

1980

## State of Utah v. Vincent L. Belgard : Supplemental Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	:	
	:	
Plaintiff-Respondent	:	
	:	
v.	:	
	:	
VINCENT L. BELGARD,	:	Case No. 15743
	:	
Defendant-Appellant	:	

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SUPPLEMENTAL BRIEF OF APPELLANT

An appeal from the conviction of Automobile Homicide in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge, presiding.

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Defendant-Appellant	:	

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SUPPLEMENTAL BRIEF OF APPELLANT

STATEMENT OF THE NATURE OF THE CASE

This is an appeal from a conviction of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) in the Third Judicial District Court in and for Salt Lake County, State of Utah, the Honorable Jay E. Banks, Judge presiding.

DISPOSITION IN THE LOWER COURT

The appellant, VINCENT L. BELGARD, was charged by Information with the offense of Automobile Homicide, a Third Degree Felony, in violation of Utah Code Ann. §76-5-207 (1953 as amended) (T.6, Vol. II). On November 17, 1977, the appellant was convicted by a jury of the offense charged in the Information. On March 17, 1978, the appellant was sentenced by the above entitled court, the Honorable Jay E. Banks, Judge presiding, to zero to five years at the Utah State Prison.

Appellant has previously filed a brief in this matter without reply from respondent and offers this Supplemental Brief on Appeal raising an additional and it is urged dispositive issue.

### RELIEF SOUGHT ON APPEAL

The appellant, VINCENT L. BELGARD, seeks reversal of the judgment of guilt entered against him and a remand of the instant case to the trial court for new trial.

### STATEMENT OF THE FACTS

Appellant submits the Statement of the Facts offered in the original Brief of Appellant submitted in the instant case.

### ARGUMENT

#### POINT IV

THE COURT BELOW ERRED BY INSTRUCTING THAT AN ELEMENT OF AUTOMOBILE HOMICIDE WAS NEGLIGENCE AND THE COURT PROPERLY SHOULD HAVE INSTRUCTED THE JURY THAT CRIMINAL NEGLIGENCE IS REQUIRED TO SUSTAIN A CHARGE OF AUTOMOBILE HOMICIDE.

Appellant was charged in one count of the Information with Automobile Homicide. Appellant contends that the court erroneously instructed the jury in the elements of automobile homicide because the court instructed the jury that simple negligence was all that the State needed to prove and appellant contends that criminal negligence is a necessary element of

any homicide offense in the State of Utah.

The recent decision of this Court in State of Utah v. Johnny M. Chavez, Utah \_\_\_\_ P.2d \_\_\_\_ (no. 16132 Filed 12-31-79) is dispositive of this issue and mandates reversal of appellant's conviction of Automobile Homicide and remand to the district court for new trial.

In Chavez this court reversed its previous rulings in State v. Durrant, Utah, 561 P.2d 1056 (1977), State v. Anderson, Utah, 561 P.2d 1061 (1977) and State v. Wade, Utah 472 P.2d 398 (1977) and held that an instruction in an Automobile Homicide prosecution which defined "negligence" in simple negligence terms was error mandating reversal and new trial.

In the case at bar the trial Court in Instruction No. 25 (R.72) defined automobile homicide as defined in Utah Code Ann. §76-5-207 (1953 as amended) and said that it was sufficient if a person caused the death of another by operating a vehicle in a negligent manner. The Court in Instruction No. 26 (R.73) also used in paragraph 3 the term simple negligence as the element. Negligence was defined by the Court in

Instruction No. 21 (R. 68).<sup>1</sup> Appellant excepted to the giving of those instructions on the basis that criminal negligence was necessary. Appellant offered instructions which defined automobile homicide and required criminal negligence and set out the elements of automobile homicide, one of those elements being criminal negligence rather than simple negligence. Appellant's proposed Instruction No. 7 (R. 93).<sup>2</sup>

The Court instructed the jury in Instruction No. 22 that any speed in excess of the posted speed limit would be sufficient evidence to permit a finding of negligence (R. 69).<sup>3</sup>

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1. Instruction no. 21:

"Negligence is the failure to do what a reasonable and prudent person would have done under the circumstances or doing what such person under such circumstances would not have done. The fault may lie in acting or in committing to act.

2. Appellant's proposed Instruction on Criminal Negligence was taken from Utah Code Ann. §76-2-103 (1953 as amended) and stated in its entirety.

