1966

State of Utah v. Glen Hess Selman : Brief of Respondent

The Supreme Court of the State of Utah

OF UTAH,

Plaintiff-Respondent,

- vs -

HEGS SELMAN,

Defendant-Appellant.

Case

Brief of Respondent

Appeal From Judgment Of The
First Judicial District Court
Of Box Elder County
Honorable Lewis Jones, Judge

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In The Supreme Court of the State of Utah

STATE OF UTAH,
Plaintiff-Respondent,
- vs -
GLEN HESS SELMAN,
Defendant-Appellant.

Case No. 10544

Brief of Respondent

STATEMENT OF NATURE OF CASE

The statement contained in the appellant's brief adequately indicates the nature of the case.

DISPOSITION IN LOWER COURT

The statement of the disposition in the appellant's brief adequately sets forth the happenings in the lower court.

RELIEF SOUGHT ON APPEAL

The respondent, State of Utah, submits that the verdict of the trial court should be affirmed.

STATEMENT OF FACTS

The respondent submits the following statement of facts:

On June 9, 1965, Carol Ann Sylvester, a housewife who resided in Thatcher, Box Elder County, Utah, was driving on Rocket Road in that county taking twelve children to school (Tr. 10). An accident occurred approximately four miles from Tremonton at an intersection of Rocket Road which runs east and west with a dirt road which runs north and south (Tr. 11). The accident occurred at approximately 8:00 a.m. (Tr. 11). The day was a cloudless, sunny, dry, warm day with no weather impediments to visibility (Tr. 27). Mrs. Sylvester had traveled the road on previous occasions and was going east at approximately 60 miles per hour prior to the accident (Tr. 11). There is a stop sign at the intersection with Rocket Road of the gravel road which controls the north-south traffic. On the southwest corner is a small farmhouse with trees and corrals (Tr. 12). Mrs. Sylvester testified that as she approached the intersection, a Pontiac vehicle, which was apparently driven by the appellant, ran the stop sign, and Mrs. Sylvester could not stop her car or even apply her brakes before she struck the vehicle. The left front of her car struck the front area of the appellant's vehicle (Tr. 13). It then veered off and struck an irrigation ditch. As a result of the accident, Kenna Okada, age 10, who was riding with Mrs. Sylvester was killed (Tr. 13). Mrs. Sylvester indicated that she had not at any time observed the car driven by the

appellant south of the stop sign and that she would estimate the speed of the vehicle at between 45 and 50 miles per hour when she struck the appellant's vehicle (Tr. 18). She said that she had seen a cloud of dust from the appellant's vehicle approximately 1/8 to 1/4 of a mile down the dirt road that intersected with Rocket Road (Tr. 19). She testified that no horn was sounded by the appellant (Tr. 21), and that the house on the corner blocks one's vision of the intersection (Tr. 20). The speed limit in the area was 60 miles per hour.

Highway trooper Boyd Jensen identified various exhibits, which were photographs of the intersection and the vehicle, showing the extent of the damage (Tr. 28-29). These pictures showed tremendous damage to the Dodge vehicle, which was being driven by Mrs. Sylvester, as well as the Pontiac vehicle driven by the appellant. Officer Jensen indicated that he noted trucks around the home on the corner of the intersection at the time of the accident. He testified that he observed approximately 15 feet of skid marks from each vehicle into the intersection. Approximately 9 feet of the skid marks were on the gravel portion of the road intersecting with Rocket Road (Tr. 41). Officer Jensen further indicated that the stop sign was visible approximately 1,000 feet away from the intersection (Tr. 52). He further indicated that in running a skid test, the comparable skid at 30 miles per hour was substantially greater than the skid from the appellant's car (Tr. 51).

Appellant's counsel brought out on cross-examination that the appellant had been arrested by Trooper Jensen for driving during a period of revoked license (Tr. 67), but that the charge had apparently been dismissed.

