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IN THE SUPREME COURT OF FLORIDA

KIMBERLI JORDAN,

Petitioner,

v. CASE NO. 92,702

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE FIFTH
DISTRICT COURT OF APPEAL

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS:

Respondent provides the following facts in support of its brief:

Defense counsel did not object to the standard jury instruction on DUI manslaughter, and did not propose an alternate instruction. (V3, TR 463). During closing argument, defense counsel stated: "We know my client ran through the stop sign and caused the crash. Nobody's contesting that. She is at fault in this accident." (V4, Tr 504).

The following evidence regarding the circumstances of the crash was presented at trial:

The driver of the victim's car testified that as he and the victim were traveling down State Road 312, petitioner ran a stop sign at the intersection of 312 and Mizell road, "T-boned" their car and knocked it into a ditch. (V2, Tr 123). The car was crushed and paramedics had to use the "Jaws of Life" to remove the victim. (V1, Tr 125). Alexander Sharp, a witness driving behind the victim's car, testified that petitioner's car approached from Mizell Road, which was the side street, at about 55-60 miles per hour. Petitioner did not slow down, and hit the victim's car. (V1, Tr 130-131). He testified that the victim's car, immediately in front of his car, had been traveling at 45-50 miles per hour, and that the posted speed limit on the road was 50 miles per hour. (V 1, Tr 132-133).

Daniel Donofrio, who lives near the location of the accident, testified that he did not hear any tires squealing or skidding noises prior to hearing the crash. (V1, Tr 137-138, 140). He testified that Mizell road, on which petitioner was driving, had stop signs on both sides of the intersection with 312. (V 1, Tr 142). Another witness driving behind the victim's car, Christopher Fugate, testified that the victim's car was traveling at the speed limit, about 50 miles per hour. (V1, Tr 145). He testified that petitioner's car appeared to be accelerating as it approached the intersection, ran the stop sign and struck the victim's car. (V1, Tr 146, 148). Mr. Fugate testified that he had a clear view of the intersection at the time of the accident, and that he had approached petitioner's car to see if she was alright. (Tr 147, 149). He identified petitioner in court as the driver of the car which struck the victim's car. (V 1, 149). He testified that petitioner had a blank stare and that he did not believe that she was sober. (V1, Tr 150).

Torree Alexander, who was four cars behind the victim's car, testified that he saw petitioner's car run a stop sign and hit the victim's car. (V1, Tr 155). He testified that the line of cars in which he and the victim were traveling was going 50 miles per hour, which was the speed limit. (V1, Tr 156). He testified that as petitioner's car neared the intersection, it was going about 55-60, which was faster that the line of cars on State Road 312 (V1, Tr

156). He testified that petitioner's car accelerated as it approached the intersection, and that it ran a stop sign and struck the victim's car. (V1, Tr 157). Mr. Alexander identified petitioner in court as the driver of the car which struck the victim's car. (V 1, Tr 158).

Trooper Dupont, who examined the accident scene, testified that the posted speed limit of Mizell road, on which petitioner was driving, was 25 miles per hour. (V 3, Tr 252, 263). He also testified that Mizell road has stop signs on both sides of the intersection with state road 312. (V3, Tr 252). Photos of those stop signs were entered into evidence. (V3, Tr 253).

Petitioner testified that she drove down Mizell Road, to where it meets 312, and then "felt the wreck." (V3, Tr 436). Petitioner testified that she was not "going in excess of 50 or 60 miles an hour." (V3, 450). Petitioner testified that she did not "stop completely" at the stop sign and that the "cars hit" when she made a left hand turn. (V3, Tr 450).

The jury found petitioner guilty of DUI manslaughter, two counts of DUI damage to a person, and driving with a suspended or revoked license. (R 61, 62, 63). Petitioner scored 231 total sentence points on the sentencing guidelines scoresheet, which resulted in a recommended sentencing range between 152.25 and 253.75 months (12.6 to 21.1 years). (R 117). Petitioner was sentenced to 253.75 months for manslaughter, 364 days concurrent

for the damage counts, and 60 days concurrent for the license count.