As used in these instructions negligence is defined with respect to circumstances surrounding his conduct or the result of his conduct when he ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint.

3. In its entirety this instruction stated:

It is the duty of a driver to operate his automobile at a speed that was safe, reasonable and prudent under the circumstances, with due regard to the surface and width of the roadway, the traffic thereon, and any actual or potential hazards then existing. Failure of the driver to operate his automobile in accordance with the foregoing requirements of the law would constitute negligence on his part.

The legal speed limit for the place in question in this case was 50 miles per hour. This means only that in the absence of any special hazards tending to make such a speed limit unsafe, then the speed limit indicated should be regarded as reasonable and lawful under ordinary circumstances. But any speed in excess of such indicated speed limit would constitute sufficient evidence to permit a finding of negligence.



And, in Instruction No. 23 (R.70) the Court instructed the jury that failure of a driver to obey a traffic control device would constitute "negligence" (R.70)<sup>4</sup>.

Appellant Instruction No. 7 was not submitted to the jury even though as in Chavez it defined negligence in terms of Utah Code Ann. §76-2-103(4) (1953 as amended).

Appellant's contention at the time of trial and now is that under our statutes no offense is a criminal offense unless a person acts intentionally, knowingly, recklessly or with criminal negligence or his act constitutes an offense involving strict liability. Utah Code Ann. §76-2-101 (1953 as amended). Further, appellant was charged with a form of criminal homicide and our statute, Utah Code Ann. §76-5-201 (1953 as amended) provides that a person commits criminal homicide if he intentionally, knowingly, recklessly, or with criminal negligence unlawfully causes the death of another. Criminal Homicide is defined as murder in the first and second degree, manslaughter, or negligent homicide, or automobile homicide. Appellant was fully aware that this argument was made and

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4. This instruction in its entirety stated:

If you find that a driver of a vehicle failed to obey the instructions of a traffic-control signal at an intersection where the traffic is controlled by a traffic-control signal, such a finding would constitute sufficient evidence to permit a finding of "negligent" as stated elsewhere in these instructions.

A traffic-control signal includes any device, whether manually, electrically, or mechanically operated by which traffic alternately directed to stop and to proceed.

rejected by this Court in three previous cases, State v. Durant, 561 P.2d 1056 (Utah 1977), State v. Wade, 572 P.2d 398 (Utah 1978) and State v. Anderson, 561 P.2d 1061 (Utah 1977). Appellant contended however that the opinions in those cases are and were erroneous and the dissenting opinion of Justice Maughan in State v. Durant, supra was the correct law in the State of Utah, and should have been adopted by this Court and the above three cited cases should be overruled based upon reasoning set forth by Justice Maughan.

Appellant saw his argument adopted in Chavez and his case also demands reversal and remand for retrial in accordance with the Chavez opinion.

The appellant, Belgard, was charged with events arising on July 28, 1977 (Brief of Appellant at 2). Johnny Chavez was charged with events arising on July 21, 1977 (Brief of Appellant State of Utah v. Johnny Chavez Case No. 16132 at 1). The appellant-Belgard was convicted after trial on November 17, 1977 and Johnny Chavez was convicted after trial on March 29, 1978.

Under the facts of this case where appellant was found guilty of automobile homicide, it is apparent that the jury found appellant to be negligent in his driving pattern otherwise appellant could not have been found guilty. However, had the jury been properly instructed that he must have acted with criminal negligence, using the definition of criminal negligence the jury may not have found that the risk taken by appellant was of such a nature and degree that failure to perceive it

(namely the red light) constituted a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from appellant's standpoint. The clear difference between negligence and criminal negligence could easily have made a vast difference in the outcome of this case.

The statement of Justice Wilkins writing for the majority in Chavez applies equally to appellant-Belgard.

We are therefore of the opinion that our previous cases holding that automobile homicide requires only proof of simple negligence under §76-5-207 are in error, and are overruled. And we hold that a conviction of automobile homicide requires an instruction on criminal negligence as that term is defined in §76-2-103(4), and a determination thereof by the jury. As the Court's Instruction 18 defined simple negligence and not criminal negligence, defendant is entitled to a new trial. (State of Utah v. Johnny Chavez, Utah Supreme Court Case No. 16132 Advance Slip Opinion at 4.)

For the above stated reason appellant requests reversal of his conviction for Automobile Homicide and remand to the Third Judicial District Court for new trial.

Respectfully submitted this 22 day of February, 1980.

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