IN THE SUPREME COURT OF FLORIDA

ROBERT CARLTON BEMIS, :

Petitioner, :

vs. : Case No. 87,420

STATE OF FLORIDA, :

Respondent. :

:

FILED
SID J. WHITE
FEB 1996
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

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

BRIEF OF PETITIONER ON JURISDICTION

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE, JR.
Assistant Public Defender
FLORIDA BAR NUMBER 336904

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(813) 534-4200

ATTORNEYS FOR PETITIONER

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STATEMENT OF THE CASE AND FACTS

Petitioner was charged by information with two counts of driving under the influence of alcohol causing serious bodily injury. Two victims are alleged to have been injured when Petitioner's vehicle struck the vehicle which they occupied. Petitioner filed a pretrial Motion to Dismiss one of the two counts arguing that only one count was warranted by the single incident. The motion was denied. The jury found Petitioner guilty of two counts of Driving under the influence with personal injuries and Petitioner was adjudicated guilty in both counts. (A1-10)

Petitioner filed an Initial Brief in the Second District Court of Appeal arguing error in the adjudication for multiple counts out of a single incident. (A1-19) Respondent filed an Answer Brief. (A19-26) The Second District Court of Appeal affirmed the trial court's finding on December 15, 1995. (A27) Petitioner filed a Motion for Rehearing. (A28-29) The motion was denied on January 25, 1996. (A30) Petitioner filed a Notice to Invoke Discretionary Jurisdiction on February 14, 1996.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal affirmed the trial courts denial of a motion to dismiss multiple counts of driving under the influence of alcohol with injury based upon multiple injuries in a single episode. That decision cited that court's prior decisions on the issue, Pulaski and Lamoureux. The Fourth District Court of Appeal in Salazar v. State affirmed only one of multiple convictions out of a criminal episode and certified conflict with Lamoureux. The review of Salazar v. State is currently pending before this court. Petitioner seeks review on the same issue of law based upon the conflict.

ARGUMENT

ISSUE

THE DECISION OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTED WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

Petitioner was charged by information with two counts of driving under the influence (DUI) of alcohol causing serious bodily injury. Two victims are alleged to have been injured when Petitioner's vehicle struck the vehicle which they occupied. Both injuries resulted from a single accident. Petitioner filed a pretrial Motion to Dismiss one of the two counts arguing that only one count was warranted by the single incident. The motion was denied. The jury found Petitioner guilty of two counts of DUI with personal injuries and Petitioner was adjudicated guilty in both counts. (A1-10)

Petitioner filed an Initial Brief in the Second District Court of Appeal (DCA) arguing that the trial court erred in adjudicating Petitioner guilty of two counts of DUI with injuries out of the same incident specifically citing Boutwell v. State, 631 So. 2d 1094 (Fla. 1994). Petitioner recognized Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA 1989), rev. denied, 547 So. 2d 1210 (Fla. 1989) (approved separate DUI convictions for separate victims in a single incident), but also cited the subsequent decision by the same court in Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994) (cited Boutwell, recognized DUI as an continuing offense, and affirmed only one conviction per episode). That brief was filed on June 28,

1995. (A15-18) In the Answer Brief in the Second DCA, Respondent cited Lamoureux v. State, 660 So. 2d 1063 (Fla. 2d DCA 1995) (rendered July 7, 1995, rehearing denied September 18, 1995), which affirmed multiple DUI with injury convictions from a single criminal episode. (A23-25)

On November 1, 1995, the Fourth DCA in Salazar v. State, 20 Fla. L. Weekly D2431 (Fla. 4th DCA November 1, 1995), affirmed only a single conviction of DUI with injury from a single criminal episode and specifically found that:

> We believe that Boutwell undercut and impliedly overruled the holding in Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), rev. denied, 547 So. 2d 1210 (Fla. 1989). In Pulaski, the appellant was convicted of two counts of driving under the influence of alcohol with bodily injury where two separate persons suffered bodily injury as a result of one drunk driving episode. The second district court, relying on Houser[1], approved the separate convictions based on the rationale that DUI with injury is not an enhancement of DUI but is a discrete crime against the person. Id. at 194. The holding in Boutwell compels us to disagree with the rationale utilized in Pulaski.

