IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 95,664

STATE OF FLORIDA,

Petitioner,

vs.

CHRIS KALOGEROPOLOUS

Respondent.

PETITIONER'S INITIAL BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH

Attorney General
Tallahassee, Florida

CELIA TERENZIO
Bureau Chief
Florida Bar No. 656879

SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, Florida 33401
Telephone: (561) 688-7759

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

Respondent was the defendant and petitioner was the prosecution in the Criminal Division of the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida. Petitioner was the appellant and respondent was the appellee in the Fourth District Court of appeals. In this brief, the parties shall be referred to as they appear before this Honorable Court of Appeal except that petitioner may also be referred to as the state.

In this brief, the symbol “R” will be used to denote the record on appeal and the symbol “T” will be used to denote the transcript of the trial court proceedings.

All emphasis in this brief is supplied by petitioner unless otherwise indicated.

CERTIFICATE OF TYPE SIZE AND STYLE

In accordance with the Administrative Order of this Court dated July 13, 1998, the undersigned hereby certifies that the instant brief has been prepared with 12 point Courier New type.

STATEMENT OF THE CASE AND FACTS

Respondent was charged by information filed December 10, 1996, with vehicular homicide arising from an automobile crash which occurred on September 26, 1996 (R 8). In June 1997, respondent filed a Rule 3.190(c)(4) motion to dismiss and memorandum of law, alleging that there were no material disputed facts and that the undisputed facts did not establish a prima facie case of guilt because respondent's speeding was not the proximate cause of the victim's death; rather, respondent alleged that the victim's failure to yield the right of way and his failure to wear his seat belt were the proximate cause of his death (R 32-37, 56).

On July 9, 1997, the state filed a traverse and memorandum of law, denying that the material facts were undisputed and that they failed to establish a prima facie case of guilt, admitting part of the facts alleged by respondent, denying part of the facts alleged, and stating that there were additional facts which had been omitted by respondent (R 38-41). Further, the state argued that proximate cause was an issue for the jury under the circumstances of this case, because there was no reasonable view of the evidence upon which jury could conclude that the victim's conduct was the sole proximate cause of the accident (R 38-41).

On July 11, 1997, the trial court conducted a hearing on respondent's motion (T 1-24). At the beginning of the hearing, the trial court raised the question as to whether speed alone was sufficient to prove vehicular homicide (T 2, 4-6). The state responded that it depended on the totality of the circumstances, and asserted that there were other factors in this case, such as the character of the area and the time at which respondent sped, as well as the extent of respondent's excessive speed, which combined with respondent's speeding which amounted to reckless conduct (T 2-5). The trial court also expressed concern that while the state had denied in part respondent's recitation of the facts, the state had failed to do so with specificity (T 4, 6). The state responded that some of the facts raised by respondent were irrelevant, and that as respondent's motion to dismiss was predicated on proximate cause rather than whether a prima facie case was made based on the facts, the prosecutor had not addressed that issue in her response (T 4, 6-7). Respondent's counsel provided the court with cases which held that a traverse had to allege with specificity the facts which were denied by the state; counsel acknowledged that the additional facts stated by the prosecutor on the record were true, and argued that they might not be material, but asserted that if there were other

facts they needed to be specifically listed (T 7-8). While disagreeing with the prosecutor's interpretation of her motion, respondent's counsel stated that her argument was that speed alone was insufficient to constitute recklessness, as well as an argument that it would be unjust and unfair to hold respondent criminally responsible for this accident because his speeding was not the sole cause of the accident (T 9-13). Rather, respondent's counsel asserted the victim's conduct of failing to yield the right of way, failing to wear a seat belt and possibly failing to wear his eye glasses, was equal to respondent's speeding conduct in terms of causation, such that it was unfair to hold respondent criminally responsible (T 10-13). The prosecutor argued that the victim's conduct did not enter into the consideration unless that conduct was the sole proximate cause of the accident, and that the victim's negligent conduct in attempting to turn left was not comparable to respondent's conduct in driving at twice the speed limit (T 13-15). The trial judge observed that the question was whether respondent's conduct was criminal or negligent, to which the prosecutor responded that that was why it was a jury issue and not a legal question (T 15). Noting that she thought this was the weakest vehicular homicide case she'd ever seen filed, the trial judge stated that she

