IN THE SUPREME COURT OF FLORIDA

DAVID BAUTISTA, **CASE NO. SC02-2121**

Petitioner, **LT Case No. 4D01-1610**

v.

STATE OF FLORIDA,

Respondent.

****
ON DISCRETIONARY REVIEW FROM THE FOURTH DISTRICT COURT OF APPEAL
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RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited **Page Number**

Florida Statutes Cited

PRELIMINARY STATEMENT

Petitioner, David Bautista, was the defendant in the trial court and Appellant in the Fourth District Court of Appeal. Petitioner will be referred to herein as “the Petitioner”. Respondent, the State of Florida, was the prosecution in the trial court and Appellee in the Fourth District Court of Appeal. Respondent will be referred to as “the Respondent” or “the State”.

STATEMENT OF THE CASE AND FACTS

The Respondent agrees to the Statement of the Case and Facts as they appear in the Petitioner's Brief on the Merits except as otherwise noted below or in the argument section of this brief.

The facts of the case are concisely stated in the opinion of the Fourth District Court of Appeal ("Fourth District"):

> [Petitioner's] vehicle collided with another car fatally injuring the two passengers therein. He was operating his vehicle with an unlawful blood alcohol level. He fled the scene of the accident without rendering aid to the passengers or providing information to the responding police officers. A jury convicted him of two counts of first degree DUI manslaughter with failure to render aid.

David Bautista v. State of Florida, 27 Fla. L. Weekly D1940 (Fla. 4th DCA Aug. 28, 2002). For the first time on appeal the Petitioner argued that the trial court erred when it convicted and sentenced him of two counts of Driving Under the Influence (DUI) Manslaughter because the deaths of the two victims arose out of single accident; he claimed that the DUI Manslaughter statute is ambiguous and supports only a single conviction because the statute refers to "the death of any human being" instead of "a" human being. Id. The Petitioner relied substantially on the "a/any test" of Grappin v. State, 450 So.

2d 480 (Fla. 1984) and State v. Watts, 462 So. 2d 813 (Fla. 1985) to support his argument. Bautista.

The Fourth District rejected the Petitioner's argument based on the authority of Melbourne v. State, 679 So. 2d 759, 765 (Fla. 1996), wherein this Court held that multiple convictions of DUI Manslaughter arising from a single crash do not violate double jeopardy principles. Baustita. The Fourth District also rejected the Petitioner's other points on appeal, but certified the following question:

> DOES THE "A/ANY" TEST ADOPTED IN *GRAPPIN v. STATE* AND *STATE v. WATTS* AS THE METHOD FOR DETERMINING THE UNIT OF PROSECUTION FOR THE COMMISSION OF MULTIPLE PROSCRIBED ACTS IN THE COURSE OF A SINGLE EPISODE, PRECLUDE MULTIPLE CONVICTIONS FOR DUI MANSLAUGHTER WHERE MORE THAN ONE DEATH OCCURS IN A SINGLE ACCIDENT AS APPROVED IN *MELBOURNE v. STATE.*

27 Fla. L. Weekly at D1941.

SUMMARY ARGUMENT

Point I. The decision of the Fourth District Court of Appeal should be affirmed and the certified question should be answered in the negative. Multiple convictions of DUI Manslaughter are not precluded by the "a/any" test. This matter has been resolved by this Court's decision in Melbourne wherein it was held that a defendant may sustain multiple convictions for DUI Manslaughter when multiple victims are killed as a result of the defendant's driving while intoxicated. The Petitioner's argument is contrary to decisions of this Court and district courts of appeal. His "unit of prosecution" argument fails because DUI Manslaughter is a homicide statute; the unit of prosecution is controlled by the number of victims.

Point II. The Petitioner's convictions for DUI Manslaughter were properly enhanced to first degree felonies by section 316.193(3)(c)3.b. The Petitioner was convicted of two counts of DUI Manslaughter and he failed give information or render aid to

the victims. The cases relied on by the Petitioner are inapplicable: they address the offense of leaving the scene of an accident, not DUI Manslaughter.

ARGUMENT

Point I

THE PETITIONER WAS PROPERLY ADJUDICATED GUILTY OF, AND SENTENCED FOR, TWO COUNTS OF DRIVING UNDER THE INFLUENCE MANSLAUGHTER SINCE TWO VICTIMS WERE KILLED

The Petitioner asserts that fundamental error occurred when he was adjudicated guilty of, and sentenced for, two counts of DUI Manslaughter. As the basis for his argument, the Petitioner relies on the "a/any" test adopted by this Court in Grappin v. State, 450 So. 2d 480 (Fla. 1984) and applied to the crime of theft of a firearm:

> We find that the use of the article "a" in reference to "a firearm" in section 812.014(2)(b)3 clearly shows that the legislature intended to make each firearm a separate unit of prosecution. The construction which this Court and the district court place on this statute is consistent with federal court decisions construing similar federal statutes. Federal courts have held that the term "any firearm" is ambiguous with respect to the unit of prosecution and that several firearms taken at the same time must be treated as a single offense with multiple convictions and punishments being precluded . . . On the other hand, the phrase "to receive or possess *a firearm*" has been held to express a legislative intent to allow separate prosecutions for each firearm . . .

