NOT FINAL UNTIL TIME EXPIRES FOR REHEARING AND, IF FILED, DETERMINED

ON APPEAL TO THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA IN AND FOR PINELLAS COUNTY

APPELLATE DIVISION

MARCEL K. SOARES

Appellant,

Appeal Case No.: CRC 09-00024 APANO
UCN No.: ~~522005CT191475XXXXXX~~
~~522005TR191477XXXXXX~~

v.

STATE OF FLORIDA,

522009AP000024XXXXCR

Appellee.
_____/

Opinion filed: 8/1/11.

Appeal from the County Court
for Pinellas County
County Judge William H. Overton
County Judge Robert Dittmer

Marcus Kimminau Soares
Attorney for Appellant

Lee Pearlman
Assistant State Attorney
Attorney for Appellee

ORDER AND OPINION

PER CURIAM

This cause comes before this Court for the second time. The defendant was arrested and charged with Driving under the Influence (DUI) and Careless Driving arising out of an accident

on October 23, 2005. Blood samples were taken and the results showed a blood alcohol level over the legal limit. He moved to suppress the results of the blood tests on the grounds that the test was not permissible under the implied consent law. The trial judge denied the motion and the defendant waived his right to a jury. The trial judge found him not guilty of careless driving, but guilty of DUI. The defendant appealed and another three judge panel of this Court reversed the judgment and sentence on the grounds that the State failed to introduce sufficient evidence to establish a foundation for the introduction of the blood test results. *Soares v. State*, 15 Fla. L. Weekly Supp. 768 (Fla. 6th Cir. Ct. April 17, 2008). Specifically, the Court found that there was no evidence as to who withdrew the blood or whether that person was authorized to do so. *Id.*

On remand the matter was set for trial again. The defendant moved to dismiss the DUI on the grounds that the Double Jeopardy Clause bars retrial. The trial judge denied the motion to dismiss. The defendant pled no contest and attempted to preserve the denial of the previous motion to suppress for appeal, but the trial judge did not make a finding that the ruling on the motion to suppress was dispositive of the case.

Defendant argues that the second trial was barred by the Double Jeopardy Clause. We disagree. In *Burks v. United States*, 437 U.S. 1 (1978), the United States Supreme Court held that the Double Jeopardy Clause bars retrial "once the reviewing court has found the evidence legally insufficient" to support a conviction. *Id.* at 16. *Burks* did not reach the same conclusion for mere "trial errors." The United States Supreme Court has also ruled that the Double Jeopardy Clause does not bar retrial "when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted ..., and also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction." *Lockhart v. Nelson*, 488 U.S. 33, 40 (1988). The court reasoned that when a reviewing court reverses a

conviction due to inadmissible evidence, it is essentially reversing for trial error. *Id.* at 40–41. Under such circumstances, trial on remand is clearly not barred by the Double Jeopardy Clause. *Id.* at 42. See also *Barton v. State*, 704 So.2d 569 (Fla. 1st DCA 1997).

Here, this Court found the evidence necessary for the foundation for introduction of the blood test inadequate. The Court was not referring to the insufficiency of the State's evidence as a whole. In fact, the Court made no determination as to the sufficiency of the evidence as a whole. The Court reversed because of a trial error: the erroneous admission of evidence. The Double Jeopardy Clause does not preclude retrial.

This Court finds that the defendant failed to preserve the denial of the motion to suppress. When it was first denied, the defendant went to trial and was convicted. He was successful in attacking his conviction on other grounds. On remand, the defendant opted to plead nolo contendere. Counsel announced a change of plea "conditioned upon preserving the objection relative to double jeopardy as well as the objections that were stated in the original appeal on the record concerning the voluntary nature of the draw." (R 48-49). The State had no objection. The trial judge also said: "But you're retaining your appellate right to appeal the prior decision of Judge Overton." (R 55). Counsel responded: "We're – the prior decision of Judge Overton as well as the error that was preserved on appeal and I believe also the pending motion." (R 55). The defendant never asked the trial judge to find that the earlier ruling on the motion to suppress the blood test results was dispositive nor does the record reflect any such finding. Furthermore, this Court does not find the ruling dispositive because the State could have gone forward without those results. *D.J.P., Jr. v. State*, 2011 WL 2652447 (Fla. 2d DCA opinion filed July 08, 2011).

ACCORDINGLY, this Court AFFIRMS the trial court's judgment and sentence.

ORDERED at St. Petersburg, Pinellas County, Florida this 1st day of Aug, 2011.

Original order entered on August 1, 2011 by Circuit Judges David A. Demers, Thane B. Covert, and Chris Helinger.

Copies:
The Honorable Judge William H. Overton
The Honorable Judge Robert Dittmer

Marcus Kimminau Soares
Attorney for Appellant

Lee Pearlman
Assistant State Attorney
Attorney for Appellee