

## VEHICULAR HOMICIDE\*

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*\*This chapter provides research and analysis through the June 5, 1997 opinions reported in Florida Law Weekly and Florida Law Weekly Supplement. All statutory references are to the 1996 Florida Statutes, unless indicated otherwise.*

### A. Definition of the Crime

1. Section 782.071 defines vehicular homicide as the killing of a human being by the operation of a motor vehicle by a person in a reckless manner likely to cause the death of, or great bodily harm to, another person.
2. The standard jury instruction on vehicular homicide states that before the defendant may be found guilty, the jury must find that he operated the motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another person. The state need not prove as an element of vehicular homicide the intent by the defendant to harm or injure the victim or any other person.
3. There is no such crime as attempted vehicular homicide. Williamson v. State, 510 So.2d 335 (Fla. 4th DCA 1987).

## B. Degree of Proof Necessary

1. The Supreme Court has held that the legislature created the offense of vehicular homicide "to cover the hiatus between section 782.07 manslaughter and the traffic offense of reckless driving" *McCreary v. State*, 371 So.2d 1024 (Fla. 1979); *State v. Young*, 371 So.2d 1029 (Fla. 1979).
2. Vehicular homicide cannot be proven without also proving the elements of reckless driving. *Chikitus v. Shands*, 373 So.2d 904 (Fla. 1979); *W.E.B. v. State*, 553 So.2d 323 (Fla. 1st DCA 1989).
3. It does not follow, however, that every fatality, regrettable as it may be, is accompanied by and results from conduct warranting a criminal conviction...Before one can be so condemned it must be established beyond and to the exclusion of every reasonable doubt that the defendant has been guilty of negligence of the character heretofore defined. *Jackson v. State*, 100 So.2d 839 (Fla. 1st DCA 1958).
4. The line between a traffic infraction and vehicular homicide is hard to draw. *Pitts v. State*, 473 So.2d 1370 (Fla. 1st DCA 1985); *Breeding v. State*, 543 So.2d 312 (Fla. 4th DCA 1989).
5. Motion for directed judgment of acquittal affirmed where no reckless shown. *State v. May*, 670 So.2d 1002 (Fla. 2d DCA 1996).

## C. Proximate Causation Is An Issue

1. The cause of death does not have to be the cause of the accident in order to get the jury instruction on reckless driving. In *Manno v. State*, 550 So.2d 338 (Fla. 3d DCA 1989), the defendant alleged that operating room negligence and not the accident itself caused the victim's death. The court held that the jury should have been instructed on reckless driving.
2. A drag race survivor cannot be held criminally liable for the vehicular homicide of the driver or passenger of the other vehicle. *Velazquez v. State*, 561 So.2d 347 (Fla. 3rd DCA 1990).
3. To convict, the jury must find that the operation of the vehicle in question is such as is likely to cause the specific harm, i.e. death of or great bodily harm to another. *Rushton v. State*, 395 So.2d 610 (Fla. 5th DCA 1981).

**D. Jury Instructions**

1. Courts have refused to give special jury instructions relating to the victim's conduct being a violation of traffic laws unless the victim's violation was the sole cause of the accident. *Filmon v. State*, 336 So.2d 586 (Fla. 1976); *State v. Palmer*, 451 So.2d 500 (Fla. 5th DCA 1983); *Everett v. State*, 435 So.2d 955 (Fla. 1st DCA 1983)(instruction on jaywalking not allowed); and *Brimmer v. State*, 541 So.2d 1307 (Fla. 4th DCA 1989). Unless it can be said that the decedent's conduct was the **sole proximate cause** of the homicide, or unless there is some reason why it would be unjust or unfair to impose criminal liability, the decedent's conduct does not supersede the defendant's conduct as the proximate cause of the homicide. *Union v. State*, 642 So.2d 91 (Fla. 1st DCA 1994)(here no instruction for failure to wear seat belts or intervening cause were allowed). Intervening cause instruction not allowed where the general harm is foreseeable. *M.C.J. v. State*, 444 So.2d 1001 (Fla. 1st DCA), *review denied*, 451 So.2d 849 (Fla. 1984)(here defendant was driving with defective brakes at excessive speed and a car pulled in front of him and the instruction was not allowed). The independent intervening act instruction should have been given where the passenger in a drag race was attempting to grab the gear shift and grabbed the steering wheel which caused the vehicle to go out of control. *J.A.C. v. State*, 374 So.2d 606 (Fla. 3d DCA 1979), *cert. denied*, 383 So.2d 1203 (Fla. 1980). The same courts have, however, admitted evidence of such violations.
2. A vehicular homicide conviction was reversed where the trial judge charged the jury that having a blood alcohol level of 0.10 percent or higher was an element of the offense. *Cole v. State*, 573 So.2d 175 (Fla. 2d DCA 1991).
3. Reckless driving is a lesser included offense of vehicular homicide when the cause of death is disputed. *Barritt v. State*, 531 So.2d 338 (Fla. 1988); *Manno v. State*, 550 So.2d 338 (Fla. 3d DCA 1989)(operating room malpractice alleged to be the cause of death).
4. Vehicular homicide is not a lesser included offense of DWI Manslaughter. *Higdon v. State*, 490 So.2d 1252 (Fla. 1986).