Id. at 482(internal citations omitted)(emphasis in original). In State v. Watts, 462 So. 2d 813 (Fla. 1985), this Court

applied the "a/any" test to the offense of possession of contraband in a correctional institution, finding that the defendant could only be convicted of a single count of possession of a prisonmade knife, although he actually possessed two knives, since the applicable statute[1] prohibited the possession of "*Any* firearm or weapon of any kind . . ." Id. at 814 (emphasis in original).

The Petitioner now contends that the "a/any" test should be applied to DUI Manslaughter to preclude multiple convictions even when there are multiple victims because the statute provides that:

> (3) Any person:
> (a) Who is in violation of subsection (1)[2];
> (b) Who operates a vehicle; and
> (c) Who, by reason of such operation, causes:
>
> * * *
>
> 3. The death of any human being commits DUI manslaughter . . .

Section 316.193(3), Florida Statutes (1999). Since "human being" is modified by the word "any", rather than "a", the Petitioner argues that the Legislature "did not intend to make

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[1] Section 944.47(1)(a)5, Florida Statutes (1981).

[2] This subsection defines the offense of driving under the influence.

each person killed a separate unit of prosecution", consequently precluding two convictions for DUI Manslaughter even though two victims were killed in the instant case (Initial Brief p. 11).

Although the Petitioner presents a novel and creative argument, it is contrary to decisions of this Court and other district courts. This Court should reject the Petitioner's argument and answer the District Court's certified question in the negative.

The Petitioner correctly acknowledges that this Court has already addressed the issue of multiple convictions for DUI Manslaughter in Melbourne v. State, 679 So. 2d 759 (Fla. 1996), wherein this Court held multiple convictions from a single violation of the DUI Manslaughter statute - in contrast to the driving under suspended license statute - do not violate double jeopardy principles:

> . . . Melbourne caused the death of two persons and injury of a third for which she was convicted of two counts of DUI manslaughter and one count of DUI with serious bodily injury. Melbourne claims . . . that these multiple convictions violate double jeopardy because the convictions arise from a single violation of the DUI statute. We disagree.
>
> * * *
>
> In the case of driving with a suspended license, the link between the violation and the injury is indirect - - the suspended

> license in no way causes the driver's carelessness or negligence. To allow multiple convictions for a single violation of this statute would be illogical because the violation does not *cause* injury to any of the victims. In the case of DUI, on the other hand, the link is direct - - the driver's intoxication results in his or her inability to drive safely. The DUI driver may sustain multiple convictions because the violation causes injury to each victim. We find no error.

Id. at 765 (internal citations omitted)(emphasis in original). Since "[t]he DUI driver may sustain multiple convictions because the violation causes injury to each victim", id., the Petitioner's argument must fail. Moreover, in State v. Salazar, 679 So. 2d 1183 (Fla. 1996), this Court specifically applied Melbourne to the offense of DUI Manslaughter. By quashing the decision of the district court[3] in Slazar, this Court has already rejected a somewhat similar argument now raised by the Petitioner.

Furthermore, the Petitioner's argument has been rejected in courts throughout this State: "It is abundantly clear from Section 316.193 that the legislature contemplated separate

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[3] Salazar v. State, 665 So. 2d 1066 (Fla. 4th DCA 1995), quashed, 679 So. 2d 1183 (Fla. 1996). In this decision the district court held that a DUI with serious bodily injury which arises out of a single driving episode should be considered a single offense regardless of the number of victims. Id. at 1068. This Court quashed that conclusion, 679 So. 2d 1183, and - - in effect - - nullified the Petitioner's argument in the instant case.

