IN THE SUPREME COURT OF FLORIDA

ROBERT CARLTON BEMIS, :

Petitioner, :

vs. : Case No. 87,425

STATE OF FLORIDA, :

Respondent. :

_____ :

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

Petitioner, ROBERT CARLTON BEMIS, was charged with two counts of driving under the influence of alcohol on February 24, 1992, causing serious bodily injury to Pamela Lanfair and Thomas Cummings. (R1-6) Mr. Bemis filed a motion to dismiss one of the two counts arguing that the single incident warranted only one conviction. (R34-35) In hearing before the Honorable Dennis P. Maloney on July 2, 1993, the motion was denied. (R60-63,67)

Jury trial was held before the Honorable Jesse C. Barber on August 29-31 and September 1, 1994. (R611-618,T1-716) Previous motions and rulings were renewed at trial. (R614-616,T6-11) The jury returned verdicts of guilty to the lesser offense, DUI with personal injuries, to both counts. (R619-620,T710) Mr. Bemis was adjudicated guilty and sentenced to thirty (30) days in jail as a condition of two years probation. (R636-644,648-651)

The evidence at trial established that Mr. Bemis got off work around 5:00 p.m., purchased a six-pack of beer, gave one beer to a friend, and took the others home. He returned to the store near Fort Meade between 9:00 and 9:15 p.m., purchased another six-pack of beer, and talked with the store clerk. He took the beer out to his truck, came back into the store, then went back out to the truck once or twice to drink. He did not feel or appear intoxicated. He left the store going to Plant City to see some trucks. (T164-166,516-518)

Around 9:45 p.m., Mr. Cummings was driving Ms. Lanfair home. As he approached a curve, a vehicle coming from the opposite

direction swerved into his lane. He tried to avoid the vehicle, but they hit head-on. (T63-64,72-73) The crash occurred at the bottom of where two down grades meet. It had been raining and the road was wet. Mr. Bemis drove one foot off the road on the right hand side as he came out of the curve, then over-corrected running across the center line into the other lane. There was no evidence that Mr. Bemis had been speeding. (T132-141,176-185) Florida Highway Patrol Trooper Berry testified that, when one runs off the road and gets back on the road immediately, the traction problem "causes a violent jerking of the vehicle. And, in most cases, if you have that violent return to the roadway, you have a tendency to cross the center line." (T187-188)

Emergency medical technicians (EMT) responded to the scene and found Mr. Bemis unconscious lying in the seat of the truck. Mr. Bemis was disoriented, his speech was slurred, and EMT paramedic Hancock smelled the odor of alcoholic beverage on his breath. Hancock took a sample of Mr. Bemis's blood at 10:38 p.m. (T93-110) Hancock could not testify if Mr. Bemis was impaired by alcohol based upon his observations. (T120)

The parties stipulated to the chain of custody, qualifications of the technologist, and the test results of .110 and .112 grams per deciliter on the specimen taken by Hancock. (T214-215) They also stipulated that LRMC Nurse Tina Shelton drew blood and delivered it to Jackie Arkon. Arkon's qualifications and the results of his tests, .085 serum or .07 whole blood analysis, were also stipulated. (T216-217)

SUMMARY OF THE ARGUMENT

The question at bar is whether resulting injuries enhance the degree of conviction for DUI or if the resulting injuries themselves are the basis for criminal convictions as separate crimes. If a DUI results in multiple injuries in a single accident, is the driver to be punished separately for each resulting injury?

DUI is a continuing offense. Only a single DUI conviction is proper for a single criminal episode. Statutory provisions provide for greater penalty if injury to another person occurs during the DUI. That provision is an enhancement of the single DUI penalty. If multiple persons are injured as a result of a single DUI, only a single DUI conviction, enhanced by the injuries, is warranted. Multiple enhancements do not make multiple crimes.

Petitioner recognizes that cases resulting in death are different. The legislature's titling of those cases as "DUI manslaughter" shows legislative intent that each death be penalized as a separate crime. There is no indication that the legislature intended other resulting injuries to be more than mere enhancements warranting more than one enhanced conviction.

ARGUMENT

ISSUE

THE TRIAL COURT'S ADJUDICATION AND SENTENCING RESPONDENT FOR MULTIPLE COUNTS OF DUI FROM A SINGLE OFFENSE ARE IN VIOLATION OF CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS.

