IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,)
)
Petitioner,)
) CASE NO. SC02-927
vs.)
) DCA CASE NO. 5D00-1717
HOWARD RUSSELL BONINE,)
)
Respondent,)
_______________________________)

ON DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL, FIFTH DISTRICT

RESPONDENT'S MERIT BRIEF

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SEVENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

The Respondent submits the following additions and corrections to the Petitioner's rendering of the facts. Certain facts are repeated for the sake of context and continuity.

More than three months following an accident which occurred on the evening of June 2, 1998, near Seven Rivers Community Hospital on Highway 19 in Citrus County, the Respondent, Howard Russell Bonine was charged with DUI Manslaughter. (R I, 11)[1]

Bonine had gone to visit a friend in Dunnellon who had had back surgery. (T III, 500) They had dinner around 4 p.m. and a few beers. (T III, 501) En route back, Bonine had stopped in Crystal River and had one more beer. (T III, 504) He was hungry and swung through a McDonald's to get a hamburger, but they were backed up so he had continued on up the road to try somewhere else. (T III, 501) Bonine hit something as he headed north on 19-- he initially thought it was a deer. (T III, 504) He had not seen anything-- no lights, no indication at all of anything. (T III, 499) The windshield went out and the car was swerving everywhere. (T III,

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[1]The record-on-appeal consists of eight volumes: three volumes of the transcript of documents filed with the Clerk (R I, 1-198; R II, 199-399; and R III, 400-471 (including T 1-18)) and five volumes of the transcript of trial (T I, 1-200; T II, 201-400; T III, 401-600; T IV, 601-800; and T V, 801-963).

508-509) It seemed like too much damage for a deer. (T III, 508) When he got his vehicle stopped, Bonine walked back. (T III, 505) By this time cars had begun pulling over to attempt to assist the driver in what turned out to be a motorcycle crash. (T III, 505-506) Bonine walked over to see the person the paramedics were trying to get breathing. (T III, 506) Shocked that he had hit the motorcycle, he told a witness, "I did it. I hit him." (T I, 121; T III, 509)

The State presented twelve witnesses at trial. There had been no eyewitnesses to the accident, but two individuals who had stopped at the scene testified. Five law enforcement officers of various jurisdictions who played a part in responding to, processing and investigating the accident, testified. Of the four law enforcement officers who saw the Respondent at or near the time of the accident two testified that they had detected no odor or visible signs of impairment, one detected what appeared to be an odor of alcohol, and one witness waffled in his account between deposition and trial. (T I, 152-154; T II, 223; T I, 172; T III, 467, 477-478, 486) A fifth law enforcement witness, an accident reconstructionist, opined on direct examination that he knew without a doubt that Bonine was under the influence of an alcoholic beverage, but then later admitted on cross-examination that he had not seen Bonine around the time of the accident. (T IV, 619, 648-650) In addition the medical examiner, a toxicologist, a medical technician, and a medical

records custodian also testified.

Andrew Wilburn testified that sometime after 10:30 pm on June 2, 1998, he had been driving north on Highway 19 after picking up his girlfriend at Kmart in Crystal River Mall. (T I, 45) He had seen an older car-- a Chevy or Ford-- weaving somewhat within its lane ahead of him, and so had dropped back. (T I, 46-47, 88) Wilburn had been in no hurry. (T I, 48) When Wilburn passed Seven Rivers Community Hospital, he saw something reflecting out by the ditch. (T I, 48) Curious, he turned around at the nuclear plant and came back. (T I, 48) He passed the old car and then saw a motorcycle on the ground. (T I, 48-49) He pulled in to see if he could see anybody. He found a body lying in the ditch. (T I, 49) Wilburn, a volunteer firefighter, positioned his car so that the lights shined in the ditch and got out to see if there was anything he could do. (T I, 49, 81)

Wilburn recalled that the driver of the other vehicle had come walking back down the road to the scene, staggering a little bit and looking a little rundown. (T I, 83) Shortly after the paramedics arrived, the motorcycle driver was pronounced dead. (T I, 86)

