11 Fla. Prac., DUI Handbook § 1:5 (2013-2014 ed.)

West's Florida Practice Series TM
DUI Handbook
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Chapter 1. Pleading, Proof of Basic Elements, and Defenses

§ 1:5. Under the influence of alcohol or controlled substances

West's Key Number Digest
West's Key Number Digest, Automobiles 332, 355(6)
Legal Encyclopedias
C.J.S., Motor Vehicles §§ 1382 to 1394, 1408 to 1411, 1545

It is insufficient for the State to prove that the defendant was under the influence of sleep deprivation, depression, sickness, or other natural conditions. The State must prove that the defendant was under the influence of alcoholic beverages, a chemical substance defined in Fla. Stat. § 877.111, or a controlled substance described in Florida Statutes, Chapter 893. [1] Thus, the trial court properly granted a renewed motion for judgment of acquittal where the jury found the defendant guilty of driving under the influence of a controlled substance where the defendant was clearly impaired, but had a breath alcohol reading of .000, refused to give a urine sample, and there was no other evidence that the defendant was under the influence of a controlled substance. [2] On appeal, the court observed that the state failed to present sufficient evidence to exclude every reasonable hypothesis of innocence because disease, mental illness, or other permissible factors could have explained the defendant's condition. On the other hand, the court upheld the denial of a motion for judgment of acquittal where the accused had a breath alcohol reading of .000, had been driving, was observed to be impaired after the stop, and provided a urine sample revealing controlled substances. [3] The court reached this conclusion despite the defendant's argument that fatigue reasonably accounted for his impairment.

Alcoholic beverages "are considered to be substances of any kind and description which contain alcohol." [4] Neither the statute nor current jury instructions mention medications not containing controlled substances, but containing alcohol. It is important, however, to remember that this is a criminal statute subject to strict construction. Thus, an argument can be made that the statute does not include such medications.

This argument is also suggested by the Florida Legislature's use of the word "alcohol," rather than "alcoholic beverages," in the statutes on commercial vehicles, to describe the offense. [5] "Alcohol" is defined as "any substance containing any form of alcohol including, but not limited to, ethanol, methanol, propanol, and isopropanol." [6] Thus, this section of the statutes seems to include medications. Arguably, if the Legislature intended to include the same substances in the general DUI law, it would have used the broader definition of alcohol as it did in the commercial vehicle section. That is not to suggest, however, that one cannot be convicted based on the mixing of alcoholic beverages with other substances that have a synergistic effect. [7]

The chemical substances provision includes only items set forth in Fla. Stat. § 877.111. The items include a variety of materials such as glue, fingernail polish remover, certain spray paints, or other readily available materials that people might sniff. [8] While these substances may have a legitimate purpose, [9] it is still unlawful to drive or be in actual physical control of a vehicle when impaired by any of them.

The controlled substances provision includes anything named or described in Schedules I through V of Fla. Stat. § 893.03. [10] This includes a plethora of drugs and other substances which are consumed and abused. It is simple to determine whether a substance is governed by this provision by checking the ingredients and comparing them to the schedules; however, a word

of caution is in order. One administrative procedure allows the Attorney General to add and subtract substances from the schedules. [11] Thus, in a case involving controlled substances the parties should check the appropriate administrative rules and regulations.

As with chemical substances, many of the controlled substances have lawful purposes. Medical professionals dispense the drugs and some are in over-the-counter medications. [12] The legitimate use of these materials may result in an argument that the defendant was accidentally affected by them or lacked knowledge of their effects. The State might oppose such claims on two grounds. First, the State might argue that nothing in the DUI statutes requires an intent to become impaired or knowledge that the involved substance might cause impairment. This contention must be evaluated in light of the holding in *Carter v. State*. [13]

In *Carter*, the court ruled that an involuntary intoxication defense was available in a DUI where the defendant mistakenly took an impairing drug believing it to be a different non-impairing substance. On the other hand, in another case, the court upheld a finding that the defendant violated community control were there was no proof he consumed alcohol, but there was a urine test that showed he had consumed an unknown amount of three prescription drugs (i.e. Prozac, Soma, and Xanax) for which he had a prescription; and there was expert testimony that excessive use of those substances could explain the impaired behavior that officers observed. [14] The defendant was also aware of the warning not to operate a motor vehicle while using the medications.

The second argument the State might make is that the statute uses the term "controlled substances," both in the provision authorizing medical disbursements and the provision making it a crime to drive while impaired by "controlled substances." Thus, the Legislature may have contemplated that one driving while impaired by "controlled substances" violates the law whether or not the substance is medically disbursed.

