIAL JUDGE PROPERLY ENTERED FOUR DISTINCT DISPOSITIONS UPON RESPONDENT FOR INJURING THE PERSON OR DAMAGING THE PROPERTY OF FOUR DIFFERENT VICTIMS WHILE DRIVING UNDER THE INFLUENCE OF ALCOHOL.

The "continuing offense" concept advanced by Respondent is not applicable to DUI manslaughter pursuant to section 316.193(3), Florida Statutes.[1] The gist of manslaughter by operating a motor vehicle while intoxicated is "unlawful homicide," and "[t]here is an offense for each unlawful homicide." McHugh v. State, 36 So. 2d 786, 787 (Fla. 1948). Thus, assuming that this court in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994) properly characterized driving with a suspended license causing death pursuant to section 322.34(3), Florida Statutes, as a continuing offense, that offense is "fundamentally distinct" from DUI manslaughter. See Melbourne v. State, 655 So. 2d 126, 129 (Fla. 5th DCA 1995), rev. granted, Case No. 86, 029.

As noted in Melbourne, this court in Houser v. State, 474 So. 2d 1193, 1196 (Fla. 1985) stated that "DWI manslaughter is not merely an enhancement of penalty for driving while intoxicated." This court explained that "the additional element of the death of a victim raises DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state's regulation of homicide." Houser, 474 So. 2d at 1196 (emphasis supplied). And, rather than describing the DWI damage or injury and manslaughter provisions as merely setting out the penalties for the result of damage, injury or death, this court described them as outlining the "crime" of DWI causing damage to property or person and defining "DWI manslaughter." Id. at n. 2.

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[1] Petitioner makes this argument in regard to all offenses pursuant to section 316.193.

The court in Murray v. United States, 358 A. 2d 314, 321 (D.C. App. 1976) similarly viewed the "negligent homicide statute" in a case where the defendant was charged with two counts of negligent homicide, one for each victim, resulting from a single automobile accident which occurred while the defendant was under the influence of alcohol. See also State v. Rabe, 291 N. W. 2d 809, 820 (Wis. 1980)(DUI manslaughter encompasses both negligent operation of a vehicle while intoxicated and causing the death of another)(emphasis supplied).[2] The court in Murray stated:

> The safety of individual citizens is not incidental to the purpose of the statute; it is the sole purpose of the statute. The gravamen of the crime is not the act of operating a motor vehicle negligently; rather, it is the killing of a human being.

358 A. 2d at 321.

This same reasoning was applied in the context of Massachusetts' DUI manslaughter statute in Com. v. Meehan, 442 N.Ed. 2d 43, 44 (Mass. App. 1982). The court deemed the statute as providing a "middle ground" between manslaughter and the offense of driving so as to endanger, "so that the public could be better protected against the spiraling rate of highway deaths caused by negligent, reckless and intoxicated drivers." Meehan, 442 N. E. 2d at 44.

In fact, of those states that have considered the issue, most have decided that double jeopardy is not violated when a defendant is convicted of a homicide offense for each victim of a single automobile accident. See, e.g., State v. Miranda, 416 P. 2d 444, 451-452 (Ariz. App.

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[2] Taking Respondent's argument at face value, that the DUI manslaughter statute simply enhances the penalty for drunk driving where death results (AB p. 7-9), the State should be able to prosecute a defendant for both DUI manslaughter and vehicular homicide based on the same death. The former would be in regard to the drunk driving, and the later would be in regard to the death as a result of the operation of the vehicle. However, this court has held that a defendant cannot be convicted of both DUI manslaughter and vehicular homicide for a single death. See Houser, 474 So. 2d at 1193.