Salazar v. State, 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. State v. Salazar, Case No. 87,010 (Fla. pending), is currently pending before this Court and briefs have been filed on the merits of the issue.

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[1] Houser v. State, 474 So. 2d 1193 (Fla. 1985) (a defendant can receive multiple convictions for multiple deaths resulting from one incident of driving under the influence).

On December 15, 1995, the Second 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) Petitioner filed a Motion for Rehearing specifically arguing that the court may have overlooked or failed to consider Salazar v. State and asking for reversal or certification of conflict. (A28-29) The motion was denied on January 25, 1996. (A30)

The pending issue in State v. Salazar is:

> 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.

(as stated in Respondent's Brief on the Merits).

The ruling in the Second DCA is in express and direct conflict with the Fourth DCA's finding in Salazar v. State. Petitioner requests this Court accept jurisdiction based upon Fla. R. App. P. 9.030(a)(2)(A)(iv) and grant review of the ruling in the instant case on the same point of law currently under review in State v. Salazar.

CONCLUSION

Based upon the cases cited and arguments presented herein, Petitioner respectfully requests this Honorable Court grant jurisdiction to review the decision of the Second District Court of Appeal based upon express and direct conflict with a decision of the Fourth District Court of Appeal.

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT CARLTON BEMIS,	:	
Appellant,	:	
vs.	:	Case No. 94-04171
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN T. KILCREASE, JR.
Assistant Public Defender
FLORIDA BAR NUMBER 336904

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(813) 534-4200

ATTORNEYS FOR APPELLANT

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STATEMENT OF THE CASE

Appellant was charged with two counts of driving under the influence of alcohol causing serious bodily injury to Pamela Lanfair and Thomas Cummings. (R1-6) Appellant filed a motion to exclude evidence of the blood test results. (R9-18) In Tenth Judicial Circuit Court in Polk County, hearing on the motion was held before the Honorable Oliver L. Green on July 8, 1992. (R19-32) The motion was denied on August 24, 1992. (R33)

Hearing was held before the Honorable Dennis P. Maloney on pretrial motions on July 2, 1993. (R42-65) Appellant filed a motion to dismiss one of the two counts arguing that the single incident warranted only one conviction--not a count for each victim. (R34-35) The motion was denied. (60-63,67) Appellant filed a motion to exclude the opinion testimony of state expert Mark Montgomery that a blood alcohol level (BAL) over .05 grams per deciliter is per se impairment. (R36-37) The court took the motion under advisement. (R46-60) Appellant filed a motion to suppress Appellant's statements and admissions. (R38-39) The motion was continued at the hearing and later denied on July 19, 1993. (R44-45,68)

Before the same court and judge, jury trial was held on August 30-31 and September 1, 1993. (69-301) Prior to jury selection, previous motions were renewed and denied. (R78-80) On August 31, 1993, opening statements were made (R116-144) and eight of the state's witnesses testified before the court adjourned for the day. (144-268) On September 1, 1993, the state announced that, just

before trial, state's witness Dr. Montgomery had been shown a statement made by Appellant. He had previously omitted showing the statement to the witness. The witness' testimony was significantly effected by the statement. Appellant's motion for mistrial was granted. (R281-301)

A second jury trial was held before the Honorable Charles B. Curry on March 14-15, 1994. (R304-509) After the jury was selected on March 14, 1994, all previous motions and rulings were renewed. (R474-489) On March 15, 1994, in opening statement, the state commented on the defense calling it's own experts. The comment was on the defendant's right to remain silent. A motion for mistrial was granted. (R491-509)