Brian Twiss, former Deputy with the Citrus County Sheriff's Office, testified that he had been transporting a prisoner to jail on that day and had stopped at the scene to render assistance. (T I, 140) He retrieved his "Ambu bag" from his patrol

car, a civilian had helped him remove the man's helmet, and a female passerby held the flashlight so that he could administer CPR. (T I, 141-142)

Twiss testified that his only contact with the Appellant was when the deputy had been standing by the patrol car and Bonine had asked to exit the vehicle to use the rest room. (T I, 152) Twiss had not detected any odor on Bonine, who he said seemed "okay" that night. (T I, 152-153) On cross-examination Twiss testified that there was not much of an angle-- certainly not 90 degrees-- at the intersection of Emerald Oak and Highway 19. (T I, 158)

Deputy Sheriff Richard Briggs responded to preserve the crash scene until the Florida Highway Patrol arrived. (T I, 169-170) He arrived at the same time as the paramedics, and Deputy Twiss had been performing CPR on the injured driver. (T I, 169) Briggs identified the Appellant as the man who had walked up to him smelling of what appeared to be alcohol. Briggs recounted that Bonine told him that he had hit a deer and that his car was disabled. (T I, 172) Briggs recalled Bonine's speech as having been slurred. (T I, 172) Briggs had placed Bonine into his vehicle to give him a place to sit down, relax and collect his thoughts. (T I, 172) Bonine had remained in Briggs' vehicle until the officer had left to go home at 1:30. (T I, 176) Briggs was certain that Bonine was under the influence of alcohol to the extent that he was impaired. (T I, 178-179)

During voir dire of Deputy Briggs, defense counsel asked if the way that Bonine had been acting could have been attributable to having been in an auto accident. (T I, 196) The State objection was overruled but the witness never responded to the question. (T I, 197)

Trooper George Reaves of the Florida Highway Patrol at Crystal River, identified the Appellant and noted that he first saw him in the back of Deputy Briggs' vehicle. (T II, 208) Reaves and Briggs were directed to take Bonine to Seven Rivers Hospital for a blood draw, by the homicide investigator, Corporal Wells. (T II, 211-212) Reaves retrieved a blood test kit from his trunk, and he, Briggs and Bonine went to the hospital and had the blood drawn. (T II, 212-219) On cross-examination, Reaves testified that he did not detect any odor of alcohol from the Respondent. (T II, 223)

Raymond Seely the Medical Technician at the hospital who performed the blood work testified to the procedures he followed, and identified the test kit exhibit as appearing in order. 238-250) Seely and the decedent, James Quinn, had worked together at the lab at the hospital. (T II, 253)

Theresa Adams, Toxicologist and Senior Crime Lab Analyst at Florida Department of Law Enforcement testified that she received the blood sample twenty days after it had been drawn, and analyzed the sample five weeks after that,

on July 30, 1998. (T II, 330-332) The defense cited case authority which held that the administrative rules governing implied consent are not sufficient to safeguard the reliability of the test. (T II, 337-339)

Following defense objection to an improper predicate, Adams testified outside the presence of the jury that she had no idea where or how the sample had been stored, or at what temperature between June 2d and June 17th when she had received it. (T II, 337, 400) Adams conceded that although the testing was reliable that the sample might not be; if the sample had not been maintained correctly, the result would not be reliable. (T III, 401-403) The trial court ruled that the test results could not be admitted pursuant to implied consent, but that a traditional predicate could be laid in order to admit results of the testing.[2] (T II, 337-340)

Adams testified about the packaging, labeling and processing of the drawn blood. (T II, 317-337) Defense counsel objected, noting that during her testimony, the toxicologist had been flipping through multiple pages, yet her report

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[2]Under then-current case authority, *State v. Miles*, 732 So.2d 350 (Fla. 1st DCA 1999), Florida Department of Law Enforcement rules for collection of blood samples were determined to be inadequate to ensure the integrity of the sample for purposes of instruction of the jury regarding the presumptions of impairment under implied consent law; however, the *Miles* Court determined that the presumptions could still be applicable where the State established admissibility of the blood-alcohol test results by satisfying the common-law predicate set forth in *State v. Bender*, 382 So.2d 697 (Fla. 1980). This Court did not overrule this notion that the presumptions could be reclaimed via the common law predicate until November 30, 2000. *See State v. Miles*, 775 So.2d 950 (Fla. 2000).