Trooper Scott Lee of the Highway Patrol estimated from the physical evidence of skid and scuff marks that the appellant's vehicle was going at a minimum speed of 40 miles per hour before he started his skid and the Sylvester vehicle at 55 miles per hour. A careful explanation of the difference in computations on the estimated speed of the Dodge vehicle from the testimony given by Trooper Lee at the time of preliminary hearing was provided at trial. The difference was based upon an apparent effort to make a more precise mathematical calculation (Tr. 83). Trooper Lee indicated that the appellant's vehicle would have gone 64½ feet during the reaction period from the time appellant would have observed the danger until the starting of his skid.

The appellant's contention was that he was driving his Pontiac going to Pocatello Valley to go to work. He had traveled the road before and knew of the stop sign and the intersection (Tr. 113). He testified that he stopped before entering the intersection, entered the intersection, and was struck (Tr. 113-114). On cros-examination, there was some indication that the appellant may have skidded into the intersection and observed the danger and accelerated (Tr. 117).

At the close of the State's case and at the close of the trial, appellant made a motion to dismiss the case, which was denied by the trial judge. No exceptions were taken by the appellant to the instructions given by the court. The jury retired at 12:04 p.m., and reached a verdict at 1:03 p.m., finding the appellant guilty of the crime of negligent homicide.

ARGUMENT

POINT I.
THE EVIDENCE IS SUFFICIENT TO SUSTAIN THE TRIAL COURT'S JUDGMENT.

The sole contention of the appellant on appeal is that the evidence presented at the time of trial was insufficient to sustain the jury's verdict and the trial court's judgment. It is submitted that there is no merit to the appellant's position.

It is well established that this court would be justified in reversing the jury's verdict only if it were to conclude from a consideration of all the evidence and inferences viewed in a light most favorable to the jury's verdict that reasonable men could not have reached such a conclusion. **State v. Berchtold,** 11 U.2d 208, 353 Pac. 183 (1960). It is submitted that the facts in this case are clearly sufficient to establish the appellant's guilt when the evidence is weighed in a light most favorable to the conviction.

Negligent homicide, as defined in Section 41-6-43(10), Utah Code Annotated, 1953, only requires that the death of an individual result within one year as the proximate result of the driving of a ve-

hicle in "reckless disregard for the safety of others." It should be noted that the statute does not require that the vehicle be driven in reckless disregard of the lives of others. The standard is merely that the operation of the vehicle be of such a reckless nature or evidence such heedlessness that the safety of others is in danger. Had the appellant operated his vehicle in reckless disregard of the lives of other persons, or in such a manner as would be greatly dangerous to the lives of others, he could have been charged with first degree murder. Section 76-30-3, Utah Code Annotated, 1953.

Respondent respectfully directs the court's attention to the case of the **People v. Dunleavy,** [1948] Irish Reports 95, Court of Criminal Appeals of Erie, where Justice Davitt in very clear and appropriate language spoke on the difference between the standard of action necessary to sustain a conviction in the face of a standard of reckless disregard for safety, as distinct from reckless disregard for life. The court stated:

> **"To say that a person is driving with a reckless disregard for life means that he does not care whether he kills anybody or not. Such a state of mind will ordinarily, but perhaps not universally, amount to general malice sufficient to justify a conviction for murder. To say that a person is driving with a reckless disregard for the safety of others, may mean no more than that he does not care whether or not he puts them in danger. This may amount to no more than dangerous driving. To associate these two ideas is not to achieve the desired mean, but possibly to import an ambiguity. On the other hand, if the reference to recklessness is merely omitted, the jury are**

hardly given all the assistance which they are entitled to expect.

This court is of the opinion that a more satisfactory way of indicating to a jury the high degree of negligence necessary to justify a conviction for manslaughter is to relate it to the risk or likelihood of substantial personal injury resulting from it, rather than to attach any qualification to the word 'negligence' or to the driver's disregard for the life or safety of others. In this connection the American case of **Commonwealth v. Welansky,** a decision of the Supreme Court of Massachusetts, is of very considerable interest.

