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IN THE SUPREME COURT OF FLORIDA

ROBERT CARLTON BEMIS,

Petitioner,

vs. Case No. 87,425

STATE OF FLORIDA,

Respondent.
_____/

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

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts Petitioner's Statement of the Case and of the Facts.

SUMMARY OF THE ARGUMENT

Separate convictions for each bodily injury caused by the same episode of driving under the influence are contemplated by the language of the statute and not violative of the prohibition against double jeopardy.

ARGUMENT

ISSUE

SEPARATE CONVICTIONS FOR EACH BODILY INJURY CAUSED BY PETITIONER DURING A SINGLE EPISODE OF DRIVING UNDER THE INFLUENCE WERE CORRECTLY UPHELD BY THE DISTRICT COURT OF APPEAL.

Petitioner was convicted of two counts of DUI bodily injury (R619-620) as a result of a head on collision in which he swerved into the lane of an oncoming car (T73). Two victims, Pamela Lanfair and Thomas Cummings, were injured. Pamela Lanfair had five teeth knocked out and sustained broken bones in her leg, one of which required the placement of a permanent rod therein, four fractures in her right foot, a broken jaw, a fractured pelvis, a fractured nose, and facial lacerations (T65-66). Thomas Cummings suffered a dislocated hip, cuts on his body and multiple facial lacerations (T74).

Relying on this Court's opinion in Houser v. State, 464 So.2d 1193 (Fla. 1985), the Second, Third and Fifth District courts of appeal have held that homicides and injuries resulting from one episode of driving are discrete crimes for which separate convictions are appropriate. Melbourne v. State, 655 So.2d 126 (Fla. 5th DCA 1995), rev. granted, (Fla. October 16, 1995) (Case No. 86,029); State v. Lamoureux, 660 So.2d 1063 (Fla. 2d DCA 1995),

rev. granted, (Fla. October 19, 1995) (Case No. 86,670); Wright v. State, 592 So.2d 1123 (Fla. 3d DCA 1991), quashed on other grounds, 600 So.2d 457 (Fla. 1992); Onesky v. State, 544 So.2d 1049 (Fla. 2d DCA 1989); Wick v. State, 651 So.2d 765 (Fla. 3d DCA 1995); Pulaski v. State, 540 So.2d 193 (Fla. 2d DCA 1989), rev. den., 547 So.2d 1210 (Fla. 1989).

Respondent argues that, though Houser stated that the death sustained in a DUI manslaughter is not merely an enhancement, but a discrete crime against the person, the same is not true of DUI bodily injuries. He points to this Court's decision in Boutwell v. State, 631 So.2d 1094 (Fla. 1994) in which a single episode of driving with a suspended or revoked license was said to be only one offense regardless of the number of persons injured, and quotes the Court's reasoning that the injuries occurring during Boutwell's driving episode were fortuitous.

This reasoning from Boutwell is not applicable to driving under the influence. Unlike driving with a suspended or revoked license, driving under the influence is conduct from which it is foreseeable that injuries, and multiple injuries at that, may occur due to the impaired state of the driver. This foreseeability, and a causative connection between driving under the influence and injury or death, was recognized by the legislature when it provided

in §316.193(3) Fla. Stat. (1991) that a person operating a vehicle under the influence "who, **by reason of such operation, causes**" damage to the person of another is guilty of a first degree misdemeanor [Emphasis added.].

Just as Houser found that the additional element of death of a victim raised DUI manslaughter beyond an enhancement, the additional elements of damage to the person of another or serious bodily injury to another raise DUI serious bodily injury and DUI bodily injury to the level of separate crimes.

Petitioner also relies on Salazar v. State, 665 So.2d 1066 (Fla. 4th DCA 1995), rev. granted, (Fla.) (Case No. 87,010) which found that the bodily injury provisions of the DUI statute, unlike the death provision, were merely enhancements. However, the language used in §316.193 Fla. Stat. (1991) varies little from provision to provision. If "the death of any human being" in §316.193(3)(c)3. is an element, so are the "serious bodily injury to another" of §316.193(3)(c)2. and the "damage to the . . . person of another" of §316.193(3)(c)1.

There is nothing whatsoever in this language to suggest that "another" is any less amenable than "any human being" to supporting a separate conviction for each human being or other injured or killed, just as "a human being" in §782.04(1)(a) Fla. Stat. (1991)

and "a human being" in §782.07 Fla. Stat. (1991) will support convictions of murder and manslaughter for each person killed. "Another" and "a human being" are not the same words, but they make reference to the exact same thing in these statutes. Both reference a person other than the accused.

Finally, double jeopardy is not a barrier to multiple convictions where multiple persons are injured or killed because the test of Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed.2d 306 (1932) is met in that each offense has an element which the other does not. Thus, in the instant case, Count 1 has an element that Count 2 does not, injury to Pamela Lanfair (R4-6). And Count 2 has an element that Count 1 does not, injury to Thomas Cummings (R4-6).

For the above reasons, separate convictions for injuries done to separate persons during the course of one episode of driving under the influence are contemplated by the statute and not violative of the prohibition against double jeopardy.

CONCLUSION

WHEREFORE, based upon the foregoing facts, arguments and authorities, the State respectfully requests that this Court affirm the decision of the Second District Court of Appeal.

Respectfully submitted,

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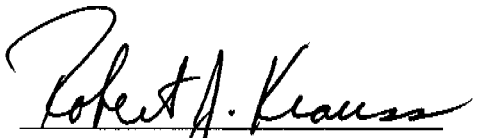
ATTORNEY GENERAL



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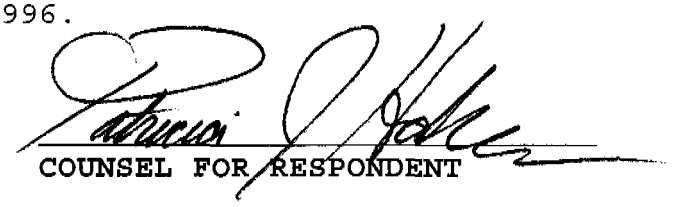
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to John T. Kilcrease, Jr., Esq., Assistant Public Defender, P.O. Box 9000--Drawer PD, Bartow, FL 33831 on this 24th day of June, 1996.



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