Azor J. EVERTON, Jr., et al., Petitioners,

v.

Marion WILLARD, et al., Respondents.

No. 63440.

Supreme Court of Florida.

April 4, 1985.

Rehearing Denied May 22, 1985.

Rick A. Mattson of Mattson, McGrady and Todd, St. Petersburg, for Everton.

Daniel C. Kasaris of Yanchuck, Thompson, Young and Berman, St. Petersburg, for Trinko.

Mark E. Hungate, James B. Thompson and Chris W. Altenbernd of Fowler, White, Gillen, Boggs, Villareal and Banker, Tampa, for respondents.

Paul A. Rowell, Gen. Counsel, and Michael J. Alderman, Asst. Gen. Counsel, Tallahassee, amicus curiae for State of Florida Dept. of Highway Safety and Motor Vehicles.

OVERTON, Justice.

This cause is before us on petition to review a decision of the Second District Court of Appeal reported as Everton v. Willard, 426 So. 2d 996 (Fla. 2d DCA 1983). The issue concerns a law enforcement officer's discretionary police power authority to make or not make an arrest and whether a decision not to take an individual into custody constitutes a basic judgmental or decision-making function that is immune from tort liability. The district court in the instant case held that an officer's decision under this discretionary authority is covered by basic governmental sovereign immunity that precludes liability for such a decision. We find direct conflict with the decision of the Fifth District Court of Appeal in Huhn v. Dixie Insurance Co., 453 So. 2d 70 (Fla. 5th DCA 1984). We have jurisdiction, article V, section 3(b)(3), Florida Constitution, and we approve the decision of the Second District Court of Appeal in the instant case, disapprove the decision in Huhn, and hold that the decision of whether to enforce the law by making an arrest is a basic judgmental or discretionary governmental function that is immune from suit, regardless of whether the decision is made by the officer on the street, by his sergeant, lieutenant or captain, or by the sheriff or chief of police.

The tragic circumstances of this case are as follows. A Pinellas County sheriff's deputy stopped the respondent, Willard, for a traffic violation. The deputy recognized, from his own observations and Willard's admission, that Willard had been drinking to some extent. The deputy did not, however, charge Willard with an intoxicated-driving offense. Rather, he issued Willard a traffic citation for making an improper U-turn and permitted him to drive on. Approximately fifteen minutes later, Willard was involved in a collision in which one person was killed and another was severely injured. The petitioners are the surviving crash victim and the father of the person killed. They filed suit against Willard, as well as the sheriff's deputy, the Pinellas County Sheriff's Department, and Pinellas County. The complaint alleged that the sheriff's deputy had negligently violated a duty to the petitioners by allowing Willard to drive subsequent to issuing him the traffic citation and that the violation of this duty resulted in the accident that caused petitioners' injuries.

The trial court dismissed the complaint for failure to state a cause of action against the deputy, the sheriff's office, and Pinellas County. In so doing, the court held that a law enforcement officer must have the discretion to enforce the law without being subject to tort liability for injuries to innocent third parties.

In affirming, the district court determined that the deputy's decision not to arrest Willard prior to the accident was operational in nature under the test of Commercial Carrier Corp. v. Indian River County, 371 So. 2d 1010 (Fla. 1979), for which liability ordinarily would attach, but found that "merely because an activity is 'operational,' it should not necessarily be removed from the 'category of governmental activity which involves broad policy or planning decisions.'" 426 So. 2d at 1001 (quoting Commercial Carrier, 371 So.2d at 1022). The court concluded that the proper planning and implementation of a viable system of law enforcement for any governmental unit must necessarily include the discretion of the officer on the scene to arrest or not arrest as his judgment at the time dictates. When that discretion is exercised, neither the officer nor the employing governmental entity should be held liable in tort for the consequences of the exercise of that discretion. Id. at 1003-04.

In direct conflict with this holding is the Huhn decision of the Fifth District Court of Appeal, in which the court determined that a city could be held liable in tort for a police officer's failure to arrest and detain an intoxicated driver when that driver subsequently injures a third party. The Huhn court held that the arrest decision did not involve the exercise of a discretionary governmental function that is immune from tort liability and found the officer and the governmental entity that employed him liable for this conduct.

