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State of Utah v. Brent Bindrup : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	
-v-	:	Case No. 18134
BRENT BINDRUP,	:	
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

Appeal from a conviction of murder in the second degree in the Second Judicial District Court in and for Weber County, State of Utah, the Honorable Calvin Gould, Judge, presiding.

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

The appellant, Brent Bindrup, appeals from a conviction of second-degree murder in the Second Judicial District in and for the County of Weber, State of Utah.

DISPOSITION IN THE LOWER COURT

The appellant was found guilty of second-degree murder 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, which sentence was suspended and the appellant was placed on probation.

RELIEF SOUGHT ON APPEAL

The respondent seeks affirmance of the conviction and judgment pronounced below. In the alternative, respondent seeks an order of this Court remanding the case to the Second

Judicial District Court with directions to that court to enter a judgment of conviction of manslaughter.

STATEMENT OF THE FACTS

In the early morning hours of October 8, 1980, Ogden City Police Officer Mike King, on regular patrol duty, "heard a loud bang, a popping sound," and looked up in time to see a pick-up truck sliding sideways followed by a motorcycle, various parts of debris, and a body "flying through the air" down Washington Boulevard (T. 9). He pulled his patrol car into the intersection of Washington and 31st South and 5-10 seconds after the accident noticed the light was still red in the direction appellant was traveling (T. 9). Officer King immediately radioed for assistance and checked the body he had seen tumbling down the street (T. 10). The victim, Mr. Charles Feeney, was dead (T. 11). Officer King then assisted Mr. Brent Bindrup, the appellant and driver of the pick-up truck, and a passenger in the truck, Mr. Kerry Moyes, out of the overturned truck. The appellant and Mr. Moyes sustained minor injuries (T. 11).

The appellant was charged with second-degree murder in violation of Utah Code Annotated, § 76-5-203 (1953), as amended. He was tried without a jury before the Honorable Calvin Gould, Judge of the Second Judicial District in and for Weber County, State of Utah, on September 3, 1981.

At the trial Officer King testified that he saw the motorcycle operated by Mr. Feeney traveling east on 31st South

seconds before a building obstructed his view and he heard the accident. Mr. Feeney was traveling within the speed limit, with his lights on, and appeared to be observing all traffic laws (T. 19). Subsequent autopsy indicated that Mr. Feeney had no drugs or alcohol in his system at the time of the accident, and that he died from multiple contusions, lacerations and fractures over most of his body (R. 29-33).

Vicky Bojanski was traveling south on Washington Boulevard moments before the accident. She stopped at the red light on 30th South and saw the appellant's truck approaching "quite fast" in her rear view mirror (T. 94). She was afraid the truck would hit her as it sped into the 30th South intersection before the traffic semaphore turned green. She watched the truck as it swerved back into the lane in which she was driving. When the light turned green Vicky continued down Washington Boulevard, keeping her eyes on the truck (T. 95). The truck did not slow down as it approached the red light on the 31st South intersection, and Vicky thought to herself "he is going to run that light too." She then noticed a "glance" of light and heard a crash before she pulled up behind the scene of the accident (T. 96).

Kerry Moyes, the passenger riding with the appellant, testified that despite at least four (T. 57, 73) attempts to get the appellant to slow down and drive better,

the appellant "just kept going." He "just hit the pedal and cruised" (R. 21) through seven red lights (T. 60). The appellant responded to the pleas to slow down by hitting the pedal and cruising (R. 26, 28; T. 57).

Accident investigation showed that the appellant hit Mr. Feeney with the right front of the pick-up truck, damaging the light, grill, and fender of the truck (T. 14). The motorcycle and Mr. Feeney were struck on their left sides (R. 29-33). Mr. Feeney's body was found 151 feet down Washington Boulevard (T. 12). The motorcycle flew through the air 62 feet (T. 13) before gouging the road surface and tumbling to a rest 179 feet from the point of impact. The appellant's truck slid sideways, rolled, and toppled to a rest upside down 246 feet from the point of collision (T. 12). The appellant's blood alcohol level was found to be .12% approximately one hour after the wreck (T. 39).

