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State of Utah v. Brent Bindrup : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
 : Case No. 18134
Plaintiff/Respondent, :
 :
vs. :
 :
BRENT BINDRUP, :
 :
Defendant/Appellant. :

BRIEF OF APPELLANT

Appeal from a verdict of guilty against
appellant in the Second Judicial District
Court, County of Weber, State of Utah,
the Honorable Calvin Gould presiding.

FILED

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Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH, :
Plaintiff/Respondent, : Case No. 18134
vs. : BRIEF OF APPELLANT
BRENT BINDRUP, :
Defendant/Appellant. :

STATEMENT OF THE NATURE OF THE CASE

Appellant appeals from a conviction of murder in the 2nd degree in the Second Judicial District Court, Weber County, State of Utah, the Honorable Calvin Gould presiding.

DISPOSITION IN THE LOWER COURT

Appellant was found guilty of murder in the 2nd degree in a non-jury trial held before the Honorable Calvin Gould, on September 21, 1981. Appellant was sentenced to a term of five years to life in the Utah State Prison. The sentence was suspended and the appellant was placed on probation.

STATEMENT OF THE FACTS

On August 8, 1980, at approximately 1:50 a.m., appellant was travelling southbound on Washington Boulevard in Ogden, Utah, when he went through a red light at the intersection of 31st Street and Washington Boulevard, and collided with a motorcycle driven by the victim. The victim was travelling east on 31st Street and had lawfully entered the intersection on a green light. The motorcyclist was killed and, although appellant's truck went into a spin and overturned, the truck's occupants were not seriously injured. The appellant had been drinking and the

evidence at trial indicated a blood alcohol level of .12%, approximately one hour after the accident. There was also evidence that appellant had, prior to the accident, run through at least two other red lights on Washington Boulevard, and was travelling in excess of the 35 mph posted speed limit. Various witnesses estimated the speed of the appellant's vehicle at between 40 mph and 59 mph.

At the first preliminary hearing held on October 23, 1980, before the Honorable Stanton M. Taylor, Judge of the Ogden Circuit Court, the prosecution attempted to get a bind over on a 2nd degree murder charge. However, Judge Taylor felt that this was not the type of situation the legislature meant to encompass within the murder statute. Judge Taylor did find probable cause that the crime of manslaughter had been committed and bound the case over to the Second Judicial District Court on that charge. The prosecution dismissed the charge of manslaughter and went back to the Ogden Circuit Court on the charge of 2nd degree murder. A preliminary hearing was held before the Honorable E. F. Ziegler on July 10, 1981, and, again the defense argued that the 2nd degree murder statute did not apply to the facts of this case. However, Judge Ziegler found probable cause that the crime had been committed and the appellant was bound over on the charge of 2nd degree murder.

The trial was held on September 3, 1981, before the Honorable Calvin Gould, Judge of the Second Judicial District Court, Weber County, Utah, sitting without a jury. After hearing the evidence, Judge Gould took the matter under advisement and rendered a

memorandum decision on September 21, 1981, finding the appellant guilty of 2nd degree murder.

ARGUMENT

POINT I

THE TRIAL COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE APPELLANT'S CONDUCT EVIDENCED THE "DEPRAVED INDIFFERENCE FOR HUMAN LIFE" REQUIRED BY UTAH'S SECOND DEGREE MURDER STATUTE.

Appellant was convicted of a 1st degree felony based upon a violation of UCA Section 76-5-203(1)(c). Specifically, this section states:

Criminal homicide constitutes murder in the second degree if the actor:

(a)...

(b)...

Acting under circumstances evidencing a depraved indifference to human life, he recklessly engaged in conduct which creates a grave risk of death to another and thereby causes the death of another.

It is a universally held view in our criminal justice system, that a conviction of murder requires a showing of malice on the part of the accused. In the case of Farrow v. Smith, 541 P.2d 1107 (Utah 1975), the Utah Supreme Court made it clear that Utah adheres to this fundamental principle. The court states in that case that:

For many years the definition of second degree murder has been the unlawful killing of a human being with malice aforethought, and that of manslaughter was the unlawful killing of a human being without malice. In our opinion, the new criminal code has not changed those definitions. Id at 1109.

