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No. 67570-2

IN THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

v.

CARLI ALVARADO

Appellant.

REPLY BRIEF OF APPELLANT

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Table of Contents

INTRODUCTION	3
ARGUMENT	4
CONCLUSION	10

Table of Authorities

<i>Campbell v. ITE Imperial Corp.</i> , 107 Wn.2d 143, 606 P.2d 275 (1980).	7
<i>Miotke v. Spokane</i> , 101 Wn.2d 307, 678 P.2d 803 (1984).....	9
<i>Sommer v. DSHS</i> , 104 Wn.App. 160, 15 P.3d 664 (2001).....	4
<i>State v. Brooks</i> , 73 Wn.2d 653, 440 P.2d 199 (1968).....	5
<i>State v. Coates</i> , 17 Wn.App. 415, 563 P.2d 208 (1977)	5
<i>State v. Eike</i> , 72 Wn.2d 760, 435 P.2d 680 (1967).....	5
<i>State v. Keeney</i> , 112 Wn.2d 140, 769 P.2d 295 (1989).....	8
<i>State v. Knowles</i> , 46 Wn.App. 426, 730 P.2d 738 (1986).....	4, 5
<i>State v. Lopez</i> , 93 Wn.App. 619, 970 P.2d 765 (1999).....	5

INTRODUCTION

In her Opening Brief, Appellant Carli Alvarado established that her conviction for vehicular homicide was not supported by substantial evidence. Washington case law stands for the proposition that ordinary negligence is not sufficient to support a conviction for vehicular homicide by driving with disregard for the safety of others. Alvarado demonstrated convincingly that exceeding the speed limit by five miles per hour, and looking away from the road for one to four seconds, is not the kind of aggravated negligence necessary to this Court to affirm a conviction.

Alvarado also established that Superior Court Commissioner Alfred Heydrich became his own expert witness and conducted his own time/distance analysis from which he concluded that Alvarado was sufficiently inattentive to have acted with aggravated negligence. Unfortunately, the Commissioner confused the time it took to travel down Cornwall Avenue with the time that Alvarado was actually distracted by the backpack. There is no evidence that would convince an unprejudiced thinking mind that Alvarado was actually not looking at the road for 11 seconds, or provide a causal link between Alvarado's conduct and the fatal accident. *Sommer v.*

DSHS, 104 Wn.App. 160, 172, 15 P.3d 664 (2001); *State v. Knowles*, 46 Wn.App. 426, 429-30, 730 P.2d 738 (1986).

The Respondent's Brief fails to address the authority cited by the Appellant in support of her position. In order to address any misconceptions that might have been created by the Respondent's Brief, and to clarify the basis for reversal of Alvarado's conviction, the Appellant submits this Reply Brief.

ARGUMENT

Numerous times in its Brief, the Respondent repeated the meme that the accident that claimed the life of Anna Brulotte was due to Alvarado's "gross inattention." This factually inaccurate exaggeration originated with the testimony of Officer Lewis Leake during the trial. RP at Vol. II, pages 108 & 132. In fact, the uncontroverted testimony of the three witnesses in the Jetta on September 30, 2010 (Alvarado, Wright, and Kenison) proved that Alvarado glanced at her backpack for between one and four seconds. RP at Vol. IV, pages 71, 92 & 30. The State could not prove otherwise at trial, and cannot successfully argue anything to the contrary on appeal.

In addition to *State v. Eike*, 72 Wn.2d 760, 435 P.2d 680 (1967), the Appellant provided examples of four different cases in which the standard of what constitutes the disregard for the safety of others was discussed. Engaging in dangerous horseplay behind the wheel while driving at an excessive rate of speed and crossing a double yellow line in a blind curve will support a conviction for vehicular homicide by disregard for the safety of others. *State v. Knowles*, 46 Wn.App. 426, 730 P.2d 738 (1986). Excessive speed in a vehicle that was known to not be in proper working order will support a conviction for vehicular homicide by disregard for the safety of others. *State v. Coates*, 17 Wn.App. 415, 563 P.2d 208 (1977). Driving at high speed, in poor weather conditions, and on the wrong side of the road will support a conviction for vehicular homicide by disregard for the safety of others. *State v. Brooks*, 73 Wn.2d 653, 440 P.2d 199 (1968).

A conviction for vehicular homicide was overturned in *State v. Lopez*, 93 Wn.App. 619, 970 P.2d 765 (1999) because lacking evidence of horseplay, substance abuse, or other reckless conduct, the State could not prove the necessary "conscious disregard" of danger necessary to support a conviction. Alvarado and her passengers did not engage in horseplay. There was never even an

allegation of horseplay or boisterous behavior. They were wearing seatbelts (RP at Vol. IV pages 18 & 60) and were not listening to loud music RP at Vol. IV pages 19 & 61. Alvarado's minor speed violation and brief period of inattention do not rise to the level necessary to support a conviction.