Officer Kevin Youngberg testified that the appellant was going 59 miles per hour after he hit the motorcycle and went into a skid (T. 104). Officer Youngberg based this testimony on the curve of the tire scuffs left on the surface of Washington Boulevard before the truck began to roll.

The appellant testified in his own behalf. His version of the incident is characterized by an attempt to mitigate the severity of what occurred. However, appellant

did admit that immediately after the collision occurred he realized the semaphore for the direction he had been traveling was red (T. 200, 204-205). He also acknowledged that he realized if someone came through the intersection from the opposite direction he would have seriously injured or killed them (T. 210).

Appellant testified that his right leg was artificial, that he drove with his left leg, and attempted to account for the apparent speed of the truck as determined after it rolled by stating that his artificial leg fell on the accelerator after the initial collision with Mr. Feeney (T. 182, 190, 201). He stated that he never drove more than 40 miles per hour (T. 197). He further testified that he had a problem with hearing "voices" which told him to do irrational things and that he had been hearing such "voices" while driving on Washington Boulevard just before the collision (T. 183-185, 199).

ARGUMENT

POINT I

THE APPELLANT ACTED WITH THE "DEPRAVED INDIFFERENCE TO HUMAN LIFE" NECESSARY TO SUSTAIN THE SECOND-DEGREE MURDER CONVICTION.

The appellant was charged with violating Utah Code Annotated, § 76-5-203 (1953), as amended:

> 76-5-203. Murder in the second degree. (1) Criminal homicide constitutes murder in the second degree if the actor:
>
> * * *
>
> (c) Acting under circumstances evidencing a depraved indifference to human life, he engaged in conduct which creates a grave risk of death to another and thereby causes the death of another;
>
> (2) Murder in the second degree is a felony of the first degree.

The appellant was intentionally speeding and running red lights as he killed Mr. Feeney. These substantive facts show that the appellant created a "grave risk of death" for Mr. Feeney and are not in dispute on appeal. The question is whether the evidence supports the finding that the appellant's actions evidenced a "depraved indifference to human life" as he sped through the red lights on Washington Boulevard.

Utah statutes do not define "depraved indifference to human life;" however, this Court has provided sufficient precedent to pinpoint the meaning of the phrase. In State v. Day, Utah, 572 P.2d 703, 705 (1977) we note the following:

> Ordinarily, non-technical words of ordinary meaning should not be elaborated upon in the instructions given by the court. It is presumed that jurors have ordinary intelligence and understand the meaning of ordinary words like "depraved" and "indifference."
>
> [3] While the jury was deliberating, they requested a dictionary. . . .

* * *

> It is difficult to believe that the court, by an instruction, could have improved upon the definitions contained in the dictionary.

This Court felt that the factfinder was qualified to know the ordinary meaning of "depraved indifference to human life" and was willing to rely on the factfinder's determination of the sufficiency of the evidence showing "depraved indifference."

Later, in State v. Nicholson, Utah, 585 P.2d 60, 62, 63 (1978), this Court added:

> Defense counsel indulges in a lengthy dissertation about the historical changes in statutes, concerning what is "malice," comparing manslaughter and murder legislation that leads to some kind of conclusion that 76-5-203 doesn't mean "depraved indifference" but something different and greater than "negligent" or "reckless," which requires a higher degree of proof. He seems to be suggesting that in this case defendant was simply negligent, or careless, or reckless; and that consequently there was insufficient evidence to reflect "depraved indifference."
>
> * * *
>
> Defendant's discussion as to the meaning of the language of the statute is academic and tends to obfuscate the normal interpretation of familiar words, and there appears to be nothing ambiguous or uncertain in the language, particularly that in "c".

