1977

State of Utah v. Johnnie Owen Wade : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT

STATE OF UTAH

STATE OF UTAH,

Plaintiff-Respondent,

-vs-

JOHNNIE OWEN WADE,

Defendant-Appellant.

BRIEF OF

APPEAL FROM THE
COURT, IN AND FOR
UTAH, THE HONORABLE
JUDGE, PRE

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IN THE SUPREME COURT

OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-vs-	:	No. 14840
JOHNNIE OWEN WADE,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

STATEMENT OF NATURE OF THE CASE

Appellant was charged in a criminal proceeding by the State of Utah, with three counts of automobile homicide in violation of Utah Code Annotated, §76-5-207 (Supp. 1977).

DISPOSITION IN THE LOWER COURT

On September 27, 1976, appellant was found guilty of automobile homicide, as charged in the information, by Judge Allen B. Sorensen, sitting without a jury, in the Fourth Judicial District Court, in an for Utah County, State of Utah, and was sentenced to an indeterminate term of 0 to 5 years in the Utah State Prison.

RELIEF SOUGHT ON APPEAL

Respondent seeks an affirmance of the judgment of the court below.

STATEMENT OF FACTS

Late in the evening of May 10, 1976, a pick-up truck and a small, foreign car crashed head-on along a stret of Highway 91, approximately two miles west of Goshen, Utah. Killed in the crash were Mrs. Thomas (Debra) Cox and her tw small children, Melinda and Jeremy. Injured were Thomas Co and appellant, who was subsequently charged with automobile homicide.

At trial, waitress Myrna Butler, an employee of Walt's Cafe in Santaquin, Utah, testified that she served three pitchers of beer and no food to two men whom she identi fied as appellant and his companion, Leo Craig Finster, on the night of May 10, 1976. (T.17) Appellant arrived at the cafe at approximately 7:30 p.m. and left about 10:30 with Leo Finster. (T.18) Ms. Butler testified that as the two left, one man commented to the other, "Well, you will have to drive." (T.18)

Leo Finster testified that he and appellant talked and drank beer at Walt's Cafe on the evening of May 10 til nearly eleven o'clock. (T.23) As the two left, Finster testified that appellant asked him if he wanted to drive. Finster said he did and drove appellant's truck to the home o appellant's girlfriend. (T.24) As appellant returned from th house to the truck, he told Finster he (the appellant) was going to drive, that he would show Finster how to drive. (

With appellant driving, the two men headed west out of Santaquin on the two-lane State Highway 91. According to Finster, they crossed a set of railroad tracks and appellant began going around a curve when Finster saw a set of headlights coming toward them which appeared to be crossing into their lane. (T. 27 -34) Then the two vehicles crashed. (T.27) Finster also testified that he told passerby Mike Okelberry that he was not driving. (T.13) Shorty after the accident, Leo Finster consented to a blood alcohol test, which determined that the percent of alcohol in his blood was 0.08% (State's Exhibit #6).

The third state's witness was Thomas Cox, the driver of the vehicle in which the fatalities occurred. Mr. Cox testified that on May 10, 1976, he had completed his workday for the Kennecott Copper Corporation at the Burgon Mine at 10:40 p.m., and that his wife had picked him up. (T.35-36) At approximately 11:00 o'clock he, his wife, and their two young children were travelling east on State Highway 91 toward their home in Payson, Utah. (T.37) Mr. Cox was driving his 1974 Honda at approximately 55 mph. (T.36-37) He testified he crossed one set of railroad tracks without any difficulty and then noticed an oncoming set of lights that appeared to be moving toward him in the eastbound lane. (T.39) Cox testified that the headlights seemed on the north shoulder of the road, with the oncoming vehicle kicking up dust. (T.39) Cox looked

toward his wife, exclaimed, "Now what do I do"? and swerved his car to the left. (T.40-41) Mr. Cox concluded his testimony by stating he swerved to the left, into the westbound lane, because he believed staying where he was or moving to the right would have surely resulted in a head-on crash, whereas if the driver of the oncoming car maintained his position in the eastbound lane, a collision would be avoided. (T.41) (Steven Hancock, Director of the Payson Hospital Blood Bank, testified that after Thomas Cox signed the consent form (at 12:06 a.m.), he withdrew blood from Mr. Cox for a blood alcohol analysis (T.68), the results of which were entered into evidence as State's Exhibit #7 and which state that Cox's blood contained 0.00% alcohol.)

The state then called Dr. J. Robert Hogan, a physician who testified that Debra, Melinda and Jeremy Cox all received fatal facial and head injuries in the accident, and that all were dead on arrival at Payson Hospital.