See also State v. Lingman, 91 P.2d 457 (Utah 1939); State v. Barker, 196 P.2d 723 (Utah 1948.)

The issue of what is meant by implied malice was squarely confronted by the Supreme Court of Arizona in the case of State v. Chalmers, 411 P.2d 448 (Arizona 1966.) In that case, the defendant was travelling on a two lane highway at between 80 mph and 100 mph, and passed several cars going in the same direction. In doing so, the defendant forced two vehicles, coming the opposite direction, to completely leave the highway to avoid a collision. Defendant swerved back into his own lane and then, shortly thereafter, attempted to pass more vehicles when he collided head-on into two vehicles in the opposite lane, causing two fatalities and three serious injuries. Defendant was convicted of 2nd degree murder and appealed. The court admitted that:

There is sufficient evidence for the jury to find gross negligence and utter disregard of the safety or welfare of any person who might have been in the vicinity of defendant's car;

but held that due to the lack of showing of malice, or as they called it:

An abandoned or malignant heart, the defendant was not guilty of murder. At 452.

In the case of Blackwell v. Maryland, 369 A.2d 53 (Md. 1977), the Court of Special Appeals of Maryland explored the same issue. In that case, a teenage girl riding a bicycle with lights and reflectors, was killed by an intoxicated driver who was weaving on and off the road. The defendant made no attempt to stop, either before or after hitting the girl. The trial judge gave a lengthy discussion of the malice, implied or actual, required

for a conviction of murder and discussed the gross negligence, wanton and reckless conduct that is required for a finding of manslaughter. In overturning the conviction, the appeals court ruled that the trial judge erred, as a matter of law, in presenting the issue of murder to the jury because of clear lack of malice.

The appellant, in the present case, was convicted of 2nd degree murder by the Honorable Calvin Gould. The only case that Judge Gould refers to in his memorandum decision is the Utah Supreme Court case of State v. Nicholson, 585 P.2d 60 (1978 Utah.) In the Nicholson case the court explains the term "depraved indifference" by listing five cases which represent examples of that type of conduct. Four of these cases are, People v. Burden, 140 Ca. Rptr. 282 (1977), starvation of a five month old child; Gibson v. State, 476 P.2d 362 (Okla. Cir. 1979), prisoner grabbing a steering wheel of sheriff's car while in transit; State v. Hokenson, 527 P.2d 487 (Idaho 1974), killing a policeman with a bomb; and State v. Draves, 524 P.2d 1225 (Ore. 1974), reckless shooting of a gun into a crowd. Each of these cases clearly conform to the concept of implied malice. The fifth case of Wagner v. State, 250 NW 2d 331 (1977 Wis.) is the only case where the facts bear any resemblance to the case presently before the court. This Wisconsin Supreme Court case is mis-cited in the Nicholson case and, therefore, the holding is incorrectly used in Judge Gould's memorandum decision.

In the Wagner case, the Wisconsin Court renders an excellent discussion on what is meant by a depraved mind. In that case, the

defendant had ingested pain medication and enough alcohol to have a .178% blood alcohol two hours after the incident. The defendant was driving a high powered automobile and was waiting at a red light when another car stopped and a challenge to race was accepted. The two vehicles proceeded to race down the town's main street and the defendant's vehicle struck and killed a pedestrian. The vehicles did not stop, but continued racing down Central Avenue. The defendant's car was seen speeding across railroad tracks at approximately 50 mph, causing sparks to fly. A witness led the police to the defendant's car. In overturning the appellant's murder conviction the court observes that:

To constitute a depraved mind, more than a high degree of negligence or recklessness must exist. The mind must not only disregard the safety of another, but be devoid of regard for the life of another. A depraved mind lacks the moral sense and appreciation of life, and is unreasonable and lacks judgment. A depraved mind has the general intent to do the acts and the consciousness of the nature of the acts and possible result but lacks the specific intent to do the harm. Id at 340.