Day and Nicholson clearly indicate that the meaning of "depraved indifference" is not to be confused by legal applications of extrinsic theories; the words connote their

usual and ordinary meanings and that is all. Nicholson cites five cases from other jurisdictions wherein "depravity" was at issue to provide guidelines as to the words' ordinary meanings. One such case, Wagner v. State, 250 N.W.2d 331, 340 (Wis. 1977), contains an excellent discussion of "depravity":

> . . . The depravity of mind referred to in second degree murder exists when the conduct causing death demonstrates an utter lack of concern for the life and safety of another and for which conduct there is no justification or excuse . . .
>
> * * *
>
> A depraved mind is one having in [sic] inherent deficiency of moral sense and rectitude. Otherwise it would not prompt an act which in its nature is imminently dangerous to the safety of another. The element of the disregard for life likewise calls for a state of mind which has no regard for the moral or social duties of a human being.
>
> A depraved mind must be indifferent to the life of others. Such negative attitude is not found in the mind of a normal, reasonable person. The desire to live and the recognition others desire to live and have a right to life is innate in the mind of a normal person. Mere negligence alone is not sufficient. A high degree of negligence may be an element. Such degree of negligence is an element of homicide by negligent use of a vehicle or weapon.

See also: State v. Draves, Or. App., 524 P.2d 1225 (1974); State v. Hokenson, 527 P.2d 487 (Ida. 1974).

For centuries the common law required a showing of malice for second-degree murder. As time went by, the legal

meaning of malice developed to connote an "evil intent" whereas the ordinary meaning remained "animosity" or "ill will." The distinction became difficult for jurors to understand and confusion in instructions and verdicts resulted. This divergence in definition prompted the drafters of the Model Penal Code to eliminate malice from the legislative descriptions of homicides in the 1950's. The Utah Legislature intentionally avoided the concept of malice in the present Utah Criminal Code for the same reason. Justice Wilkins, concurring in the Nicholson opinion at 63, stated:

> The main opinion cites cases and discusses principles of law which were pertinent to our criminal code prior to 1973, at which time the Utah Legislature enacted the present statutes under which defendant was convicted. The term "malice" and "malice aforethought" are not used in the present homicide statutes. The term "malice" was part of the prior law. Likewise, the prior statutes provided that "malice" was "express" or "implied" while the new statutes use entirely different language. We must apply the new law, not engraft the old terms into the new statute when the Legislature has seen fit to change those terms.

Justice Wilkins presented an excellent discussion of the various standards in the Model Penal Code as it relates to "depraved indifference" and concluded:

> I do not believe that the Legislature intended that "depraved indifference to human life" under subsection (c) should be

> measured by the same "awareness" of the certainty that the risk would result in death as the word "knowing" would entail. Instead, the greatness of the risk, and the lack of justification for the creation of that risk are the tests.

Id. at 65.

Although in an earlier case, this Court stated:

> 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 out opinion the new criminal code has not changed those definitions.

Farrow v. Smith, Utah, 541 P.2d 1107, 1109 (1975). As Day and Nicholson provide, it is now clear that malice is no longer a necessary element of second-degree murder in Utah. Even if it were an element, the cases discussed below indicate that this case was properly a second-degree murder case.

Because the Utah Criminal Code is relatively new and the standard of "depraved indifference to human life" is novel, there is little precedent for second-degree murder convictions under similar statutes in other jurisdictions and involving facts similar to this case. Murder of the second degree has, however, been found under similar facts with statutes requiring malice, express or implied.

In Commonwealth v. Taylor, 337 A.2d 545 (Pa. 1975), the intoxicated defendant, speeding in an automobile, hit a youngster on a bicycle and killed him. On appeal, the court found the evidence adequate to show:

> wanton and reckless conduct which manifests an extreme indifference to the value of human life which transcends the negligent killing and reaches the level of malice which supports a verdict of murder in the second degree.

Id. at 548. The conviction of second-degree murder was affirmed.

In Layne v. State, 531 S.W.2d 802 (Tenn. 1975), the court held that a claimed "overwhelming compulsion" to ingest drugs and alcohol would not justify the reckless use of a motor vehicle. The inebriated defendant negligently crossed the center line of the highway and killed two people in a head-on collision.