Utah Highway Patrol Trooper David Nusink testified that at approximately 1:15 a.m., May 11, 1976, he arrested appellant at Payson Hospital for automobile homicide. (T.57) He read appellant his rights, and appellant said he wanted to make one statement, whereupon he asked if anyone was killed. Officer Nusink responded that three persons had died in the

accident. (T.58) He testified that appellant then stated that he had not been driving the vehicle. (T.58) The officer then reported that he asked appellant if he would submit to a blood alcohol test; he testified that appellant said he would allow the test. (T.59) A registered nurse at Payson General Hospital, Jewel Roberts, testified that at 1:20 a.m., May 11, she withdrew the blood for that test; entered into evidence as State's Exhibit #5 were the test results, which state that appellant's alcohol level in his blood was 0.12%. (T.64)

Dr. Albert Swenson, a biochemist, verified the blood alcohol results of the three men tested (T.72) and further testified that in his opinion, the level of alcohol in appellant's blood at the time of the accident would have been 0.15 - 0.16%. (T.76)

On direct examination, Michael Okelberry testified that he was travelling behind the Cox car on Route 91 when he saw headlights coming from the east. From a distance of approximately a half mile, he saw the headlights of the oncoming car and the taillights of the Cox car both go out near the railroad tracks. (T.85) He realized something was wrong, stopped at the scene, and rendered assistance. (T.85-90) Finally, he stated that Leo Finster told him that he was not driving the truck. (T.91)

Officer Gary Johnson of the Utah Highway Patrol was called to testify as an accident investigator. (T.96) He testified that the point of impact was 5'5" north of the center line in the westbound lane. (T.99)

Officer Nusink was recalled. He testified that he and Lt. Newell Knight of the Utah Highway Patrol went to the accident scene on May 13 and made numerous measurements of skid marks. (T.124) His findings were that 37 feet back from the point of impact, the westbound truck was completely in the eastbound lane. (T.124-125) The officer also testified concerning the written statement (State's Exhibit #22) that appellant had made in Nusink's presence. (T.110-111)

Officer Nusink reported that in response to his question, appellant stated that he had turned his steering wheel to the right in an attempt to avoid the collision; appellant then made this directional notation in his written statement. (T.111)

The defense offered the testimony of David H. Lord, an accident reconstructionist, who stated his opinion that the two vehicles might not have been in the attitudes prior to impact as described by Officer Johnson, offering instead an alternate theory. (T.142-153)

ARGUMENT

POINT I

THE EVIDENCE AT TRIAL WAS SUFFICIENT TO PROVE APPELLANT GUILTY OF AUTOMOBILE HOMICIDE.

The fundamental rule governing an appeal on a claim of insufficient evidence was restated recently by this court in State v. Wilson, 565 P.2d 66,68 (Utah 1977):

> "The judging of the credibility of the witnesses and the weight of the evidence is exclusively the prerogative of the jury. Consequently, we are obliged to assume that the jury believed those aspects of the evidence, and drew those inferences that reasonably could be drawn therefrom, in the light favorable to the verdict. In order for the defendant to successfully challenge and overturn a verdict on the ground of insufficiency of the evidence, it must appear that upon so viewing the evidence, reasonable minds must necessarily entertain a reasonable doubt that the defendant committed the crime."

In the instant case the judge was sitting as the trier of fact, appellant having waived a jury trial. (T.3) Under the Wilson rule, the evidence is sufficient to uphold the judgement of the court below.

Judge Sorensen made these findings at the close of trial:

1. That appellant was driving a public vehicle on a public highway under the influence of intoxicating liquor;

2. That appellant was negligent in that he was on the wrong side of the road;

3. That appellant's negligence was a cause of the death of each of the persons contained in each of the counts; and

4. That although appellant was not criminally negligent under the statute, he was guilty of the crime charged. (T.172) Utah Code Annotated §76-5-207 (Supp. 1977), provides that an actor who is under the influence of an intoxicating liquor, to a degree which renders him incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner is guilty of automobile homicide.

