

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA

Petitioner,

Case No.: SC18-1108
L.T. No.: 2D16-3542;
532015CF003622A000XX

ELIZABETH F. MARSH

Respondent
_____ /

RESPONSE BRIEF
STATE'S DISCRETIONARY REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

RESPONDENT'S RESPONSE BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

This is a case where Elizabeth Marsh, a person who was on probation and in the throes of the substance dependency recovery process, had a car accident on December 15th, 2014 when she wasn't supposed to be driving. She was not drinking at the time of the crash and did not have any etoh in her blood draw.

However, Elizabeth had prescription medications in her system. There were injuries, nobody was killed. Based on information and belief, the injured parties made full recoveries.

On July 15, 2016, Elizabeth took responsibility for what occurred and plead straight up to the trial court because she felt it was the right thing to do. She expressed sincere remorse. Elizabeth was advised by her counsel to plead straight up. Elizabeth was shocked when she received a 20 year sentence.

Alcohol was not involved in this case. The medications in Ms. Marsh's blood were prescribed by doctors. Ms. Marsh is a person who struggled with addiction and needs treatment help. Elizabeth Marsh is not a heartless criminal out to hurt anyone. To be certain, Ms. Marsh did have remorse and a lot of fear arising from the horrid accident. She owned up to it in open court. Thanks to God, nobody was killed and everyone has recovered to the best of our knowledge. Ms. Marsh appealed the extraordinarily heavy sentence she received. The double jeopardy protection afforded to all Americans is there to inject fairness and mercy into our justice system. At its heart, our double jeopardy rule embodies our philosophy as stated by Thomas Aquinas: "Justice without mercy is cruelty."

Ms. Marsh appealed to the Second District Court of Appeals based on double jeopardy considerations. On, October 4, 2018 the Second District Court of Appeals issued a mandate. Based on the Second District Court of Appeal's mandate, the trial court resentenced Elizabeth Marsh. The trial court, per the mandate, thus vacated Ms. Marsh's adjudications on two counts essentially cutting her extremely heavy 20 year sentence in half. The resentencing judgment is final and was not appealed by either party.

The state moved for a re-hearing before the Second District Court of Appeals. The Second Court of Appeals denied the state's motion. So the state appealed to this court's discretionary jurisdiction arguing that the Marsh v State, 253 So. 3d 674 (Fla. 2d DCA 2018) conflicts with the Fifth District Court of Appeals opinion in Lott v State, 74 So.3d 556 (Fla. 5th DCA 2011) and with the Fourth District Court of Appeals opinion in Anguille v State, 243 So.3d 410 (Fla. 4th DCA 2018).

ARGUMENT SUMMARY

Initially, we note that the respondent, Ms. Marsh, has already been resentenced pursuant to the Second District Court of Appeals opinion. Neither party appealed the re-sentencing. Thus the case is moot. The second district court of appeals held in Hickman v State, 64 So.3d 683 (Fla. 2d DCA 2011): "In light of the status report received from appellant's counsel stating that the sentences challenged in this appeal were vacated and the appellant was resentenced and then released from prison on June 7, 2011, this appeal is dismissed as moot." Cox v State, 799 So 2d 339 (Fla. 1st DCA 2001).

Double jeopardy is based on notions of fundamental equities. Elizabeth Marsh was convicted of DUI with serious bodily injury and DWLS causing serious bodily injury for rear-