If the negligence proved is of a very high degree and of such a character that any reasonable driver, endowed with ordinary road sense and in full possession of his faculties, would realize, if he thought at all, that by driving in the manner which occasioned the fatality he was, without lawful excuse, incurring, in a high degree, the risk of causing substantial personal injury to others, the crime of manslaughter appears clearly to be established."

It is submitted that this is the standard that this court reached in the case of **State v. Berchtold,** 11 U.2d 208, 353 Pac. 183 (1960), where this court was first called upon to construe the requisite standard of the Utah Negligent Homicide Act. This court in addressing itself to the standard stated:

"* * * Our statute only requires reckless disregard for the safety of others, which is a much greater lack of care than ordinary negligence, but does not require as great a consciousness of the danger confronted as wilful misconduct required to create civil liability under our guest statute. To be 'reckless' does not require 'wilfulness' but means rather heedless, careless, and rash inadvertence to consequences."

The court made it very clear that an intentional accident or a choosing of a highly dangerous course while conscious of the danger was not required, but that the evidence must be such that, had the defendant stopped and considered, he would have realized that he had made the choice of a course marked with grave and serious dangers. The court expressly said:

> **"This does not require a finding that the defendant was fully conscious of the great danger to others."**

It is submitted that the very clear and precise language in the opinion of the Court of Criminal Appeals of Erie to the effect that "any reasonable driver endowed with ordinary road sense and in full possession of his faculties would realize, if he thought at all," is the standard to be applied in determining the element of consciousness. Indeed, the word "heedless" as used by this court in the Berch-told case implies that the operator of a vehicle need not be conscious in that he intends the accident, but might be quite indifferent to the actual danger involved.

In **State v. Park,** 17 U.2d 90, 404 P.2d 677 (1965), this court stated, in affirming a conviction for negligent homicide:

> **"The statute upon which the conviction is based, Section 41-6-43.10, U.C.A. 1953, provides that one who causes death by driving a motor vehicle in 'reckless disregard of the safety of others' shall be guilty of negligent homicide.**

> The term 'reckless disregard of the safety of others' of course implies a much greater dereliction in hazarding the safety of others than ordinary negligence. However, it does not require any intent to do harm either generally, or to the victim in particular. What is essential is that it be shown beyond a reasonable doubt that the defendant drove in a manner that he knew, or should have known, was highly dangerous to others, and that he did so intentionally, or heedlessly, with a careless indifference to the consequences. This court has said that the 'doing of an act fraught with the potentiality of producing death amounts to such a reckless disregard for the safety of others' that it will justify a conviction of this crime."

Thus, it can be seen that the standard applicable under the negligent homicide statute is the same as the standard applied under the manslaughter statute, where the individual would enact **malum prohibitum,** since this court required that the act be done in a manner which evidenced a disregard for the safety of others. **State v. Lingman,** 97 Utah 180, 91 P.2d 457. Applying the judicial standard noted above, and taking the facts in a light most favorable to the trial court's verdict, it is submitted that the jury and the trial court were both justified in concluding that the evidence demonstrated a reckless disregard on the part of the appellant for the safety of others.

The appellant, by his own admission, had traveled on the road before; he knew that there was a stop sign at the end of the road; he knew that there was an intersection on which cars could be traveling in an opposite direction. The stop sign was