furnished to the defense through discovery was only one page. (T II, 363-364) In reviewing the twenty-five pages of additional documents furnished following the objection, the defense noted that they included diagrams and medical records which the defense had five minutes to process and prepare to cross-examine. (T II, 377)

Over defense objection, based upon materials which had not made available to the defense until mid-trial, Ms. Adams was allowed to testify based upon a series of computations attempting to determine how many drinks the Appellant had at the time of the accident, extrapolating backwards from the blood draw result. (T II, 380-381) The court decided that the witness could testify to the extrapolations on the stand, but not from prepared notes. (T II, 385) Adams testified that at the time she tested it, the Respondent's blood sample result was .226 grams of ethyl alcohol per 100 ml. of blood. (T III, 404) Based upon hypothetical weight, food intake, and time of the last drink, the witness estimated that this blood alcohol level resulted from 9.9 to 10.9 drinks in the system. (T III, 427)

Trooper Vincent Parnell of the Florida Highway Patrol had read Bonine his Miranda Warnings and took a recorded interview from him. (T III, 467-470, 495-510) Parnell noted a moderate odor of alcohol coming from Bonine, and testified at trial that he felt that the Appellant was under the influence. (T III, 477-478) On

cross-examination Parnell admitted that at his deposition he had testified that the Appellant *may* have been intoxicated. (T III, 486) Parnell also admitted that no citations had been issued, nor had any field sobriety tests been administered. (T III, 484) Bonine had not been arrested until several months later. (R 11; T III, 483)

Both the homicide investigator, Corporal Wells, and the State's expert accident reconstruction witness, John Kwasnoski, testified that the accident was a rear-end relatively low-impact collision of the car with the motorcycle. (T III, 566) The theory was that Quinn turned off of Emerald Oak Drive coming from work at the hospital and onto Highway 19 northbound. Despite all of the damage to the left side of the motorcycle and the relatively undamaged right side, the expressed belief was that the Bonine vehicle overtook the bike from behind. (T III, 573; IV, 629, 695, 697-712) Wells felt this was so even though a piece of the red reflector from the left side of the motorcycle was found imbedded in the right-front headlight of the Chevy. (T III, 581-582) However, on cross-examination Wells admitted that his report had been prepared with the skid marks four feet to the north of the zero point when it should have been four feet to the south, but denied that this error would have changed his testimony. (T IV, 671-674). The witness had also incorrectly assumed in preparing his report that State witness Andy Wilburn had actually witnessed the crash whereas in fact there had been no witnesses to the

crash. (T IV, 657-659) Wells agreed that the motorcycle coming out of West Emerald Oak Drive should have stopped and yielded the right of way to any motor vehicle coming [along highway 19]. (T IV, 641)

When questioned about whether the fuel shut-off switch, which was in the horizontal position was "off", Wells who admitted that he was not familiar with the operation of motorcycles, said that did not know. (T IV, 637) In response to a hypothetical question concerning whether or not a driver who was riding and wanted to turn the switch back on would be able to reach back, Wells thought that the switch was about a foot behind the seat. (T IV, 638-639)

Professor Kwasnoski admitted on his cross-examination that he had relied on Trooper Wells' report and drawing and had no independent knowledge about whether the road [intersecting highway 19] was straight or at an angle. (T IV, 748-749) He did agree that the change in location of the skid marks would make a difference in his analysis and conclusions. (T 749-750)

Dr. Janet Pillow, the medical examiner who performed the autopsy on Mr. Quinn, testified that his injuries were consistent with a number of different scenarios regarding how the accident had happened. (T II, 310-312) Multiple injuries were determined to be the cause of death. (T II, 293-294) The most serious injuries were an abdominal aorta laceration, liver and spleen lacerations and pelvic injuries.