thought looking at the totality of the circumstances, it still came down to speed alone (T 15-17). Respondent's counsel distinguished a case cited by the state, arguing that there were additional factors not present in this case, to which the state responded by listing a number of factors which did exist (T 18-20). The trial judge stated that she thought the state's case rested on just speed, and when the factors of the victim's improper turn and failure to wear a seat belt were added, that proximate cause was "way up in the air." (T 19-20). Arguing that the failure to wear a seat belt could not be considered in criminal law, the state asserted that a jury could not conclude that the victim's act of attempting to turn was the sole proximate cause of the accident if the jury believed the accident reconstructionist who was going to testify that had respondent been doing the speed limit, the victim could successfully have completed his turn without incident (T 20-23). The trial court asked whether counsel had the cases on 'speed alone is not enough' with them, but they did not (T 23). The prosecutor apologized to the court for not supplying the court with all the law, noting the she did not realize that respondent was going to argue that the facts in and of themselves were not sufficient [to constitute vehicular homicide] (T 23). The trial court requested

that each party submit a written argument on the issues of causation as well as sufficiency of the facts to support a prima facie case, and took respondent's motion under advisement until she had received those arguments (T 23-24).

On July 18, 1997, the state filed a "Memorandum of Law: Facts Sufficient to Constitute Vehicular Homicide", setting forth further facts and arguing that the facts were sufficient to constitute the offense of vehicular homicide (R 44-55, 57-68). In the memorandum, the state alleged: that the crash occurred at 1:06 on a Sunday afternoon on well-traveled US 1 in North Palm Beach, at the intersection of Yacht Club Drive (R 45, 58); that the intersection had a restaurant on one corner, a gas station on another corner, the country club, with golf course, restaurant (which was crowded on Sundays due to people dining after church), tennis courts and swimming pool along the other side of the road, and that pedestrians, both adults and children frequently crossed the road from the country club to a convenience store just up the road (R 45-46, 58-59); that while the area was primarily a business district, there were adult residences directly across the road, and that there was a clear view of the traffic signal from both north and south bound sides of the road (R 46, 59); that the victim's vehicle was struck by respondent's vehicle,

which was traveling at a high rate of speed, as the victim was attempting to turn left or east (R 46, 59); that a witness believed that respondent was traveling at about 70 miles per hour, which was twice the legal limit of 35 miles per hour, when respondent passed the witness prior to the intersection (R 46, 59); that respondent did not decrease his speed when approaching the intersection as required by Florida Statutes (R 46, 59); that respondent took no evasive action until immediately prior to the impact, i.e. 33 ½ feet before the point of impact (R 46, 59); that respondent's speed at impact was 66.9 miles per hour (R 46, 59); that respondent was not paying attention in light of evidence that the victim was turning at a speed of 12 miles per hour (R 46-47, 59-60); that although the victim's vehicle weighed 3800 pounds and respondent's vehicle weighed only 1925 pounds, the force of the impact was so great that it moved the victim's vehicle 70 north of the intersection (R 47, 60). After reciting these facts, the state cited various cases, and argued that the facts in this case were sufficient to set forth a prima facie case (R 47-51, 60-64), that depending on the circumstances 'speed alone' might be sufficient to sustain a conviction for vehicular homicide (R 51-53, 64-66), and distinguished cases cited by respondent (R 53-54, 66-67).