Mr. Bemis was charged with two counts of driving under the influence of alcohol [DUI] causing serious bodily injury. Each count alleged a separate victim, Pamela Lanfair and Thomas Cummings. Both counts are alleged to have occurred in a single accident on February 24, 1992. (R1-6) Mr. Bemis filed a motion to dismiss one of the counts arguing that a single incident warranted only one conviction. (R34-35) The motion was denied. (R60-63,67)

The evidence at trial established that Mr. Cummings was driving and Ms. Lanfair was a passenger when, as he approached a curve, a vehicle coming from the opposite direction swerved into his lane and they collided. (T63-64,72-73) The evidence clearly established that both charges arose from a single accident. The jury returned verdicts of guilty to the lesser offense, DUI with personal injuries, to both counts. (R619-620,T710) Mr. Bemis was adjudicated guilty and sentenced by the trial court. (R636-644,648-651)

On December 15, 1995, the Second District Court of Appeal [DCA] affirmed the decision of the trial court: "Affirmed. See State v. Lamoureux, 660 So. 2d 1063 (Fla. 2d DCA 1995); Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), review denied, 547 So. 2d 1210

(Fla. 1989)." Bemis v. State, 20 Fla. L. Weekly D2750 (Fla. 2d DCA December 15, 1995). (A27)

In Pulaski, the Second DCA recognized that DUI is a "continuing offense", but found that separate convictions were warranted when two separate persons suffered bodily injury in a single episode of DUI. The finding was based upon Houser v. State, 474 So. 2d 1193 (Fla. 1985)[1].

> [T]he distinguishing factor between this offense and the misdemeanor offense of D.U.I. is the fact someone was injured. This, like death sustained in the course of a D.U.I. manslaughter, "is not merely an enhancement of penalty for driving while intoxicated," but a discrete crime against the person and thus an instant offense. Houser, 474 So. 2d at 1196.

Pulaski, at 194.

Subsequently in Boutwell v. State, 631 So. 2d 1094 (Fla. 1994), this Court found the offense of driving with license suspended or revoked [DWLSR] to be a continuing offense which only enhanced any resulting death or 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[2] that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.

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[1] Houser found that a defendant may not be sentenced for both DWI manslaughter and vehicular homicide for effecting a single death because the legislature did not intend punishment of a single homicide under two different statutes. Houser addressed only resulting death--not injury to a person or damage to property.

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

Boutwell, at 1095. This Court distinguished the DWLSR case from cases of multiple sexual batteries and robberies committed at the same time and place[3] in that, "There was an intent to commit separate crimes in each of those cases. In the instant case it was fortuitous[4] that four persons were injured as a result of Boutwell's negligent driving instead of only one." This Court analogized the DWLSR case to James v. State, 567 So. 2d 59 (Fla. 4th DCA 1990) (only one burglary with battery conviction though more than one battery resulted from the single entry). In dissenting opinion, Justice Grimes recognized the parallel between DWLSR and DUI charges (arguing that neither were continuing offenses). Boutwell at 1096.

In Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994), the district court specifically addressed the application of the continuing offenses principle to DUI cases.

> [T]raffic offenses such as driving under the influence or driving with suspended license are "continuing offenses" permitting a single conviction per episode. See Boutwell v. State, 631 So. 2d 1094 (Fla. 1994) (regardless of the number of injured persons, there can be only one conviction arising from a single accident). The trial court should have merged the two counts of each offense. Separate convictions and penalties, in these circumstances, violate double jeopardy.

Michie, at 1108.

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[3] State v. Brandt, 460 So. 2d 444 (Fla. 5th DCA 1984), review denied, 467 So. 2d 999 (Fla. 1985), and Palmer v. State, 438 So. 2d 1 (Fla. 1983).

[4] Happening by accident or chance; unplanned. The American Heritage Dictionary, p. 278 (1987).

Michie effectively overruled that court's previous finding in Pulaski. Subsequently in Lamoureux, the Second District Court found that the language in Michie addressing DUI with injuries to be only dicta, held that the Michie finding applied only to DUI cases without injury, and reiterated the previous holding in Pulaski. The defendant in Michie had been charged with DUI with serious injuries, but was found guilty of two counts of the lesser simple DUI. Review of the district court's decision in Lamoureux is currently pending before this Court. Lamoureux v. State, Case No. 86,670 (Fla. pending).

The Fourth DCA in Salazar v. State, 20 Fla. L. Weekly D2431 (Fla. 4th DCA November 1, 1995), found "no reason to distinguish" DUI from DWLSR for multiple punishment purposes involving multiple injuries from the same accident and affirmed only a single conviction of DUI with injury from a single criminal episode. As in Boutwell, the driver did not intend to commit separate crimes by the single act of DUI, and the multiplicity of result was "fortuitous." That court specifically found no inconsistency with Houser. Houser had found that:

> [T]he 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.

Id., at 1196; Salazar, at D2431. Salazar found that:

> Unlike DUI manslaughter, it is clear that section 316.193(3)(b)1 and 2 are enhancements to the basic offense. We can discern no legislative intent to make DUI resulting in bodily or serious injury or property damage discrete crimes against the individual, as is DUI manslaughter.

Salazar, at D2431. The Fourth DCA specifically disagreed with the Second DCA's reliance on Houser in finding in Pulaski that DUI with injury is not an enhancement of DUI but is a discrete crime against the person. Id. at 194. Salazar, at D2431. The Fourth DCA certified conflict with Lamoureux, "which, relying on the continued viability of Pulaski, reached a different result." Salazar v. State, at D2432.[5] State v. Salazar, Case No. 87,010 (Fla. pending), is currently pending before this Court.