(T II, 278, 287-288, 289-291)

The jury was instructed in part, that in order to find the Appellant guilty of DUI manslaughter, the state had to prove the following three elements beyond a reasonable doubt: (1) Howard Russell Bonine drove or was in actual physical control of a vehicle; (2) While driving or while in actual physical control of the vehicle, Howard Russell Bonine was under the influence of alcoholic beverages, and/or a chemical substance, and/or a controlled substance to the extent that his faculties were impaired and/or he had a blood alcohol level of 0.08 or higher; and (3) As a result, Howard Russell Bonine caused or contributed to the cause of the death of James Quinn. (R I, 95; T V, 934-935) The jury was also instructed to make the presumptions of impairment pursuant to section 316.1934 (2)(a), (2)(b), and (2)(c). (R I, 96; T V, 936-937)

The jury returned a verdict of guilty as charged. (T V, 959-960) Motion for new trial was denied. (R II, 376-378: R III, 417-425, 429) The Respondent was sentenced to twelve years in prison to be followed by three years probation. (R III, 439-441) On appeal, the Fifth District Court of Appeal *en banc* reversed and remanded for a new trial, holding that an error in instructing the jury as to the statutory presumption of impairment in a prosecution for DUI manslaughter was not subject to harmless error analysis, even if there were overwhelming evidence on

one valid alternative legal ground, because there is no way to know which ground the jury relied upon. Bonine v. State, 811 So.2d 863 (Fla. 5th DCA 2002). In so holding, the Bonine Court certified conflict with McBride v. State, 816 So.2d 656 (Fla. 2d DCA 2002). The State of Florida as Petitioner, invoked jurisdiction of this Honorable Court and this appeal follows.

SUMMARY OF ARGUMENT

A major purpose of implied consent law is to ensure the reliability of scientific evidence for use in future court proceedings by establishing uniform, approved procedures for testing. According the same deference to results of tests performed with samples collected and maintained using substandard quality assurance safeguards utterly defeats the purpose of the law and stands the rule on its head.

The Petitioner argues that the Respondent's counsel never preserved the issue of instructing the jury on presumptions of impairment for appellate review. Respondent's counsel relied upon then-current law from the Second District Court of Appeal in arguing that the State by its failure to satisfy the mandate for quality assurance upon which the implied consent statute is based, forfeited its privilege of obtaining presumptions of impairment because the blood test result was of questionable value and integrity. That same authority provided that where the common-law Bender/Robertson predicate can otherwise be met, the presumptions could be applied. The defense argued that the reliability predicate was not met, and Respondent argues that it never can nor will be met, absent safeguards that insure the integrity of the blood sample itself. The defense objection to the admissibility of the blood evidence encompasses and presumes objection to the presumptions

of impairment thereupon.

Counsel cannot be expected to anticipate and preserve objections based upon future developments in the law. Moreover any jury instruction which shifts the burden of proof as do the presumptions of impairment when given without the benefits and safeguards of the implied consent law, is fundamental error. In particular, a supreme court decision which applies or announces a rule of criminal law, must be applied to any case pending on direct review and not yet final.

The State argues that harmless error analysis should be applied because the only way a jury verdict would be influenced by the erroneous presumption instruction, is if the jury had itself determined that there was an unlawful blood alcohol level. The State is arguing the validity of verdicts based upon a process which its own toxicology witness admitted flouts reliability safeguards.

Next the Petitioner argues that just because an "alternative **method** of proving impairment is erroneously used that does not make the **theory** of impairment unlawful." If there is adequate evidence to support an erroneously used method of improving impairment, the State contends that "[i]t is still a lawful theory of guilt." Respondent disagrees. It is precisely the erroneous use or miss-instruction of one legal theory in the face of two alternatives which nullifies a general jury verdict.

Finally, the Petitioner argues that there was overwhelming evidence to show that the Respondent was guilty based both on the theory of impairment and on the invalid alternative legal ground of unlawful blood alcohol level. When it cannot be discerned which of the two theories the jury relied upon in arriving at its verdict, this is the same thing as saying that a verdict based upon an invalid law is acceptable.

In the alternative, even if this Court were to accept that instructing a jury that it can find guilt based upon a legally insufficient theory might be subject to harmless error analysis in a case where evidence of guilt based upon the other theory is overwhelming, this is not such a case. There were no witnesses to the accident itself, none but tenuous theories of what happened were presented, the State's own law enforcement witnesses were evenly divided on the subject of the Respondent's sobriety, field sobriety exercises were not administered, no citations were issued, and the Respondent was sent home after the blood draw.