The Fifth District Court of Appeal affirmed the judgment and sentence. Jordan v. State, 707 So. 2d 816 (Fla. 5th DCA 1998). The district court held that petitioner did not object to the standard jury instruction at trial and could not show fundamental error. Id. at 817. The court noted that, during closing argument, defense counsel conceded that petitioner caused the accident. The court held that since there was no dispute about causation, petitioner could not show fundamental error concerning the causation element of the jury instruction. Id. The district court also held that although petitioner's 21.1 year guidelines sentence exceeded the statutory maximum for a second degree felony, the sentence was proper pursuant to Section 921.001(5), Florida Statutes (1995). Id. at 819. The district court cited as authority its decisions in Mays v. State, 693 So. 2d 52 (Fla. 5th DCA), rev. granted, 700 So. 2d 686 (Fla. 1997), and Green v. State, 691 So. 2d 502 (Fla. 5th DCA), rev. granted, 699 So. 2d 1373 (Fla. 1997).

SUMMARY OF ARGUMENT

POINT ONE: Pursuant to this Court's recent decision in Mays v. State, 23 Fla. L. Weekly S387 (Fla. July 16, 1998), the sentence imposed by the trial court was proper. Although petitioner's sentence exceeded the statutory maximum for the offense, it was within the recommended sentencing guidelines range and was authorized by Section 921.001(5), Florida Statutes (1995).

POINT TWO: This claim lies beyond the scope of the issue for which jurisdiction was accepted, and need not be addressed by this Court. Should this Court choose to address this issue, it is Respondent's position that the Fifth District Court of Appeal properly held that petitioner did not preserve this issue for appeal and cannot show fundamental error. Petitioner failed to object to the standard jury instruction for DUI manslaughter and, since causation was not at issue, petitioner cannot show fundamental error with respect to the causation element of that instruction. In any event, the standard jury instruction properly defines the element of causation for DUI manslaughter. In stating that the defendant "caused or contributed to the cause of death," the standard instruction makes it clear that the defendant need not be the sole cause of the accident, and that it is sufficient if the accident can be attributed to any lack of care on the part of the defendant.

ARGUMENT

POINT ONE

PETITIONER'S SENTENCE, WHICH WAS WITHIN THE RECOMMENDED SENTENCING GUIDELINES RANGE BUT EXCEEDED THE STATUTORY MAXIMUM, WAS PROPER PURSUANT TO THIS COURT'S RECENT DECISION IN MAYS V. STATE.

Petitioner claims that trial court erred by imposing a sentence in excess of the fifteen year statutory maximum for a second degree felony. The Fifth District Court of Appeal held that the guidelines sentence was proper under §921.001(5), Florida Statutes (1995).

The district court's decision was correct pursuant to this Court's recent decision in Mays v. State, 23 Fla. L. Weekly S387 (Fla. July 16, 1998). In Mays, this court held that pursuant to Section 921.001(5) of the Florida Statutes, a sentence which is within the recommended sentencing guidelines range may be imposed even if it exceeds the statutory maximum for the offense. Id. (trial court properly imposed sentence of 70 months where recommended range was between 50.85 and 84.75 months and statutory maximum for offense was 60 months); See also §921.001(5), Fla. Stat. (1995) ("...If a recommended sentence under the guidelines exceeds the maximum sentence otherwise authorized by s. 775.082, the sentence under the guidelines must be imposed, absent a departure").

In the instant case, the sentence imposed by the trial court was proper. Petitioner scored 231 total sentence points on the

guidelines scoresheet, which resulted in a recommended sentencing range between 152.25 and 253.75 months (12.6 to 21.1 years). (R 117). Petitioner was sentenced to 253.75 months, which was within the recommended sentencing range but exceeded the fifteen year statutory maximum for the offense. See § 775.082(3)(c), Fla. Stat. (1995). Pursuant to Mays, the sentence was proper.