Respondent likewise filed an additional memorandum of law in support of his motion to dismiss, realleging the facts as set forth in his motion to dismiss and arguing that speed alone cannot constitute recklessness as an element of vehicular homicide, and that while proximate cause was an element of vehicular homicide, an independent act could supersede such that it would be unjust to hold the defendant criminally liable (R 70-77).

On July 23, 1997, the trial court entered its order granting respondent's motion to dismiss (R 78-87). The trial court recited its findings of fact, and held that the state could not establish a prima facie case of vehicular homicide because the State could not show that respondent's operation of the vehicle was reckless based upon respondent's act of speeding alone; the court further held that the state could not show that any reckless operation of the vehicle was the proximate cause of the victim's death, in light of the victim's act of turning left in front of respondent's car, and his failure to wear a seat belt (R 78-87).

The state appealed and on March 24, 1999, the Fourth District issued its opinion affirming the trial court's dismissal, finding the state's traverse insufficient to defeat

the motion to dismiss. The court held that the state was required in its traverse to deny with specificity the disputed facts set forth in the motion to dismiss, and/or to state with specificity such additional material facts as that the state wished the trial court to consider. The Fourth District acknowledged conflict with the decisions of the Second District in Branciforte v. State, 678 So. 2d 426 (Fla. 2d DCA 1996) and the Third District in State v. Blanco, 432 So. 2d 633 (Fla. 3d DCA 1983). The state's motion for rehearing and rehearing en banc was denied, and this appeal follows.

SUMMARY OF THE ARGUMENT

The trial court erred in granting respondent's motion to dismiss, where the motion failed to set forth all of the material facts, where the facts alleged were sufficient to set forth a prima facie case, where the issue upon which the trial court decided the motion was causation which is an issue for the jury, and where respondent did not object to the additional facts recited by petitioner during the hearing on the motion to dismiss.

ARGUMENT

THE TRIAL COURT ERRED IN GRANTING RESPONDENT'S MOTION TO DISMISS.

Petitioner submits that the trial court erred in granting, and the Fourth District erred in affirming the granting of, respondent's motion to dismiss, where the motion failed to set forth all of the material facts, where the facts alleged were sufficient to set forth a prima facie case, where the issue upon which the trial court decided the motion was causation which is an issue for the jury, and where respondent did not object to the additional facts recited by petitioner during the hearing on the motion to dismiss.

Courts of this state have repeatedly held that a motion pursuant to Rule 3.190(c)(4) Fla. R. Crim. P., should not be granted only where the most favorable construction of the facts or inferences from the facts to the state fails to establish a prima facie case against the defendant. State v. Davis, 243 So. 2d 587 (Fla. 1971); State v. Gutierrez, 649 So. 2d 926, 927 (Fla. 3d DCA 1995); State v. Duque, 472 So. 2d 758, 762 (Fla. 2d DCA 1985); State v. Fuller, 463 So. 2d 1252, 1254 (Fla. 5th DCA 1985); State v. Upton, 392 So. 2d 1013 (Fla. 5th DCA 1981); State v. Graney, 380 So. 2d 500 (Fla. 2d DCA 1980); See also State v. Knight, 622 So. 2d 188, 190 (Fla. 1st DCA 1993); State

v. Purvis, 560 So. 2d 1296, 1301 (Fla. 5th DCA 1990). All inferences that arise must be taken in the light most favorable to the state. A (c)(4) motion is similar to a summary judgment in a civil case and should be granted sparingly. State v. Patel, 453 So. 2d 218 (Fla. 5th DCA 1984); State v. Raulerson, 403 So. 2d 1102 (Fla. 5th DCA 1981); Upton. In considering a (c)(4) motion the trial judge may not try or determine factual issues nor consider the weight of conflicting evidence or the credibility of witnesses in determining whether there exists a genuine issue of material fact. State v. Lewis, 463 So. 2d DCA 1985); State v. Fort, 380 So. 2d 534 (Fla. 5th DCA 1980); State v. Pettis, 379 so. 2d 1150 (Fla. 5th DCA 1980). The proceeding is designed to create neither a trial by affidavit nor a dry run of a trial on the merits, nor is it supposed to serve as a "fishing expedition". Ellis v. State, 346 So. 2d 1044, 1045 (Fla. 1st DCA 1977), cert. denied, 352 So. 2d 175 (Fla. 1977), quoting State v. Giesy, 243 So. 2d 635 (Fla. 4th DCA 1971).

