

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

Case No. SC02-927

HOWARD RUSSELL BONINE,

Respondent.

_____ /

PETITIONER'S REPLY BRIEF

On Review from the District Court of Appeal
of the State of Florida
Fifth District

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TABLE OF CONTENTS

SUMMARY OF ARGUMENT 1

ARGUMENTS 2

POINT ON REVIEW

THE HARMLESS ERROR RULE APPLIES
WHEN THERE IS EVIDENCE TO SUPPORT
A GUILTY VERDICT FOR DUI
MANSLAUGHTER UNDER BOTH
ALTERNATIVE THEORIES - UNLAWFUL
BLOOD ALCOHOL LEVEL AND IMPAIRMENT
- EVEN WHEN THE JURY WAS
ERRONEOUSLY INSTRUCTED AS TO
THE
STATUTORY PRESUMPTIONS 2

CONCLUSION 5

CERTIFICATE OF SERVICE 5

CERTIFICATE OF COMPLIANCE 6

SUMMARY OF ARGUMENTS

The Defendant has merely re-argued the admissibility of the blood evidence. However, that is not the issue before this Court. The sole issue is whether the appellate court should have applied the harmless error analysis when there was no possibility that the erroneous instruction on impairment affected the jury's decision.

In the instant case, the only way the jury could ever have reached the improper presumption was **if and only if** it had already determined that the Defendant had an unlawful blood alcohol level. Therefore, the jury verdict was based on the proper theory of unlawful blood alcohol level, even though there was also abundant evidence of impairment.

Because there was no possibility that the improper instruction affected the jury's verdict, this Court should reverse the Fifth District Court of Appeal and re-instate the Defendant's conviction.

ARGUMENT

POINT ON REVIEW

THE HARMLESS ERROR RULE APPLIES WHEN THERE IS EVIDENCE TO SUPPORT A GUILTY VERDICT FOR DUI MANSLAUGHTER UNDER BOTH ALTERNATIVE THEORIES - UNLAWFUL BLOOD ALCOHOL LEVEL AND IMPAIRMENT - EVEN WHEN THE JURY WAS ERRONEOUSLY INSTRUCTED AS TO THE STATUTORY PRESUMPTIONS.

The sole issue is whether the appellate court can apply the harmless error analysis when the trial court erroneously gives a jury instruction on the statutory presumption of impairment. In his merits brief, the Defendant has re-argued the admissibility of the blood evidence. There is no doubt, however, that the blood evidence was admissible. The State met all of the requirements for admitting the blood evidence, apart from the statutory safe harbor. Once it made all of the required showings, the blood evidence clearly was admissible. There simply is no issue regarding the admissibility of the blood evidence.

Nor is there any dispute as to the ample evidence that the Defendant was impaired. Numerous witnesses testified that the Defendant staggered when he walked, slurred his speech when he talked, had a strong odor of alcohol on his breath and person,

and that he told several people that he was drinking alcohol that night. He also admitted that he hit the victim on his motorcycle, but thought he had hit a deer. The physical evidence showed that the Defendant never tried to slow down before he hit the victim, nor was he able to stop his car for quite some distance after hitting the victim. The record contains sufficient competent evidence to show impairment.

But apart from the evidence of impairment, the most important fact before the jury was that the Defendant was driving with almost three times the legal limit of alcohol in his system. He was clearly driving with an unlawful blood alcohol level. Once that evidence was before the jury, they could find the Defendant guilty of DUI manslaughter under the theory that he drove with an unlawful blood alcohol level.

The faulty jury instruction could not have affected the jury's decision, because before the jury could consider the presumption it necessarily **must** have found that the Defendant had an unlawful blood alcohol level. The presumption instruction tells the jury that they can only presume impairment if they have **already** determined that the Defendant's blood alcohol level was greater than 0.08. Therefore, under the dual theory prosecution, the erroneous instruction could **not** have affected the jury's decision.

In the instant case, where there was clear evidence that the Defendant drove with an unlawful blood alcohol level, as well as strong evidence of impairment, the appellate court should have applied the harmless error analysis. This Court, therefore, should reverse the decision of the Fifth District Court of Appeal, and remand for a reimposition of the conviction for DUI Manslaughter.

CONCLUSION

Based on the arguments presented herein, the State respectfully asks this court to reverse the decision of the Fifth District Court of Appeal, adopt the well-reasoned dissent of Judge Harris in its place, and reinstate the Defendant's conviction.

Respectfully

submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Respondent's Reply Brief has been furnished by delivery to **Rosemarie Farrell**, Assistant Public Defender for Respondent,

this _____ day of September, 2002.

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Rebecca Roark Wall
Of Counsel

CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief is produced in COURIER NEW, 12 point font, and thereby fully complies with the font requirement of Fla.R.App.P. 9.210(a)(2).

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Of Counsel