NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

JOSEPH McBRIDE, Appellant, v. STATE OF FLORIDA, Appellee.	)	Case No. 2D99-2629

Opinion filed October 10, 2001.

Appeal from the Circuit Court for Hillsborough County, J. Rogers Padgett, Judge.

James Marion Moorman, Public Defender, Bartow, and Joseph N. D'Achille, Jr., Assistant Public Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General, Tallahassee, and Susan D. Dunlevy, Assistant Attorney General, Tampa, for Appellee.

DAVIS, Judge.

This case is before us on remand from the Florida Supreme Court. Joseph McBride challenges his conviction for DUI manslaughter that arose out of an incident in which he drove his car into oncoming traffic and hit the victim's car head on.

McBride originally argued before this court that the trial court improperly instructed the jury on the statutory presumptions of impairment and erred in excluding evidence of the victim's impairment. We affirmed McBride's conviction, see McBride v. State, 744 So. 2d 698 (Fla. 2d DCA 2000), based on our holding in State v. Townsend, 746 So. 2d 495 (Fla. 2d DCA 1999), that the State is entitled to the legislatively created presumptions of impairment once the predicate established in Robertson v. State, 604 So. 2d 783 (Fla. 1992), is laid. However, the supreme court has overturned in part this court's decision in Townsend, see Townsend v. State, 774 So. 2d 693, 693 (Fla. 2000), and quashed our holding in the instant case, "only to the extent it is inconsistent with . . . Townsend."

Although pursuant to Townsend, 774 So. 2d 693, it was clear error for the trial court to instruct the jury on the statutory presumptions of impairment, we conclude that the error was harmless and affirm McBride's conviction.

Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." State v. DiGuillo, 491 So. 2d 1129, 1135 (Fla. 1986). Here, the State charged McBride with DUI manslaughter, in violation of section 316.193(3), Florida Statutes (1997), alleging that he

> did drive or was in actual physical control of a vehicle while under the influence of alcoholic beverages . . . to the extent that his normal faculties were impaired or while having a blood-alcohol level of 0.08 or more grams of alcohol per 100 milliliters of blood . . . and did operate said vehicle and did by reason of such operation cause the death of a human being.

At trial, the State presented evidence that McBride drove at approximately seventy miles an hour, swerved in and out of lanes, nearly rear-ended a minivan, just missed hitting a bicyclist, hit a bridge's metal grating, and swerved into oncoming traffic, where he hit the victim's car head on. Additionally, the State presented testimony that, while still at the scene of the accident, McBride's breath smelled of alcohol, and McBride told police he had been drinking all day.

Furthermore, the State properly laid the Robertson predicate. So, although the State was not entitled to jury instructions that included the statutory presumptions of impairment, the State was entitled to the admission of the results of McBride's blood-alcohol tests, which showed he had a blood-alcohol level of .306, well over the limit specified in the charging document. See § 316.1934(2)(C), Fla. Stat. (1997); Tyner v. State, 26 Fla. L. Weekly D2203 (Fla. 2d DCA Sept. 12, 2001). Additionally, the medical examiner's chief toxicologist testified as to the effects such a level could have on a person.

Due to the overwhelming evidence presented by the State, we conclude that the error of instructing the jury on the statutory presumptions was harmless. Accordingly, we affirm McBride's conviction.

Affirmed.

CASANUEVA, A.C.J., and CAMPBELL, MONTEREY, Associate (Senior) Judge, Concur.