> . . . we nevertheless hold that a driver of an automobile while intoxicated and driving recklessly upon the public highway, will not be heard to say he had no intention of doing an injury to the person or property of another. The intent to commit a criminal act, . . . is evidenced by the act itself, so in the case at bar intent is evidenced (1) by the wilful drinking of intoxicating liquors, (2) knowingly driving an automobile while drunk at a dangerous and reckless rate of speed, to wit 60 and 70 miles an hour, and (3) with knowledge that his condition in thus driving was perilous to every person

> on the highway including the defendant himself. It would be a mockery of the law for one thus guilty of violating the criminal laws of the State, enacted for the protection of human life, to say he could not foresee the consequence of his act.

Id. at 803, 804. The conviction of second-degree murder was affirmed.

In Palmer v. State, 401 So. 2d 266 (Ala. 1981), the defendant was convicted of second-degree murder after killing the victim in an automobile accident. The court found the defendant capable of second-degree murder although his blood alcohol level was .26% two hours after the fatal accident. Proof of consciousness of the act, consciousness of impeding danger, and of consciousness of probable results, with reckless indifference to the probable consequences was apparent. The conviction of second-degree murder was affirmed.

In Commandu v. State, 374 So. 2d 910 (Ala. 1978), Mrs. Henderson had pulled off the road to fix a flat tire. Her son was removing the spare from the trunk when the drunk defendant, coming from behind, hit Mrs. Henderson's car and knocked it 80 feet down the road. The Henderson boy did not survive the accident.

> Mrs. Henderson was repelled away from her automobile by the collision. She sustained a broken leg and sent two of her

> children to seek help. Mrs. Henderson testified that she saw the appellant get out of his automobile and throw some bottles out of his car. She called to him and after two or three minutes he came over and asked if she was all right.
>
> "I said, 'Yes, but you have killed my young'un'. He said 'No, I hadn't killed nobody'. So, I could smell the alcohol around him and I told him. I said, 'You're drunk, ain't you'? He said, 'No lady, I'm not drunk, but I'm gonna be drunk'. And I told him next time he put a beer to his mouth, I hoped he could see what he had done there tonight."
>
> The appellant then went and lay down near the Henderson automobile.

Id. at 912.

The court held that it was a "settled principle of law that where death ensues from an act done without lawful purpose, dangerous to life, malice is implied." Id. at 914. The conviction of second-degree murder was affirmed.

In Hamilton v. Commonwealth, 560 S.W.2d 539 (Ky. 1978), the defendant appealed from a twenty-year sentence based upon a conviction of second-degree murder. The defendant had been traveling down a street at 50 miles per hour, ignored a red light and killed a woman lawfully entering the intersection on a green light. Two hours after the accident the defendant's blood alcohol level was .18%. The applicable statute for second-degree murder was similar to that of the statute considered in this case and read:

> A person is guilty of murder when: (b) Under circumstances manifesting extreme indifference to human life, he wantonly engaged in conduct which creates a grave risk of death to another person and thereby causes the death of another person.

Id. at 541. The court found the defendant's conduct met the requirements of the statute:

> The facts in this case demonstrate that the accident was not the typical automobile accident where a driver makes a gross error of judgment and is tried for manslaughter or reckless homicide. Rather, Hamilton's conduct surpasses the usual vehicle manslaughter case and demonstrates "wanton" conduct and extreme indifference to human life. The jury was instructed on murder, second degree manslaughter and reckless homicide. It found that Hamilton should have known of the plain and obvious likelihood that death or great bodily injury could have resulted from operating his truck, while in a drunken condition, through an intersection where a red light demanded that he stop.
>
> This is a "hurry-up" world of people on the go, with heavy traffic by high-powered vehicles on all types of roads and at all times of the day or night. Such a situation coupled with a driver's inclination to take "one or more [drinks] for the road," increases the vehicular death rate on the highways of this Commonwealth. A majority of the members of this court is of the opinion that the legislature enacted KRS 507.020(1)(b) to deter such conduct. The legislature is commended for taking a giant step forward. Its action in enacting this statute will do much to decrease vehicular highway deaths by persons operating an automobile while under the influence of intoxicants.

Id. at 541. The conviction for second-degree murder was affirmed.