A third jury trial was held before the Honorable Daniel True Andrews on June 20-21, 1994. (R510-607) Previous motions and rulings were renewed. (R510-523) On June 21, 1994, opening statements were made (R532-562) and three state's witnesses testified (R523-600). Appellant's attorney announced that he had just discovered that a critical defense witness, Dr. Poupko, required emergency surgery and would not be available to testify that week. A motion for mistrial was granted. (R600-604)

A fourth jury trial was held on August 29-31 and September 1, 1994. (R611-618,T1-716) Before the Honorable Robert Young on August 29, 1994, the previous motions and rulings were renewed before the jury was selected. (R614-616) The remainder of the trial was conducted before the Honorable Jesse C. Barber. (T1-716) On August 30, 1994, previous motions and rulings were renewed. (T6-

11) Following opening statements (T23-61), six state's witnesses testified. (T62-120)

The testimony of Dr. Russell Sklenicka at this trial was the reading a transcription from the previous trial. (R206-212) Appellant agreed to the reading of the transcribed testimony. (T9,203-206) Appellant moved for a mistrial following the testimony arguing that the state was supposed to edit out all references indication that there had been a previous trial. The testimony included the reading of an instruction that the witness "describe to the jury" the nature of injuries. (See T209) The state said that it did so inadvertently. The court took the motion under advisement. (T220-223)

On August 31, 1994, the court denied the motion for mistrial and offered to give curative instruction. Appellant declined the curative instruction offer specifically to avoid bringing further attention to the matter. (T231-232) The remaining two state witnesses testified before the state rested it's case. (T239-374)

Appellant had been allowed a continuing objection to the testimony of Dr. Montgomery's testimony about impairment over a .05 BAL. (T6-7) Appellant moved for mistrial based upon Montgomery's evasive answers and failure to respond to questions in cross-examination. The motion was denied and the witness was instructed to properly answer the questions. (T292-297) Appellant objected and moved for mistrial due to the state's questions of Montgomery relating to a hypothetical where the witness is asked if Appellant

was telling the truth to the police. The motion was denied. (T355-363)

After the state rested it's case, Appellant entered a motion for judgment of acquittal arguing that the state's evidence had failed to exclude every reasonable hypothesis of innocence and that the evidence of impairment was insufficient. The motion was denied. (T375-381) Appellant presented the testimony of four witnesses before he rested. Appellant did not testify. (T387-527) The motions for judgment of acquittal were renewed and denied. (T571)

Conference was held reviewing jury instructions. (T528-533,539-568) During closing arguments (T571-667), Appellant objected to the appropriateness of arguments by the state in rebuttal argument. The objections were sustained. (T648-664) A conference was held again reviewing the jury instructions. (T668-682) Appellant requested a special instruction on circumstantial evidence or a mistrial based upon misstatements of the law by the state in rebuttal closing argument. Both were denied. (T676-678) Based upon the frequency of his objections in closing, Appellant requested "special instruction as to the duty of counsel to make objections or in the alternative, move for mistrial." The instruction was granted and mistrial denied. (T678-682)

The jury was instructed (T685-709), then returned verdicts of guilty to the lesser included offense, DUI with personal injuries, to both counts. (R619-620,T710) Before the same judge on October 6, 1994, Appellant was adjudicated guilty and sentenced to thirty

(30) days in jail (15 consecutive weekends) as a condition of two years probation (one year probation for each count to be served consecutively). (R636-644,648-651)

STATEMENT OF THE FACTS

Appellant was charged with driving under the influence of alcohol causing serious bodily injury on February 24, 1992, to Pamela Lanfair and Thomas Cummings. (R1-6) Little Dixie convenience store manager Pam Smith knew Appellant because he worked for a company that did business with them regularly. (T513-514) Appellant got off from work around 5:00 p.m., went to Little Dixie, and purchased a six-pack of Busch "tall boys" beer. He gave one to a friend and took the others home. (T166,516-517) He went home, drank two beers, argued with his wife, then left. (T166)

