

NO. 39788-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KENNETH PAWSKI,

Appellant.

FILED
COURT OF APPEALS
DIVISION TWO
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STATE OF WASHINGTON
BY  DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Roger A. Bennett, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court's finding that the required speed limit was 25 m.p.h. is not supported by the evidence. CP 8 (Finding of Fact 5).

2. The trial court's finding that appellant's speed caused an inability to stay in his lane is not supported by the evidence. CP 9 (Finding of Fact 14).

3. The trial court's finding that appellant's excessive speed caused him to forcefully apply his brakes, resulting in the collision, is not supported by the evidence. CP 9 (Finding of Fact 15).

4. By inferring recklessness from the fact of excessive speed, the court relieved the State of its burden of proving an essential element of the crime.

5. The State failed to prove appellant drove with disregard for the safety of others.

Issues pertaining to assignments of error

Appellant was charged with vehicular homicide by driving in a reckless manner or with disregard for the safety of others.

1. It was undisputed that appellant was speeding at the time of the collision, and the court inferred from the fact of appellant's excessive speed that he was driving in a reckless manner. Where, under the facts of this case, speed alone does not support the finding of recklessness, did the

court's reliance on the inference relieve the State of its burden of proving an essential element of the offense? (Assignments of Error 1-4)

2. Where the evidence showed no more than ordinary negligence, did the State fail to prove appellant drove with disregard for the safety of others? (Assignment of Error 5)

B. STATEMENT OF THE CASE

1. Procedural History

On January 30, 2009, the Clark County Prosecuting Attorney charged appellant Kenneth Pawski with one count of vehicular homicide. CP 1; RCW 46.61.520(1)(b)(c). Pawski waived his right to a jury trial, and the case proceeded to bench trial before the Honorable Roger A. Bennett. CP 5. The court found Pawski guilty and imposed a standard range sentence of 24 months confinement. CP 7-9, 12. Pawski filed this timely appeal. CP 23.

2. Substantive Facts

Kenneth Pawski spent the night of August 1, 2008, camping with friends. 2RP¹ 261. He had a few beers and went to sleep around 2:30. 2RP 262-63. Pawski woke up around 7:30 the next morning and headed home, driving along Rawson Road, a route he had driven many times.

¹ The Verbatim Report of Proceedings is contained in four volumes, designated as follows: 1RP—8/13/09; 2RP—8/14/09; 3RP 8/17/09; 4RP—9/10/09.

2RP 263-64. He drove like he usually does on that road, not looking at his speedometer but instead paying attention to the road through the windshield. 2RP 264, 275. As Pawski came around a curve, he saw a red Jeep which he believed to be in his lane. 2RP 265. He panicked and slammed on the brakes. 2RP 265. His tires locked and he went into a skid, colliding with the Jeep. 2RP 266. The Jeep rolled into a ditch. 1RP 35.

Pawski got out of his truck and tried to pull the Jeep's driver out of the vehicle. 2RP 267. He was unable to make much progress because his wrist was broken, and when nearby residents arrived, Pawski asked them to help the man in the Jeep. 1RP 22, 27, 29, 35, 44; 2RP 267. They were eventually successful in pulling the driver, Jason Skelton, from the Jeep, but Skelton died at the scene. 1RP 24. Not long after Skelton was pulled from the Jeep, it caught fire. 1RP 24, 38.

Pawski was taken to the hospital where he was treated and then interrogated by a sheriff's deputy. Pawski told the deputy he had drunk three to four beers the night before, his last drink was at 2:30 a.m., and he had about four hours of sleep. 1RP 59-60. Pawski said he did not believe his ability to drive was impaired, and the deputy noted he did not smell of alcohol. 1RP 61. After learning of Skelton's death, Pawski said he should have stayed at the campsite and that this was the stupidest thing he had

ever done, and he asked what kind of jail time he was looking at. 1RP 62, 65. Blood drawn at 9:46 a.m., about two hours after the collision, showed a blood alcohol level of only .02 percent. 1RP 67, 161.