In Ellis, the First District stated:

> Initially, the defendant in his sworn motion must allege that the material facts of the case are undisputed, describe what the undisputed material facts are, and demonstrate that the undisputed facts fail to establish a prima facie case or that they establish a valid defense (either an affirmative defense or negation of an

> essential element of the charge). Obviously, if the undisputed facts as alleged in the motion to dismiss do not meet such burden then any response from the state would be superfluous, and the motion may be summarily denied. If, however, the allegations of the motion meet the above test, then the burden shifts to the state. If the state wishes to avoid the effect of the motion, then its traverse or demurrer, as described in Rule 3.190(d), must place a material issue of fact in dispute or establish that the undisputed facts do establish a prima facie case.

Id. at 1045-1046. To counter a (c)(4) motion, the state need not produce evidence sufficient to sustain a conviction, nor does the rule require that the state present additional facts. State v. Gale, 575 So. 2d 760, 761 (Fla. 4th DCA 1991); State v. Hunwick, 446 So. 2d 214, 216 (Fla. 4th DCA 1984); State v. Oberholtzer, 411 So. 2d 376 (Fla. 4th DCA 1982), rev. denied 419 So. 2d 1199 (Fla. 1982); Ellis at 1046. The state need only show sufficient reasonable inferences to make a prima facie case. State v. Fetherolf, 388 So. 2d 38 (Fla. 5th DCA 1980). So long as the state shows the barest prima facie case, it should not be prevented from prosecution. State v. Pentecost, 397 So. 2d 711 (Fla. 5th DCA 1981); Fuller; Hunwick; Oberholtzer.

In its opinion in the cause, the Fourth District found that petitioner's traverse was legally insufficient because it failed to state with specificity which facts alleged by respondent

petitioner denied or disputed, and/or because it failed to affirmatively state each of the additional facts upon which petitioner was relying in prosecuting respondent. State v. Kalogeropoulos, 24 Fla. L. Weekly D783, 784 (Fla. 4th DCA 1999). The district court acknowledged conflict with the decisions in Branciforte v. State, 678 So. 2d 426 (Fla. 2d DCA 1996), and State v. Blanco, 432 So. 2d 633 (Fla. 3d DCA 1983), and declined to follow those cases because the Fourth District found that those cases were wrongly decided. The Fourth District was incorrect[1].

Here, the prosecutor in the trial court, told the trial court that the state did not dispute the facts alleged; however as stated in the traverse, the prosecutor asserted that the facts set forth by respondent were incomplete (T 4, 6; R 38). Clearly, where the state does not dispute or deny the facts set forth in a defendant's (c)(4) motion the state can not in good faith deny those facts. However, where the defendant alleges that the undisputed facts do not establish a prima facie case, yet the

---

1. The trial court's order granting respondent's motion to dismiss did not rest on this basis; rather, the trial court found that petitioner could not establish a prima facie case of vehicular homicide against respondent because petitioner could not show that respondent's conduct was 'reckless', and because it would be unjust to prosecute respondent under the facts of this case (R 78).