ending a vehicle while driving under the influence and causing serious bodily injury to two of its passengers. Elizabeth Marsh's convictions for DWLS causing serious bodily injury were actually enhanced by a later version of the same enhancement statute in *Cooper*. See § 322.34(6), Fla. Stat. (2014). Both versions provide for enhancement when the defendant "causes the death of or serious bodily injury to another." § 322.34(3), Fla. Stat. (1991) (emphasis added); § 322.34(6), Fla. Stat. (2014) (emphasis added). The Second DCA was accurate in observing that the fact that Elizabeth Marsh did not kill the victims in the vehicle she rear-ended does [253 So.3d 678] not distinguish her case from *Cooper* in any meaningful way. If enhancement of the *Cooper* defendant's charge for DWLS was improperly cumulative, then enhancement of Marsh's charge for DWLS was likewise improperly cumulative and hence fundamentally unfair. Thus, the *Kelly* court properly relied upon *Cooper* and *Chapman* to conclude that convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury to the same victim placed the defendant in double jeopardy. Therefore, the State's assertion that *Kelly* improperly extended the rule precluding dual punishment for a single homicide to precluding dual punishment for a single injury is incorrect. And for the reasons set forth in *Kelly*, Elizabeth Marsh's dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy. Thus, the Second DCA acted correctly and this court should affirm Marsh's convictions for two counts of DUI causing serious bodily injury but affirm the Second DCA's reversal of the convictions for two counts of DWLS causing serious bodily injury and this court should affirm the Second DCA's remand with directions to enter convictions for two counts of DWLS. *Marsh v. State*, 253 So.3d 674 (Fla. App., 2018).

Elizabeth Marsh accidentally, while taking medications, rear-ended another car and caused serious bodily injury to two of its passengers from which they have recovered. As to each passenger she was convicted of driving under the influence (DUI) with serious bodily injury and driving while license suspended (DWLS) with serious bodily injury. The Second DCA reviewed the record and concluded that the dual convictions as to each victim based on the serious bodily injury arising from one act violate the constitutional prohibition against double jeopardy. The Second District Court of appeals thus affirmed the convictions for DUI causing serious bodily injury but reversed the convictions for “DWLS causing serious bodily injury” and remanded with directions to enter convictions for two counts of “DWLS”. Ms. Marsh made an open, no contest plea to the above third-degree felony charges and to the second-degree misdemeanor charge of failure to carry adequate liability insurance. The trial court imposed consecutive five-year sentences for each felony count and sentenced Elizabeth Marsh to time-served for the misdemeanor count.

Ms. Marsh appealed concerning double jeopardy. The Second District Court of appeals was troubled by the very real double jeopardy issues due to the cruelty and unfairness inherent in double jeopardy questions. Because double jeopardy issues are so serious the court made it a point to state that Elizabeth Marsh did not waive a double jeopardy challenge by entering a plea because the plea was a general plea, as opposed to a plea bargain. See Novaton v. State, 634 So.2d 607, 609 (Fla. 1994). On the merits, this case is controlled by the Second District Court of Appeals decision in Kelly v. State, 987 So.2d 1237, 1238 (Fla. 2d DCA 2008). In the Kelly case, the Second District Court of Appeals addressed a double jeopardy challenge to dual convictions for DUI with serious bodily injury and driving without a valid license with serious bodily injury.

Both convictions were based on the same injury. The court found the convictions violated double jeopardy because they unfairly punished the defendant twice for the same injury caused by the same act.

ARGUMENT
ISSUE

WHETHER THE SECOND DISTRICT COURT OF APPEALS WAS CORRECT IN APPLYING THE PRINCIPLES OF DOUBLE JEOPARDY EMBODIED IN THE “SINGLE HOMICIDE RULE” TO CONVICTIONS OF DUI CAUSING SERIOUS BODILY INJURY AND DWLS CAUSING SERIOUS BODILY INJURY IN ORDER TO ELIMINATE THE FUNDAMENTAL UNFAIRNESS AND THE INEQUITY THAT INHERES IN MULTIPLE PUNISHMENTS FOR A SINGULAR DEATH OR SERIOUS INJURY?

ANSWER: YES – THE SECOND DISTRICT COURT OF APPEALS WAS CORRECT IN APPLYING THE PRINCIPLES OF DOUBLE JEOPARDY EMBODIED IN THE “SINGLE HOMICIDE RULE” TO CONVICTIONS OF DUI CAUSING SERIOUS BODILY INJURY AND DWLS CAUSING SERIOUS BODILY INJURY IN ORDER TO ELIMINATE THE FUNDAMENTAL UNFAIRNESS AND THE INEQUITY THAT INHERES IN MULTIPLE PUNISHMENTS FOR A SINGULAR DEATH OR SERIOUS INJURY.