1966)(manslaughter); Tackett v. State, 745 S. W. 2d 625 (Ariz. 1988)(manslaughter); Murray, 358 A. 2d at 320-323(negligent homicide); Meehan, 442 N. E. 2d 43(DUI homicide); Galavan v. State, 655 P. 2d 155, 157-158 (Nev. 1982)(DUI manslaughter);State v. Bailey, 508 A. 2d 1066 (N. H. 1986)(DUI manslaughter); Gibson v. State, 512 P. 2d 1399, 1400 (Okl. Cr. 1973)(murder); State v. Timms, 505 A. 2d 1132, 1138 (R. I. 1986)(DUI manslaughter); State v. Irvin, 603 S. W. 2d 121, 123 (Tenn. 1980)(second degree murder and involuntary manslaughter) ; Ramirez v. State, 895 S. W. 2d 405 (Tex. App. 1994)(involuntary manslaughter); Johnson v. State, 693 S. W. 2d 707, 710-711 (Tex. App. 1985)(vehicular homicide); Rabe, 291 N. W. 2d at 815-823(DUI manslaughter). And, in addition to Judge Polen's dissent in the instant case, four out of five district courts have determined that double jeopardy is not offended by multiple convictions grounded on multiple victims of the same automobile accident. See, e.g., State v. Lamoureux, 660 So. 2d 1063 (Fla. 2d DCA 1995); Melbourne v. State, 655 So. 2d at 129; Wick v. State, 651 So. 2d 765, 766 (Fla. 3d DCA 1995); Wright v. State, 592 So. 2d 1123, 1126 (Fla. 3d DCA 1991), quashed on other grounds, 600 So. 2d 457 (Fla. 1992); Pulaski v. State, 540 So. 2d 193, 194 (Fla. 2d DCA), rev. denied, 547 So. 2d 1210 (Fla. 1989); Rosier v. State, 343 So. 2d 972 (Fla. 1st DCA 1977)(manslaughter by culpable negligence). Even this Court in McHugh held that the defendant could be prosecuted for two homicides as a result of two victims being killed by the operation of the defendant's motor vehicle while he was intoxicated. 36 So. 2d at 786(vehicular homicide and manslaughter).

This Court pointed out that there was a difference in the identity of the victims. McHugh, 36 So. 2d at 787. This same reasoning has been applied by other courts to illustrate that because the State has a different burden of proof in regard to each victim, multiple offenses resulting from a single automobile accident are justified. See, e.g., Bailey, 508 A. 2d at 1069; Timms, 505 A. 2d at

1138; Ramirez, 895 S. W. 2d at 406; Johnson, 693 S. W. 2d at 710-711; Rabe, 291 N. W. 2d at 818. The court in Miranda, 416 P. 2d at 452, explained that reference to "a human being" in the manslaughter statute called for a separate offense for the killing of each victim, stating: "Respect for human dignity is of the essence of our way of life. Certainly it is in keeping with the spirit that the wrongful killing of each human being should be treated as a separate offense."

Section 316.193(3)(c)(3) uses a term similar to that discussed in Miranda, "any human being." This term is not present in section 322.34(3), the DUS manslaughter statute; that section uses "to another human being" instead. The State submits, therefore, that the DUI statute focuses on the result caused, whereas the DUS statute focuses on the act which results in injury or death. The court in Spradling v. State, 773 S. W. 2d 553, 556-557 (Tex. Cr. App. 1989) interpreted the term "any" in the leaving the scene of the accident statute to require a driver to give assistance to "all injured persons." And, in Vigil v. State, 563 P. 2d 1344, 1351 (Wyo. 1977), the court stated, "It must be noted that 'any human being' is in the singular and there is no indication that the defendant can get a bargain rate if he assaults a group of human beings."

There is, however, another more apparent distinction between the DUI and DUS offenses. The person with a suspended license is not presumptively incapacitated. There are a number of different reasons that could cause a license to be suspended, not all of which relate to the person's ability to drive.

On the other hand, with DUI, the person is under the influence of alcohol to the extent that he is, or is presumed to be, impaired. See Section 316.193(1). In Rabe, 291 N. W. 2d at 822, the court stated, "It is foreseeable that intoxicated use of a motor vehicle poses a substantial risk of causing multiple deaths." The court in Bailey, 508 A. 2d at 1069-1070, also rejected argument

concerning the "fortuitous nature" of a drunk driving accident resulting in several deaths, stating:

> We believe that the defendant's argument is logically flawed in that it was as much a matter of chance that anyone at all was killed as the result of defendant's negligent behavior as that multiple individuals were killed. To the defendant's fortuity argument, we can only say as did the District of Columbia Court of Appeals: " That appellant's conduct would have resulted in the tragedy which occurred was not fortuitous but, unhappily, was almost inevitable. The combination of an undue ingestion of alcohol and the resultant mishandling of automobiles causes awesome carnage on our highways daily. In fairness it can be said that appellant could hardly have chosen a means which would have been more likely to result in injury to many persons." Murray v. United States, 358 A. 2d 314, 321-22 (D.C. 1976).

The point is that with a .31 alcohol level, driving at about 100 m.p.h., Respondent risked not seeing or reacting to even a large vehicle, like a bus carrying 20 people (AB p. 8).[3] Obviously, there are three district courts that perceive a difference between DUI and DUS, for they upheld multiple convictions from a single accident pursuant to the DUI statute after this court's decision in Boutwell. See Lamourex; Melbourne; Wick.