POINT TWO

THE FIFTH DISTRICT COURT OF APPEAL PROPERLY HELD THAT THIS ISSUE WAS NOT PRESERVED FOR APPEAL, AND THAT PETITIONER COULD NOT SHOW FUNDAMENTAL ERROR.

Petitioner claims that the standard jury instruction improperly states that one commits DUI manslaughter if he caused "or contributed to" the death of the victim. Petitioner argues that while the DUI statute requires that the defendant "cause" the victim's death, the standard jury instruction redefines the crime to allow conviction where the defendant merely "contributes to" the victim's death. This claim lies beyond the scope of the issue for which jurisdiction was accepted, and need not be addressed by this Court. Cf., Goodwin v. State, 634 So. 2d 157 (Fla. 1994) (declining to address issues beyond the scope of certified question).

Should this Court exercise its discretion and choose to address this issue, it is Respondent's position that the Fifth District Court of Appeal properly held that this issue was not preserved for appeal and that petitioner could not show fundamental error. In any event, even if the issue were preserved for appeal, the standard jury instruction for DUI manslaughter properly defines causation for the jury.

The district court properly held that this issue was not preserved and that, since causation was not at issue, petitioner could not show fundamental error with respect to the causation element of the jury instruction. Petitioner did not object to the

standard jury instruction for DUI manslaughter and did not propose an alternate instruction on causation. (V3, TR 463). As noted by the Fifth District, jury instructions are subject to the contemporaneous objection rule and, absent a timely objection, can be raised on appeal only if fundamental error occurred. Jordan, 707 So. 2d at 817; See State v. Delva, 575 So. 2d 643, 644 (Fla. 1991); Castor v. State, 365 So. 2d 701 (Fla. 1976). Moreover, failure to instruct an element of a crime about which there is not dispute does not rise to fundamental error. Delva, 575 So. 2d at 645; State v. Austin, 532 So. 2d 19 (Fla. 5th DCA), rev. denied, 537 So. 2d 568 (Fla. 1988).

Causation was not at issue in the instant case. In defense counsel's closing argument to the jury, he acknowledged that Jordan had caused the fatal accident. Specifically, defense counsel stated: "We know my client ran through the stop sign and caused the crash. Nobody's contesting that. She is at fault in this accident." (V4, Tr 504).

Further, it was uncontradicted at trial that petitioner caused the accident. The driver of petitioner's car, and the drivers of the three cars following behind, testified that petitioner went through the stop sign and struck the victim's car. (V2, Tr 123, 130-131, 146-148, 155). The witnesses testified that petitioner was going 55-60 miles per hour, that petitioner did not slow down when she approached the intersection, and that she accelerated as

she approached the intersection. (V1, Tr 130-131, 156, 146, 148, 157). The posted speed limit of the road on which petitioner was driving was 25 miles per hour. (V3, Tr 252, 263). A witness who lives near the crash site testified that there were no skidding noises or sounds of tires squealing before the accident. (V1, Tr 137-138, 140). Petitioner testified that she was not "going in excess of 50 or 60 miles an hour," and that she did not stop at the intersection. (V3, Tr 450).

The Fifth District properly held that this issue was not preserved and that, since causation was not an issue, petitioner could not show fundamental error regarding the causation element of the standard jury instruction. Jordan, 707 So. 2d at 817.

In any event, the standard jury instruction properly defines causation for the jury. Prior to legislative amendments in 1986, the DUI manslaughter statute was a strict liability statute which required no "causal relationship" between the manner of operation of the defendant's motor vehicle and the death of the victim. Magaw v. State, 537 So. 2d 564, 565 (Fla. 1989). The statute was amended to require that an intoxicated person, whose normal faculties are impaired, operate a vehicle and by reason of such operation, "causes" the death of a person. §316.193, Fla. Stat. (1987).

It is clear under Florida caselaw, however, that the driver need not be the sole cause of the accident. In Magaw, the Florida

Supreme Court held that the amendment required a "causal connection between the operation between the driver's conduct (in the operation of a motor accident) and the resulting accident." Id. at 566. The Court further stated, however:

> We caution, however, that the statute does not say that the operator of the vehicle must be the sole cause of the fatal accident... Any deviation or lack of care on the part of a driver under the influence to which the fatal accident can be attributed will suffice.