In reaching the decision permitting multiple convictions for DUI with injury from the same incident, Pulaski relied upon the DUI manslaughter decision in Houser. Lamoureux reaffirmed the decision in Pulaski. The Second DCA decision in the instant case permitting multiple convictions of DUI with injury out of the same accident is specifically based upon Lamoureux and Pulaski. The Houser determination is that "the additional element of death of a victim raises DWI [DUI] manslaughter beyond mere enhancement and places it squarely within the scope of the states regulation of homocide." Houser, at 1196. Salazar found that the Houser decision **did not apply to DUI with injury** because the element of death was different--that court could "discern no legislative intent to make DUI resulting in bodily or serious injury or property damage discrete crimes against the individual, as is DUI manslaughter." Salazar, at 2431.

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[5] Salazar also certified conflict with Melbourne v. State, 655 So. 2d 126 (Fla. 5th DCA 1995); review before this Court pending, Melbourne v. State, Case No. 86,029 (Fla. pending).

The answer to whether the legislature intended multiplicity in the punishment lies in examination of the statute. The statute is founded upon the prohibition of DUI. § 316.193(1), Fla. Stat. (1991). The first three DUI convictions, without further enhancement, are misdemeanors. The fourth and subsequent convictions are third-degree felonies. § 316.193(2), Fla. Stat. (1991). When a person drives under the influence 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.

§ 316.193(3), Fla. Stat. (1991).

All provisions of this statute, except one, provide only the degree of the conviction and sentence under specific circumstances--the number of prior commissions or the effect caused by the DUI. The exception, § 316.193(3)(c)3, Fla. Stat. (1991), provides that, when the death of another human being is caused, the defendant is guilty of a separate specifically named crime, "DUI manslaughter." The legislative intent is clear that, as found in Salazar, death is different--only the cases resulting in death are separate crimes. Except DUI manslaughter, charges based upon this statute are titled simply DUI or DUI with applicable enhancements--such as DUI with property damage, with personal injury, or with serious bodily

injury. The provisions, other than death, only provide for enhancement. Proof of more than one enhancement factor does not transform one commission of the base crime into separate crimes. See, Troedel v. State, 462 So. 2d 392 at 399 (Fla. 1984) (an armed burglary also with an assault therein warrants only one conviction).

Convictions of both simple DUI and DUI with injuries from the same accident are in violation of double jeopardy protections. Collins v. State, 578 So. 2d 30 (Fla. 4th DCA 1991). Simple DUI is a Category One lesser included offense of DUI with injury. Cox v. State, 618 So. 2d 291 (Fla. 2d DCA 1993). In charging multiple counts of DUI with injury, more than one count of simple DUI from that single incident is being therein charged. Should the defendant be convicted of the lesser offenses, the resulting convictions make the initial double jeopardy apparent. See, Michie.

An examination of the statute in light of applicable case law clearly establishes legislative intent that DUI is the crime prohibited and injuries to persons resulting therefrom (except death) is an enhancement to the penalty for the DUI. Multiple enhancements do not create multiple crimes. A single DUI is a single crime whether it is enhanced by single or multiple victims having received injuries to their person.

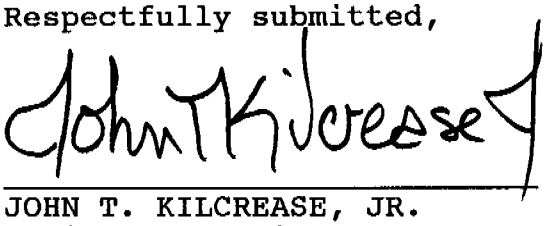
CONCLUSION

Based upon the cases cited and arguments presented herein, Petitioner respectfully requests this Court reverse the decision of the Second District Court of Appeals and remand this cause for dismissal of one of the two counts of driving under the influence of alcohol resulting in injury to a person.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Patricia J. Hakes, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 30th day of May, 1996.

Respectfully submitted,



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May 30, 1996

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Robert Carlton Bemis vs. State of Florida
Appeal No. 87,425

Dear Mr. White:

Enclosed for filing in the above-styled cause are the original and seven (7) copies of the Initial Brief of the Petitioner on the Merits. This brief has been saved as 87425.BRI on the enclosed disk.

Sincerely,

LINDA WESLEY
Secretary, Appellate Division

/lw

Enclosures: noted above

xc: Patricia J. Hakes, Attorney General's Office

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

87,425

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

ROBERT CARLTON BEMIS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 94-04171

Opinion filed December 15, 1995.

Appeal from the Circuit Court for Polk County; Dennis P. Maloney and Jesse Barber, Judges.

James Marion Moorman, Public Defender, and John T. Kilcrease, Jr., Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Patricia J. Hakes, Assistant Attorney General, Tampa, for Appellee.

PER CURIAM.

Affirmed. See State v. Lamoureux, 660 So. 2d 1063 (Fla. 2d DCA 1995); Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), review denied, 547 So. 2d 1210 (Fla. 1989).

THREADGILL, C.J., and FRANK and FULMER, JJ., Concur.

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