Appellant returned to Little Dixie between 9:00 and 9:15 p.m., purchased another six-pack of beer, and talked to Ms. Smith about the fight he had with his wife and about the trucks he was going to see. He took the beer out to his truck, drank some, then came back into the store. He went back out to the truck once or twice to drink. (T165,517-518) He did not feel or appear intoxicated. (T166,519) He was going to Plant City to see trucks for his stepson. (T164) He does not remember the accident due to trauma and a head injury. (T163-164) His next memory is at the hospital after the wreck. (T165)

Around 9:45 p.m., Mr. Cummings was taking his girlfriend, Ms. Lanfair, home. She had fallen asleep in his car. As he approached a curve in Brooke Road, a vehicle coming from the opposite direction swerved into his lane. He tried to avoid the vehicle, but it hit him head-on. (T63-64,72-73)

Emergency medical technicians (EMT) Doyle Tucker and Luther Hancock responded to the scene and found Appellant unconscious lying in the seat of the truck. Appellant was disoriented and uncooperative. He said that someone else had been driving. Appellant's speech was slurred and Hancock smelled the odor of alcoholic beverage on his breath. EMT paramedic Hancock took a sample of Appellant's blood at 10:38 p.m. Lanfair was transported to the hospital in one ambulance and Appellant and Cummings were transported in the second unit. (T81-86,93-110) Hancock testified that could not testify if Appellant was impaired by alcohol based upon his observations. (T120)

Florida Highway Patrol Trooper John Berry testified that Appellant told him at the scene that his wife had been driving. The trooper smelled alcohol on Appellant's breath. (T143) Appellant's face and mouth were bloody. He did not place much substance to what Appellant said because confusion, being argumentative, and combative are common for people with head injuries. (T189-190) The slurred speech could have been caused by the mouth injury. (T192)

The crash occurred at the bottom of where two down grades meet. It had been raining and the road was wet. He found tracks where Appellant had run one foot off the road on the right hand side as he came out of the curve, then overcorrected running across the center line into the other lane. There was no evidence that Appellant had been speeding. (T132-141,176,179,181,184-185) The trooper testified that, when one runs off the road, one should slow

and gradually come back onto the road. If one 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) He specifically testified that running off the road is not conclusive evidence that the driver is intoxicated or impaired. (T188-189) Trooper Berry took the blood sample from EMC Hancock to the LRMC lab for analysis. (T144-150)

Ms. Lanfair spent two weeks in the hospital with a broken leg, fractures in a foot, a broken jaw, 5 missing teeth, a fractured nose, a fractured pelvis, and lacerations. (T65,372-373) Mr. Cummings spent four days in the hospital with a dislocated hip, cuts, and lacerations. (T74,208-209) Appellant had an open compound fracture to his jaw, teeth knocked out, a cut tongue, and multiple lacerations requiring suturing. (T388-390)

After Appellant got out of the hospital, Pam Smith went with Appellant to where his truck had been towed to retrieve tools needed for work, then rode with him to the view the crash scene. Appellant could not remember what had happened. She observed that four of the beer cans still remained in the truck unopened. (T521-522) Appellant met with trooper Berry at the Fort Meade police station and told the trooper what he remembered of the incident. (T151-167)

The jury was informed of stipulations as to the chain of custody, qualifications of Lakeland Regional Medical Center (LRMC) technologist Gerald Strickland, and his test results of .110 and

.112 grams per deciliter on the specimen taken by paramedic Hancock. (T214-215) They were also informed of the stipulation 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)

Mark Montgomery, found to be an expert in the field of toxicology (T246), testified that, "The threshold for cognitive motor impairment is as low as .02 to .03 [BAL]. All individuals are impaired at levels above .05 [BAL]." (T265) Given the facts in this case as a hypothetical, Montgomery rendered the opinion that Appellant's BAL at the time of the accident can be extrapolated to be .12 to .13 (T267-268) and that Appellant was under the influence of alcohol to the point that his facilities were impaired. (T276-278)