Consumption of drugs as the basis for conviction creates special concerns as to jury instructions. *Sabree v. State* [15] was a DUI case involving death and serious bodily injury. The trial judge instructed the jury that the state had to prove beyond a reasonable doubt that "[w]hile driving or while in actual physical control of the vehicle, [the defendant] had a blood alcohol level of 0.08 or higher and/or a controlled substance to-wit: cocaine." [16] The jury found the defendant guilty, but did not specify whether its decision was based on the blood alcohol level or the consumption of cocaine. The defense did not object to the instruction. But on appeal, the court concluded that giving such an instruction constituted fundamental error because having cocaine in the system is not a crime unless the State proves beyond a reasonable that the accused was impaired by the substance. [17] Accordingly, in *Whynot v. State*, [18] a case similar to *Sabree*, [19] the court found no error in instructing the jury that the State had to prove beyond a reasonable doubt that "While driving or while in actual physical control of the vehicle, [the defendant] was under the influence of alcoholic beverages or a control substance *to the extent that his normal faculties were impaired* or had a blood or breath alcohol level of 0.08 or higher" (emphasis by court). [20]

Footnotes

a0 Circuit Court Judge, Sixth Judicial Circuit, Pinellas County Florida.

1 Fla. Stat. § 316.193(1)(a).

2 State v. Annis, 8 Fla. L. Weekly Supp. 421 (Fla. 13th Cir. Ct. April 19, 2001). See also Baker v. State, 9 Fla. L. Weekly Supp. 168 (Fla. 11th Cir. Ct. Jan. 15, 2002) (three judge appellate panel relied on *Annis* to justify reversal because the State did not exclude reasonable possibility that appellant's impaired condition was due to factors other than alcohol or controlled substances).

3 Broco v. State, 13 Fla. L. Weekly Supp. 226 (Fla. 6th Cir. Ct. Oct. 31, 2005). See also Carter v. State, 17 Fla. L. Weekly Supp. 1159 (Fla. 6th Cir. Ct. Sept. 29, 2010) (where defendant engaged in conduct evidencing impairment that resulted from methadone use, the fact that there was circumstantial evidence that it may have resulted from low blood sugar did not require a JOA; where there is both direct and circumstantial evidence, the standards on circumstantial evidence requiring acquittal do not apply).

4 Fla. Std. Jury Instr (Crim.) 28.1. See appendix for standard instructions.

5 Fla. Stat. §§ 322.61 to 322.64.

6 Fla. Stat. § 322.01(2).

7 Cf. Gagen v. State, 7 Fla. L. Weekly Supp. 82 (Fla. 9th Cir. Ct. Oct. 26, 1999) (Defendant claimed that he was taking medicine that caused him to be impaired. A doctor testified about Defendant's condition and the medicine, and that, "it was possible that Defendant's medication had interacted with the alcohol in his system, but that without blood tests, there was no way to determine the actual cause of Defendant's impairment." There was also a paramedic that testified as to observations at the scene that were consistent with impairment by alcohol. A three judge panel ruled that the trial judge properly denied a motion for judgment of acquittal because the jury was not required to accept the expert's opinion. The expert's opinion could cause the jury to conclude that Defendant's intoxication explained his conduct, and the expert's testimony along with the paramedic's was sufficient to support the verdict.) See discussion relating to this matter under § 1:14.

8 This includes "any compound, liquid, or chemical containing toluol, hexane, trichloroethylene, acetone, toluene, ethyl acetate, methyl ethyl ketone, trichloroethane, isopropanol, methyl isobutyl ketone, ethylene glycol monomethyl ether acetate, cyclohexanone, nitrous oxide, diethyl ether, alkyl nitrates (butyl nitrite), or any similar substance for the purpose of inducing a condition of intoxication or which distorts or disturbs the auditory, visual, or mental processes." Fla. Stat. § 877.111(1).

9 Fla. Stat. § 877.111(1).

10 Fla. Stat. § 893.02(4).

11 Fla. Stat. § 893.035.

12 Fla. Stat. §§ 893.04 to 893.05.

13 Carter v. State, 710 So. 2d 110 (Fla. 4th DCA 1998). For more details see § 1:14.

14 Hoffman v. State, 743 So. 2d 130 (Fla. 4th DCA 1999).

15 Sabree v. State, 978 So. 2d 840 (Fla. 4th DCA 2008).

16 Sabree v. State, 978 So. 2d 840, 841 (Fla. 4th DCA 2008).

17 Sabree v. State, 978 So. 2d 840 (Fla. 4th DCA 2008). See also Taylor v. State, 15 Fla. L. Weekly Supp. 234 (Fla. 17th Cir. Ct. Jan. 15, 2008) (court reversed DUI conviction where judge refused to permit amendment of information and change in verdict to eliminate reference to chemical and control substances, where there was no evidence of such usage).

18 Whynot v. State, 987 So. 2d 739 (Fla. 5th DCA 2008).

19 Sabree v. State, 978 So. 2d 840 (Fla. 4th DCA 2008).

20 Whynot v. State, 987 So. 2d 739 (Fla. 5th DCA 2008).

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