The focus in double jeopardy cases is fundamental fairness. The fact that Elizabeth Marsh did not kill the victims in the vehicle she rear-ended does not distinguish this case from Cooper in any meaningful way. If enhancement of the Cooper defendant's charge for dwls was improperly cumulative, then enhancement of Marsh's charge for dwls was likewise improperly cumulative. Thus, the Kelly court properly relied upon Cooper and Chapman to conclude that convictions for dui causing serious bodily injury and driving without a valid license causing serious bodily injury to the same victim placed the defendant in double jeopardy. The state is wrong in asserting that Kelly improperly extended the rule precluding dual punishment for a single homicide to precluding dual punishment for a single injury. For the reasons set forth in

Kelly, Marsh's dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy. Thus the Second DCA was correct in reversing the convictions for two counts of dwls causing serious bodily injury and for remanding for entry of convictions for two counts of simple “dwl”. Marsh v. state, 253 so.3d 674 (fla. app., 2018)

In Kelly, the defendant argued that the convictions were impermissible because they punished the defendant twice for causing injury to a single victim by one act. The appeals court for the second district of Florida agreed based on the longstanding double jeopardy principle applied in State v. Cooper, 634 So.2d 1074 (Fla. 1994), and State v. Chapman, 625 So.2d 838 (Fla. 1993), which precludes dual convictions for the single death of a victim that occurred as a result of one act of operating a vehicle while under the influence. Kelly, 987 So.2d at 1238–39. The court noted that this principle had been applied in Cooper to determine that convictions for both DUI manslaughter and DWLS causing death were impermissible. Kelly, 987 So.2d at 1238 (citing Cooper, 634 So. 2d at 1075). The second DCA found the Kelly defendant's dual convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury were analogous to those in Cooper in that they imposed two penalties for causing serious injury to a single victim by one act of operating a vehicle while under the influence. Id. at 1239. Thus, the dual convictions violated the defendant's double jeopardy rights. Id. In this case, the defendant was convicted of DUI causing serious bodily injury and DWLS causing serious bodily injury. As in Kelly, her convictions were enhanced for causing serious injury to a victim as the result of the defendant's single act of operating her vehicle. Thus, Marsh's convictions for both offenses for each victim violate the constitutional prohibition

against double jeopardy. The State asserts that Kelly was erroneously decided because it improperly extended the rule precluding dual punishment for a single homicide to dual punishment for a single injury. In support of its argument, the State relies on the Fifth District's decision in Lott v. State, 74 So.3d 556, 559–60 (Fla. 5th DCA 2011), in which the court determined that convictions for both reckless driving and DWLS that were enhanced for causing serious bodily injury to the same victim did not place the defendant in double jeopardy. In so doing, the Fifth District rejected the defendant's argument that dual convictions were impermissible under Cooper and Chapman as interpreted in Kelly because they imposed dual penalties for causing serious bodily injury to only one victim during a single act. Lott, 74 So.3d at 559–60. The court found no legal support "to extend the reasoning from Cooper and Chapman, both of which involved a single homicide, to the instant case where a single serious injury occurred." Lott, 74 So.3d at 559. Kelly was properly and logically decided in light of Cooper and Chapman. The rule set forth in Cooper and Chapman is referred to as the "single homicide rule." See McCullough v. State, 230 So.3d 586 (Fla. 2d DCA 2017). The rule, which is based on the premise "that the legislature did not intend to punish a single homicide under two different statutes," applies even in circumstances where the double jeopardy analysis set [253 So.3d 677] forth in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932), may not grant relief. McCullough, 230 So.3d at 591 (quoting Houser v. State, 474 So.2d 1193, 1197 (Fla. 1985)). The single homicide rule was first adopted by the supreme court in Houser to preclude dual convictions for DWI manslaughter and vehicular homicide based on a single death. Id. The Houser court recognized that the two crimes passed muster under Blockburger, but it explained that "Blockburger and its statutory equivalent in section