This Court is asked to affirm the *en banc* decision of the Fifth District Court of Appeal.

ARGUMENT

THE FIFTH DCA'S DECISION MUST BE AFFIRMED BECAUSE WHERE THE STATUTORY PRESUMPTIONS OF IMPAIRMENT ARE BASED UPON A BLOOD ALCOHOL READING OF UNKNOWN INTEGRITY THEY ARE LEGALLY INVALID DUE TO A FAILURE TO COMPLY WITH THE MANDATE FOR QUALITY ASSURANCE UPON WHICH THE IMPLIED CONSENT LAW IS BASED. EVEN IF SUCH A CASE WERE SUBJECT TO HARMLESS ERROR ANALYSIS, WHERE AS HERE THE EVIDENCE OF IMPAIRMENT WAS IN CONFLICT, REVERSAL WOULD STILL BE REQUIRED.

In Robertson v. State, 604 So.2d 783 (Fla. 1992), the Florida Supreme Court recalled that "the Bender Court expressly recognized that the implied consent law includes an exclusionary rule prohibiting the use of blood-test results taken contrary to its core policies." According to the Bender Court, none of the statutory presumptions could be applied in the absence of compliance to the administrative rules. State v. Bender, 382 So.2d 697, 700 (Fla. 1980). If there is an argument that the Respondent did not preserve an objection to the jury instruction on the statutory presumptions, that would appear to be it. As binding Supreme Court precedent, Bender and Robertson both proscribed application of the statutory presumptions of impairment to blood-alcohol test results deemed admissible via the common-law predicate, as opposed to compliance with the administrative rules.

It is unclear whether the holding of the Second District Court of Appeal in State v. Miles resulted from a misreading of Bender and Robertson or the separate problem, that on its face the Miles case appeared to satisfy the letter if not the overarching purpose of the administrative rules:

> Robertson also instructs that the implied consent law does not constitute the only means by which blood-alcohol test results may be admitted into evidence. In the event the state lays the three-pronged predicate described in Bender, and successfully withstands any and all defense rebuttal, the evidence is deemed scientifically reliable, hence admissible. After admissibility has been determined in accordance with the common law principles, ***it seems,*** and we hold, that the legislatively created presumptions wth respect to impairment are applicable to the blood-alcohol test results which have been determined to be admissible into evidence. [Emphasis added.]

732 So.2d 350, 353 (Fla. 1st DCA 1999). The Court admits that the issue is not entirely clear and goes on to certify the issue which was ultimately decided by this Honorable Court in State v. Miles, 775 So.2d 950 (Fla. 2000)(recognizing that the State's obligation for quality assurance under the implied consent law would otherwise be pursued less vigorously, the common law approach (the three-prong predicate) and the presumptions are mutually exclusive to the extent that the presumptions are specifically contingent upon compliance with the mandate for quality assurance of the implied consent law.)

In response to the argument that the Petitioner makes that the objection to jury instruction on implied consent presumptions of impairment was not preserved, Respondent first claims that the error of giving a jury instruction which shifts the burden of proof is fundamental error. Compare Quaggin v. State, 752 So.2d 19 (Fla. 5th DCA 2000)(where a trial judge gives an instruction that is an incorrect statement of the law and necessarily misleads the jury, and the effect of the instruction is to negate the defendant's only defense, it is fundamental error and highly prejudicial to the defendant).

In particular, all supreme court decisions applying or announcing rules of criminal law must be applied retrospectively to all cases, state or federal, that are pending on direct review or not yet final. Griffith v. Kentucky, 479 U.S. 314 (1987); Smith v. State, 598 So.2d 1065 (Fla. 1992) (where standard jury instruction had changed subsequent to trial, a conviction was reversed because decisional law in effect at the time of the appeal governs the issues raised on appeal).