The Respondent argues unconvincingly that Alvarado's conviction was not based solely on her exceeding the speed limit by 5 MPH or looking away for one to four seconds, but "cumulatively on the evidence, and in large part upon the fact that [Alvarado] did not see the Escort at any time, and should have, from the time she turned onto Cornwall Avenue out of the high school parking lot to the time of impact, over a block and a half and over ten seconds away."¹

The Respondent's argument attempts to blur the distinction between evidence and speculation. What anyone subjectively believes that Alvarado should have done is not competent evidence. The only evidence of Alvarado's inattention is the testimony of the three occupants of the car. Alvarado looked away from the road for one to four seconds. Commissioner Heydrich speculated or theorized that Alvarado was inattentive for 11

¹ Brief of Respondent, page 8.

seconds before her Jetta collided with Bron's Escort. A verdict cannot be founded on mere theory or speculation. *Campbell v. ITE Imperial Corp.*, 107 Wn.2d 143, 145, 606 P.2d 275 (1980).

While Commissioner Heydrich may have performed the arithmetic calculations discussed in the Respondent's brief accurately, his interpretation of those calculations was fatally flawed. Acting as a self-appointed expert, the Commissioner committed reversible error when he mistakenly concluded that because it may have taken 11 seconds to travel from the intersection of Kentucky and Cornwall to Virginia and Cornwall, Alvarado was looking away from the road during that entire period of time. The conclusion is pure speculation. It isn't even plausible speculation, because no rational trier of fact could possibly believe that a car would travel in a straight line for approximately 400 feet if the driver were not looking at the road for that entire distance. There is no substantial evidence in the record to support Commissioner Heydrich's conclusion that Alvarado was inattentive for 11 seconds.

The Commissioner also erroneously concluded that Alvarado "never saw the Bron car at any time prior to the impact." CP at 69. The evidence in the record is that Alvarado did not recall

seeing other vehicles travelling north on Cornwall Avenue on the date in question. RP at Vol. IV, page 22-23. The Commissioner erred by equating “not recalling” with “not seeing” despite a complete lack of supporting evidence. The only so-called evidence that supports this conclusion is Commissioner Heydrich’s own theory about 11 seconds of inattention. The Respondent correctly points out that the Commissioner viewed the accident scene during the trial at the request of the Defense, but the scene view does not create a reasonable inference that supports the Commissioner’s finding of 11 seconds of inattention.

The Respondent has requested that the Court deny the Appellant an award of attorney’s fees if she prevails. The Court should look with disfavor upon that request. In one of the cases cited by the Respondent, our Supreme Court held that it was improper to award attorney’s fees to the State against an unsuccessful criminal appellant, whether charged as a juvenile or adult. *State v. Keeney*, 112 Wn.2d 140, 145, 769 P.2d 295 (1989) On that basis, the Appellant would oppose an award of attorney’s fees to the State in the event she is unsuccessful, but that case does not preclude an award to the Appellant.

This Court has the inherent equitable power to order the State to defray some or all of Alvarado's legal costs, should it find that she was wrongfully convicted of vehicular homicide. There are four recognized equitable grounds for an award of attorney's fees: bad faith conduct of the losing party, preservation of a common fund, protection of constitutional principles, and private attorney general actions. *Miotke v. Spokane*, 101 Wn.2d 307, 338, 678 P.2d 803 (1984). The private attorney general exception allows for an award of attorney's fees when a successful litigant incurs considerable economic expense to effectuate an important legislative policy benefitting a large class of citizens. *Miotke*, 101 Wn.2d at 340. In the present case, clarification of the standard of what constitutes the greater and more marked dereliction from ordinary negligence enunciated by *Eike* forty five years ago would create a policy benefitting all citizens of Washington. The fact that Alvarado hasn't used one cent of public money for her trial, expert witness, or appeal (except for the transcript), even though she was lawfully entitled to do so, lends further support to an award of attorney's fees under equitable principles.

Although the Appellant has incurred substantial economic expense in defense of this criminal action, she does not wish to

make a request for attorney's fees the central issue of her appeal. Although recouping her family's expenses would be helpful, Alvarado is far more concerned with the reversal of a conviction for a Class A felony that was not supported by substantial evidence at trial.

CONCLUSION

Alvarado is entitled to the relief set forth in her Brief: reversal of her conviction, dismissal of the case, and reasonable attorney's fees and costs. Nothing in the Brief of Respondent should persuade this Court that the grounds for reversal as set forth in Alvarado's Brief are not valid. For all of the reasons previously stated, Alvarado respectfully requests an order granting the relief she is seeking.

RESPECTFULLY SUBMITTED this 2nd day of May, 2012.

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Declaration of Service

I, Hieu Do, Legal Assistant to Mark A. Kaiman, Attorney for the Appellant in this matter do hereby certify that on May 3, 2012, in order to serve the Respondent, I personally delivered a true and correct copy of the Reply Brief of Appellant to:

Mr. David McEachran
Whatcom County Prosecutor
311 Grand Ave.
Bellingham WA 98225

This is sworn under penalty of perjury under the law of the State of Washington at Bellingham, Washington on this 3rd day of May, 2012.

LUSTICK LAW FIRM PLLC,



Hieu Do
Legal Assistant, Lustick Law Firm PLLC

ORIGINAL