

DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2009

ANTONIO ANTWAN SMITH,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

No. 4D08-1981

[August 5, 2009]

PER CURIAM.

Affirmed.

DAMOORGIAN and GERBER, JJ., concur.

GROSS, C.J., specially concurring.

Appellant was convicted of violating section 782.071(1)(b), Florida Statutes (2008), a vehicular homicide aggravated by leaving the scene of the accident, so that the crime was a first degree felony. This was a close case on the issue of appellant's recklessness, a necessary element of the crime. On that issue, we are bound by *McCreary v. State*, 371 So. 2d 1024 (Fla. 1979), a case involving slightly less egregious facts than those in this case. I also note that appellant might well have been charged under section 316.027(1)(b), Florida Statutes (2008), also a first degree felony, which does not require proof of recklessness.

* * *

Appeal from the Circuit Court for the Nineteenth Judicial Circuit, St. Lucie County; Larry Schack, Judge; L.T. Case No. 562006CF1725A.

Carey Haughwout, Public Defender, and Ellen Griffin, Assistant Public Defender, West Palm Beach, for appellant.

Bill McCollum, Attorney General, Tallahassee, and Heidi L. Bettendorf, Assistant Attorney General, West Palm Beach, for appellee.

Not final until disposition of timely filed motion for rehearing.