In other words, the court is saying that the legislature did not put the word "depraved" in the statute as mere surplusage. The state must show that the defendant was aware or should have been aware that his conduct was imminently dangerous to human life. It is not necessary to show that a defendant intended to kill any specific individual. However, it is not enough to show that the defendant's conduct could conceivably result in someone's death. The distinction is important because it rightfully reserves the

murder statute for those cases where malice or a clear substitute for malice is present. For example, if parents fail to feed an infant, they may, not consciously intend that the infant should die, but it is reasonable for the law to place the burden on the parents that they should have known. If a person drives a car or shoots a gun into a crowd of people without intending to kill anyone, it is also reasonable for the law to assume that a normal moral person would realize that, regardless of intent, someone will probably die. These are cases where a "depraved indifference" on the part of the actor exists and the law will imply malice.

The Wisconsin Court in Wagner, supra, recognized that the defendant's conduct created a situation of unreasonable risk of injury. However, the court ruled that the fact situation was insufficient to show that defendant's conduct constituted a depraved mind. The court also found that the defendant lacked the state of mind necessary for him to be found guilty of 2nd degree murder.

In the present case, the appellant was driving while intoxicated at a speed of somewhat over the limit. The streets were virtually deserted at 2:00 a.m., and the defendant foolishly and negligently drove through several intersections with red lights. Anytime someone runs through a red light there is the danger of an accident. But, the facts are that the vast majority of times that someone passes through a red light, there is no resulting incident. On this particular occasion, the appellant's truck and the victim's motorcycle arrived at the same point at the same time and a terrible tragedy occurred. The appellant did not intend for the

event to occur. No one can claim that the appellant, even unconsciously, intended to kill the victim in this case as required by the concept of malice. The court in the Wagner, supra, case referred to an earlier Wisconsin case of Seidler v. State, 219 N.W.2d 320 (1974), and stated that:

It was not the lack of evidence of any intent to harm the deceased in Seidler, supra, which this court found critical, but rather the lack of intent to do the act which resulted in the death, i.e., a lack of evidence that Seidler consciously threw the victim at the hard and unyielding portions of the bed. Id at 341.

Likewise, in the case before this court, no one has argued that the appellant intended to run his vehicle into another vehicle under circumstances where he should have known that someone would be killed or injured as would be required to show implied malice.

The state could only introduce evidence that the defendant may have intended to run the red light. Even this evidence was controverted by the testimony of the psychiatrist. From this showing, the prosecution tried to imply that the appellant should have known that he would collide with another car and, further, that this inevitable collision would cause the death of another. By accepting the prosecution's argument, the trial court has attempted to stretch and contort the parameters of the murder statute to include what was, under the circumstances, an automobile accident. The appellant was not acting under circumstances where a person should have known the event would occur. The appellant did not demonstrate a depraved indifference to the life of the

victim. In fact, the evidence at trial tended to show that he was badly shaken by the results of his actions.

It was the clear lack of malice in the present case which caused Judge Stanton Taylor, in the first preliminary hearing, to refuse to bind over the case on a murder charge. Judge Taylor stated that:

The court does not believe that it was the intent of the legislature to cover this type of incident with your second degree murder statute. I believe that in order to be convicted of a second degree murder under these circumstances, the defendant would have to be aware of the presence of either the victim or someone like him. In other words, some specific knowledge that a person is being endangered by my conduct, not a generalized knowledge that someone might be there, some potential hazard, but a specific knowledge that a person is there and I am creating a danger to him through my willful indifference to his safety.

First preliminary hearing transcript, page 55.

Although Judge Taylor's remarks are, in no way, binding upon this court, appellant contends that the judge has correctly expressed the state of the law in Utah. That the terms "depraved indifference to human life" and "grave risk of death" require a showing that the appellant was aware of a person's presence and aware that his conduct would probably result in a person's death or near death, and that the appellant continued in his course of conduct with no concern for the consequences. The facts in the present case showed that the appellant ran through a red light in the middle of the night when the streets were virtually deserted.