Rawson Road is a winding, hilly road. 1RP 159. There are signs posted warning drivers of upcoming curves. 1RP 160. Just east of the collision site, a warning sign going into the turn recommends a speed of 25 miles per hour. 1RP 160-61. Accident reconstructionists estimated Pawski was driving 56 to 65 or 67 miles per hour when his brakes locked. 1RP 119; 2RP 249. His truck skidded for 107 feet in just over a second before colliding with the Jeep. 1RP 178, 191.

Clark County Sheriff's Deputy Douglas Harada was the lead investigator in this case. 1RP 69, 77. Harada had received training in investigating traffic collisions and the mathematical formulae used in accident reconstruction. 1RP 70-76. He calculated the truck's speed using crush analysis, slide to stop, and momentum formulae, concluding that the truck was traveling 67 miles per hour at the start of the skid. 1RP 114, 119.

Even though he did not have the educational background normally required to determine the cause of the collision, Harada gave his opinion that Pawski drove down the hill around the corner going too fast, fixated on a telephone pole, and locked his brakes. 1RP 145-46. Harada believed

Pawski did not apply his brakes until he was at or beyond the apex of the curve, which was too late. 1RP 146. Although he acknowledged it was possible Pawski saw the Jeep approaching, he did not think it was probable. 1RP 146.

Thomas Fries, a consulting mechanical engineer specializing in forensic accident reconstruction, who had conducted over 3000 accident reconstructions, testified for the defense. 2RP 215-16. He agreed with many of Harada's calculations, although he estimated Pawski's speed as 56 to 65 miles per hour at the start of the skid. 2RP 219, 221, 236, 249. Using a line of sight evaluation, Fries determined that the Jeep would have been visible to Pawski prior to the start of the skid. 2RP 242-45. Moreover, Fries found no indication that the truck was out of control before the brakes were applied. 2RP 249. It was lined up in its lane, and most of the skid was actually very straight. 2RP 249. Fries concluded that something caused Pawski to panic brake, probably the approaching vehicle becoming visible, which in turn sent the truck out of control. 2RP 252. Pawski could have made the curve if he had not panic-braked. 2RP 252.

In finding Pawski guilty of vehicular homicide by driving in a reckless manner and with disregard for the safety of others, the court focused on the speed Pawski was driving, finding beyond a reasonable

doubt that he was driving too fast. 3RP 321. The court relied on RCW 46.61.465, which states that exceeding the speed limit is prima facie evidence of recklessness. 3RP 325; CP 9. The court entered written findings of fact, including the following:

4. Defendant approached a curve to the right at a speed between 60 and 67 m.p.h.

5. The speed limit, well posted with a warning sign, which Defendant drove past, was 25 m.p.h. This low speed was required because at the location in issue, Rawson Road is a curvy and hilly two lane road with narrow shoulders.

...

13. The Defendant's speed was grossly excessive for the conditions.

14. The Defendant's excessive speed most likely caused an inability to remain in his own lane, necessitating that he forcefully apply his brakes.

15. The excessive speed, which caused the Defendant to lock up his wheels by braking, caused the Defendant's vehicle to enter the Eastbound lane and strike the Jeep Cherokee.

CP 7-9.

C. ARGUMENT

1. BY INFERRING RECKLESSNESS FROM THE FACT OF EXCESSIVE SPEED, THE COURT RELIEVED THE STATE OF ITS BURDEN OF PROVING AN ESSENTIAL ELEMENT OF THE CRIME.

In every criminal prosecution, due process requires the State to prove each fact necessary to constitute the charged crime beyond a reasonable doubt. U.S. Const. amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970); State v.

Crediford, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). The vehicular homicide statute requires the State to prove that the victim died as a result of injury caused by driving and that the driver was operating a motor vehicle:

- (a) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502; or
- (b) In a reckless manner; or
- (c) With disregard for the safety of others.