The fact findings of the trial court will not be disturbed by this Court unless " . . . the evidence was so inconclusive or unsatisfactory that reasonable minds acting fairly must have entertained reasonable doubt that the defendant committed the crime." State v. Mills, Utah, 530 P.2d 1272 (1975); State v. Wilson, Utah, 565 P.2d 66 (1977); State v. Lamm, Utah, 606 P.2d 229 (1980). Further, the evidence relied upon by the trier of fact need not refute contrary allegations by the defendant. State v. Lamm, supra, at 232. As discussed above, and as will be further discussed in Point III of this brief, the evidence adduced in this case was sufficient to support Judge Gould's finding that appellant's conduct constituted "depraved indifference to human life" in convicting appellant of second-degree murder (R. 18). This conviction should not be reversed for insufficiency of the evidence to support the finding of guilt.

POINT II

THE APPELLANT WAS AWARE OF THE SUBSTANTIAL AND UNJUSTIFIABLE RISK OF DEATH AND THEREFORE THE UTAH AUTOMOBILE HOMICIDE STATUTE DOES NOT APPLY.

At the time of the accident in this case, Utah Code Annotated, § 76-5-207 (1953), as amended, read:

> 76-5-207. Automobile homicide. (1) 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.
> (2) The presumption established by Section 41-6-44(b) of the Utah Motor Vehicle Act, relating to blood alcohol percentages, shall be applicable to this section, and any chemical test administered on a defendant with his consent or after his arrest under this section, whether with or against his consent, shall be admissible in accordance with the rules of evidence.
> (3) For purposes of the automobile homicide section, a motor vehicle constitutes any self-propelled vehicle and includes, but is not limited to, any automobile, truck, van, motorcycle, train, engine, watercraft, or aircraft.
> (4) Automobile homicide is a felony of the third degree.

The standard of negligence required for conviction under this statute was criminal negligence as defined in Utah Code Annotated, § 76-2-103 (1953), as amended. State v. Chavez, Utah, 605 P.2d 1226 (1979). Section 76-2-103 provides:

> A person engages in conduct:
>
> (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.

Criminal negligence requires only that the offender ought to have been aware of the substantial and unjustifiable risk associated with the conduct. In this case it was shown at trial that the appellant was actually aware of the grave risk of death to another, as is evidenced by the testimony of the appellant himself.

> Q. Brent, you realized that if somebody did come through a green light going through one of those intersections, and you hit them, they might be seriously injured or killed, didn't you?
>
> A. Yes.
>
> Q. You knew what you were doing, didn't you?
>
> A. Well, yeah, I guess I knew what I was doing.
>
> Q. Okay. Were you concerned about the fact that somebody might run through those intersections on a green light, and you would be there to meet them?
>
> A. No, the thought never crossed my mind. I was watching for them.

(T. 210).

Moreover, if the appellant was not aware of it on his own, his companion and passenger, Kerry Moyes, made it

clear to the appellant that he was creating a risk of death (T. 57, 73). The following is from a police report by Moyes:

> Q. Did Bindrup stop at any of the lights or did he just slow down and then proceed through.
> A. He stopped at some of them, I know he didn't run all of them from the Golden Spike. But he did run the last five or six.
> Q. What street did you enter Washington Blvd. from?
> A. I don't remember. It seems like we went straight from Harrisville Rd. to Washington Blvd.
> Q. How fast were you traveling down Washington Blvd.?
> A. I never looked at his gauge.
> Q. Did you feel he was traveling too fast or dangerously driving?
> A. I don't feel he was driving dangerously but he was at least ten over.
> Q. Did you ever ask Bindrup to slow the truck down?
> A. I didn't ask him I told him to slow it down.
> Q. Did you run any red lights at a high rate of speed before the accident?
> A. At least one.

(R. 27, State's Exhibit K) (emphasis added); and the following from the preliminary hearing:

> Q. Yes. Okay. Now, did Brent slow down at all for the last several red lights that he ran including the one at 31st and Washington where he hit the motorcycle?
>
> A. No, sir. The last few he just went straight through.
>
> Q. What did you say to Brent when he started driving like this?
>
> A. I told him to stop.