A change in the state of the law intervening between trial and appeal seldom occurs and usually is not foreseeable. Florida East Coast Railway Company v. Rouse, 194 So.2d 260, 262 (Fla. 1967). Regardless of the failure of the parties to attack the validity of a holding, the appellate court is required to apply the law as it exists at the time of appeal. Florida East Coast Railway Company. In any case,

his trial counsel's argument did preserve the objection. The defense timely objected to the reliability of the blood alcohol test result based upon the lack of procedural safeguards in the administrative rules, and his objection was overruled. Smith. Moreover, his further objection that the first prong of the common law predicate was not met and indeed cannot be met, encompasses and presumes objection to the presumptions of impairment thereupon. Bender; Robertson, Miles, supra, 775 at 954-957. Respondent submits, and urges that this Court adopt, the view that the initial, reliability prong of the common law predicate can never be met absent handling, preservation, and maintenance safeguards that insure the integrity of the blood sample itself. When the court determined that the administrative rules governing handling and storage of legal blood samples retrieved via the implied consent statutory scheme provided insufficient safeguards of reliability, whether or not the State was entitled to the statutory presumption of impairment based upon satisfaction of the three-prong predicate under Robertson, is a question of law subject to de novo review. See State v. R.R., 697 So. 2d 181 (Fla. 3d DCA 1997)(aspects or components of a trial court's decision resolving legal questions are subject to de novo review); Wilson v. State, 673 So. 2d 505 (Fla. 1st DCA), rev. denied, 682 So. 2d 1101 (Fla. 1996)(same).

In the instant case there were 15 days of unaccounted-for handling and

storage of the blood sample taken from the Appellant on June 2, 1998 before it was received on June 17, 1998, and tested on July 30, 1998. At that time, the Florida Department of Law Enforcement Administrative Rule 11D-8.012 governing the labeling and sampling of blood contained no provision for preservation of samples taken. State v. Miles, 775 at 954 (where testing did not occur until 14 days after the blood draw, and no provision for preservation or refrigeration of the sample could be shown, the test result lacks integrity and the rule fails to satisfy the quality assurance provisions of the implied consent law with the result that the State is not entitled to the statutory presumptions of impairment). Nonetheless, in abrogation of the implied consent statute the statutory presumptions of impairment were part of the instructions given the jury. The State argues that the result should be analyzed as harmless error.

According to the implied consent statute, anyone who drives on Florida roads is deemed to have consented to submit to an appropriate test to determine blood alcohol content upon arrest for an offense allegedly committed while driving under the influence of alcohol or other prohibited substance. Miles; Fla. Stat., Sections 316.1932, 316.1933, 316.1934 (1995).

The purpose of those portions of sections 322.261 and 322.262, Florida Statutes which direct that law enforcement use only approved techniques and

methods is to *ensure reliable scientific evidence for use in future court proceedings and to protect the health of those persons being tested*, who by this statute have given their implied consent to these tests. Miles, citing State v. Bender, 382 So.2d 697 (Fla. 1980). None of the statutory presumptions apply in the absence of compliance with the administrative rules. Bender at 700. In the event of the State's noncompliance with safeguards of the statute, it must resort to the traditional, common-law predicates set forth in Robertson, and it is error to instruct the jury on any of the presumptions of the implied consent law. Robertson v. State, 604 at 791.

The absence of blood preservation and maintenance standards in the FDLE administrative rules fails to ensure the reliability of blood alcohol test rests, and the State is not entitled to the presumptions of impairment of the implied consent statute. Miles, 775 at 955. The statutory presumptions are "specifically contingent upon compliance with the mandate for quality assurance of the implied consent law." Miles, supra.

Contrary to the Petitioner's assertion, it was harmful error for the trial court to have charged the jury to make the statutory presumption of impairment, once the absence of quality assurance safeguards, the non-integrity of the test sample and the unreliability of the results were determined to be in noncompliance with the

implied consent statute, regardless of whether or not the State satisfied the common-law predicates pursuant to Robertson. Contra McBride v. State, 816 So.2d 656 (Fla. 2dDCA 2002)(clear error of trial court in instructing jury on statutory presumptions of impairment was harmless, given other, overwhelming evidence supporting conviction). However, where there is no way to determine which of several theories was relied upon by a jury in reaching a general verdict, the possibility that one of the theories relied upon was an erroneous statutory presumption theory requires reversal. Servis v. State, 802 So.2d 359 (Fla. 5th DCA 2001); see also Bass v. State, 801 So.2d 975 (Fla. 5th DCA 2001)(where it cannot be concluded that the state's use of the presumption did not likely contribute to the jury's verdict, reversal for a new trial is required.) The State's argument that the presumption is harmless since the jury must first conclude that *there was an unlawful blood alcohol level*, argues that the faulty conclusion is acceptable so long as it is based upon the faulty premise.