5. The jury instruction on excusable homicide must be given. See Chapter 5, section H.1 above.

**E. Cases Sustaining Conviction**

1. The state proved that the intersection was a safe intersection which met all applicable federal and state safety regulations; the traffic through the intersection was heavy; the intersection and stop sign could be clearly seen from 400 feet; the defendant imbibed of alcohol immediately prior to the accident; the defendant drove into the intersection, at or near the maximum speed prescribed by law, without reducing his speed; and the defendant did not apply his brakes until he had passed the stop sign and struck the victim's vehicle with sufficient force to knock it across three lanes of traffic and cause it to completely flip over. The conviction was affirmed. *McCreary v. State*, 371 So.2d 1024 (Fla. 1979).
2. The defendant was exceeding the 55 mph speed limit with the knowledge that her brakes were defective. Beer cans were found in the car, and alcohol was observed on her breath. *M.C.J.*, supra.
3. The defendant was operating her vehicle in a residential area at between 50 and 60 m.p.h.. There were no obstructions to her view; she was familiar with the area; the area was all residential and heavily congested with children; and the defendant did not reduce the speed of her vehicle after striking the children. *Hamilton v. State*, 439 So.2d 238 (Fla. 2d DCA 1983).
4. The defendant drank beer and was exceeding the speed limit on a wet road. He passed a vehicle, with no obstructions and with overhead lighting, and hit a parked vehicle. *Savoia v. State*, 389 So.2d 294 (Fla. 3d DCA 1980).
5. A conviction was sustained where the defendant was weaving in and out of traffic and driving at or near the speed limit. As he approached a busy intersection, the defendant willfully disregarded a yellow signal and ran a red light, killing a young boy. *Moye v. State*, 571 So.2d 113 (Fla. 4th DCA 1991).
6. The defendant was told to slow down as he went through a caution light; he had just passed a reduced speed sign; he had passed a 45 m.p.h. sign less than one-half mile before the accident. The defendant hit an automobile in the opposite lane of

traffic at a speed estimated at twice the limit. Traffic was heavy, and the motorist was not paying attention as he tried to stop at the stop sign. *Byrd v. State*, 531 So.2d 1004 (Fla. 5th DCA 1988).

7. The defendant was travelling 20 m.p.h. over the speed limit and in the opposite lane of travel passing a vehicle after consuming a good deal of malt liquor. *Wright v. State*, 573 So.2d 998 (Fla. 1st DCA 1991).
8. In *State v. Knight*, 622 So.2d 188 (Fla. 1st DCA 1993) the court reversed a C-4 dismissal of a vehicular homicide where the facts showed that the defendant was driving through a residential area at a speed greater than that permitted on an interstate highway and at nearly twice the posted speed limit, without a license and in a car that was in poor condition.
9. Fact sufficient to sustain conviction where the defendant was driving in the rain on a hilly, two-lane road at an excessive speed, attempted to pass another vehicle in a no-passing zone. *Berning v. State*, 639 So.2d 151 (Fla. 5th DCA 1994).
10. Defendant doing 70 mph in a 30 mph zone in a curving section of the road; continuous double yellow lines; defendant was passing a car, hit the median, went across the road killing the passenger. Sufficient to sustain a V-H conviction. *Martinez v. State*, 22 FLW D305 (Fla. 3rd DCA, Jan. 29, 1997).

#### F. Cases Reversing Conviction

1. The testimony was in dispute as to the defendant's driving prior to entering the curve. His speed was estimated at 45 m.p.h.. There was no testimony that this speed was excessive or dangerous for the curve. The defendant went off the right side of the road and came back over to hit the victim, who had a 0.19 BAC. *W.E.B. v. State*, 553 So.2d 323 (Fla. 1st DCA 1989).
2. The First District reversed a conviction without relating any facts but observing the driving was not nearly as egregious as the drivers' actions in *Byrd* and *Hamilton*, supra. *Ealy v. State*, 616 So.2d 531 (Fla. 1st DCA 1993).
3. Conviction reversed where simple inattentiveness proved. *State v. Esposito*, 642 So.2d 25 (Fla. 4th DCA 1994).

4. No wanton disregard for others found where speed at 50-55 in posted 35, defendant had control of vehicle, and traffic light. Miller v. State, 636 So.2d 144 (Fla. 1st DCA 1994).
5. The defendant drove after being injected with demerol and phenergan. She was not told what was in the injection. She was involved in an accident which resulted in a death. She was charged with manslaughter, DUI-M, and V-H. She was acquitted of manslaughter but convicted of V-H and DUI-M. The court granted a motion for directed judgment of acquittal that he had reserved ruling on mid-trial. The state appealed. The court affirmed as to the V-H but reversed as to the DUI-M. The trial court must now rule on the motion for new trial on the DUI-M. State v. May, 670 So.2d 1002 (Fla. 2d DCA 1996).

**G. Vehicular Homicide Enhanced by Willful Leaving the Scene**

1. Vehicular homicide is a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. s. 782.071(1). The commission of a vehicular homicide and the willful failure to stop or comply with the requirements of s. 316.027(1) is a felony of the second degree. s. 782.071(2). The willful leaving of the scene is an element and must be alleged in the information and proven at trial. Sullivan v. State, 562 So.2d 813 (Fla. 1st DCA 1990) (error to sentence the defendant to a second degree felony under s. 782.072(2) where he was convicted of vehicular homicide as a lesser offense of manslaughter and of leaving the scene of the accident in separate counts). See also Wright v. State, 592 So.2d 1123 (Fla. 3d DCA), quashed on other grounds 600 So.2d 547 (Fla. 1992).