Q. Were you concerned about the circumstances?

A. Yes, sir.

Q. What was Brent's reaction when you told him to slow down or knock it off?

A. He just kept going.

Q. Did he say anything?

A. No.

Q. Did he look at you or change his facial expression at all?

A. He looked at me and that, and kept going.

Q. Just kept going?

A. Yes.

Q. How many times did you tell him to knock it off or slow down?

A. About four times.

(R. 21, State's Exhibit L).

The appellant did not kill Charles Feeney as a result of criminally negligent behavior; he intentionally sped through the red light at the intersection of 31st South and Washington Boulevard, causing the grave risk of death to himself, his passenger, and Mr. Feeney. His intoxicated condition did not prevent him from being aware of the circumstances whereby he killed a man. There was no delayed reaction, no torpid attempt to stop for the light, no clouded perception of the situation, and no mistake as to the speed

the appellant was traveling. The appellant began speeding, began running red lights in the wee hours of the morning; he grew bolder at each light as the chance for collision became greater at each light. He intentionally and repeatedly drove through intersections he was prohibited from entering and by so doing disregarded the grave risk of death he created thereby. Kerry Moyes testified that the appellant "drove real good" (T. 20) until he started running red lights. The appellant decided to disregard the light at 31st South and killed Mr. Feeney. Thus, his conduct evidenced much more than mere criminal negligence. Cf. State v. Hallett, Utah, 619 P.2d 335 (1980), bending over a stop sign constitutes criminal negligence. Appellant's argument that since his conduct occurred at 2:00 a.m. rather than at some other time when there might have been more traffic, his conduct shows only negligence and not "depraved indifference" is misplaced. There was no evidence that the streets were "virtually deserted" as alleged in appellant's brief, and even if there were, it would not change the nature of appellant's conduct. In addition, appellant's contention that prior cases involving convictions of automobile homicide involved more egregious fact situations than this case and thus that the evidence in this case does not support a conviction of murder, is also without merit. Appellant cites State v. Chavez, Utah, 605 P.2d 1226 (1979) as a case in which the facts evidenced a higher degree of depravity than those of the case at bar.

Respondent submits that the facts of Chavez might have supported a second-degree murder conviction; that issue was simply not raised since the defendant there was not so charged. Thus, Chavez is not authority for the proposition that conduct such as appellant's cannot support a conviction under § 76-5-203(c).

Finally, appellant alleges that the automobile homicide statute is more specific than the second-degree murder statute and thus that the former should control. As argued above, respondent contends that appellant's conduct evidenced a state of mind at least higher than that of criminal negligence. Appellant was actually aware of the danger he was creating to human life and acted in complete disregard of that danger. Thus, the automobile homicide statute, which at the time of the conviction required proof of criminal negligence, does not apply to the facts of this case. Appellant's contention that it is the more specific of two statutes, either of which might apply in this case, is erroneous.

POINT III

APPELLANT'S CONDUCT EVIDENCED "DEPRAVED INDIFFERENCE TO HUMAN LIFE" AND NOT MERELY RECKLESSNESS AS REQUIRED FOR A CONVICTION OF MANSLAUGHTER.

Respondent recognizes that the Utah Legislature eliminated the word "reckless" from § 76-5-203(c) in 1979.

The causing of a death in a reckless manner is now proscribed by § 76-5-205(a), the manslaughter statute. The definition of "recklessly" is found in § 76-2-103(3) as follows:

> A person engages in conduct: . . .
> (3) Recklessly, or maliciously, with respect to circumstances surrounding his conduct or the result of his conduct when he is aware of but consciously disregards 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 its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as viewed from the actor's standpoint.

Appellant contends in Point III of his brief that if this Court reverses his conviction of second-degree murder, he is entitled to the benefit of the automobile homicide statute, rather than the manslaughter statute, on the theory that where the same conduct is proscribed by two different statutes involving different penalties, the accused is entitled to the benefit of the lesser penalty.

This argument does not apply in this case since § 76-5-207 and § 76-5-203 do not proscribe the same conduct. A conviction of manslaughter requires proof of recklessness, while an automobile homicide conviction requires proof of only criminal negligence. Each of these terms is defined by statute, and although each involves a gross deviation from the ordinary standard of care, the distinction between the two is

that for criminal negligence the actor "ought" to be aware of the risk while for recklessness the actor is aware but consciously disregards the risk. Appellant's contention thus fails.