Dr. Jay Poupko, found to be an expert in pharmacology and toxicology (T410), disagreed with Montgomery's opinion that someone with a BAL of .05 is impaired as far as driving and automobile. (T415) He testified that more information than factored by Montgomery to extrapolate the BAL at an earlier time. Every person absorbs and eliminates alcohol at different rates. He extrapolated that Appellant's probable range of BAL at the time of the accident was within a .07 to .13 range. (T417-418,429-434,439) Dr. Thomas McClane, found to be an expert in psychiatry (T492), testified that Appellant had a concussion from a head injury which can effect his memory. A person knocked out and with a concussion awakens disoriented, confused, and sometimes aggressive. His opinion is

that Appellant's statement that his wife had been driving was a manifestation of the confusion rather than lying. His aggressive behavior is consistent with the concussion. He regained memory one and one-half days later in the hospital. When a person with a concussion had been drinking, it is difficult to sort out the symptoms. The symptoms of each makes the other's symptoms worse. Appellant's behavior could have been the result of concussion instead of the influence of alcohol. (T499-506)

SUMMARY OF THE ARGUMENT

The trial court erred in denying Appellant's motion to dismiss multiple counts of driving under the influence (DUI) of alcohol resulting in serious injury based upon two victims in a single accident. The two victims were to two occupants of the same automobile in an accident.

The Florida Supreme court in Boutwell recognized this Court's Hallman "continuing offense" principle and found that, regardless of the number of injured persons, there can only be one conviction arising from a single accident though there be multiple victims. That decision was based upon charges of driving with license suspended resulting in injuries. In Michie, this Court has recognized that the "continuing offense" principle also applies to DUI cases.

Both charges in the instant case were the product of one continuing offense. The trial court erred in denying the motion to dismiss one of the charges.

ARGUMENT

ISSUE

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTION TO DISMISS ONE OF THE TWO DUI COUNTS CHARGED.

Appellant was charged by information with two counts of driving under the influence of alcohol 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) The facts at trial established that Mr. Cummings was taking his girlfriend, Ms. Lanfair, home. She had fallen asleep in his car. As he approached a curve in Brooke Road, a vehicle coming from the opposite direction swerved into his lane. He tried to avoid the vehicle, but it hit him head-on. (T63-64,72-73)

"In Hallman v. State, 492 So. 2d 1136 (Fla. 2d DCA 1986), the defendant had been charged with two counts of driving with a suspended license under section 322.34, Florida Statutes (1985).[1] Both charges arose out of a single driving episode. The court held that driving with a suspended license was a continuing offense in which only one conviction could be obtained unless the defendant had resumed driving following the police intervention. The court reasoned that where an illegal act was ongoing, there was no

[1] At that time, the statute was directed only to driving with a suspended license and did not refer to causing injuries or death.

practicable place to draw the line between one charge and several." Boutwell v. State, 631 So. 2d 1094, 1095 (Fla. 1994).

In Boutwell, the Florida Supreme Court found consistent with this Court's ruling in Hallman and consistent with the Third DCA's finding in Wright v. State, 592 So. 2d 1123 (Fla. 3d DCA 1991), "that regardless of the number of injured persons, there can only be one conviction under section 322.34(3) arising from a single accident.[2] In Wright, while disapproving separate convictions for driving with license suspended, that court had approved separate DUI convictions for separate victims. Wright, at 1126. However, the portion of the decision approving the DUI convictions was not specifically addressed in the body of the Boutwell majority decision. In the dissenting opinion, Justice Grimes recognized the parallel between the unlicensed driver and DUI charges. Boutwell at 1096.

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

> [W]e agree, that traffic 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 penal-

[2] The Third DCA's Wright decision was reversed on a separate issue, peremptory challenges. State v. Wright, 600 So. 2d 457 (Fla. 1992).

