

DA 8-31-98

FILED

SID J. WHITE

MAY 4 1998

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

CAL HENDERSON, etc.,

CASE NO.: 91,965

Petitioner/Defendant,

v.

DISTRICT COURT OF APPEAL,
SECOND DISTRICT - NO.
96-02301

ISAC B. BOWDEN, et. al.,

Respondents/Plaintiffs.

INITIAL BRIEF OF PETITIONER
CAL HENDERSON, SHERIFF OF HILLSBOROUGH COUNTY

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REFERENCES

In this brief, Petitioner/Defendant CAL HENDERSON as Sheriff a Hillsborough County will be referred to as SHERIFF. Plaintiffs/Respondents, ISAC B. BOWDEN and LUNA DELL ARCHIE HAYWOOD will be referred to as BOWDENS.

References to the Record on Appeal will be referred to as (R.) followed by a page number.

STATEMENT OF CASE AND FACTS

I. FACTS RELEVANT TO THE PETITION

This Petition relates to a consolidated appeal, based upon two separate wrongful death complaints. The representatives of the estates of Damon and Robert Bowden filed these complaints based upon the conduct of deputies of the Hillsborough County Sheriff's Office. The alleged negligent conduct related to events taking place after a traffic stop occurring shortly before midnight after the evening of August 7, 1992.

The traffic stop involved a car driven by Jimmy Bowden, the brother of the decedents. Passengers with Jimmy Bowden included Damon Bowden, Robert Bowden and Brandon Lyons. Lyons was a friend of the BOWDENS and he was the son of the owner of the car driven by Jimmy Bowden.

It is undisputed that the occupants of this car had been consuming alcohol in the hours just before the traffic stop. They were traveling from Brandon to Plant City, an area of essentially rural Hillsborough County. (R. 702-704)

The SHERIFF'S deputies had received a call from a private motorist, reporting of a speeding car matching the description and the location of the car driven by Jimmy Bowden. The deputies determined that this car was traveling at 74 miles per hour in a 45 miles per hour

speed zone. (R. 268-269)

The deputies initiated a traffic stop. Jimmy Bowden stopped the car on Turkey Creek Road, just north of Trapnell Road. (R.268-269) Directly across the road was a Circle K convenience store, located at the northwest corner of that intersection. Several deputies with separate patrol cars arrived at the scene of the traffic stop during the course of the traffic stop.

Field sobriety tests were administered to Jimmy Bowden, who was determined impaired, arrested for D.U.I. and taken into custody by placing him in the back of a patrol car. (R.388-389)It is also undisputed that Damon and Robert Bowden also appeared intoxicated.

The record reflects, however, a factual dispute between the deputies and Brandon Lyons.

Lyons testified at deposition that he told the deputies that he was too "trashed" to drive and that is why Jimmy Bowden was driving. (R. 223) The deputies recall hearing not such statements, and in fact recall that Lyons insisted upon driving the car to the not-too-distant home of his parents and claimed that he was not too impaired to drive the car. (R. 324,390-391, 431-435) The deputies further testified that they suggested that Lyons use the public telephone, located across the road next to the Circle K, to call his parents so that they could drive to the arrest scene and provide transportation for Lyons, Damon Bowden and

Robert Bowden.(R.328)

Despite those factual disputes, it is undisputed that Brandon Lyons was administered one Type of field sobriety test, a horizontal gaze nystagmus test. (R.230) The deputies testified that Lyons passed this test. BOWDEN'S expert witnesses opined, however, that the test was improperly administered. (R.483-495) The alcohol tests indicate Lyons was impaired by alcohol. (R.524-525) For purposes of this appeal, the trial court assumed that the deputies should have known Lyons was impaired.

It is further undisputed that Brandon Lyons was urged or instructed to drive his car, along with passengers Damon and Robert Bowden, across the road wait for a deputy there in the Circle K parking lot. (R. 232-233, 433-435) After a few minutes, upon the suggestion of one of the passengers, Lyons disregarded the deputies' instructions and drove out of the parking lot and westbound on Trapnell Road. (R.238-239, 331-332) Brandon Lyons has no recollection of any events after driving out of the Circle K parking lot. (R.239)

Deputy Garcia observed Lyons speeding from the parking lot, and began to follow. (R. 331,342,360) He used his communication radio and asked if any deputies were located in the direction of Lyons Vehicle, but no deputies were in a position to intercept

Lyons' vehicle. (R.341, 997-998) Garcia observed Lyons disregard a stop sign about .7 mile (seven tenths of a mile) from the Circle K, making a right hand turn at high speed and began traveling northbound on Jerry Smith Road. (R.335, 361, 702-704) Garcia then began his attempt to catch the Lyons vehicle. Garcia approached the intersection, then began to attempt to catch Lyons' car. However, by the time he caught up with Lyons' car, Lyons failed to negotiate a curve in the road and the car struck a tree, located about .5 (one-half) mile north of the intersection of Trapnell Road. The impact with the tree killed Damon and Robert Bowden. (R.323-324, 361-364)

