

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA : 99-10,912

VS :

THOMAS C. SHIP MAN :

OPINION AND ORDER

Before the Court is the Defendant's Motion to Declare 75 Pa.C.S.A. § 3735.1 Unconstitutional, and his Motion for Writ of Habeas Corpus. The Defendant was charged with two counts of aggravated assault by vehicle while driving under the influence, and two counts of driving under the influence of alcohol. The charges stem from an incident that occurred on June 4, 1999 at the intersection of High Street and Cherry Street. At approximately 11:19 p.m. on that date, the Defendant, while driving a motor vehicle, hit two boys who were standing in the westbound lane of the roadway.

The Commonwealth presented the testimony of Janice Springman, a registered nurse, at the preliminary hearing. Ms. Springman testified that she was travelling eastbound on High Street when she noticed two boys leaning over a bicycle in the westbound lane (N.T. 6/11/99 p. 4). At some point, she noticed headlights coming toward her in the westbound lane. She saw the car, driven by the Defendant, strike the two boys (Id., p.6). She testified that she saw one of the boys fly through the air. She stopped her vehicle and went to aid the boys. After assuring that the ambulance had been called, she assessed the condition of the boys and stayed on the scene until an ambulance arrived. The two boys were life flighted to Geisinger Medical Center.

Officer Brian Wolmer of the Williamsport Bureau of Police testified that when he arrived on the scene, he saw a bicycle under the Defendant's vehicle. The Defendant was standing next to the vehicle with the driver's door open. The Defendant stated at

that time that he struck the two boys, but that he hadn't seen them until he was on top of them. He testified that the Defendant was visibly distraught (Id., p 18). The Defendant had stated that he had come over the crest of the hill, that his lights had come down, and the boys were there and he struck them. Officer Wolmer testified that his observation of the scene revealed no "crests at the actual scene of the accident at Cherry and High. The crest was actually, as I observed it, back at Elmira and Center Street, and that when you came down to Cherry and High, it was actually a downward grade that straightened out right at the bottom" (Id., p.25).

Officer Wolmer testified that after a few minutes of conversing with the Defendant, he began to detect an odor of alcohol. He then noticed that the Defendant appeared to be unsteady on his feet, he "swayed in place," and his eyes were slightly bloodshot and glossy (Id., p.20). He requested that the Defendant complete field sobriety tests. He conducted the tests out of the sight of the crowd. Officer Wolmer testified that the Defendant failed the three field sobriety tests that were administered. The Defendant was then taken into custody and placed under arrest for suspicion of driving under the influence. The Defendant was taken to the Williamsport Hospital where blood was drawn for a chemical analysis. The blood test results indicated that the blood alcohol content of the Defendant's blood was 0.16.

HABEAS

A preliminary hearing was held June 11, 1999, before District Justice Page. At the conclusion of the hearing, District Justice Page bound over both charges. The Defendant now argues that the charge of aggravated assault by vehicle should be dismissed, as the Commonwealth did not present a prima facie case. To successfully

establish a prima facie case, the Commonwealth must present sufficient evidence that a crime was committed and the probability the Defendant could be connected with the crime. Commonwealth v. Wodjak, 502 Pa 359, 466 A.2d 991 (1983). 18 Pa.C.S.A. § 3735 provides that a person is guilty of aggravated assault by vehicle while driving under the influence if he negligently causes serious bodily injury to another person as the result of driving under influence of alcohol or controlled substance, and who is convicted of driving under the influence, when his act of driving under the influence is the cause of the injury. As used in this section, the term "serious bodily injury" means any bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ.