facts set forth by him are incomplete, it cannot be said that his motion is legally sufficient or that he has filed his motion in good faith. Particularly since a (c)(4) proceeding is not designed to create a dry run of a trial on the merits, nor to serve as a 'fishing expedition', and since the rule does not require the prosecutor to present additional facts, it is apparent that the decisions in Branciforte and Blanco are correct. See Ellis; Gale; Hunwick; Oberholtzer. Surely, the rule was not designed to enable a defendant, by filing an incomplete motion to dismiss, to force the state to disclose all of the facts and theory upon which it will rely to prosecute the case, when that same information is obtainable, or has been obtained, through discovery. See Henderson v. State, 1999 WL 90142 (Fla. February 18, 1999) (defendant may not use public records statutes to avoid compliance with reciprocal discovery). The rule requires that the state's traverse be filed under oath, thus should the ensuing proceedings reveal that the prosecutor's averment that there are additional facts upon which the state will rely in prosecuting a defendant prove untrue, sanctions can be imposed for such misrepresentation. Likewise, sanctions are available for discovery violations. Consequently, as was recognized by the courts in Branciforte and Blanco, a traverse

denying that the material facts alleged in a(c)(4) motion to dismiss are not the only facts upon which the state would rely in the state's case in chief, or conversely, as here, stating that there are additional facts upon which the state would rely in its prosecution of the defendant, should be legally sufficient to defeat a motion to dismiss.

Here, as in Branciforte and Blanco, the state alleged in its sworn traverse that the defendant's motion did not contain all the facts which would be relied on in the state's case in chief (R 38). More importantly, here, respondent acknowledged that there were additional undisputed facts which **had not** been included in his motion (T 7-8). Thus, here, the record establishes that respondent's motion to dismiss was not legally sufficient and should have been denied.

Moreover, **contrary** to the Fourth District's (at least implicit), finding that the state had not presented additional facts, the record establishes that petitioner did do so. Below, at the hearing on the motion to dismiss, the prosecutor brought additional facts to the trial court's attention (T 3-4, 19); respondent did not object to the recitation of these facts, admitted that the facts recited were true, and that they were not set forth in the motion (T 7-8). While respondent did argue that

these additional facts should have been set forth in petitioner's traverse, respondent did not argue that the trial court could not consider them (T 7-8). Nor did respondent object when the trial court stated that she wanted the parties to submit written arguments to her (T 23-24). In its "Memorandum of Law Facts Sufficient to Constitute Vehicular Homicide" (R 43-55), the state set forth many additional, specific facts upon which the state would rely in presenting its case in chief (R 45-47). Respondent did not object to the recitation of the facts presented in this pleading by the state. By failing to object to the trial court's consideration of these additional facts, respondent waived his objection to the state's oral, and subsequent written, traverse. Newman v. State, 698 So. 2d 896 (Fla. 4th DCA 1997); Upton; State v, Turner, 388 So. 2d 254 (Fla. 1st DCA 1980), dismissed, 394 So. 2d 1154 (Fla. 1980). See also State v. Aurelius, 587 So. 2d 1167 (Fla. 4th DCA 1991). Hence, even if this Court determines that Branciforte and Blanco are wrongly decided, the record in this case reveals that specific, additional, undisputed, facts **were** presented to the trial court **without** objection by respondent, thus, it was error to grant dismissal in this case. See State v. Feagle, 600 So. 2d 1236, 1240 (Fla. 1st DCA 1992) (dismissals in criminal cases are to be cautiously granted); State v. Rodriguez,

640 So. 2d 206, 208 (Fla. 4th DCA 1994) (dismissal is too harsh a sanction for state's procedurally defective traverse); State v. Kagan, 529 So. 2d 356 (Fla. 4th DCA 1988), rev. denied, 537 So. 2d 569 (Fla. 1988) (same); State v. Burnison, 438 So. 2d 538, 540 (Fla. 2d DCA 1983) (same).

