

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA.

STATE OF FLORIDA,

APPELLATE DIVISION (CRIMINAL)

Case No.: 502009AP900078AXXMB

Co. Court Case No.: 502009CT021167AXXMB

Appellant,

v.

JOEL COHEN,

Appellee.

Opinion filed: September 29, 2010

Appeal from Judge, Sandra Bosso-Pardo,
County Court in and for Palm Beach County.

For Appellant, Michelle Zieba, Esq., Office of the State Attorney, 401 N. Dixie Highway, West
Palm Beach, FL 33401.

For Appellee, Mitchell Beers, Esq., Prosperity Gardens, Suite 204, 11380 Prosperity Farms
Road, Palm Beach Gardens, F L 33410.

PER CURIAM.

Appellee was charged by Information with Leaving Scene of Crash Involving Damage. Witnesses saw Appellee hit another vehicle, causing it to roll over and observed Appellee leave the scene. Appellee then drove westbound and was involved in another crash and continued without stopping. A witness pulled in front of Appellee's vehicle and Appellee hit his front right end and swerved to the left. The police then made contact with Appellee and placed him under arrest.

Appellee filed a motion to dismiss and the State filed a traverse. Appellee's motion to dismiss stated that Appellee is an orthopedic surgeon who has had previous episodes of seizure. A

copy of Appellee's neurological evaluation was attached to the motion and the impression of Appellee's doctor was that Appellee had a focal seizure (complex partial seizure characterized by a period of automatism and confusion).

At the hearing on the Appellee's motion to dismiss, the trial court granted the Appellee's motion to dismiss over the State's objection, concluding that "maybe technically you have prima facie and maybe it shouldn't be a motion to dismiss, but this has JOA written all over it." The State filed a timely appeal of the trial court's Order granting the motion to dismiss.

A rule 3.190(c)(4) motion to dismiss is akin to a civil motion for summary judgment. State v. Hart, 677 So. 2d 385 (Fla. 4th DCA 1996). The motion is decided only on the undisputed facts. Id. at 386. In considering the evidence, the court must draw all inferences in favor of the state and against the defendant. Id. The trial court may neither weigh conflicting evidence nor pass on the credibility of witnesses nor determine disputed issues of fact. Id. Even if a trial court doubts the sufficiency of the State's evidence, it cannot grant a motion to dismiss criminal charges simply because it concludes that the case will not survive a motion for judgment of acquittal. State v. Paleveda, 745 So. 2d 1026, 1027 (Fla. 2d DCA 1999). Where a defendant's sworn motion to dismiss is met with a traverse by the state which specifically denies under oath material facts alleged, the motion to dismiss must automatically be denied. Boler v. State, 678 So. 2d 319, 323 (Fla. 1996).

Based on a review of the hearing, it appears that the trial court improperly weighed the conflicting evidence and determined disputed issues of fact in order to come to the decision to grant the motion to dismiss. The State filed a traverse which specifically disputed whether Appellee had a seizure at the time of the car crash and/or at what point the Appellee became aware of the crash if he did suffer a seizure. The State specifically disputed material facts and therefore, the trial court erred in granting the motion to dismiss.

ORDERED AND ADJUDGED that the trial court's order granting Appellee's motion to dismiss is hereby REVERSED and REMANDED for further proceedings consistent with this opinion.

KASTRENAKES AND MARTIN, JJ. concur. COLBATH, J., recused.

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Appellant,

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JOEL COHEN,

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BY ORDER OF THE COURT:

THIS CAUSE is before the Court upon Appellee's Motion for Rehearing, Clarification, and/or Certification and/or Rehearing en banc. On September 29, 2010, this Court entered an Opinion reversing the lower court's Order granting Appellee's Motion to Dismiss and remanding the cause to the lower court for further proceedings. On October 12, 2010, Appellant filed the instant motion.

Appellee maintains that the Court misinterpreted/misapprehended the stated purpose of Rule 3.190(c)(4) and requests this Court to certify two issues to the Fourth District Court of Appeal.

Florida law is very clear about the standards by which the Court determines whether a Motion for Rehearing should be granted. Specifically, Florida Rule of Appellate Procedure 9.330(a) articulates the proper contents of a Motion for Rehearing: "a motion for rehearing shall state with particularity the points of law or fact that in the opinion of movant the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding."

Florida Courts have historically interpreted this Rule narrowly holding that a Motion for Rehearing should be granted only when a material fact or point of law has been overlooked or misapprehended, and if it had been considered, it would have changed the outcome. Atlantic v. City of Lakeland, 115 So. 669 (Fla. 1928). Having considered Appellee's motion, the applicable law, and being otherwise fully advised in the premises, this Court finds that it has not overlooked or misapprehended the stated purpose of Rule 3.190(c)(4).

Accordingly it is

ORDERED AND ADJUDGED that Appellant's Motion for Rehearing, Clarification, and/or Certification and/or Rehearing en banc is **DENIED**.

DONE AND ORDERED this 18 day of November, 2010 in West Palm Beach, Palm Beach County, Florida.


CIRCUIT JUDGE


CIRCUIT JUDGE

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cc:
Michelle Zieba, Esq., Office of the State Attorney, 401 N. Dixie Highway, West Palm Beach, FL 33401.

Mitchell Beers, Esq., Prosperity Gardens, Suite 204, 11380 Prosperity Farm Road, Palm Beach Gardens, FL 33410.