IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA, Petitioner, v. PAUL VANBEBBER, Respondent.	Case No. SC01-2558

ON PETITION FOR REVIEW FROM
THE SECOND DISTRICT COURT OF APPEAL
STATE OF FLORIDA

INITIAL BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE

Paul VanBebber, hereinafter referred to as the respondent, was charged by criminal information 00-326CFA with the following offenses all of which took place on May 23, 1999 in Collier County:

Count I: Driving under the influence/ property damage (Mazda motor vehicle)(M1);
Count II: Driving under the influence/personal injury (victim: Serigy Bjazevic) (M1);
Count III: driving under the influence/personal injury (victim: Ljubica Bjazevic (M1);
Count IV: Driving under the influence/serious bodily injury (victim: Andrissa Bjazevic) (F3);
Count V: Driving under the influence/Manslaughter (victim: Ivan Bjazevic) (F2)..

(R42-44).

A written plea form, executed by respondent and defense counsel reflects an open a plea of nolo contendere to all offenses as charged (R78-79).

On September 21, 2000, respondent entered pleas of no contest to the charges. A sentencing hearing was conducted on October 19, 2000 (R7-33). The sentencing guidelines scoresheet provided for a lowest permissible sentence of 175.6 months imprisonment (R82-83). Respondent was given a downward departure sentence of 200 months imprisonment suspended on counts IV and V and placed on probation for 15 years and was sentenced to consecutive 1 year jail terms for counts I, II, and III (R81-82; 85; 96-99). Downward departure was based upon respondent showing remorse, the offenses being an isolated incident and

being committed in an unsophisticated manner (R82).

On Appeal, the Second District upheld the sentences finding the reason given for downward departure to be valid and certified conflict with the Fourth District in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), *aff'd on other grounds*, 762 So.2d 507 (Fla. 2000).

STATEMENT OF THE FACTS

The facts of the case, as pertinent to the issue before this Court were brought forth at the sentencing hearing conducted on October 19, 2000.

The prosecutor advised the court that a member of the victim's family wanted to be heard. Bee Asvick testified that she was present in the vehicle that was involved in the DUI crash with the respondent. With her in the vehicle was her husband, her 3 children and her brother-in-law (R9-10). He brother-in-law did not survive the crash (R10). She stated that the crash affected her family's life "very hard". It happened at the corner which they have to travel to get to and leave their home and it is very difficult to go through that corner now knowing what happened. It was hard to see their 3 children being taken to the emergency room. Her baby, who was only 4 weeks old, was taken to St. Petersburg while the older children were admitted to Naples Community Hospital. (R10)

The baby suffered hemorrhaging in her brain and a fracture

in her skull (R10). With regard to the other two children, her son, 6 years old, had a fractured nose and other injuries and her daughter, 4 years old, had a lot of pain in her leg and both were admitted into the hospital (R11). Her brother-in-law was visiting from Columbia and came to see his brother (her husband) and his nieces and nephew. He is survived by a wife and daughter, who is 9 years old. Asked what sentence she would recommend the judge to impose, she responded that she believed justice should be served but would it up to the judge to determine what sentence was fair (R11-12). The prosecutor pointed out that he has discussed in the past that the guideline scoresheet called for a sentence of anywhere from 175 months up to 20 years in prison and asked if she would like to see a guideline sentence imposed; she responded, “Like I said, whatever the Judge – whatever the Judge feels that will be justice that’s all I ask for.” (R12).

The state advised the court that it had no further witnesses to call. Defense counsel, Mr. Faett, advised the court that he had two witnesses and the respondent who would like to speak. (R12)

Laura Turner, respondent’s aunt by marriage, has known respondent for the past several years (R13). She testified that the incident has had a dramatic effect on the respondent and that he is “very, very remorseful” about it. He has discussed

with her teenage boys the dangers of drinking and driving and has discussed with her his willingness to discuss the issues with the youth of the community if given an opportunity. (R13). She stated that the respondent is a wonderful person with a bright future ahead of him and is very loving and caring with his wife and child and new child on the way (R13). Respondent has been married since last year (R14). Asked to tell the court about the change in the respondent and if he is going to get into trouble again, she responded, “No. No. It’s had a dramatic effect on him. He’s given up drinking. He goes to church on a regular basis and it has changed his life dramatically; very much so.” (R14). She never thought, before the incident, that respondent had any drinking problem and believes that this was an isolated incident (R14).