Our decision in Trianon Park Condominium Association v. City of Hialeah, 468 So. 2d 912 (Fla. 1985), which explained that governmental entities are immune when making the basic decision of how to enforce the laws, controls the resolution of this cause. In Trianon we stated: How a governmental entity, through its officials and employees, exercises its discretionary power to enforce compliance with the laws duly enacted by a governmental body is a matter of governance, for which there never has been a common law duty of care. This discretionary power to enforce compliance with the law, as well as the authority to protect the public safety, is most notably reflected in the discretionary power given to judges, prosecutors, arresting officers, and other law enforcement officials. Id., at 919.

It is important to recognize that, although the factual situations in this and the Huhn case concern the failure to arrest intoxicated drivers, the basic principle involved concerns the liability of all governmental bodies and their taxpayers for the negligent failure of their law enforcement officers to protect their citizens from every type of criminal offense. There has never been a common law duty of care owed to an individual with respect to the discretionary judgmental power granted a police officer to make an arrest and to enforce the law. This discretionary power is considered basic to the police power function of governmental entities and is recognized as critical to a law enforcement officer's ability to carry out his duties. See ABA Standards for Criminal Justice, Standard 1-4.1 (2d ed. 1980); President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 103-06 (1967). We recognize that, if a special relationship exists between an individual and a governmental entity, there could be a duty of care owed to the individual. This relationship is illustrated by the situation in which the police accept the responsibility to protect a particular person who has assisted them in the arrest or prosecution of criminal defendants and the individual is in danger due to that assistance. In such a case, a special duty to use reasonable care in the protection of the individual may arise. See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

A law enforcement officer's duty to protect the citizens is a general duty owed to the public as a whole. The victim of a criminal offense, which might have been prevented through reasonable law enforcement action, does not establish a common law duty of care to the individual citizen and resulting tort liability, absent a special duty to the victim. This majority view was expressed by the United States Supreme Court in its early decision in South v. Maryland, 59 U.S. (18 How.) 396, 15 L. Ed. 433 (1855). A substantial majority of the jurisdictions in this country that have addressed this issue follow this view. See, e.g., Commercial

Carrier; Trautman v. City of Stamford, 32 Conn. Supp. 258, 350 A.2d 782 (1975); Crouch v. Hall, 406 N.E.2d 303 (Ind. App. 1980); Commercial Union Insurance Co. v. City of Wichita, 217 Kan. 44, 536 P.2d 54 (1975); Zavala v. Zinser, 123 Mich. App. 352, 333 N.W.2d 278 (1983); Cairl v. State, 323 N.W.2d 20 (Minn. 1982); Maynard v. City of Madison, 101 Wis.2d 273, 304 N.W.2d 163 (1981). We recognize that two jurisdictions have expressed a contrary view. See Ryan v. State, 134 Ariz. 308, 656 P.2d 597 (1982); Irwin v. Town of Ware, 392 Mass. 745, 467 N.E.2d 1292 (1984). In our opinion, there is no distinction between the immunity afforded the police officer in making a determination of whether to arrest an individual for an offense and the discretionary decision of the prosecutor of whether to prosecute an individual or the judge's decision of whether to release an individual on bail or to place him on probation. All of these decisions are basic discretionary, judgmental decisions that are inherent in enforcing the laws of the state. They are clearly not ministerial acts as contemplated by the Huhn decision or the dissents.

Our decision in this case is consistent with our holding in Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), in which we held that a governmental entity could not be held liable for damage caused during a riot, regardless of the fact that the city had removed police officers dispatched to guard against the damage. In that case we stated that the determination of strategy and tactics for the deployment of police powers was inherent in the right to exercise those powers. Id. at 134. We concluded by noting that "sovereign authorities ought to be left free to exercise their discretion and choose the tactics deemed appropriate without worry over possible allegations of negligence." Id. We reaffirmed that principle in our decision in Commercial Carrier. 371 So. 2d at 1019-20.

We note as we did in Trianon that this is a narrow issue relating to the discretionary judgmental decision of making an arrest under the police power of a governmental entity. It does not have the broad ramifications attributed to it by the dissents, nor does it recede from Commercial Carrier.

In conclusion, if a governmental entity is going to be held liable for the negligent discretionary, judgmental decisions made by its police officers in enforcing the law, this means of accountability by tort liability should be imposed by the elected representatives in the legislative branch who may create this new duty of care and place this fiscal responsibility on the governmental entity and its taxpayers, rather than having the judiciary establish this new duty by judicial fiat.

Accordingly, we approve the decision of the Second District Court of Appeal in the instant case and disapprove the Fifth District Court of Appeal decision in Huhn.

It is so ordered.

BOYD, C.J., and ALDERMAN and McDONALD, JJ., concur.

EHRLICH, J., dissents with an opinion.

