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Court of Appeals
Division III
State of Washington
6/15/2018 8:00 AM

NO. 35481-4

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

MICHAEL ADRIAN HARNESS,

Defendant/Appellant.

REPLY BRIEF

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ARGUMENT

The State, in its brief, relies upon *State v. Flake*, 76 Wn. App. 174, 883 P. 2d 341 (1994).

The *Flake* case involved the same offenses as in Mr. Harness's case. Nevertheless, Mr. Harness contends that Flake was erroneously decided and that the "same criminal conduct" analysis has been clarified since its publication.

The critical language of *Flake* is at 180-81:

...Flake objectively intended to avoid responsibility for the collision by leaving the scene. That intention has no relation to the crime of vehicular assault or any criminal purpose that might be ascribed to it. In addition, Flake's commission of the hit and run did not further the vehicular assault because the assault was already completed when Flake fled the scene. ... Flake violated RCW46.52.020 *after* the vehicular assault occurred, not simultaneously with it, and thus, the two crimes occurred at different times.

Mr. Harness's argument is counter to the argument in *Flake*. The Court, in *Flake*, looked at whether or not the hit and run furthered the vehicular assault. Mr. Harness contends that it is the vehicular assault which furthers the hit and run.

There can be no dispute that the victim as to each offense is the same.

In order for the offense of hit and run to become a chargeable offense it is necessary for a vehicular assault to have occurred. Here, a few minutes between offenses is sufficiently close to satisfy the time prong of the "same criminal conduct" analysis.

Flake's requirement that it be simultaneous is no longer valid. *See: State v. Porter*, 133 Wn. 2d 177, 182-83, 942 P. 2d 974 (1997).

Finally, Mr. Harness recognizes that the doctrine of *stare decisis* comes into play.

Stare decisis is a doctrine developed by courts to accomplish the requisite element of stability in court-made law, but is not an absolute impediment to change. Without the stabilizing effect of this doctrine, law could become subject to incautious action or the whims of current holders of judicial office. But we also recognize that stability should not be confused with perpetuity. If the law is to have a current relevance, courts must have and exert the capacity to change the rule of law when reason so requires. The true doctrine of stare decisis is compatible with this function of the courts. The doctrine requires a clear showing that an established rule is incorrect and harmful before it is abandoned.

In Re Stranger Creek, 77 Wn. 2d 646, 653, 466 P. 2d 508 (1970).

Mr. Harness also asserts that the *Flake* decision is harmful because it detracts from the recognized standards pertaining to a “same criminal conduct” analysis.

The fact that *Flake* is a Division I case does not detract from Division III’s ability to rule differently.

...Two inconsistent opinions of the Court of Appeals may exist at the same time. See Mark DeForrest, *In the Groove or in a Rut? Resolving Conflicts Between the Divisions of the Washington State Court of Appeals at the Trial Court Level*, 48 **GONZ. L. REV.** 455 (2012/13). We have found no Court of Appeals opinion that actually states it is overruling an earlier Court of Appeals opinion. When one of our panels concludes that a previous Court of Appeals decision used a faulty legal analysis or has been undermined by some new development in the law, the opinion will usually state simply that the panel “disagrees with,” “departs from,” “declines to follow” the other opinion...

Grisby v. Herzog 190 Wn. App. 786, 809-10, 362 P. 3d 763 (2015)

Mr. Harness respectfully requests that the court decline to follow Division I's opinion in *Flake* and adopt his argument as the correct analysis of "same criminal conduct" for purposes of his current convictions.

Mr. Harness otherwise relies on the arguments contained in his original brief.

DATED this 15th day of June, 2018.

Respectfully submitted,

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NO. 35481-4-III
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,)
) YAKIMA COUNTY
Plaintiff,) NO. 15 1 01855 3
Respondent,)
)
v.) CERTIFICATE OF SERVICE
)
MICHAEL ADRIAN HARNESS,)
)
Defendant,)
Appellant.)
_____)

I certify under penalty of perjury under the laws of the State of Washington that on this 15th day of June, 2018, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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