visible 1,000 feet down the road. According to Mrs. Sylvester, the appellant's car approached the stop sign in a cloud of dust. Although the appellant testified that he stopped at the sign, Mrs. Sylvester testified that he did not. The testimony of the Highway Patrol trooper, based on the physical evidence, is completely contrary to the appellant's, thus justifying the jury in completely disregarding the testimony of the appellant. **falsus in uno, falsus in omnibus.** Appellant made no effort to sound his horn and must certainly have appreciated the serious danger that would be involved in running a stop sign. Further, having traveled the same road before, appellant was undoubtably aware of the obstructions to vision that would prevent him from fully viewing approaching traffic and prevent drivers on the main road from having a full view of the danger of anyone ignoring the stop sign. The jury would have been justified in concluding that the appellant deliberately failed to stop at the stop sign and intended to travel on through, and but for the Sylvester vehicle, would have made no effort to make a full and complete stop, as required. The whole pattern of driving conduct of the appellant indicates that he was heedless as to the consciousness of his act and took a course of action which recklessly endangered the lives of others and, in fact, brought death to a 10-year-old school boy.

Other decisions from this court have clearly found comparable fact situations to present sufficient evidence to justify the jury in returning a guilty verdict.

In **State v. Anderson,** 100 Utah 468, 116 P.2d 398 (1941), a challenge was made to the sufficiency of the evidence, where the defendant was charged with involuntary manslaughter by the operation of a motor vehicle. This court recited the evidence as follows:

> "The uncontroverted evidence discloses that Anderson was proceeding northward on Third East. Clark Romney was traveling westward on Twenty First South, a through highway. On the southeast corner of the intersection and facing south was the usual state highway 'stop' sign.
>
> Mr. Silcox and Mr. Engstrom, two eyewitnesses, testified that they saw the two automobiles as they approached the intersection. Their testimony is that they saw Anderson enter the intersection at a speed of between 40 and 45 miles an hour. No stop was made before entering the intersection. The Anderson automobile collided with the Romney automobile a few feet north of the center of the intersection. The Romney automobile went up in the air five or six feet and rolled over twice before coming to a stop between the curb and sidewalk. Romney was thrown from the automobile and died from the injuries received."

After reviewing the assignments of error, the court ruled the evidence sufficient and affirmed the conviction.

Of importance in demonstrating what conduct is recklessly in disregard of the safety of others, the decision of **State v. Riddle,** 112 Utah 356, 188 P.2d 449 (1948), warrants consideration. In that case, this court affirmed a conviction of involuntary manslaughter. The apparent sole evidence of negligence was that the appellant operated a vehicle on

the wrong side of the road. It did not appear that he had operated his vehicle for any great length of time on the wrong side of the road. In discussing the evidence, this court stated:

> "Whether or not it is criminal negligence to drive an automobile in such a manner that all or part of it extends over the center line of a highway must necessarily depend upon all of the surrounding circumstances. We do not say that in every case it is criminal negligence for a driver to permit part of his vehicle to project over the center line and onto the left hand side of the highway. Under some circumstances such conduct might not amount to criminal negligence. But where a driver enters a blind curve in the darkness of the night, and permits his automobile to get onto the left side of the road, and fails to see an automobile approaching in a lawful manner from the opposite direction, reasonable minds not only might fairly conclude that he was guilty of 'reckless conduct or conduct evincing a marked disregard for the safety of others,' but could hardly conclude otherwise.
>
> The record does not show the degree of the curve upon which the collision took place, nor does it indicate whether or not the curve was blind. However, the witnesses described it as a 'bad turn,' 'a dangerous curve,' 'a pronounced curve,' etc. And it is clear from defendant's own testimony that he (Riddle) did not see the Wells vehicle until an instant before the crash (too late to apply the brakes or to turn aside). It is therefore inferable, in fact practically inescapable, that either he did not see what he should have seen, or the curve was so blind that his range of view was very limited, and that by failing to remain on his own side of the road he was criminally negligent."