On the face of the opinion in Kelly v. State, 527 N.E. 2d 1148 (Ind. App. 1988), cited by Respondent, it is clear that the language of the Indiana DUI manslaughter statute is different than the language of section 316.193(3). The Indiana statute reads, "A person who violates [IC 9-11-2-2] commits a class . . . felony if the crime results in . . ." Kelly, 527 N. E. 2d at 1155. Based on this language, the court in Kelly reasoned that the legislature chose to use the result as a factor for enhancement, making clear that the crime was for operating a vehicle while intoxicated. Id. Notably,

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[3] Of course, the majority of vehicles on the road can only hold a few people, and usually are not full with passengers, so that Respondent's hypothesis of 20 people is an extreme example. However, since a single collision can involve more than just two vehicles, the likelihood that an intoxicated driver might cause multiple deaths is foreseeable.

the Indiana statute does not even have a causation element, but focuses entirely on violation of the basic DUI section.

To the contrary, the Florida DUI manslaughter statute, section 316.193(3), focuses not only on a violation of the basic DUI statute, section 316.193(1) on driving under the influence, but also focuses on the operation of the vehicle which "causes" the death of "any human being." In Kelly, the court suggested that if the Indiana legislature had intended there to be multiple offenses as a result of a single accident, it might have defined manslaughter as "whoever kills another human being while operating a vehicle while intoxicated commits a class C felony." 527 N. E. 2d at 1155. It explained, "[t]here, the result of the conduct is part of the definition of the crime." Id. The State maintains that in Florida, the applicable statute makes any resulting death an element of DUI manslaughter.

In Wilkoff v. Superior Court, 696 P. 2d 134 (Cal. 1985), also relied on by Respondent, the court likewise considered a statute that is unlike Florida law. The California DUI statute " is defined in terms of the act of driving" and "The actus reus of the offense does not include causing bodily injury." Wilkoff, 696 P. 2d at 139. Rather, like the Indiana statute, "where bodily injury *proximately results* from the prohibited act, the offense is elevated from a misdemeanor to a felony" Id. (emphasis in opinion). Again, the Florida statute, section 316.193(3)(c)(3), refers to the act of causing death.

Furthermore, the court in Wilkoff referenced a California rule, Penal Code section 654, which provides, "[a]n act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions but in no case can it be punished under more than one. Id. at 138, n. 8. Section 775.021(4)(a), Florida Statutes, on the other

hand, provides, "Whoever, in the course of one criminal transaction or episode, commits an act or acts which constitute one or more separate criminal offenses, upon conviction and adjudication of guilt, shall be sentenced separately for each criminal offense." Moreover, section 775.021(4)(b) states, "[t]he intent of the Legislature is to convict and sentence for each criminal offense committed in the course of one criminal episode or transaction and not to allow the principle of lenity . . . to determine legislative intent."

Finally, the court in Wilkoff noted that case law construing the California statute had held since 1971 that a defendant could not be convicted of multiple DUI offenses arising from a single automobile accident. It reasoned, therefore, that had the legislature disagreed with such an interpretation of the California statute, it would have reacted to it in some way. Id. At 140. Applying the same reasoning to this case, had the Florida legislature disagreed with case law preceding the instant case, which held that multiple DUI convictions arising from one accident were permissible under the current statute, it would have also reacted to it. See, e.g., Wright, 592 So. 2d at 1126; Pulaski, 540 So. 2d at 194. Notably, as early as 1961, the Second District held that there are as many DUI manslaughter offenses as there are victims killed in a single collision. State v. Lowe, 130 So. 2d 288 (Fla. 2d DCA 1961).

If this Court disagrees with Petitioner's interpretation of the Florida DUI manslaughter statute, Petitioner requests that this Court make clear that the State may prosecute a defendant for each additional death that results from a single automobile accident, pursuant to the homicide statute, in addition to a DUI charge based on the accident. See McHugh, 36 So. 2d at 786 (charge for first death arising from automobile accident was manslaughter by operation of a motor vehicle while intoxicated, while charge for second death was for manslaughter through culpable negligence). In

People v. McFarland, 765 P. 2d 493 (Cal. 1989), the court decided that although the defendant could only be convicted of one count of felony drunk driving, he could also be convicted of vehicular manslaughter for a death arising from the automobile accident which was the result of the same drunk driving.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities, Petitioner respectfully requests this Honorable Court to **QUASH** the decision of the district court and to remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to, CHERRY GRANT, Assistant Public Defender, 421 3rd Street, 6th Floor, West Palm Beach, FL on March 4, 1996.

Counsel for Petitioner