SHAW, J., dissents with an opinion.

EHRLICH, Justice, dissenting.

I cannot agree that a police officer who, after stopping a dangerous driver and having "reason to believe that [the] person's ability to operate a motor vehicle is impaired by alcohol," releases the driver to continue an on-going violation of the law and so to massacre and mutilate innocent citizens of the state has performed the sort of policy-making function this Court immunized from tort liability in Commercial Carrier. This case does not merely deal with that indeed "discretionary exercise of police power authority" involved when a police officer decides whether or not to stop one particular motorist among the myriad drivers and in the face of developing situations. That is, in fact, an allocation-of-resources strategy decision similar to that

discussed in Wong v. City of Miami, 237 So. 2d 132 (Fla. 1970), cited with approval in Commercial Carrier. It cannot be fairly argued that the police officer who returned Marion Willard to the driver's seat of that vehicle was making a strategic decision about the deployment of law enforcement resources. That decision was made when he stopped Willard and discovered his inebriation.

The majority misperceives the issue in this case by saying that it "concerns a law enforcement officer's discretionary police power authority to make or not make an arrest and whether a decision not to take an individual into custody constitutes a basic judgmental or decision-making function that is immune from tort liability." Willard was intoxicated, according to the allegations of the amended complaint. To arrest or not to arrest was not the decision facing the police officer. The legislature has long ago determined that an intoxicated driver is a menace to the safety of others and must be removed from the road. That policy decision has resulted in the enactment of legislation designed to achieve that end. How that policy decision is carried out is a ministerial act of the police officer. Arrest is one alternative. Another alternative is provided in section 396.072 which provides that intoxicated persons shall be taken into protective custody. A further alternative is section 856.011 which provides yet another means for getting a drunk off the highway. Letting the drunk stay on the road is not an alternative, and permitting him to continue driving violates the letter and the spirit of the statutes.

Yet the majority says that this is permissible and the governmental entity is immune from suit. However, if a private person violates a statute and such violation is the proximate cause of injury and damage to another, he is liable in damages for his tort. Section 768.28 says that if a private person be liable to the injured party in accordance with the general laws of the state, then the governmental entity is liable. It appears to me to be self evident that when the police officer failed to follow one of the statutory alternatives to keep the intoxicated driver from operating an automobile, and injury to another was proximately caused thereby, that the legislature fully intended to make the governmental entity liable for any acts of negligence committed by the police officer.

The tragic results of the officer's breach of duty were not merely foreseeable, they were highly predictable. It would be sheer sophistry to argue that the victims were not in the class the statute was designed to protect or that the harm was not precisely that which the statute was intended to prevent. The police officer was without the governmental authority to abet the violation of the law and to thus set into motion the events leading to this senseless tragedy.

I would embrace Judge Orfinger's thorough, compelling and just analysis in Huhn v. Dixie International Insurance Co., 453 So. 2d 70 (Fla. 5th DCA 1984), as the proper standard for measuring the scope of sovereign immunity. There are no viable grounds for immunity here.

I would disapprove the decision of the district court.

SHAW, Justice, dissenting.

The series of decisions issued today reflects the near total nullification of the legislative waiver of sovereign immunity. After today a plaintiff suing a government tortfeasor will have to overcome a formidable series of hurdles which effectively restore full sovereign immunity to the state and its political subdivisions. First, there is the four-part Evangelical Brethren test which is ambiguous enough to produce whatever answer is desired. If the wrong answer is produced, i.e., that the government is not immune, then the plaintiff must pass the discretionary action test of Commercial Carrier which has been so broadly interpreted as to include a dogcatcher knowingly releasing a vicious pit bulldog on the public as a discretionary activity. In the extremely unlikely event the plaintiff's action survives these tests, the government by virtue of today's opinions is in a position to administer the coup de grace: there is no liability

where the injurious action is performed under the police powers of the state. If that is not enough, the plaintiff will also discover that governmental functions are also immune, as are all functions not performed by private persons.

The well-pleaded allegations establish that Deputy Parker detained an intoxicated Willard, observed that he staggered, smelled of alcohol, and admitted drinking, discouraged a friend's offer to drive Willard home, and then released Willard to drive away in an intoxicated state. Deputy Parker admitted to the investigating officer at the homicide scene that he knew Willard was intoxicated when he released him. On these facts, the removal of a known intoxicated driver from the road is a ministerial duty, not a discretionary planning-level judgment, and immunity should not bar the action. I would disapprove the decision of the district court.