The Bonine Court in making a distinction between an invalid legal theory and legally insufficient evidentiary support for a valid legal theory, distinguishes between the flawed legal premise that potentially invalidates the jury's conclusion in the form of the verdict and the imperfect results of valid legal theories and processes which in the event of legal error must occasionally be reviewed for harmlessness

notwithstanding the soundest of legal premises. Neither the Petitioner nor the dissenting judges in Bonine seem willing or able to let go of the notion that there is a ***blood alcohol level*** in evidence, despite the State's own toxicology witness's testimony that if the blood sample had not been properly maintained the test result would not be a reliable reading of what the level would have been at the time the blood was drawn. (T III, 401-403). See State v. Miles, 775 at 954 (experts agree that without benefit of anticoagulant, preservative, and refrigeration, exposure of a blood sample to a certain level of heat and/or bacteria over time may give false high alcohol reading). Instead the inflammatory, likely-false, high readings are repeated as justification for perpetuation of the legal error which created them.

The State's argument that an erroneously used alternative method of proving impairment is different that an unlawful alternative theory of impairment is a distinction without a difference. How, as the State argues, can there be adequate evidence to support an erroneously used alternative method of impairment?

In the alternative, contrary to the State's assertion that "[t]here was no conflict in the evidence at trial" there was conflict in the evidence of sobriety/impairment, there were admitted errors in crime scene reconstruction by expert witnesses, there was conflict in the theory of how and exactly where the accident occurred. No field sobriety exercises were conducted, no citations were

issued, and the Respondent was sent home pending the results of the blood draw. If it is possible to find harmless error in a case with a legally invalid alternative theory based upon overwhelming evidence, this is not such a case.

The purpose of implied consent law which was to establish uniform, approved procedures for testing to ensure reliable scientific evidence for use in future court proceedings was clearly frustrated in the instant case. Robertson, 604 at 789. As a result none of the statutory presumptions apply in the absence of compliance with the administrative rules. Bender, 382 at 700. There is no way to analyze a jury's general verdict to determine whether or not it relied upon the invalid statutory presumptions. Servis; Bass; contra McBride.

Moreover, failure to correctly instruct a jury which reduces the State's burden of proof on an essential element of the charged crime is fundamental error. Young v. State, 753 So.2d 725 (Fla. 1st DCA 2000). The Fifth District Court of Appeal's decision reversing for a new trial must be affirmed.

CONCLUSION

BASED UPON the cases, authorities, and policies cited herein, the Respondent requests that this Honorable Court approve the decision of the Fifth District Court of Appeal, reversing and remanding for a new trial.

Respectfully submitted,

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to: The Honorable Robert A. Butterworth, Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118, via his basket at the Fifth District Court of Appeal, and mailed to Howard R. Bonine, F-6; Citrus County Detention Facility; 2604 W. Woodland Ridge Drive; Lecanto, Florida, 34461, this 9th day of September, 2002.

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ROSEMARIE FARRELL
ASSISTANT PUBLIC DEFENDER

STATEMENT CERTIFYING FONT

I hereby certify that the size and style of type used in this brief is 14 point Times New Roman.

____
ROSEMARIE FARRELL
Assistant Public Defender

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,	)	
	)	
Petitioner,	)	
	)	CASE NO. SC02-927
vs.	)	
	)	
HOWARD RUSSELL BONINE,	)	DCA CASE NO. 5D00-1717
	)	
Respondent,	)	
______________________________	)	

APPENDIX

Bonine v. State, 811 So.2d 863 (Fla. 5th DCA 2002) A 1-6