During the course of these events there was no indication of other traffic in the area and no other witnesses to dispute Deputy Garcia's deposition testimony. However, the BOWDENS' experts opine that Deputy Garcia's patrol car was much faster than Lyons' car, which should have allowed Garcia to quickly catch Lyons. The experts also opine that Garcia violated department policy and created a dangerous situation during the pursuit by not activating emergency lights during the course of the pursuit. (R.496-500, 978) Deputy Garcia testified that he did not activate emergency lights because he considered that it was safer not to activated emergency lights under these circumstances (R. 323-328)

II. THE PROCEDURAL HISTORY OF THE CASE

The wrongful death complaints filed on behalf of Damon and Robert Bowden are identical. The complaints have two separate, but related theories of negligence. The first basic theory of negligence relates to the conduct of the deputies at the arrest scene, which resulted in creating a situation where Brandon Lyons, presumably impaired, was put in a position where he disregarded the deputies' instruction and sped away from the scene of a traffic stop. The second theory of negligence is the alleged negligent pursuit by Deputy Garcia. BOWDEN used the alleged negligence at the stop scene as part of the negligence allegations as to the pursuit, in addition to the alleged negligence in the actual pursuit.

The SHERIFF moved to dismiss (R.40-43, 47-59) and moved for summary judgment, (R.152-161) arguing that the BOWDENS failed to state an actionable claim, and failed to come forward with any facts which could make an actionable claim in light of longstanding Florida law on sovereign immunity as it relates to traffic stops and traffic pursuits. The SHERIFF'S defenses were identical in both wrongful death complaints.

The trial court simultaneously considered the legal issues in both cases, as the legal issues and the facts related to the legal issues were identical in both complaints. The trial court granted partial summary

judgments in favor of the SHERIFF, based upon sovereign immunity, for the acts and conduct of the deputies at the scene of the traffic stop, including the acts and conduct which resulted in the arrest of Jimmy Bowden and which also resulted in the three remaining occupants driving away from that arrest scene. (R. 510-511)

The trial court permitted the BOWDEN'S to amend their complaints in an effort to make out an actionable claim against the SHERIFF relating to the alleged negligent pursuit. The BOWDENS amended their complaints, but the court granted summary judgment, in favor of the SHERIFF, based upon sovereign immunity, for the allegations relating to the alleged negligent pursuit. Final summary judgment was entered based upon the trial court's orders.

A consolidated appeal was filed by the BOWDENS. The appellate court reversed the trial court's orders of summary judgment, deciding that the conduct of the deputies at the arrest scene was operational activities, and, therefore, not immune from liability. Since the arrest scene conduct was not immune, then this conduct could be included in the allegations related to the negligence related to the alleged negligent pursuit. The appellate court ruled that the alleged pursuit, standing alone, was probably insufficient to make an actionable claim. However, the

allegations of negligence at the scene of the arrest, in combination with the allegations of the pursuit, were sufficient to make an actionable claim. Therefore, the case was remanded to the trial court, giving the BOWDENS the option of amending their complaint consistent with the appellate court's decision.

The instant Petition seeks review of that appellate decision which expressly construes the Florida Constitution, which affects all constitutional law enforcement officers, and which expressly and directly conflicts with previous decisions on sovereign immunity relating to traffic stops.

SUMMARY OF ARGUMENTS

The appellate court erred failing to first determine if the deputies owed a duty, in common law to the decedents at the time of the fatal accident. If the appellate court had engaged in that inquiry, they should have determined that the BOWDENS failed to establish any duty of law enforcement to the decedents, who were passengers in a car driven by another who had disregarded police instruction and fled an arrest scene. The Appellate court should have determined that the only possible duty in that context is in the line of cases where the police engage in gross negligence in the manner of pursuit, and the appellate court found no such gross negligence in this pursuit. Therefore the Appellate court should have affirmed the trial court's order of final summary judgment because there is no duty established.

The appellate court also erred in reversing the trial court's entry of final summary judgment by finding that the decedents were in the custody of the deputies as they disregarded the deputies' instruction and voluntarily drove away from the arrest scene. Since those three were no longer restrained or controlled by the deputies, the three occupants of Lyons' car, at the time of the fatal accident, had no "special relationship" with the deputies. Since there was no "special relationship," there is no waiver of sovereign immunity as

recognized in the context of traffic stops. The appellate court erred in determining that the decision to arrest Jimmy Bowden triggered a "special relationship" with the other three occupants as they disregarded the deputies and drove away from the arrest scene.

Consequently, the determination of the alleged negligent "pursuit" of the vehicle driven by those three occupants must be considered without regard to the deputies' discretionary conduct at the arrest scene. The remaining allegations and proof fall far short of any facts which are sufficient to rise to the level of an actionable "negligent pursuit." Therefore, the trial court's entry of final summary judgment in favor of the SHERIFF should be reinstated.

ARGUMENT

I. THE COMMON LAW DOES NOT RECOGNIZE A DUTY OF THE DEPUTIES TO THE DECEDENTS AT THE TIME OF THE FATAL COLLISION.

Florida has waived sovereign immunity for any act for which an individual would be held liable under similar circumstances, §768.28, Fla. Stat. (1995) Therefore, it must first be determined whether or not the common law recognizes a duty of the deputies, had the deputies been private citizens, based upon the factual context of this case.