Evidence in the record supports the trial court's findings that each element of the crime was present. It is undisputed that at the time of the blood alcohol tests, defense witness Finster had 0.08% alcohol in his blood, which under Utah Code Annotated §41-6-44(3) (Supp. 1977), gives rise to the presumption that Finster was under the influence of alcohol. It is further undisputed that appellant's alcohol level at the time of his test was 0.12%, which under Utah Code Annotated §41-6-44.2 (Supp. 1977), made it unlawful for him to have been driving. It is also undisputed that the driver of the second car, Thomas Cox, had 0.00% alcohol in his blood. Therefore, in light of the two versions of events precipitating the accident, it was within the discretion of the trier of fact to believe the Cox version, the testimony of a man who was completely sober as he drove along a straight stretch of road, as opposed to a passenger in another vehicle, under the influence of alcohol, riding in the truck of appellant, who himself was so intoxicated as he came around a turn in the road that he was

unlawfully behind the steering wheel. The credibility of the Cox version is supported by physical evidence in the finding of Officer Johnson that 37 feet back from the point of impact the pickup truck was entirely in the wrong lane. (T.99)

Consequently, the findings of the trial court, being both reasonable and in accord with sufficient, competent evidence, should be undisturbed by this court.

POINT II

CRIMINAL NEGLIGENCE IS NOT AN ELEMENT OF THE CRIME OF AUTOMOBILE HOMICIDE.

Appellant urges that this Court reconsider and overrule its position in State v. Durrant, 561 P.2d 1061 (Utah 1977) and State v. Anderson, 561 P.2d 1056 (Utah 1977), wherein this Court specifically held that:

> "Simple negligence in the driving of a motor vehicle which causes the death of another person is all that is required when the driver is so under the influence of liquor as to be unable to drive his car in a reasonably safe and prudent manner."

(Anderson at p. 1063). To the contrary, respondent maintains that in those cases this Court properly and reasonably concluded that automobile homicide is unique among the various kinds of criminal homicide as simple negligence is the standard against which the behavior is to be gauged. Consequently, respondent asks that this Court affirm the judgment of the court below.

The Utah rule has always been that automobile homicide is an offense requiring simple negligence when the driver is under the influence of alcohol and causes the death

of another. In State v. Johnson, 12 Utah 2d 220, 364 P.2d 1[illegible] (1961), reaffirmed in State v. Risk, 520 P.2d 215 (Utah 197[illegible] this Court had occasion to construe the old automobile homicide statue, Utah Code Annotated §76-30-7.4 (1953), as amended, which provided that the culpable behavior for one driving under the influence of alcohol or narcotics was driving "in a reckless negligent or careless manner..." Writing for the court, Justice Henriod found simple negligence to be the standard and the legislative intent, the Utah statute having been borrowed from Colorado, which required mere simple negligence. He continued:

> "It seems evident that our Legislature has concluded that the time has now come when we must recognize that any kind of vehicular negligence, mingled with gas and booze, produces a lethal mixture that, if it cause death, should penalize to a greater degree than before, the mobile, tipsy vehicle-operating brew-master, in order to bring to a screeching halt the mounting holocaust daily dedicated to traffic fatalities." (Id. at 1020).

The new statute, Utah Code Annotated §76-5-207[illegible] (Supp. 1977), provides:

> "Criminal homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor...to a degree which renders the actor incapable of safely driving a vehicle, causes the death of another by operating a motor vehicle in a negligent manner."

The clear intent of the statutory language is to enable juries to convict drunk drivers of automobile homicide upon a showing of simple negligence. Mr. Justice Henriod's observations were even more relevant in 1973 with the adoption of the new statute, as alcohol related highway fatalities continue to rise.

Respondent submits that if criminal negligence were the standard that §76-5-207 would, in fact, be surplusage as §76-5-206(1) provides that "criminal homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another." If indeed the Legislature intended only to make the alcohol related vehicular homicide a more severe offense, it could have added to §76-5-206(2) that negligent homicide is a felony of the third degree if the actor is a vehicle driver under the influence of alcohol.

Furthermore, whenever possible or reasonable, statutes are construed to be meaningful in themselves, neither repetitious of nor disharmonious with other statutes. Given the limitations of Utah Code Annotated §76-5-201(1) (Supp. 1977), it is certainly reasonable to view the automobile homicide statute as an outgrowth of the recklessness provision, rather than the criminal negligence element; for reckless driving is a lesser included offense of driving under the influence. A drunk driver under 41-6-44.2 is per se a reckless driver. Consequently, if

convicted under §76-5-207, a driver has acted recklessly in that he drove while intoxicated and he has acted negligently by performing the behavior which caused the fatality, i.e., veering across the center line. Given these considerations, it was reasonable and proper that the court in Durrant (supra) and Anderson (supra) determined that simple negligence was the appropriate, legislatively-intended standard.

CONCLUSION

Because the evidence was sufficient to sustain the judgment and simple negligence is the appropriate standard of culpability in automobile homicide cases, respondent urges this court to affirm the judgment of the trial court.

Respectfully submitted,

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