Additionally, the petitioner submits that respondent's motion should have been denied as it was insufficient on it face in that it relied on accident investigation, accident reconstruction, and coroner's reports, and did not contain an unqualified recitation of facts within the defendant's personal knowledge. Kagan; State v. McIntyre, 303 So. 2d 675 (Fla. 4th DCA 1974). Further, even where the state's traverse is procedurally inadequate, a trial court must still examine the motion to dismiss and, resolving the inferences in favor of the state, determine whether the defendant has met his initial burden of demonstrating that the undisputed facts fail to establish a prima facie case of guilt. Boler v. State, 678 So. 2d 319, 323 (Fla. 1996); Davis; Gutierrez; Duque; Fuller; Upton; Graney; See also Knight; Purvis. Issues such as knowledge, motive, and intent, like causation and probable cause, are questions of ultimate fact for the jury, and cannot be decided on a motion to dismiss. Boler; State v. Hart, 677 So. 2d 385 (Fla. 4th DCA

1996); Feagle; State v. Duran, 550 So. 2d 45 (Fla. 3d DCA 1989); State v. Atkinson, 490 So. 2d 1363 (Fla. 5th DCA 1986). In the instant case, the trial court erred in weighing the evidence and making factual determinations in ruling on the motion to dismiss.

Below, the trial judge indicated that in her opinion the facts were insufficient to show that respondent operated his vehicle in a reckless manner likely to cause the death of another, notwithstanding the facts that on a Sunday afternoon, respondent drove his vehicle, without slowing down, into an intersection known to be well traveled by pedestrians, and bordered by a large country cub pool which is constantly used by many children, at a speed in excess of 67 miles per hour, on a street on which the speed limit was 30 miles per hour, striking the victim's car, which was twice as heavy as respondent's car, with such force that it was pushed 70 feet north of the intersection. Citing cases which stand for the proposition that 'speed alone is not enough', the trial court reviewed the evidence and found that there were no circumstances "that could even remotely suggest that additional care or caution should have been exercised at that time." (R 85). Thus, the trial court erred by determining fact issues and considering the weight of conflicting evidence which are properly functions of the jury.

State v. Miller, 710 So. 2d 686 (Fla. 2d DCA 1998); Gutierrez; State v. Burns, 546 So. 2d 1137 (Fla. 1989); Fort; Purvis.

Moreover, the trial court's findings are not in conformance with decisional law. It must be noted, that with the exception of State v. Knight, the cases relied upon by the trial court involved appeals from convictions, rather than cases involving a ruling on a motion to dismiss. In so doing, the petitioner submits that the trial court erroneously confused the quantum of facts necessary to sustain a conviction, versus the quantum of facts, which if taken as true, are sufficient to set forth a prima facie case. Contrary to the trial court's interpretation of the case law, this Court has held that "[i]t cannot be stated as an absolute rule that speed alone cannot amount to manslaughter." Johnson v. State, 92 So. 2d 651 (Fla. 1957); See also Copertino v. State, 726 so.2d 330 (Fla. 4th DCA 1999), rev. denied, ___ So. 2d ___ (Fla. June 24, 1999, Case No. 95,360); High v. State, 516 So. 2d 275 (Fla. 2d DCA 1987). Circumstances in addition to speed which are have found to be supportive of a determination that a defendant's conduct was reckless include: not having a driver's license or a valid license, having a car in poor condition, heavy traffic, inattention, driving through a residential area or an area congested with children at a speed

twice the legal limit, and failing to reduce speed when a hazard or intersection clearly appeared ahead. See State v. Knight; Behn v. State, 621 So. 2d 534 (Fla. 1st DCA 1993); Wright v. State, 573 So. 2d 998 (Fla. 1st DCA 1991); Byrd v. State, 531 So. 2d 1004 (Fla. 5th DCA 1988); Brown v. State, 511 So. 2d 1116 (Fla. 2d DCA 1987); Hamilton v. State, 439 So. 2d 238 (Fla. 2d DCA 1983); Grala v. State, 414 So. 2d 621 (Fla. 3d DCA 1982); Savoia v. State, 389 So. 2d (Fla. 3d DCA 1980); McCreary v. State, 371 So. 2d 1024 (Fla. 1979). In light of the surrounding circumstances cited by petitioner in the instant case, i.e. speed more than twice the legal limit in an area well traveled by pedestrians including children, failure to brake when approaching an intersection which is clearly visible, and failure to brake when a hazard clearly appeared ahead, the record establishes that petitioner set forth a prima facie case of reckless conduct by respondent which is sufficient to support a charge of vehicular homicide. See Knight. As held by this Court in Lynch v. State, 293 So. 2d 44 (Fla. 1974):

