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

Utah Supreme Court

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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 APPELLANT

Appeal from the Fourth Judicial District in and
for Utah County, State of Utah, the Honorable Allan B.
Sorenson, Presiding.

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vs. : No. 14840
JOHNNIE OWEN WADE, :
Defendant-Appellant. :

STATEMENT OF NATURE OF THE CASE

Johnnie Owen Wade was charged in a criminal proceeding by the State of Utah, of the offense of 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, Johnnie Owen Wade was found guilty of automobile homicide as charged in the information by the Judge, Allen B. Sorenson, sitting without a jury, in the Fourth Judicial District Court, in and 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

Appellant seeks an Order of their Court reversing the finding of guilty as entered by the Trial Court, and the entry of an order dismissing any action against the Defendant, or, in the alternative, a ruling remanding the case for a new trial.

STATEMENT OF FACTS

This case involves the deaths of three individuals in an automobile accident which occurred on May 10, 1976, in Utah County, State of Utah. The Defendant, Johnnie Owen Wade, was charged with automobile homicide in connection with this accident.

At trial, the first witness was Myrna Butler, an employee of a cafe in Santaquin, Utah. (T.14). She testified that at about 7:30 until about 10:30, on May 10, 1976, she observed the Defendant and Leo Craig Fenster at the cafe and observed both of them drinking beer. (T.16).

The second witness was Leo Fenster, who was present with the Defendant in the Defendant's pick-up truck at the time of the collision. (T.21). He stated that when he and the Defendant left the cafe in Santaquin, he was driving the vehicle. (T.22)

After stopping at the Defendant's girl friend's house in Santaquin, the Defendant drove the truck out of Santaquin, west on the two lane highway toward Goshen, Utah. (T.29). Mr. Fenster said that there was nothing unusual about the manner in which the Defendant was driving the truck that evening (T.32). He said the truck was traveling at a normal speed of about fifty to sixty miles an hour. (T.33). He recalled that the truck proceeded around a right-hand curve in the road without any problem. (T.34). He described his observations immediately prior to the head-on collision as follows:

"As we was coming around the turn, when I looked back I could see the headlights and they were starting to come across the railroad tracks, because they were moving, you know, coming across the tracks, and, anyway, it looked to me that the lights started to come over into our lane and, anyway, I just looked at John and I said "John, look out." I thought for a minute what was going on. You know, it went through my mind. And I turned and I looked at John. I said, "John, look out. We are going to hit." And then it seemed like we just crashed. Then I could see John. He had ahold of the steering wheel, you know, and it crashed and he went out. (T.34).

The third witness was Thomas Cox, of Payson, Utah, who was the driver of the 1974 Honda Civic automobile in which his wife and two children were riding. (T.36) He testified that he was going east down Highway 91 at about fifty-five miles per hour at about 11:00 p.m. on May 10, 1976. (T.39).

He stated that he observed headlights of another vehicle coming in the opposite direction which appeared to be in his lane of traffic. (T.39). He recalled dust coming up from the shoulder of the road next to the east bound lane of traffic. (T.40). He swerved to the left into the other lane of traffic because he believed that the other vehicle would continue straight ahead in his lane of traffic. (T.41).

The State called as a witness, T. Robert Hogan, a physician, who testified that Debra, Malinda, and Jeremy Cox were all killed as a result of the accident. (T.52).

The evidence indicated that the Defendant was given a blood test at 1:20 a.m. on May 11, 1976, at the Payson Hospital. (T.64.), and that as a result of chemical analysis the blood-alcohol was .12 grams of alcohol per hundred grams of blood. (T.73).

The next witness for the State was Michael Okelberry who was the driver of the vehicle which was behind the 1974 Honda prior to the collision. (T.83). He stated that from about one-half mile away he observed the taillights of the Co vehicle, and the headlights of the vehicle driven by the Defendant. (T.85). He said that at the same time both of the lights went out. (T.85). On cross-examination, he admitted that he never saw the headlights of the Defendants truck cross in front of the victims car and never saw any erratic movements of the headlights of the Defendant's vehicle. (T.95).