Instantly, the Defendant does not dispute that he struck and seriously injured two boys while he was driving under the influence. The Defendant argues, however, that the Commonwealth did not introduce evidence that his intoxicated condition was the cause of the injury or collision. The Defendant argues that the collision was not caused by his intoxicated condition, but was caused by the two boys who stood in the lane of traffic. Instantly, the Court finds that the Commonwealth did present evidence to establish a prima facie case that the Defendant's intoxicated condition was the cause of the injury. Although there was testimony that the Defendant saw the two boys after he crested a hill, at which time he had no opportunity to stop, Officer Wolmer testified that his observation of the scene revealed that the hill crested approximately a block before the collision. This would tend to indicate that the Defendant had ample opportunity to stop his vehicle, yet in his intoxicated condition his reflexes had slowed rendering him

unable to stop his vehicle in time. The Defendant's Motion to Dismiss on this basis is therefore denied.

MOTION TO DECLARE STATUTE UNCONSTITUTIONAL

The Defendant cites Commonwealth v Heck, 341 Pa.Super. 183, 491 A.2d 212, (1985) in support of his proposition that 75 Pa.C.S.A. § 3735 violates due process and is therefore unconstitutional, because it imposes criminal liability for an act of ordinary negligence. In Heck, the defendant hit a motorcycle while negotiating a left-hand turn at an intersection. The driver of the motorcycle was tragically killed as a result of the impact. The defendant was charged with homicide by vehicle under 75 Pa.C.S. § 3732. Under that statute, a person is guilty of homicide by vehicle if he unintentionally causes the death of another person while engaged in the violation of any law of this Commonwealth or municipal ordinance applying to the operation or use of a vehicle or to the regulation of traffic, when the violation is the cause of death.

The court concluded that a defendant's conviction based on his ordinary negligence in violating a traffic law, where the violation is neither knowing nor criminally negligent, violates due process. In making that determination, however, the court distinguished the circumstances in that case (accident as a result of making an improper turn) from the circumstances presented in the instant case (accident as a result of driving while under the influence). The court recognized that there is a vast difference between *negligent* and *conscious* wrongdoing and cited Hall, in *Negligent Behavior Should be Excluded from Penal Liability*, 63 Col.L.Rev. 632, 634 (1963) for providing the following contrast:

It should from the outset be borne in mind that negligent behavior implies inadvertence and must therefore be sharply

distinguished from voluntary harm-doing, i.e. from conduct that includes at least an awareness of possible harm. *If, for example, one who is about to drive an automobile knows that he is ill or very tired or if he drinks alcoholic beverage knowing this will incapacitate him, subsequent damage may justifiably be attributed to the immediately prior conduct. Taking all the directly relevant facts into account, it is tenable, though far from self-evident, to hold that he was reckless, not merely negligent.* This would seem to fall within the Model Penal Code's definition of recklessness as conscious disregard for "a substantial and unjustifiable risk." ... With respect to negligent damage, however, neither at the time of the damage nor shortly prior to it, i.e., the time immediately related to the dangerous behavior in issue, does the defendant have knowledge, belief, or suspicion that he is endangering anything socially valued. The vast difference between voluntary harm-doing and negligent damage was expressed in Mr. Justice Holmes's graphic terms that even a dog understands the difference between being kicked and being stumbled over.

Commonwealth v. Heck, 491 A.2d at 224. (emphasis added)

The court further noted the distinction between the circumstances in that case to the crime of homicide by vehicle while driving under the influence. The court noted that "with regard to such drunk driving offenses, it has been said that it is by definition criminally negligent to drive while intoxicated." Heck, 491 A.2d at 227. The Court therefore finds the Defendant's knowing and voluntary conduct in this case, which may by definition be criminally negligent, to be distinguishable from the ordinary negligent conduct in Heck. The Court therefore denies the Defendant's motion to declare the statute unconstitutional.

ORDER

AND NOW, this _____ day of February, 2000, based on the foregoing Opinion, it is ORDERED AND DIRECTED that the Defendant's Petition for Writ of Habeas Corpus and Motion to Declare 75 Pa.C.S.A. § 3735.1 Unconstitutional are DENIED.

By The Court,

Nancy L. Butts, Judge

cc: CA
Eric Linhardt, Esquire
Lori Rexroth, Esquire
Honorable Nancy L. Butts
Judges
Law Clerk
Gary Weber, Esquire