RCW 46.61.520. Pawski was charged under alternatives (b) and (c), and thus the State was required to prove beyond a reasonable doubt that he drove either in a reckless manner or with disregard for the safety of others. CP 1.

“Reckless manner” is not defined by statute, but Washington courts have interpreted it to mean “driving in a rash or heedless manner, indifferent to the consequences.” State v. Roggenkamp, 153 Wn.2d 614, 622, 106 P.3d 196 (2005). Under RCW 46.61.465², evidence that the defendant was exceeding the speed limit constitutes prima facie evidence of driving in a reckless manner. But evidence of speeding is not alone

² RCW 46.61.465 provides as follows:

The unlawful operation of a vehicle in excess of the maximum lawful speeds provided in this chapter at the point of operation and under the circumstances described shall be prima facie evidence of the operation of a motor vehicle in a reckless manner by the operator thereof.

sufficient to convict the defendant of vehicular homicide. The State must still prove that the defendant was driving in a rash or heedless manner, indifferent to the consequences. State v. Randhawa, 133 Wn.2d 67, 78, 941 P.2d 661 (1997); Hanna v. Riveland, 87 F.3d 1034, 1038 (9th Cir. 1996) (holding instruction permitting inference of recklessness from speed alone violated due process).

In Randhawa, the defendant was driving on a road with a posted speed limit of 50 miles per hour, but a warning sign approaching a curve suggested a speed of 25 miles per hour. The defendant entered the curve traveling 60 to 70 miles per hour, and he lost control of the vehicle. The car skidded across an island of gravel and grass, slamming into a power pole and killing the passenger. Randhawa, 133 Wn.2d at 70, 77-78.

The defendant was charged with vehicular homicide, and the trial court instructed the jury that “A person who drives in excess of the maximum lawful speed at the point of operation may be inferred to have driven in a reckless manner.” Randhawa, 133 Wn.2d at 75. The Washington Supreme Court held that, under the facts of that case, the inference instruction relieved the State of its burden of proving every element of the offense, thus violating due process. Randhawa, 133 Wn.2d at 76-78.

The most that can be said is that Randhawa was traveling between 10 to 20 m.p.h. over the posted speed limit of 50 m.p.h. just before the accident. That speed is not so excessive that one can infer solely from that fact that the driver was driving in a rash or heedless manner, indifferent to the consequences. In short, although it was essentially undisputed that Randhawa was speeding, we cannot say with substantial assurance that the inferred fact of reckless driving flowed from the evidence of speed alone.

Randhawa, 133 Wn.2d at 78.

In this case, the court relied on an inference of recklessness drawn from evidence that Pawski was speeding in finding him guilty of vehicular homicide. CP 9. But as in Randhawa, it cannot be said with substantial assurance that the fact of reckless driving flowed from evidence of Pawski's speed alone. As in Randhawa, Pawski was driving 60 to 67 miles per hour, despite the recommended speed approaching the curve of 25 miles per hour, when he lost control of his vehicle. As the Supreme Court held in Randhawa, that speed is not so excessive that recklessness can be inferred from that fact alone. See Randhawa, 133 Wn.2d at 78.

The court below entered no separate finding that Pawski was driving in a rash or heedless manner, indifferent to the consequences. And the findings the court did make regarding the effects of Pawski's speed were not supported by the evidence. First, the court found that the speed limit in the area was 25 m.p.h., which was required because of the road conditions. CP 8 (Finding of Fact 5). The evidence, however, was that 25

m.p.h. was the recommended speed for the curve, not the maximum speed limit. 1RP 161.

Next, the court found that because of his speed, Pawski was unable to stay in his own lane, necessitating his forceful braking and resulting in the collision. CP 9 (Findings of Fact 14 and 15). There was no testimony that Pawski's truck left its lane of travel before the brakes were applied or that Pawski braked because he could not stay in his lane. Rather, the State's expert theorized that Pawski applied the brakes because he was traveling too fast and became fixated on a telephone pole. 1RP 194. The defense expert testified that there was no indication the truck was out of control before the brakes were applied and that the evidence showed it was lined up in its lane. 2RP 249. In fact, the State's expert testified that if the truck had been traveling too fast and attempted the turn without braking, it would have created a critical speed scuff. 1RP 102. There was no critical speed scuff here, indicating that the truck was in control. 1RP 103; 2RP 249.