> ties, in these circumstances, violate double jeopardy.

Michie, at 1108.

This Court's decision is Michie is contrary to the previous ruling in Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA 1989) (approved separate DUI convictions for separate victims in a single incident). This case was cited Justice Grimes in the Boutwell dissent. This Court's decision in Michie applied the continuing offense principle established Boutwell to DUI cases effectively overruling Pulaski.

Based upon this Court's more recent finding in Michie, the lower court erred in denying Appellant's motion to dismiss one of the two counts of DUI with injury.

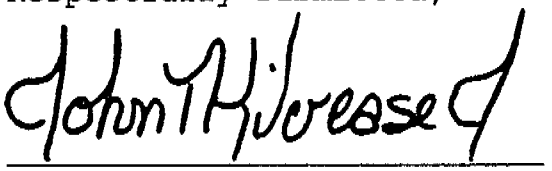
CONCLUSION

Based upon the cases cited and arguments presented herein, Appellant respectfully requests this Honorable Court reverse the judgement and sentence for one of the two counts of Driving under the influence of alcohol resulting in personal injury and remand this cause for discharge of that count.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Robert Butterworth, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 28th day of June, 1995.

Respectfully submitted,



JOHN T. KILCREASE, JR.
Assistant Public Defender
Florida Bar Number 336904
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

/jtk

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT CARLTON BEMIS,

Appellant,

vs. Case No. 94-04171

STATE OF FLORIDA,

Appellee.

_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PATRICIA J. HAKES
Assistant Attorney General
Florida Bar No. 0829341
Westwood Center
2002 N. Lois Avenue, Suite 700
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE AND OF THE FACTS

Appellee accepts appellant's statement of the case and statement of the facts.

SUMMARY OF THE ARGUMENT

The trial court was correct in denying Appellant's motion to dismiss multiple counts of driving under the influence with serious bodily injury arising from a single accident in which two persons were injured. This Court has now made clear, in State v. Lamoureux, 20 Fla. L. Weekly D1587 (Fla.2d DCA July 7, 1995), that "multiple convictions for DUI with serious bodily injury are indeed permissible for injuries to more than one victim arising out of a single driving episode." Id.

ARGUMENT

THE TRIAL COURT'S REFUSAL TO DISMISS ONE OF APPELLANT'S TWO DUI WITH SERIOUS BODILY INJURY CHARGES ARISING FROM THE SAME ACCIDENT WAS CORRECT. MULTIPLE CONVICTIONS FOR DUI WITH SERIOUS BODILY INJURY ARE PERMISSIBLE FOR INJURIES TO MORE THAN ONE VICTIM ARISING OUT OF A SINGLE DRIVING EPISODE.

Appellant argued that this Court's ruling in Michie v. State, 632 So. 2d 1106 (Fla. 2d DCA 1994), which reversed one count each of simple DUI and driving with a suspended license, where the defendant had been convicted of two counts of each arising out of the same accident, effectively overruled Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA 1989), rev. den., 547 So. 2d 1210 (Fla. 1989).

Pulaski upheld the propriety of two convictions of DUI serious bodily injury arising out of one accident in which two persons were injured.

Subsequent to the filing of Appellant's brief, this Court made clear, in State v. Lamoureux, 20 Fla. L. Weekly D1587 (Fla. 2d DCA July 7, 1995), that Pulaski is still good law. In Lamoureux, this Court limited Michie to simple DUI, not involving personal injury, and reversed a trial court which dismissed one of two counts of DUI with serious bodily injury in the erroneous belief that multiple convictions of this offense were not permissible for injuries arising out of the same driving episode.

Lamoureux relied on this Court's pre-Michie case law permitting multiple DUI convictions where one accident resulted in multiple personal injuries, including Pulaski and Onesky v. State,

544 So. 2d 1048 (Fla. 2d DCA 1989) (upholding convictions of manslaughter, DUI serious bodily injury and DUI involving damage or injury to another where accident killed one and injured two).

