STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS E. JOHNSON, JR.,

Defendant-Appellant.

UNPUBLISHED
April 4, 1997

No. 193241
Genesee Circuit Court
LC No. 95-053323

BEFORE: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

Defendant appeals by leave granted a circuit court order denying his motion to quash the information charging him with driving while intoxicated thereby causing death, MCL 257.625(4); MSA 9.2325(4). We reverse.

On August 4, 1994, defendant was driving west on Alma Street in Flint at approximately twenty-five miles per hour when a minor child darted out in front of his car on a bicycle from a driveway. The child hit the passenger side of the car, went up in the air, and hit the hood of defendant's automobile. Defendant was eventually charged as indicated.

During the preliminary examination, the passenger in defendant's car at the time of the accident testified that defendant appeared to be operating the vehicle correctly and was not speeding. Breathalyzer tests administered more than two hours after the accident indicated defendant had a blood alcohol level of 0.11%, thus reaching the threshold established in the statute for driving while intoxicated. Officer Robert Clark, the officer in charge of the case and also an expert in the area of accident investigation and reconstruction, testified that the victim had been riding his bicycle on the sidewalk and rode onto a driveway and from there into the street in front of the vehicle being driven by defendant. As there were parked cars adjacent to the driveway and defendant approached from the back of them, Clark opined, on the basis of the sight lines, the size of the bicycle, and the rider's size, that defendant's sight of the bicycle and rider may have been obscured by the parked cars. Consistent with this, Clark's report concluded that the bicyclist was at fault for failure to yield.

After the district court was finished questioning Clark, the court stated the following:

> Just in terms of your cross, I have no evidence indicated [sic] so far that establishes speeding. I have no evidence indicated [sic] so far a failure to maintain clear lookout. All the evidence appears to indicate this was a sudden emergency, there was no time to react, and absent the issue of drinking, that there would not be any evidence of negligence on the behalf – on the part of this driver.

Defendant argued that the charge had to be dismissed because the statute contained a causation requirement and the evidence showed his driving did not cause the accident. The court explained that there was no evidence of negligent driving, and absent the issue of alcohol, it would dismiss the charge if it was brought on some kind of negligent homicide. The court nevertheless bound defendant over for trial in the circuit court.

Defendant reiterated his causation argument in the circuit court. With respect to whether the statute required proof of causation, the circuit court agreed with the district court's interpretation that entering a vehicle and operating it while under the influence of intoxicating liquor was sufficient to establish causation.

We reverse on the basis of the Supreme Court's recent opinion in *People v Lardie*, 452 Mich 231; 551 NW2d 656 (1996).[1] In *Lardie*, the defendant drove while under the influence of alcohol and marijuana. *Id*. at 235. His car hit two trees, killing three of his passengers. *Id*. While the main issue in the case was whether MCL 257.625; MSA 9.2325 imposed strict liability or required mens rea, the Court addressed the issue of causation:

> In seeking to reduce fatalities by deterring drunken driving, the statute must have been designed to punish drivers when their drunken driving caused another's death. Otherwise, the statute would impose a penalty on a driver even when his wrongful decision to drive while intoxicated had no bearing on the death that resulted. Such an interpretation of the statute would produce an absurd result by divorcing the defendant's fault from the resulting injury. [*Id*. at 257.]

A footnote corresponding to the above explanation provided additional clarification:

> What is missing is the necessary causal connection between the [reckless] conduct and the result of [that] conduct; and causal connection requires something more than mere coincidence as to time and place. [*Id*. at 257, n 45 (citing 1 LaFave & Scott, Substantive Criminal Law, §3.12[a], pp 391-392).]

The Court further explained that to prove causation, the prosecution had to:

> …establish that the particular defendant's decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim. In this way, the statute does not impose a severe penalty when the injury was

> unavoidable for that particular driver (regardless of whether he was intoxicated), because the statute ensures that the wrongful decision caused the death in the accident. [*Id*. at 258.]

The Court then set forth the elements necessary to prove the crime: (1) the defendant was operating his motor vehicle while he was intoxicated; (2) he voluntarily decided to drive knowing that he had consumed alcohol and might be intoxicated; and (3) his intoxicated driving was a substantial cause of the victim's death. *Id*. at 259-260. In a footnote, the Court explained that to prove causation, the prosecution must demonstrate that the defendant's prohibited conduct, i.e., his culpable decision to drive while intoxicated, substantially contributed to the resulting death. *Id*. at 260, n 51.

Lardie thus makes it clear that causation is a requirement of the statute. Therefore, the district and circuit courts erred as a matter of law in ruling that causation was established simply by defendant's consumption of alcohol and subsequent driving of his vehicle. The charges must be dismissed because the evidence adduced at the preliminary examination showed defendant's driving was not a cause of the accident. Indeed, the district court stated there was no evidence of careless driving on the part of defendant in light of the fact that the bicycle was hidden by the cars parked on the street and defendant was given no opportunity to stop when the child rode his bicycle into the street. There was no evidence that defendant was driving improperly. Rather, the evidence showed that the accident was a sudden emergency that defendant could not have avoided.

Defendant's other issues are moot in light of our holding on causation.

Reversed and remanded to the circuit court for entry of an order of dismissal.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor

[1] We recognize that the district court and the circuit court did not have the benefit of this recent opinion when they issued their rulings in this case.