> Where there is room for difference of opinion between reasonable men as to the proof or facts from which an ultimate fact is sought to be established, or where there is room for such differences as the inferences which might be drawn from conceded facts, the court should submit the case to the jury for their finding, as it is their conclusion, in such

> cases, that should prevail and not primarily the views of the judge. The credibility and probative force of the conflicting testimony should not be determined on a motion for judgment of acquittal.

Clearly here, there is room for difference of opinion between reasonable men as to whether the facts established the crime of vehicular homicide, thus the trial court erred in resolving the conflicts in the evidence, and ruling that in her view, the facts did not constitute vehicular homicide. See State v. Sheppard, 401 So. 2d 944, 946 (Fla. 4th DCA 1981) (where it cannot be said as a matter of law that the defendant's conduct was not reckless, error to grant motion to dismiss). Consequently, the trial court's order of dismissal must be reversed.

Finally, it appears that the trial court was persuaded by respondent's argument that the evidence did not establish that respondent's acts were the proximate cause of the victim's death. It is well established that the decedent's conduct may only be asserted as a defense to vehicular homicide when that conduct can be viewed as the **sole proximate cause** of the accident which resulted in the victim's death. Nunez v. State, 721 So. 2d 346 (Fla. 2d DCA 1998); Union v. State, 642 So. 2d 91 (Fla. 1st DCA 1994); Palmer v. State, 451 So. 2d 500 (Fla. 5th DCA 1984);

Everett v. State, 435 So. 2d 955 (Fla. 1st DCA 1983); Filmon v. State, 336 So. 2d 586 (Fla. 1976). Thus, in J.A.C. v. State, 374 So. 2d 606 (Fla. 3d DCA 1979), where the decedent grabbed the steering wheel and caused the vehicle to go out of control, and in Velazquez v. State, 561 So. 2d 347 (Fla. 3d DCA 1990), where the decedent, after completing a drag race with the defendant, turned his car around and sped away, crashing at the opposite end of the road, the decedents' conduct was clearly independent, intervening action, and the sole proximate cause of their deaths. See M.C.J. v. State, 444 So. 2d 1001 (Fla. 1st DCA 1984) (while the defendant could not reasonably have foreseen that the decedent would have swerved into her lane, she should have foreseen that the same general type of harm might occur if she drove her vehicle at excessive speed with bad brakes). Here, the evidence does not show that the victim's conduct was the sole proximate cause of his death. While proximate cause is a required consideration in a vehicular homicide case, proximate cause is determined by the evidence, which in this case, the trial court improperly weighed and evaluated. Miller; Gutierrez; Burns; Fort. Thus, the trial court erred in granting the motion to dismiss on this ground as well, and the order must be reversed.

CONCLUSION

Wherefore, based on the foregoing arguments and the authorities cited therein, petitioner respectfully requests this Court QUASH the decision of the Fourth District below.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

_____
CELIA TERENZIO
Assistant Attorney General
Bureau Chief
Florida Bar No. 656879

_____
SARAH B. MAYER
Assistant Attorney General
Florida Bar No. 367893
1655 Palm Beach Lakes Blvd.
Suite 300
West Palm Beach, FL 33401-2299
(561) 688-7759

Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing “Merits Brief of Petitioner” has been furnished by Courier to: ELLEN GRIFFIN, Assistant Public Defender, Criminal Justice Building/6th Floor, 421 Third Street, West Palm Beach, FL 33401, this _____day of August, 1999.

_____

Of Counsel

APPENDIX