Magaw, 537 So. 2d at 567.

After Magaw, the standard jury instruction was revised to provide that the defendant "caused or contributed to the cause of the death of the victim." See Foster v. State, 603 So. 2d 1312, 1315 (Fla. 1st DCA 1992). In Foster, the Second District Court of Appeal noted that this revision to the standard instructions was effected to "make it clear that the defendant's negligence need not have been the sole cause of the victim's death." Id. The Fourth District has held that, under Magaw, DUI manslaughter requires the state to prove "that the defendant was negligent and that this negligence was a *contributing cause* of the death." Melvin v. State, 677 So. 2d 1317, 1318 (Fla. 4th DCA 1996).

The standard jury instruction properly defines the element of causation for DUI manslaughter. In stating that the defendant "caused or contributed to the cause of death," the standard instruction makes it clear that the defendant need not be the sole cause of the accident, and that it is sufficient if the accident

can be attributed to the defendant's lack of care.

Contrary to petitioner's argument, permitting conviction for DUI manslaughter where a drunk driver "contributed to" the victim's death does not transform the crime into a strict liability offense. The crime clearly requires a "causal connection." Magaw, 537 So. 2d at 566. The fact that the offense does not require that the defendant be the sole cause of the accident does not transform it into a strict liability crime.

Petitioner argues that, at the very least, the jury should have been instructed that the defendant "substantially contributed" to the victim's death, as is required by the standard jury instruction for civil negligence. Petitioner never submitted such an alternate instruction and, even if he had, that instruction would have been a misstatement of the law. It is clear under Magaw that the DUI manslaughter statute requires a "causal connection." However, it does not require that the driver be the sole cause of the fatal accident, and requires only that the accident can be attributed to "any deviation or lack of care on the part of the driver." It would be a misstatement of law to require that the driver "substantially contribute" to the victim's death. Even if petitioner had requested an instruction which required that he "substantially caused" the death, such an instruction would be a misstatement of the law. Parker v. State, 641 So. 2d 369 (Fla. 1994).

Moreover, the jury instructions for criminal DUI manslaughter should not be compared with those for civil negligence. The DUI manslaughter statute is aimed at deterring "the serious social problem of drunken driving." Magaw, 537 So. 2d at 565. The current statute's requiring, as causation, that the drunken driver "contribute" to the victim's death serves that purpose. Civil negligence statutes are not addressed at the specific conduct of drunk driving. The causation required for civil negligence statutes should therefore not be compared to that required for drunk driving statutes.

Further, the Fourth District Court of Appeal has refused to broaden the standard jury instruction regarding a different portion of the causation element for this offense. In Melvin v. State, 677 So. 2d 1317 (Fla. 4th DCA 1996), the defendant requested an instruction that the collision was caused by deviation or lack of care which caused the death of the victim. The court analyzed Magaw and found it did not require that the standard instruction be broadened to specify lack of care as a distinct element. Id. If the instruction need not be broadened to include lack of care as a specific element, it certainly need not be broadened to require substantial contribution to the accident.

The Fifth District Court of Appeal properly held that this issue was not preserved and that, since causation was not at issue, petitioner could not show fundamental error regarding the causation

element of the standard jury instruction. In any event, the standard jury instruction properly defines the element of causation for DUI manslaughter. In stating that the defendant "caused or contributed to the cause of death," the standard instruction makes it clear that the defendant need not be the sole cause of the accident, and that it is sufficient if the accident can be attributed to the defendant's lack of care.

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CONCLUSION

Based on the arguments and authorities presented herein, appellee respectfully prays that this honorable Court affirm the decision of the Fifth District Court of Appeal in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Respondent's Brief on the Merits has been furnished by delivery to Brynn Newton, Assistant Public Defender, this 27th day of July, 1998.

Lori E. Nelson
Of Counsel