775.024(1), Fla. Stat. (1983), are only tools of statutory interpretation which cannot contravene the contrary intent of the legislature." Houser, 474 So.2d at 1196. Because "Florida courts have repeatedly recognized that the legislature did not intend to punish a single homicide under two different statutes," these dual convictions were impermissible regardless of whether the offenses satisfy the Blockburger test. Id. at 1197. The single homicide rule "is based on notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing." Gordon v. State, 780 So.2d 17, 25 (Fla. 2001), *receded from* on other grounds by Valdes v. State, 3 So.3d 1067 (Fla. 2009). "[P]hysical injury and physical injury causing death, merge into one and it is rationally defensible to conclude that the legislature did not intend to impose cumulative punishments." Id. (quoting Carawan v. State, 515 So.2d 161, 173 (Fla. 1987) (Shaw, J., dissenting)). Although there was no death in Gordon, this court determined that "the logical extension of" the single homicide rule precludes dual convictions based on a single attempted homicide. In Kelly, the Second DCA applied the same principle to preclude enhancements to dual convictions for single acts of operating a vehicle that cause serious bodily injury to another. The "notions of fundamental fairness which recognize the inequity that inheres in multiple punishments for a singular killing," Gordon, 780 So.2d at 25, and a singular attempted killing, see *id.*, apply with equal force to multiple punishments for a singular serious bodily injury committed during a single act. This principle is reinforced by a comparison of the facts of Cooper with those in this case. In Cooper, this court applied the single homicide rule to hold that dual convictions for DUI manslaughter and DWLS causing death violate double jeopardy when there is only a single death. 634 So.2d at 1075. The defendant had rear-ended a vehicle while driving under the influence, and the crash had caused

the death of its passenger. *Cooper v. State*, 621 So.2d 729, 730 (Fla. 5th DCA 1993), approved, 634 So.2d 1074 (Fla. 1994). This court determined that the defendant could be convicted of both DUI manslaughter and DWLS as long as the latter charge was not enhanced for causing death as provided in section 322.34(3), Florida Statutes (1991). *Cooper*, 634 So.2d at 1075.

In this case, Elizabeth Marsh was convicted of DUI with serious bodily injury and DWLS causing serious bodily injury for rear-ending a vehicle while driving under the influence and causing serious bodily injury to two of its passengers. Ms. Marsh's convictions for DWLS causing serious bodily injury were actually enhanced by a later version of the same enhancement statute in *Cooper*. See § 322.34(6), Fla. Stat. (2014). Both versions provide for enhancement when the defendant "causes the death of or serious bodily injury to another." § 322.34(3), Fla. Stat. (1991) (emphasis added); § 322.34(6), Fla. Stat. (2014) (emphasis added). As the Second DCA observes: "The fact that Marsh did not kill the victims in the vehicle she rear-ended does [253 So.3d 678] not distinguish this case from *Cooper* in any meaningful way. If enhancement of the *Cooper* defendant's charge for DWLS was improperly cumulative, then enhancement of Marsh's charge for DWLS was likewise improperly cumulative. Thus, the *Kelly* court properly relied upon *Cooper* and *Chapman* to conclude that convictions for DUI causing serious bodily injury and driving without a valid license causing serious bodily injury to the same victim placed the defendant in double jeopardy."

Ignoring this court's precedents, the state relies instead on the 5th DCA's wooden application of the single homicide rule despite the SHR's clear tendency to splinter when it abuts

the august notions of fairness embodied in the principles of double jeopardy. The 5th DCA simplistically ignores the principles of double jeopardy which are embodied in the SHR and concludes: “SHR is only for homicides” Lott v State, 74 So. 3d 556 (Fla, 5th DCA 2011).

Probably sensing the wafer thin structure of this argument in the attempt to surmount the storied principles of double jeopardy, the state attempts to bolster its position by citing Anuille v State, 243 So. 3d 410 (Fla. 4th DCA 2018). Anguille is inapposite to the issues we are considering in this case. Anguille seems to speciously rely on the elements necessary for conviction and ignores the fundamental notion of unfairness arising from cumulative punishments as set forth in the well accepted principle that the legislature does not intend to punish the same offense under two different statutes. Moreover, the state fatally crumbles its own arguments by citing to F.S. 775.021.