Gary N. Johnson, a trooper for the Utah Highway patrol, was called as an expert witness. (T.96). He testified that the point of impact occurred five feet into the westbound lane of traffic, the lane of traffic in which the Defendant was traveling and not in the lane in which the victim's vehicle was traveling. (T.99). The road was thirty-two feet wide at the point of impact. (T.101).

A written statement made by the Defendant, which substantially corroborated the testimony of Craig "Red" Fenster, the passenger in his vehicle, was introduced into evidence. The Defendant stated that he said "Red said, 'look out, there's a car' and 'I turned the wheel and there was an impact.'" T.110). Upon questioning, the Defendant said he turned the wheel to the right. (T.111).

Both the State and the Defense offered expert witnesses who testified extensively on the basis of the photographs taken of the vehicles and the skid marks at the scene. (T.106, T.143). Each of the experts reached different conclusions from the evidence as to the possible position of the truck, in relation to the Honda, prior to impact. (T.106, T.143).

I.

THE DEFENDANT'S CONVICTION SHOULD BE REVERSED
BECAUSE THE EVIDENCE PRESENTED BY THE STATE AT TRIAL WAS
NOT SUFFICIENT TO PROVE THE DEFENDANT GUILTY OF THE OFFENSE
OF AUTOMOBILE HOMICIDE.

The appellant's case was tried without a jury to the trial judge, the Honorable Allen Sorensen. The appellant made a motion to dismiss the case at the close of the State's evidence on the ground that the State had failed to prove a prima facie case of Automobile Homicide. (T. 140). This motion renewed at the close of the defendant's case. (T. 169).

In response to Appellant's motion, the Court expressly found that there had been no showing of any criminal negligence. (T. 169). When the case was submitted the Judge made the following ruling:

"THE COURT: Well, I find that the defendant was driving a motor vehicle on a public highway under the influence of liquor, intoxicating liquor, within the meaning of the statute and that he was negligent in that he was on the wrong side of the road and that that negligence was a cause of the death of each of the persons contained in each of the counts. I expressly do not find that he was criminally negligent within the meaning of the statute, and I therefore find him guilty." (T. 172).

The Appellant submits that the evidence does not support the finding of negligence on the part of the defendant. The evidence presented at trial indicates that the point of impact between the two vehicles occurred in the westbound lane of traffic, the lane in which the Appellant was operating his vehicle, and not in the victims' lane of traffic. (T. 99). The exhibits and photographs indicate that the victims' vehicle came to rest north of

the highway next to the westbound lane of traffic. The expert witness, David Lord, who testified on the part of the defendant, (T. 142 to 168), was of the opinion that damage to both vehicles as shown by the photographs did not indicate that the victims' vehicle, the Honda, made contact with the defendant's truck in the manner described by the driver of the Honda. (T. 153).

The fact that the defendant was in the proper lane of traffic was further corroborated by the testimony of Craig Finster. (T. 21). Mr. Finster, the passenger in the defendant's truck, observed the collision and was the only witness with a present recollection of the events following the accident. He stated that he observed the other vehicle cross a set of railroad tracks and start to come over into the westbound lane of traffic. (T. 34). Prior to the accident he did not notice any erratic movements of the truck, and noted nothing unusual concerning the defendant's driving pattern. (T. 33). The statement of the Appellant introduced into evidence is consistent with the account of the accident made by Mr. Finster. (T. 110).

The Appellant submits that the State did not meet the burden of proving the defendant guilty beyond a reasonable doubt in light of the above-described facts. Therefore, this Court after reviewing the record and evidence should set aside the judgment of conviction in this matter and

award the Appellant a new trial.

II.