On cross-examination, she stated that she had not seen him drinking when the incident occurred. Asked if she knew he was drinking when this happened, she responded, “Not directly, but yes.” (R14). She does not know if this night was the only night that he had ever drunk alcohol (R15).

The defense called Nicole VanBebber, respondent’s wife. They had been married November 13, 1999 (R15). They have a one year old boy (R16). Asked to explain since the incident, what effect it had on him, she stated every night since the accident has been a nightmare. Respondent cannot sleep at night and he

has told her that he wished it would have taken his life. (R16). Respondent is the sole provider for the family; she does not work at the moment. He has always worked and works 7 days a week. He did not have an alcohol problem before the incident. Asked if she thought this was an isolated incident and did he normally go out and drink, she replied, “No, just on occasion. That’s basically what this was.” (R16). She did not know him to go out and get drunk (R16-17).

On cross-examination, she was asked how much would respondent drink when she said he went out on occasion and drank, she replied, “Once every couple of months. I mean, I’m not really –- there was never a date set or anything.” (R17). She stated that respondent never drove on these occasions, that there was always a designated driver. She stated that she probably saw twice when he had too much to drink prior to this incident (R17).

Respondent testified that his whole outlook on life has changed since the night of the incident (R18). There have been incidents where people have been out partying and he would get up at 2 a.m. and pick them up so that something like this does not happen. He state, “I’m sorry for what I’ve done.” (R18). He does not feel that he had any alcohol problem before this incident (R18). Asked if this was an isolated incident, he responded, “I – it was about six months that was the first time

I’ve drank prior to that. It’s been six months.” (R18). When he drank before he did not get drunk (R18-19). He gave the individual who died CPR and tried to revive him but it wasn’t enough (R19). He never attempted to leave the scene (R19). He came to defense counsel’s office after the accident (R20). They discussed that it was pretty likely that charges would filed against him but it took almost a year and he never left town (R20).

On cross-examination, he was asked if prior to the incident there had ever been an occasion where he had too much to drink just to where his faculties were impaired, he responded, “Maybe once at my brother’s wedding, but other than that, no, I’ve never been much of a drinker.” (R20). He never drank and drove a motor vehicle before this incident, this was the only time (R20-21).

The prosecutor stated that the state was not unsympathetic to respondent’s position but that the bottom line is that he drank, and the prosecutor believed his blood alcohol was a .16; he drove a vehicle and he killed someone (R21). It was argued that everyone is aware of what can happen if they drink too much and drive; a person with a family was killed. The prosecutor requested a prison sentence be imposed and asked for a sentence of 176 months as in the presentence investigation report (R22).

Defense counsel reiterated that respondent remained at the

scene after the accident and attempted to administer CPR to the victim and did whatever he could to help out (R22). He stated that respondent remained in town knowing that the state was likely to press charges. It was pointed out that respondent came forward and pled no contest and did not try “to duck” his responsibility. (R23).

Defense counsel stated the purpose of the hearing today was to determine if respondent should be sentenced under the guidelines or not and that there were a few reasons to depart (R223). Counsel stated that the one reason in particular is that “the offense was committed in an unsophisticated manner and is an isolated incident and respondent has shown remorse (R23). It was argued that the incident was not planned, was not intended and was not even a series of events that could be foreseeable to respondent.(R23)

It was argued that it was an isolated incident and that the testimony and the PSI shows respondent has no prior record. Respondent did have a few traffic citations but short of that he has never been in trouble and he is 24 years old (R23).

It was argued that respondent had a child and is the sole support for his family. Respondent “has the direction that he’s going to need to be an isolated incident for the future. Nothing has happened before. He has the motivation to make sure it doesn’t happen again.” (R24).

Defense counsel stated that remorse was testified to by respondent's wife and respondent himself and has been expressed to defense counsel wherein the respondent told him he would trade places if he could do so. (R24).

It was argued that another reason for departure was the need for restitution outweighs the need for prison (R24). If kept out of prison respondent keep working until that restitution "is owed; any restitution that is owed." (R24).