offenses where different victims are injured or killed . . .” State v. Wright, 546 So. 2d 798, 799 (Fla. 1st DCA 1989). “The prosecution of multiple counts of DUI manslaughter is apparently commonplace, and not open to serious question.” Id. at 799, FN2. See also, Hertzschuch v. State, 687 So. 2d 52 (Fla. 3d DCA 1997); Duckett v. State, 686 So. 2d 662, 663 (Fla. 2d DCA 1996)(“The supreme court has . . .held that multiple convictions for driving under the influence with serious bodily injury are permissible for injuries to multiple victims arising from a single driving episode”); State v. Lamoureux, 660 So. 2d 1063,1064 (Fla. 2d DCA 1995)(“ . . . multiple convictions for DUI with serious bodily injury are indeed permissible for injuries to more than one victim arising out of a single driving episode”); Onesky v. State, 544 So. 2d 1048 (Fla. 2d DCA 1989)(“. . .we believe the legislature intended to provide separate offenses and penalties for the commission of each of these offenses [DUI serious bodily injury] where different victims are involved”); Pulaski v. State, 540 So. 2d 193, 194 (Fla. 2d DCA 1989)(“one count of manslaughter is permissible for *each* death sustained during a drunk driving episode”)(emphasis in original) Consequently, the Petitioner’s argument should be rejected by this Court.

The Petitioner also acknowledges that this Court’s decision

in Houser v. State, 474 So. 2d 1193 (Fla. 1985), suggests that the unit of prosecution for DUI Manslaughter is defined by the death of each victim. This conclusion is clear: in Houser, this Court held that "the additional element of the death of a victim raises DWI manslaughter beyond mere enhancement and places it squarely within the scope of this state's regulation of homicide." Id. at 1196. See also, Cooper v. State, 621 so. 2d 729, 732 (Fla. 5th DCA 1993), approved, 634 So. 2d 1074 (Fla. 1994)(DUI manslaughter is a homicide offense). The Petitioner attempts to escape this conclusion by noting that the murder statute prohibits the unlawful killing of "a human being" rather than "any human being". See e.g., section 782.04(1)(a), Florida Statutes. However, the manslaughter statute states that a person who causes the death of "*any* elderly person or disabled adult" by culpable negligence commits aggravated manslaughter of an elderly person or disabled adult and that a person who causes the death of "*any* person under the age of 18" by culpable negligence commits aggravated manslaughter of a child. Section 782.07(2) and (3), Florida Statutes (emphasis added). Clearly, it could not be argued that a defendant could only face a single conviction for each of these offenses even if there were multiple victims. Likewise, the placement of the article "any" before human being in section 316.193(c)3 does not define the

unit of prosecution nor preclude multiple convictions of that section when the defendant's driving while intoxicated results in the deaths of multiple victims.

Pursuant to this Court's decisions in Melbourne and Salazar, the decision of the lower court should be approved and the certified question answered in the negative.

Point II

THE PETITIONER'S CONVICTIONS FOR DUI MANSLAUGHTER WERE PROPERLY ENHANCED BY SECTION 316.193(3)(c)3.b., FLORIDA STATUTES

On his second point on appeal, the Petitioner argues that his convictions for DUI Manslaughter should not have both been enhanced by section 316.193(3)(c)3.b., Florida Statutes, which states that a person who commits a DUI Manslaughter commits a felony of the first degree if "[a]t the time of the crash, the person knew, or should have known, that the crash occurred; and . . . [t]he person failed to give information or render aid as

required by s. 316.062." He asserts that enhancing both convictions from second to first degree felonies violates double jeopardy.

The Petitioner's argument in point II must fail for the same reason that his argument in point I fails: in Melbourne this Court held that a defendant who kills multiple victims as a result of driving while intoxicated may be convicted of multiple counts of DUI Manslaughter. Id. at 765. It therefore follows that the enhancement provision of section 316.193(3)(c)3.b. may apply to each count of DUI Manslaughter.

The Petitioner's primary reliance on Hardy v. State, 705 So. 2d 979 (Fla. 1998) and Pierce v. State, 744 So. 2d 1193 (Fla. 4th DCA 1999) is misplaced since those cases address the offense of leaving the scene of an accident involving death or injury, not DUI Manslaughter. In fact, Pierce supports the Respondent's position that a defendant may be convicted of multiple counts of DUI Manslaughter when there are multiple victims: "Here, unlike DUI manslaughter and DUI resulting in injuries, leaving the scene of an accident is not a discrete crime against an individual in which causation of injury to the 'victim' is related to the leaving the scene charge." Id. at 1196. Since DUI Manslaughter is "a discrete crime against an individual", the number of victims determines the unit of prosecution.

Furthermore, both counts of DUI Manslaughter were properly enhanced by section 316.193(3)(c)3.b.

CONCLUSION

WHEREFORE based on the foregoing arguments and authorities cited herein, the Respondent respectfully requests this Honorable Court affirm the decision of the lower court and answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of hereof has been furnished by

U.S. mail to: David John McPherrin, Assistant Public Defender, 421 Third Street, West Palm Beach, FL 33401, on this ____day of _____, 2002.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief has been prepared with Courier New 12 point type and complies with the font requirements of Rule 9.210.

_____
Of Counsel