F.S. 775.021 states clearly at subparagraph 1 that “when the language is susceptible to differing constructions,, it shall be construed most favorably to the accused.”

The state digs deeper by citing to Valdes v State, 3 So. 3d 1067 (Fla. 2009) and the Valdes court’s interpretation of Section 775.021(4)(b) (1988) which actually gives life to the ‘primary evil’ discretion of courts to protect citizens’ rights against double jeopardy. In fact, the state itself lists three examples of the legislature’s animation of ‘primary evil’ rationale made in furtherance of protecting all of our rights against the unfairness of double jeopardy. One of the examples listed by the state is: “offenses which are degrees of the same offense” This very well applies to DWLS and DUI as they are both offenses that involve driving when one is not authorized to drive. Another example cited by the state as set forth in F.S. 775.021 is: “offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.”

In this case DWLS can be said to be subsumed by DUI. This court in Valdes held that the principles of double jeopardy apply to “offenses that fall under [a] subsection...that constitute different degrees of the same offense...” Valdes at 1077.

The statutory language offered by the state regarding lenity has nothing to do with this case. Lenity means “leniency or kindness” (Merriam-Webster’s Dictionary). In this case, we are dealing with constitutional considerations of double jeopardy which address fundamental fairness. The statutory language set forth by the state clearly requires respect of the citizenry’s constitutional rights and defers to the courts’ for interpretations “most favorable” to the accused. It further mandates certain exceptions. The state misinterprets the statute by discussing lenity. Lenity is not the same thing as interpreting statutes in favor of constitutional rights. Lenity is not equivalent to honoring the fundamental fairness principles of double jeopardy. The statute states and implies that courts must be a bulwark against legislative, judicial and prosecutorial (executive) constitutional mistakes such as double jeopardy violations. Considering double jeopardy principles is not “allow[ing] the principle of lenity as set forth in subsection (1) to determine legislative intent.”

Additionally, the legislature then sets forth and non-exclusive list of “Exceptions to this rule of construction”. This means that the legislature goes even further to honor double jeopardy considerations by listing three times when double jeopardy must apply: 1. Offenses which require identical elements of proof. 2. Offenses which are degrees of the same offense as provided by statute. 3. Offenses which are lesser offenses the statutory elements of which are subsumed by the greater offense.” This is a non-exclusive list of protections. And the legislature leaves it to the courts to interpret the statute in light of double jeopardy considerations in the

light most favorable to the accused.

In this case we are not faced with a prayer for lenity. We are faced with a prayer for fairness, the very same fairness required by the United States Constitution's Fifth Amendment: "no person shall be subject for the same offense to be twice put in jeopardy of life or limb."

Florida's constitution echoes the United States Constitution at Article 1 Section 9: "Due process.—No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against oneself."

All statutes and legislative intent must be examined through the prism of fundamental rights as expressly set forth in both the U.S. Constitution and the Florida Constitution. There is nothing in any of the state's arguments that would compel this honorable court to look away from the double jeopardy considerations in this case in favor of the cruel, wooden, mistaken application of F.S. 775 or the cases the state has cited.

In conclusion, this case is moot as set forth above.

That said, the State is wrong. Kelly properly applied the rule precluding dual punishment for a single homicide in order to preclude dual punishment for a single injury. And for the reasons set forth in Kelly, Elizabeth Marsh's dual enhancements for causing serious bodily injury for each victim violate the constitutional prohibition against double jeopardy. Thus, this court should affirm Marsh's convictions for two counts of DUI causing serious bodily injury but also affirm the Second DCA's reversal of the convictions for two counts of DWLS causing serious bodily injury and remand with directions to enter convictions for two counts of DWLS. Marsh v. State, 253 So.3d 674 (Fla. App., 2018).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this has been furnished to all counsel of record this August 27, 2019. I further certify that I have complied with the font requirements and that this has been served through the e-filing portal.

Respectfully Submitted,

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