A case which directly sheds light on the fact situation presented by this appeal is **State v. Barker,**

113 Utah 514, 196 P.2d 723 (1948). In that case, the appellant challenged the sufficiency of the evidence, as well as claims instructional error of the trial court. This court reversed on the grounds of instructional error, but ordered a new trial finding that the evidence was sufficient to have justified a jury verdict of guilty. The defendant had been traveling north and the victim east. The defendant ran a stop sign, resulting in a collision and the death of the occupant of the other car. The facts bear striking resemblance to those in the instant case. It was observed:

> "So if the driver, after carefully ascertaining that no traffic was approaching in the 'thru' highway, after he had all but completely stopped at the stop sign, ran down and killed a pedestrian who suddenly darted in front of the car, there would be no criminal negligence. On the other hand, if at the time the driver all but completely stopped at the stop sign, there was traffic in the thru highway approaching so near that a collision could not be avoided, death from such a collision to a person in the car approaching on the thru highway would present a jury question on the criminal negligence of the driver of the car that all but completely stopped at the stop sign. So, while defendant is correct in his contention that the facts as far as they go in the illustration are the same as in the present case, that illustration did not contemplate the additional facts here presented, that when the defendant entered the intersection the other car was approaching on the thru highway so near that it constituted an immediate hazard, and **so that case is no authority for defendant's contention that the facts here do not support a finding that he was guilty of criminal negligence.**

Here it would make little difference whether he stopped at the stop sign or not. The fact that he entered this intersection at a time when another car was approaching so near as to constitute an immediate hazard made it highly dangerous to the occupants of that car regardless of whether he came to a complete stop, or merely slowed down or drove through without even slowing down. The thing that created the danger was the fact that he entered the intersection when a car which had the right of way over him was approaching and that he failed to yield the right of way and thereby caused the accident. It was his duty under those circumstances to look and be sure that there was no car approaching so near as to create an immediate hazard before he drove his car into the intersection. This duty in this respect was just as great if he came to a full stop as if he failed to stop. The fact that there was a stop sign should have told him not only that he must stop, but that if there was a car approaching, the driver would expect him to yield the right of way, and that it would be highly dangerous for him to proceed into the intersection without first ascertaining that no car was approaching so near as to constitute an immediate hazard. If under these circumstances his failure to yield was the result of inattention on his part or because of his failure to observe and see in time that there was a car approaching on the intersectiong highway, or if he saw the approaching car in time to yield the right of way and failed to do so, **then the jury from those facts would be justified in finding that he was guilty of conduct which was reckless or in marked disregard for the safety of others.** That inattention to the traffic and other persons on the highway which results in a driver's failure to avoid great danger and injury to others who are on the highway, has been repeatedly held by this court to constitute recklessness and to justify a verdict of manslaughter. See **State v. Thatcher,** supra, where the driver failed to observe pedestrians who were walking on the shoulder of the highway in front of him. **State v. Newton,**

> supra, where a driver turned his vehicle into the course of a car approaching from the opposite direction. **State v. Riddle,** supra, where the driver drove his car around a curve partly on the wrong side of the highway and ran into a car approaching from the opposite direction. The evidence was sufficient to justify the court in submitting the case to the jury, but on account of the erroneous instructions, the case is reversed and remanded for a new trial."

As can be seen from the Barker case, this court has ruled in a comparable fact situation to that now before the court, that the evidence justified submission of the matter to the jury for its determination. In the instant case, the jury had full opportunity to hear the witnesses, observe their demeanor on the stand, and judge their credibility. The facts, when taken in a light most favorable to the jury's verdict, clearly do not demonstrate that the jury and the trial judge were unreasonable men. There is no basis for a reversal.

CONCLUSION

In the instant case, the matter of the appellant's guilt was clearly presented to the jury on a clear and unobstructed presentation of the facts. No exceptions to the trial court's instructions were taken by the appellant. The jury was, therefore, clearly apprised of the law and weighed the conduct of the appellant as against the requisite legal standard. The facts, when viewed in a light most favorable to the jury's verdict, justify the conclusion the jury reached and support the trial court's judgment.

There is no basis for reversal. This court should affirm.

Respectfully submitted,

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