BECAUSE THE TRIAL COURT EXPRESSLY RULED THAT THE APPELLANT WAS NOT CRIMINALLY NEGLIGENT, THE DEFENDANT CANNOT BE CONVICTED OF AUTOMOBILE HOMICIDE.

In State v. Durrant, 561 P.2d 1056 (Utah, 1977), the Court dealt with the conflict which exists between the language of the automobile homicide statute, Utah Code Annotated, 76-5-207 (Supp. 1977) and the provisions of the Utah Criminal Code which define the requisite elements of mental intent, Utah Code Annotated 76-2-101, 76-2-103, and 76-5-201.

Justice Ellett, writing the majority opinion, expressly found that the element of criminal negligence was present in that case, 561 P.2d at 1058, and held that the Court had correctly instructed the jury. The ruling of that case does not remove the necessity of a finding of criminal negligence in an automobile homicide case.

In Appellant's case, the trial judge expressly held that the defendant was not criminally negligent. (T. 169, T. 172). Therefore, the State did not prove each element of the case beyond a reasonable doubt and the defendant's conviction should be reversed.

III.

THIS COURT SHOULD OVERRULE STATE V. DURRANT AND STATE V. ANDERSON TO THE EXTENT THAT THESE DECISIONS HOLD THAT THE PROVISIONS OF THE UTAH CRIMINAL CODE ARE NOT APPLICABLE TO THE OFFENSE OF AUTOMOBILE HOMICIDE.

In State v. Anderson, 561 P.2d 1061 (Utah 1977), Justice Ellett described the scope of the ruling in the case of State v. Durrant as follows:

"The holding in the Durrant case was to the effect 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."

C. F. Maughn, Justice, dissenting at 561 P.2d 1058 and 561 P.2d 1063.

The Appellant submits that this decision violates Article V, Section I of the Utah State Constitution. That section prohibits this Court as a separate department of government from exercising a power properly belonging to the legislative department of the State government. State v. Johnson, 44 U. 18, 137 P. 632 (1913). As a result of the ruling set forth in Durrant and Anderson, this Court has effectively repealed several provisions of Utah Criminal Code, i.e., Sections 76-2-101, 76-2-103, and 76-5-201. The repeal of these sections of the law of the State is properly the province of the Legislature and

not the Supreme Court.

A clear conflict now exists in the Utah Criminal Code, Utah Code Annotated 76-1-101 et. seq., between the section which defines Criminal Homicide, Utah Code Annotated 76-5-201 (Supp. 1977) and the section defining Automobile Homicide 76-5-207 (Supp. 1977). A person can be convicted of Criminal Homicide by acting with simple negligence if he is under the influence of alcohol as defined by the statute and unlawfully causes the death of another.

The Appellant submits that this Court should reconsider the ruling announced in State v. Durrant and State v. Anderson and overrule those decisions by adopting the reasoning set forth in the dissent and holding that a person must be found to act with criminally negligent in order to be convicted of Automobile Homicide.

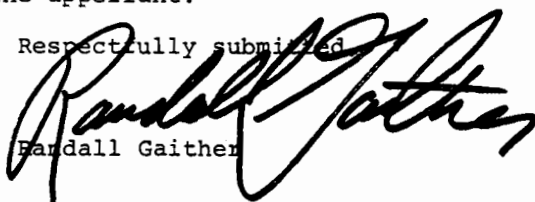
Durrant was a three to two decision with one member who is not presently with the Court. In Durrant, Justice Ellett, speaking of the decision in Gibb v. Dorius, 533 P.2d 299 (Utah 1975), stated:

"That case is of small value since it was decided by a divided court, three to two, and two of the three members who favored the decision are no longer with the Court." 561 P.2d at 1057.

The Appellant's conviction should be reversed because of the express finding entered in this case that there was no criminal negligence on the part of the defendant and the trial court directed to enter an order dismissing

any further action against the appellant.

Respectfully submitted,


Randall Gaither