Under Lamoureux this Court should affirm the refusal of the trial court to dismiss one of the state's two counts of DUI with serious bodily injury arising from the same accident.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, the State respectfully requests that the judgment and sentence of the lower court be affirmed.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

PATRICIA J. HAKES
Assistant Attorney General
Florida Bar No. 0829341
Westwood Center, Ste. 7000
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John T. Kilcrease, Assistant Public Defender, P. O. Box 9000--Drawer PD, Bartow, FL 33831, on this 24th day of July, 1995.

COUNSEL FOR APPELLEE

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

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.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

ROBERT CARLTON BEMIS,	:	
Appellant,	:	
vs.	:	Case No. 94-04171
STATE OF FLORIDA,	:	
Appellee.	:	
	:	

MOTION FOR REHEARING

Appellant, ROBERT CARLTON BEMIS, moves for rehearing in the above-styled cause and as grounds states as follows:

1. On December 15, 1995, this Court filed an opinion affirming the decision of the trial court citing State v. Lamoureux, 660 So. 2d 1063 (Fla. 2d DCA 1995), and Pulaski v. State, 540 So. 2d 193 (Fla. 2d DCA), review denied, 540 So 2d 1210 (Fla. 1989). Due to the weekend and New Years Day holiday, this motion is timely filed. See, Fla. R. App. P. 9.330(a) and 9.420(e).

2. The issue argued by Appellant in the instant case is whether multiple convictions for DUI resulting in serious injury are warranted based upon the injury of more than one victim in a single accident.

3. In Salazar v. State, 20 Fla. L. Weekly D2431 (Fla. 4th DCA November 1, 1995), found that Boutwell v. State, 631 So. 2d 1094 (Fla. 1994), "undercut and impliedly overruled the holding in Pulaski and certified conflict with Lamoureux. That court specifically found that "each injured person and damaged property

item may be referenced in the information or indictment, but only one conviction for DUI with serious bodily injury under subsection ([§ 316.193(c)2, Fla. Stat. (1993)]3) and on conviction for DUI with property damage under subsection [§ 316.193(3)(c)1, Fla. Stat. (1993)]." Salazar, at D2432.

4. This Court may have overlooked or failed to consider this case in rendering the previous opinion. Appellant requests this Court reconsider the issue and grant reversal or also certify conflict based up Salazar.

WHEREFORE, Appellant asks this Court to grant this motion for rehearing.

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 2nd day of January, 1996.

Respectfully submitted,

John T. Kilcrease

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

JOHN T. KILCREASE, JR.
Assistant Public Defender
Florida Bar Number 336904
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

/jtk

IN THE SECOND DISTRICT COURT OF APPEAL, LAKELAND, FLORIDA

JANUARY 25, 1996

ROBERT CARLTON BEMIS, Appellant(s), v. STATE OF FLORIDA, Appellee(s).	)	Case No. 94-04171

BY ORDER OF THE COURT:

Counsel for appellant having filed a motion for rehearing in this case, upon consideration, it is

ORDERED that the motion is hereby denied.

I HEREBY CERTIFY THE FOREGOING IS A TRUE COPY OF THE ORIGINAL COURT ORDER.

WILLIAM A. HADDAD, CLERK

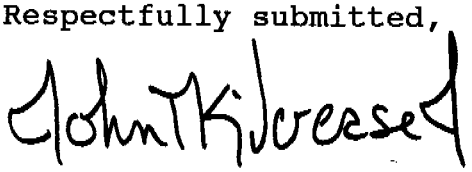
c: John T. Kilcrease, Jr., A.P.D.
Patricia J. Hakes, A.A.G.

/PM

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 14th day of February, 1996.

Respectfully submitted,



JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
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Florida Bar Number 336904
P. O. Box 9000 - Drawer PD
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/jtk