Respondent contends that although appellant's conduct in this case could have supported a manslaughter conviction, it went even beyond the degree of recklessness required under § 76-5-205. Since the term "reckless" was removed from § 76-5-203(c) in 1979, it may be presumed that the Legislature intended that "depraved indifference to human life" is a mental state greater than recklessness as defined in § 76-2-103. In this case, appellant did not simply consciously disregard a known risk of death to another (i.e., recklessness), he continued running through stoplights at a high rate of speed despite repeated warnings by his passenger. Appellant acknowledged those warnings by smiling at Mr. Moyes and continuing his conduct (T. 57, 73; R. 21). As indicated in the Commentary to the Model Penal Code, risk is a matter of degree:

> Recklessness . . . presupposes an awareness of the creation of substantial homicidal risk, a risk too great to be deemed justifiable by any valid purpose that the actor's conduct serves. Since risk, however, is a matter of degree and the motives for risk creation may be infinite in variation, some formula is needed to identify the case where

> recklessness should be assimilated to ... (intentional conduct). The conception that the draft employs is that of extreme indifference to the value of human life. The significance of. . . (intentional conduct) is that, cases of provocation apart, it demonstrates precisely such indifference. . . .

Model Penal Code, Tentative Draft #9, 29-30 (May 8, 1959).

This is not a case where the appellant's state of mind must be inferred from the circumstances surrounding his conduct alone. The direct evidence of Mr. Moyes and even the testimony of appellant establish that his conduct was intentional. When viewed in this light, appellant's conduct is not distinguishable from shooting a gun into a crowd or running one's vehicle into a parade, which appellant admits are situations justifying a second-degree murder conviction. The mere fortuity that this death occurred at 2:00 a.m. rather than at a time when the streets were more congested with traffic does not provide a basis for distinguishing appellant's conduct from the examples given. Just before the accident occurred, appellant had passed the vehicle of Vicky Bojansky as he ran through the red light at 30th South and Washington Boulevard (T. 94-96). Thus, appellant knew that the streets were not totally deserted, as he admitted at trial (T. 196).

People v. Marcy, Colo., 628 P.2d 69 (1981) provides significant guidance in distinguishing "extreme indifference

human life" from reckless manslaughter. In Marcy, the Colorado Supreme Court held that "extreme indifference to human life" was not sufficiently distinguishable from the second-degree murder statute to provide a rational basis for punishing such murders under the first-degree murder provisions. The Court went on to discuss the meaning of extreme indifference murder as follows:

> Extreme indifference murder involves conduct that creates a grave risk of death to another. "Grave" is commonly understood to mean serious or imminent, or likely to produce great harm or danger. See Webster's New International Dictionary at 1094 (2d ed. 1958). Second degree murder encompasses conduct that is practically certain to cause the death of another [citations omitted]. "Practical certainty" has been used interchangeably with the term "more than merely a probable result" [citation omitted]. . . . it was described as "such a high probability of death that death was practically certain" [citation omitted]. In the context of criminal homicide, conduct that is practically certain to cause the death of another is the semantic equivalent of conduct creating a grave risk of death to another. Any difference here is so imperceptible as to vitiate its meaningful application in an adjudicative proceeding. . . .
> The statutory terminology under scrutiny is descriptive of the facts or circumstances under which the death causing conduct occurred. It seems to reflect a judgment that there is a certain indifference that is qualitatively distinct from the conscious disregard required for reckless manslaughter . . .

> We do not view the term "under circumstances manifesting extreme indifference to the value of human life" as without meaning. What it connotes is a heightened awareness and disregard of a fatal risk. People ex rel. Russel v. District Court (521 P.2d 1254 (Colo. 1974)), noted that "an extreme indifference to human life is clearly a more culpable standard of conduct "than the reckless conduct involved in manslaughter . . . Reckless manslaughter requires a conscious disregard of a substantial and unjustifiable risk of death.