The court's inference of recklessness from the fact of Pawski's speed relieved the State of its burden of proving an essential element of the crime, in violation of due process. The conclusion that Pawski committed the charged offense by driving in a reckless manner must be reversed.

2. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT PAWSKI DROVE WITH DISREGARD FOR THE SAFETY OF OTHERS.

On appeal, a reviewing court should reverse a conviction and dismiss the prosecution for insufficient evidence where no rational trier of fact, viewing the evidence in the light most favorable to the State, could find that all elements of the crime were proven beyond a reasonable doubt. State v. C.G., 150 Wn.2d 604, 610-11, 80 P.3d 594 (2003); State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); State v. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996); State v. Chapin, 118 Wn.2d 681, 826 P.2d 194 (1992); State v. Green, 94 Wn. 2d 216, 616 P.2d 628 (1980).

As charged in this case, to convict Pawski of vehicular homicide the State was required to prove he operated a motor vehicle with disregard for the safety of others. CP 1; RCW 46.61.520(1)(c). Under this prong of the vehicular homicide statute, the State must prove an aggravated kind of negligence, “falling short of recklessness but constituting a more serious dereliction than the hundreds of minor oversights and inadvertences encompassed within the term ‘negligence.’” State v. Eike, 72 Wn.2d 760, 765-66, 435 P.2d 680 (1967). “[D]isregard for the safety of others is conduct more culpable than ‘driving in such a manner as to endanger or be likely to endanger any persons or property (RCW 46.61.525—negligent driving).’” State v. Lopez, 93 Wn. App. 619, 623, 970 P.2d 765 (1999)

(quoting Eike, Donworth, J., dissenting). The State failed to prove Pawski drove with disregard for the safety of others, as the evidence did not show his actions exceeded ordinary negligence.

Under RCW 46.61.400(1)³, drivers must drive at no greater speed than is reasonable and prudent for the conditions, and speed must be controlled so as to avoid collisions. The failure to follow the rules of the road is admissible but not conclusive on the issue of negligence. RCW 5.40.050 (abolishing the doctrine of negligence per se); Lopez, 93 Wn. App. at 622-23; Mathis v. Ammons, 84 Wn. App. 411, 418, 928 P.2d 431 (1996), review denied, 132 Wn.2d 1008 (1997).

On appeal, as below, Pawski does not dispute that he may have been negligent. 2RP 307. He disputes, however, that the State proved more than ordinary negligence. The evidence demonstrated nothing extraordinary or grossly negligent about his driving. Pawski had driven on Rawson Road many times, and he was driving as he always did. 2RP 264. He remained in his lane of travel and in control of his vehicle until he panicked and stepped on the brakes. 2RP 249. Although there was no

³ RCW 46.61.400(1) provides as follows:

No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. In every event speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highway in compliance with legal requirements and the duty of all persons to use due care.

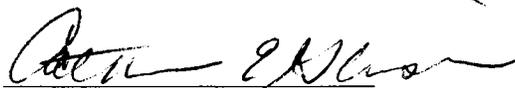
proof that the Jeep had entered Pawski's lane, Pawki believed it had. 2RP
265. The collision was the result of his tragic panic reaction to mistaken
circumstances. The facts do not establish a disregard for the safety of
others.

D. CONCLUSION

The court's reliance on an inference relieved the State of its burden
of proving Pawski drove in a reckless manner. Moreover, the State failed
to prove Pawski drove with disregard for the safety of others. Pawski's
conviction for vehicular homicide must be reversed.

DATED this 12th day of February, 2010.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant in

State v. Kenneth Pawski, Cause No. 39788-9-II directed to:

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
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