The appellant was not acting under some depraved death wish

and, clearly, had no intention of hurting himself or anyone else. The evidence at trial showed that the appellant was deeply distressed and concerned for the victim of the accident and showed great remorse for the results of his foolish behavior. Had the appellant had any real belief that his actions would result in another's death, he would not have run the red light.

POINT II

DEFENDANT'S ACTIONS, AS A MATTER OF
LAW, CONSTITUTED AUTOMOBILE HOMICIDE
AS SET OUT IN THE UTAH CODE.

The Utah Automobile Homicide Statute, UCA 76-5-207, at the time of this offense, read as follows:

Criminal Homicide constitutes automobile homicide if the actor, while under the influence of intoxicating liquor, a controlled substance, or any drug, 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 above statute was interpreted by this court in its decision of State v. Chavez, 605 P.2d 1226 (1979.) In the Chavez case, the court determined that the statute requires the state to show that the defendant acted with criminal negligence rather than just simple negligence.

The appellant contends that if he is guilty of a crime, that crime should be automobile homicide. The Chavez case is helpful to the present case in three respects: The facts, the holding and the dissenting opinion.

The facts in Chavez are as follows: The defendant was travelling down State Street in Salt Lake City, Utah, at a high

rate of speed when he approached the intersection of 3900 South facing a red light. It was 10:00 p.m., and the lanes of traffic were blocked by several cars waiting for the red light. The defendant veered out of the lanes of traffic, drove on the gutter around the other cars waiting for the light to change, and went into the intersection where he collided with a car travelling on 3900 South, killing a two year old boy.

The facts in the Chavez case are more aggregious than the present case in many respects. Chavez was driving at a time when State Street was congested with traffic. He not only ran a red light, but actually had to veer off the road to get around vehicles waiting for the red light, and his blood alcohol registered at .19%. Yet, in this case, the Utah Supreme Court wasn't grappling with the problem of murder or manslaughter. They were trying to determine if the degree of culpability evidenced by Chavez was great enough to impose an automobile homicide conviction.

Chavez appealed his automobile homicide conviction on the basis that the court had instructed the jury that only simple negligence was required. Chavez claimed that a showing of criminal negligence was required. The Supreme Court of Utah agreed and remanded the case for retrial to determine if Chavez's actions constituted criminal negligence. The law stated in Chavez was later overruled by the legislature but at the time of appellant's accident, Chavez was the law in Utah. The court was clear in the Chavez case, holding that:

We are, therefore, of the opinion that our previous cases holding that automobile homicide requires only proof of simple

negligence under Section 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 Section 76-2-103(4). Id at 1228.

Criminal negligence is defined in Section 76-2-103:

A person engages in conduct:

(1)...

(2)...

(3)...

(4) With criminal negligence or is criminally negligent 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.

This appears to be an accurate and appropriate description of appellant's conduct in the case now before the court.

Finally, the dissenting opinion of Chief Justice Crockett recognizes an important principle. Crockett made it clear that he felt that Chavez's actions were exactly what was contemplated in the definition of automobile homicide and he affirms an important rule of law that should be considered in the present case. He states that:

The universally accepted rule is that a specific statute takes precedence over a general one. Therefore, the definition of defendant's crime is found in the just quoted (automobile homicide) statute. Id at 1229.

73 American Jurisprudence 2d, Statutes, Section 257, indicates that:

Where there is in the same statute a specific provision and also a general one which in its most comprehensive sense would include matters embraced in the former, the particular provision must control, and the general provision must be taken to affect only such cases within its general language as are not within the provisions of the particular provisions.