The decedents and the deputies had no legal relationship outside the law enforcement context. At the time of the fatal accident, the deputies were otherwise in no position to control the actions or conduct of the relevant parties. In fact, the decedents had demonstrated their independence of the deputies when they and Brandon Lyons voluntarily drove away from the intersection of Turkey Creek Road and Trapnell Road. Therefore, absent some sort of actual control of the decedents in the context of the dangerous condition, the common law recognizes no duty of the deputies as to the decedents. The duty owed is a duty to the public at large.

Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912(Fla.1985).

II. THE DECEDENTS WERE NOT IN THE CUSTODY OF THE DEPUTIES AT THE TIME OF THE FATAL COLLISION

Sovereign immunity has not created any new duties of care Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912, 917 (Fla.1985). For example, the decision to make an arrest, in and of itself, does not create a duty of care. Likewise, the decision to temporarily detain an individual does not, in and of itself, create a duty of care. However, if a temporary detention or arrest occurs under circumstances where the person in temporary custody and is under the control of a law enforcement officer, is restrained of liberty, is not free to leave a dangerous area without disregarding police orders, and is otherwise deprived of self-protection, then a "special relationship" and legal duty is recognized. Kaisner v. Kolb, 543 So.2d 732 (Fla.1989). This duty is recognized because the officer is actually controlling the position and movement of the person in custody, a relationship which would be recognized if the officer was a private citizen under similar circumstances. Therefore, the actual custody and control are the operative facts which waives sovereign immunity. It makes no difference, for purposes of sovereign immunity, whether or not an arrest is made.

The appellate court, in the case at bar, determined that the

decision to arrest Jimmy Bowden, in and of itself, created a "special relationship" with regard to the remaining three occupants, without considering that the three occupants were no longer in the custody of the deputies at the time of the fatal collision. The BOWDENS' theory of recovery is that the deputies should have prevented the negligence of Brandon Lyons. There is no such duty recognized at common law. Trianon Park Condominium Association v. City of Hialeah, 468 So.2d 912 at 918(Fla.1985). The appellate court in this case has effectively decided that the arrest and custody of one individual creates a legal duty as to others, even if those others are not in the actual custody and control of the arresting officers.

What the BOWDENS have actually alleged and argued is that, since the deputies should have recognized that Brandon Lyons was impaired, he should not have been placed in a position where he could disregard the deputies' instruction, drive away and cause a fatal accident. However, this argument has been squarely addressed and rejected. Everton v. Willard, 468 So.2d 936(Fla.1983); Duvall v. City of Cape Coral, 468 So.2d 961(Fla.1985) and City of Daytona Beach v. Huhn, 468 So.2d 963(Fla.1985). The decision to enforce or not enforce a law is a basic policy decision, inherent in the constitutional provisions of the separation of powers. The Florida Supreme Court has previously recognized that the courts should not

become entangled in these policymaking issues. Everton V. Willard, 468 So.2d 936, 939 (Fla.1985). The court has recognized that the legislature has the authority, power and prerogative to extend or expand sovereign immunity and has chosen not to extend sovereign immunity, even after the Florida Supreme Court has clearly stated its position. No changes have been made. Therefore, the legislature has apparently agreed with this approach.

III. THE COMPLAINT CONTAINS INSUFFICIENT ALLEGATIONS OF NEGLIGENT PURSUIT

The common law recognizes no duty of the deputies at the arrest scene. The decedents were not in the custody of the deputies at the time of the fatal collision. The deputies were involved in discretionary conduct at the arrest scene. Therefore, this conduct of the deputies cannot be considered as negligent conduct relative to these wrongful death complaints. The allegations as to the negligent pursuit cannot allege that the conduct of the deputies at the arrest scene, because that conduct is immune from liability.

Consequently, the remaining allegations as to the negligent pursuit relate to this pursuit in rural Hillsborough County, where the record indicates that no others in any way endangered, and where the total distance about one and one-half mile. There are no other facts or allegations that the Deputy Garcia recognized a danger or that he was responsible for this accident. As the appellate court noted, "Standing alone, we question whether (BOWDEN) third amended complaint charging negligent pursuit could be sustained." Bowden V. Henderson, 700 So.2d 714,716(Fla.2d DCA 1997) As suggested by the appellate court, these allegations fall far short of the allegations necessary for negligent pursuit. City of Pinellas Park v. Brown, 604 So.2d 1222(Fla.1992) and City of Miami v.

Horne, 198 So.2d 10(Fla.1967).

CONCLUSIONS

The SHERIFF owed no duty to the decedents when they and Brandon Lyons at the time of the fatal collision. Furthermore, the facts and the complaints' allegation cannot sustain a claim for negligent pursuit. Therefore, Cal Henderson, as Sheriff of Hillsborough County, respectfully requests that this honorable court reverse the appellate decision below and reinstate the trial court's order of final summary judgement.