628 P.2d 69, 79 (emphasis added).

Applying this standard to this case, appellant's conduct evidenced that "depraved indifference to human life" required to sustain a conviction of second-degree murder under § 76-5-203(c), and went beyond the conscious disregard of a substantial risk of death as required under reckless manslaughter, § 76-5-205(1)(a).

Even if this Court finds that the evidence in this case does not justify the conviction of second-degree murder, the evidence, as discussed above, without doubt supports a conviction of manslaughter, under § 76-5-205(1)(a). In the event of such a finding, respondent requests that this Court exercise its statutory power to remand the case ordering entry of a judgment of conviction of the included offense of manslaughter. § 76-1-402(5) and cf. State v. Noren, Utah, 621 P.2d 1224 (1980). The trier of fact in this case necessarily

had to find every fact necessary for conviction of manslaughter in finding appellant guilty of the greater offense of second-degree murder.

CONCLUSION

The Utah Automobile Homicide Statute was specifically enacted to deter drunk driving in this state. Since the mental state of a drunk person is so often difficult or hard to establish, the statute at the time of the conviction in this case required only proof of criminal negligence. Intoxication, a death caused by an automobile accident, and currently simple negligence will sustain a violation of Section 76-5-207. Because of the ease of conviction under the statute, the Legislature classified its violation a third-degree felony--the same as writing a bad check (Utah Code Annotated, § 76-6-505 (1953), as amended).

However, where an inebriate's mental state can be shown, and that state of mind evidences a depraved indifference to human life, the defendant should be held guilty of second-degree murder, a first-degree felony, despite his drunkenness. Otherwise, a few drinks before the intentional conduct constituting the crime would mitigate the severity of the criminal act. This cannot be the intention of the Utah Legislature.

Appellant acted in these circumstances with depraved indifference to the value of human life and not merely in conscious disregard of a known risk of death or in a situation where he should have known of such a risk. Thus, he was properly convicted of second-degree murder rather than reckless manslaughter or automobile homicide.

Respondent respectfully requests this Court to affirm the conviction of second-degree murder and further requests, if this Court reverses the murder conviction, that the Court remand the case to the trial court directing that court to enter a judgment of conviction of manslaughter.

Respectfully submitted this 6th day of May, 1982.

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CERTIFICATE OF MAILING

I hereby certify that I mailed two true and exact copies of the foregoing Brief, postage prepaid, to Reed M. Richards and Bernard L. Allen, Attorneys for Appellant, The Public Defender Association, 2568 Washington Boulevard, Ogden, Utah, 84401, this 6th day of May, 1982.

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IN THE SUPREME COURT OF THE

STATE OF UTAH

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	RESPONDENT'S ADDITIONAL AUTHORITY
-v-	:	
BRENT BINDRUP,	:	Case No. 18134
Defendant-Appellant.	:	

COMES NOW the respondent, by and through Robert N. Parrish, Assistant Attorney General, and respectfully submits the following newly uncovered case pursuant to Rule 75(p)(3), Utah Rules of Civil Procedure.

I. People v. Watson, Cal., 637 P.2d 279 (1981) is offered in support of the following propositions:

A. A fact situation similar to the case at bar does not preclude a finding of implied malice to support a second-degree murder conviction even if proof of malice is required by statute. Id. at 281, 285-286.

B. The automobile homicide statute is not a more specific statute which takes precedence over the second-degree murder statute since the elements of each (particularly the mental states involved) are not identical. Id. at 282-284.

C. The determination of criminal negligence to support a charge of automobile homicide in Utah is an objective test, whereas the test for determining "depraved indifference to human life" to support a charge of second-degree murder focuses on the subjective awareness by the defendant of the risk created by his conduct. Id. at 283-284.

Respectfully submitted this 16th day of June, 1982.

DAVID L. WILKINSON
Attorney General

BY: Robert N. Parrish
ROBERT N. PARRISH
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that I mailed true and exact copies of the foregoing Additional Authorities, postage prepaid, to Reed M. Richards and Bernard L. Allen, Attorneys for Appellant, The Public Defender Association, 2568 Washington Boulevard, Ogden, Utah, 84401, this 16th day of June, 1982.

Susan Patton