Counsel argued that the victim stated that the court should do what is appropriate (R24). The PSI recommended a guidelines sentence and made an alternative recommendation, a departure from the guidelines[1] (R24). Counsel argued that, "[w]ith the

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[1]The PSI recommendation and alternative recommendation state: "**RECOMMENDED DIPOSITION and REASON:** According to the sentencing guidelines, the minimum sentence is 175.9 months to a maximum of 20 years (240 months) of prison. Since an adult has died as a result of the negligent action of the defendant, this Officer recommends the subject be sentenced to 176 months in prison. A period of probation following prison is recommended to pay any restitution ordered by the Court. Since Counts I, II, and III, are misdemeanors, a concurrent jail sentence is recommended." (R104)
"**Alternative Recommended Dispositions (If Any):** On Cts IV and V, 200 months in state prison, suspended, upon completion of fifteen (15) years of Probation Supervision with Special Conditions of (1) One year in the Collier County Jail on Cts. I, II, and III consecutive with credit for time served of nine (9) days on each count with a work release review from the County Jail for employment only and a twenty-four furlough at Christmas with his family; (2) the offender will not possess nor consume any form of alcohol or illegal substance; (3) complete forty (40) hours of Community Service Work each year working with groups involved in preventing teen age alcohol consumption; (4) cost of supervision is waived until restitution and court costs are paid by the subject; (5) ongoing drug/alcohol

Department of Corrections, I feel that there's a valid reason for departure at that point." (R25).

Defense counsel argued that he was asking for a departure even further than what the recommendation is. Counsel stated:

> What we were attempting to do is to have him remain out of custody with whichever restraints for however long the Court sees fit; something where we can keep him working and provide for his family. I'm providing himself and his family in reference to that.

(R25).

Defense counsel argued that he could think of no better case where someone would qualify for departure. Respondent has never been in trouble before and is not going to be trouble in the future. (R25).

Counsel asked for a term of house arrest or a long-time term of probation. (R25).

The prosecutor responded that there is restitution to be made but there is insufficient evidence for the court to find that the need for the victim's restitution outweighs the need for a prison sentence, that there was no evidence as to that (R25-26).

Regarding the other reason, the prosecutor argued:

> As to the other reason, obviously, the Defendant has shown remorse. Based on his testimony, it seems this is an isolated

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testing/treatment, as directed by the Probation Officer and (6) no early termination of supervision." (R105)

> incident; whether or not this was committed in an unsophisticated manner, I don't know. I guess that's up to the Court to decide. Someone who drinks too much and drives a vehicle, does that make it unsophisticated? I don't know. I guess that's up to the Court, if you want to find that reason. But again, we ask for a guidelines sentence.

(R26).

The court then stated:

> There's lots of consideration that goes into sentencing. There's punishment or vindication, there's making an example for the rest of society.
>
> Frankly, in this case I'm given to be somewhat tolerant of your lawyer's arguments and finding that this is an isolated incident for which you have shown great remorse. This unsophisticated manner leaves me puzzled. I don't know how you can commit this kind of offense in a sophisticated way. I don't know whether there's any sophisticated way to get under the influence and drive a car. It almost seems that's immaterial to this consideration.
>
> I appreciate the strive that you've made and the remorse that you have shown. Unfortunately for you, I guess, I feel compelled for the rest of society to somewhat to punish you so that others can see that people that do these things don't walk off with just a slap on the wrist. So I'm going to try to fashion a sentence that does that in a way that doesn't visit too much more tragedy on you and your family.

(R26-27).

SUMMARY OF THE ARGUMENT

This Court should resolve the conflict between the Second District in State v. VanBebber, 2001 WL 1299449, 26 Fla. L.

Weekly D2558 (Fla. 2d DCA October 26, 2001) with that of the Fourth District in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), *aff'd on other grounds* 762 So.2d 507 (Fla. 2000), by adopting the decision of the Fourth District Court of Appeal in Warner, *id.* DUI manslaughter offenses cannot be committed in an "unsophisticated manner". Furthermore, to hold that §921.0026(2)(j), Fla. Stat. (1999) ["the offense was committed in an *unsophisticated manner* and was an isolated incident for which the defendant had expressed remorse"] applies to DUI manslaughter cases would create a conflict/ambiguity with §921.0026(3) ["The defendant's substance abuse or addiction, including intoxication at the time of the offense is not a mitigating factor under section 2 and does not, under any circumstances, justify a downward departure from the permissible sentencing range."] and would lead to the absurd result of negating the specific intent of the legislature that intoxication, even if it could be considered "unsophisticated" under §921.0026(2)(j), cannot be considered a mitigating factor under any "subsection 2" factor.

