Supreme Court of Florida

No. SC02-1369

ROBERT CHARLES LEVERITT
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

[January 13, 2005]

PARIENTE, C.J.

We have for review Leveritt v. State, 817 So. 2d 891 (Fla. 1st DCA 2002), in which the First District Court of Appeal certified the following question of great public importance:

> IN A DUI [DRIVING UNDER THE INFLUENCE] MANSLAUGHTER TRIAL, IS IT FUNDAMENTAL ERROR TO GIVE A JURY INSTRUCTION THAT IS ERRONEOUS BASED UPON THE PRESUMPTION OF IMPAIRMENT DECLARED INVALID UNDER MILES V. STATE[STATE V. MILES], 775 So.2d 950 (Fla.2000), WHEN THE OPINION IN MILES WAS ISSUED DURING PENDENCY OF THE APPEAL IN THE INSTANT CASE, AND WHEN MILES CHANGED THE LAW APPLICABLE TO THE JURY INSTRUCTION PRESUMPTIONS OF IMPAIRMENT, AND WHEN THE ISSUE OF IMPAIRMENT WAS DISPUTED AT TRIAL AND IS AN ESSENTIAL ELEMENT OF THE CRIME.

Id. at 897-98.[1] Answering a similar certified question in Cardenas v. State, 867 So. 2d 384 (Fla. 2004), we held "that an improper instruction on the statutory presumption of impairment, given contrary to the holding in Miles, is not fundamental error if the State charges DUBAL [driving with an unlawful blood alcohol level] and the jury is correctly instructed thereon, or if the jury is correctly instructed on actual impairment." Id. at 397. We approved the First District decision affirming the convictions of boating under the influence (BUI) manslaughter because we determined from the record that the jury rendered a general verdict of guilt after being properly instructed on the alternative theories of DUBAL and actual impairment. See id. at 396.

In this case, we are unable to ascertain from the First District's opinion whether the giving of the presumption of impairment instruction was fundamental error based on the criteria set forth in Cardenas. We therefore answer the certified question in the negative, vacate the decision below, and remand for reconsideration in light of Cardenas.[2]

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1. We have jurisdiction. See art. V, § 3(b)(4), Fla. Const.

2. Subject to our holding in Cardenas, we agree with the First District that Miles applies in cases that were pending on direct appeal when Miles was issued. See generally Smith v. State, 598 So. 2d 1063, 1066 (Fla. 1992) (holding that any decision of this Court "announcing a new rule of law, or merely applying an established rule of law to a new or different factual situation, must be given

It is so ordered.

WELLS, ANSTEAD, LEWIS, QUINCE, CANTERO, and BELL, JJ., concur.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND IF FILED, DETERMINED.

Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance

First District - Case No. 1D98-4519

(Duval County)

D. Gray Thomas and William J. Sheppard of Sheppard, White and Thomas, P.A., Jacksonville, Florida,

for Petitioner

Charles J. Crist, Jr., Attorney General and Carolyn J. Mosley, Assistant Attorney General, Tallahassee, Florida,

for Respondent

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retrospective application by the courts of this state in every case pending on direct review or not yet final").