In addition to Justice Crockett's opinion in the Chavez case, the Utah Supreme Court in Millert v. Clark Clinic Corp., 609 P.2d 934 (Utah 1980); Bateman v. Board of Examiners, 322 P.2d 381 (Utah 1958); Pacific Intermountain Express Co. v. State Tax Commission, 316 P.2d 549 (Utah 1957); State v. Burnham, 49 P.2d 963 (Utah 1935); has held that the State of Utah adheres to this general principle.

In the present case, there is no question that the appellant was operating a motor vehicle while under the influence of intoxicating liquor and thereby caused another's death.

The Chavez case confirms that at the time of the appellant's accident, a conviction of automobile homicide required a showing of criminal negligence. Appellant denies that he was acting with any kind of malice, either implied or actual. However, appellant concedes that his conduct was arguably criminally negligent as defined by that statute.

POINT III

WHEN THE SAME CONDUCT IS PROSCRIBED BY
TWO DIFFERENT CRIMINAL PENALTIES, THE
ACCUSED IS ENTITLED TO THE BENEFIT OF
THE LESSER.

In the Utah State Supreme Court case of State v. Shondel, 453 P.2d 146 (Utah 1969), a case involving possession of LSD, this

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court adhered to the general criminal principle that where the defendant's conduct is encompassed by two different criminal penalties, that the accused should be convicted of the lesser. This general rule is summarized in 50 ALR 1531, where it states that:

The safest of all rules, in the construing of criminal statutes of doubtful meaning, is to resolve the ambiguity into the milder construction, in favor of the party accused. Id at 1533 and 1534.

The United States Supreme Court affirmed this rule in the case of United States v. Universal CIT Credit Corp., 344 U.S. 218, 73 S. Ct. 227, 97 L. Ed. 260 (1952.)

In the initial preliminary hearing, Judge Taylor felt that the state had made out a case against the appellant for manslaughter. However, the Utah Supreme Court has ruled that driving a vehicle while intoxicated constitutes an act of recklessness in the cases of State v. Wade, 572 P.2d 398 (Utah 1977); State v. Anderson, 561 P.2d 1061 (Utah 1977); and State v. Durrant, 561 P.2d 1056 (Utah 1977.) Also, under the manslaughter statute, this court has ruled in State v. Adamson, 125 P.2d 429 (Utah 1942); and State v. Olsen, 160 P.2d 427 (Utah 1945), that a defendant must be shown to have acted with criminal negligence. Therefore, from the above cases and the ruling in Chavez, which requires criminal negligence for an automobile homicide conviction, we find that the culpability distinction between the two statutes is virtually obliterated. Therefore, the appellant contends that he is entitled to the benefit of the lesser statute, that of automobile homicide.

CONCLUSION

The state failed to show any form of malice on the part of appellant as required by Utah's second degree murder statute. Therefore, the trial court erred as a matter of law in finding that the appellant's conduct evidenced the depraved indifference for human life that is required by the statute. The cases cited by this court in the Nicholson case and subsequently cited by the trial court substantiate the appellant's claim.


A person who sets off a bomb in a crowded area or a person who drives his car at high speed into a parade, or the person who shoots a gun into a crowded theater, is clearly guilty of 2nd degree murder. That is a far cry from the factual situation in the present case. The appellant's conduct was inappropriate and foolhardy and resulted in a terrible tragedy. However, to construe the totality of the circumstances in this case to, in some way, imply a state of maliciousness on the part of the appellant would blur the concept of malice to the point of making it meaningless. There is absolutely no reason for this court to do that.

The legislature has enacted the statute of automobile homicide, which clearly and distinctly covers the factual situation presented by this case. This court has affirmed that it adheres to the general rule that when a specific statute proscribes a certain set of facts, the specific statute should be used as opposed to a general statute which may also, in a broader sense, cover the same circumstances. Further, this court has indicated that it follows the rule of statutory construction that entitles the accused to the benefit of the lesser of two statutes that describe

the same conduct.

The appellant contends that the murder in the 2nd degree conviction should be overturned and a conviction entered for automobile homicide.

Respectfully submitted this 9th day of March, 1982.


REED M. RICHARDS


BERNARD L. ALLEN