ARGUMENT

ISSUE

WHETHER THE STATUTORY GUIDELINES MITIGATOR OF §.921.0026(2)(J), FLA. STAT. (1999) IS APPLICABLE TO DUI MANSLAUGHTER CASES.

The standard of review is de novo.

This Court should adopt the reasoning of the Fourth District Court of Appeal in State v. Warner, 721 So.2d 767 (Fla. 4th DCA 1998), *aff'd on other grounds* 762 So.2d 507 (Fla. 2000)[2]. The offense of DUI manslaughter cannot be committed in an unsophisticated manner.

Petitioner submits that the statutory mitigator of that "the offense was committed in an *unsophisticated manner* and was an isolated incident for which the defendant had expressed remorse," as set forth in §921.0026(2)(j), Fla. Stat. (1999), because these offenses cannot be committed in an "unsophisticated manner".

This Court in State v. Sachs, 526 So.2d 48, at 50 (Fla. 1988), stated:

> ..[w]e cannot say it is improper also to consider in mitigation the manner of the commission of the crime if it has not been factored. The state does not dispute that this respondent may not have been the immediate cause of the deaths that occurred in this incident. We believe that a judge does in fact have the discretion to take into account a factor such as this, especially in the context of a strict-liability criminal statute such as the DUI manslaughter law. Although the respondent is held strictly accountable under this statute, the sequence of events that resulted in the deaths in this instance tends to show a lesser degree of moral culpability. The guidelines manifestly do not deal with this consideration, not do they prohibit a judge from weighing it. If

[2]State v. Beck, 763 So.2d 506 (Fla. 4th DCA 2000), agreeing with the panel in Warner regarding this same issue.

> based on clear and convincing evidence, this factor thus could, and in this case does, constitute a reason for a downward departure.

Petitioner submits that when this Court in considering "the manner of the commission of the crime" in Sachs the Court was looking at the possible lack of moral culpability in an otherwise strict-liability criminal statute (the question of whether defendant's action was the immediate cause of the victim's death). The Court was not considering "the unsophisticated manner" in which the crime was committed. Accordingly, petitioner submits that the Second District's reliance upon Sachs, *id.*, to "buttress" its conclusion is incorrect.

In State v. Fleming, 751 So.2d 620, 621 (Fla. 4th DCA 1999), the Fourth District was considering whether a person charged with purchase of cannabis could receive a downward departure sentence because the offense was committed in an unsophisticated manner. In that case, the ploce were executing a warranted search of an apartment when the defendant knocked on the door and asked to speak to "Alfred" and when told that Alfred was not there started, "I only have fifteen dollars for three sack," and was sold the drugs. The Fourth District considered the meaning of "unsophisticated" and stated:

> ...The word "unsophisticated" is generally defined in the dictionaries we have looked at as being the opposite of

> sophisticated. One of the definitions of sophisticated is "having acquired worldly knowledge or refinement; lacking natural simplicity or naiveté." *American Heritage Dictionary of the English Language* (1981).

Id.

The Fourth District found that there was competent substantial evidence to support the court's findings.

In DUI manslaughter cases the gist of the offense is that the accused caused the death of a human being as a result of his/her driving an automobile while intoxicated. Respondent knew that it was unlawful to drink and drive because in the past he had gone out drinking "on occasion" (R16), "once every couple of months" (R17) and always had a designated driver (R17). Respondent obviously had the "worldly knowledge or refinement" and was therefore "sophisticated" in his knowledge not to drink and drive. Moreover, everyone is presumed to know the law. Therefore, there is no way to commit the offense of DUI with "naivete" and without "knowledge and refinement." There is no way to commit the offense of DUI in an unsophisticated manner.

Additionally, petitioner would submit that to apply the mitigator §921.0026(2)(j) - "the offense was committed in an *unsophisticated manner* and was an isolated incident for which the defendant had expressed remorse," - to DUI cases would create conflict/ambiguity with §921.0026(3), Fla. Stat. (1999) which provides:

> (3) The defendant's substance abuse or addiction, including intoxication at the time of the offense is not a mitigating factor under section 2 and does not, under any circumstances, justify a downward departure from the permissible sentencing range.

Petitioner submits that to grant downward departure based upon the DUI being committed in an "unsophisticated manner" would negate the prohibition against intoxication being a justification to depart. The Second District itself acknowledges that the legislature has promulgated the public policy to eradicate the scourge of drunk driving by precluding intoxication from being a ground for departure, yet concludes that it did not exempt DUI crimes from application of §926.0026(2)(j), VanBebber, *supra* at D2559. If DUI offenses could be committed in an unsophisticated manner, the legislature's prohibition against departing for intoxication at the time of the offense would become a nullity and the legislature's public policy to eradicate the scourge of drunk driving would be a nullity in the specific type of cases in which that public policy was suppose to apply.

There being a conflict/ambiguity between §921.0026(2)(j) and §921.0026(3), this Court should resort to rules of statutory construction to resolve the conflict/ambiguity. First, a more specific statute is considered to be an exception to the general words of a the more comprehensive statute. McKendry v. State,

641 So.2d 45, 46 (Fla. 1994). In this instance, petitioner submits that §921.0026(3), which prohibits intoxication at the time of the offense from being a mitigating factor under subsection 2, is the more specific statute and that §926.0026(2)(j), which is part of "subsection 2" and permits downward departures when "the offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse", is the more general statute and therefore the prohibition against departing when a defendant is intoxicated at the time of the offense takes precedence over and is an exception to the more general statute permitting departure when the offense is committed in an unsophisticated manner.

Secondly, when two statutes are in conflict, the latter promulgated statute should prevail as the last will of the legislature. McKendry, *id.* In 1997, the legislature enacted "The Criminal Punishment Code", a comprehensive overhaul of the prior sentencing guidelines. As a pertinent part of this new comprehensive sentencing legislation, the legislature specifically added subsection (5) stating in pertinent part that intoxication at the time of the offense is not to considered a mitigating factor:

> (5) A defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (4) and does not,

> under any circumstances, justify a downward departure from the sentence recommended under the sentencing guidelines.

Ch. 97-194, s. 41, at 2332, Laws of Fla.[3]

This amendment (section 41) took effect on July 1, 1997 pursuant to Chapter 97-194, s. 44, at 2332, Laws of Fla. This subsection was renumbered and is now §921.0026(3). Ch. 97-194, s. 8, at 2312.

On the other hand, §921.0026(2)(j) was originally enacted as §921.0016(4)(j) in June 1993. Ch.93-406, §13 at 2944. Accordingly, §921.0026(3) being the latter enacted statute prevails over §921.0026(2)(j).

Statutes are to be construed to effectuate the intent of the legislature in light of public policy. White v. State, 568 So.2d 886, 889 (Fla. 1990). Also, "It is a basic tenet of statutory construction that statutes will not be interpreted so as to yield an absurd result. Williams v. State, 492 So.2d 1051, 1054 (Fla. 1986). Again, petitioner would point out that the Second District recognized in its opinion that the legislature was aware of the public policy to eradicate drunk driving and promulgated this policy by precluding intoxication as a mitigator, VanBebber, *supra* at D2559. Yet by holding that the legislature nevertheless exempted DUI cases from §921.0026(2)(j) the Second District failed to see the conflict between the two

[3] These subsections were renumbered and are now s. 921.0026(2)(d), and 921.0026(3). Ch. 97-194, s. 8, at 2312.

sections. To allow a departure on the ground that the DUI manslaughter was committed in an unsophisticated manner would lead to the absurd result of negating the specific intent of the legislature that intoxication, even if it could be considered "unsophisticated" under §921.0026(2)(j), cannot be considered a mitigating factor under any "subsection 2" factor.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Appellant respectfully requests that this Honorable Court resolve the conflict between the second District in State v. VanBebber, *supra*, and the Fourth District Court of Appeal in State v. Warner, *supra*, by adopting the reasoning of the Fourth District.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Joshua Faett, Esq., and Rexford Darrow, of the Law Offices of Casassa, Mangone, Miller, and Faett, 4280 E. Tamiami Trail, Suite 204, Naples, Florida 34112, this 26th day of December, 2001.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this pleading is 12-point Courier New, in compliance with Fla. R. App. P. 9.100(*l*).

Respectfully submitted,

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