

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

IVORY L. HERRON,

Defendant-Appellant.

UNPUBLISHED

April 6, 1999

No. 198353

Recorder's Court

LC No. 95-012810 FY

Before: Holbrook, Jr., P.J., and White and J.W. Fitzgerald,* JJ.

PER CURIAM.

Defendant was convicted in successive jury trials of negligent homicide, MCL 750.324; MSA 28.556, driving with license revoked or suspended, MCL 257.904; MSA 9.2604, and involuntary manslaughter, MCL 750.321; MSA 28.553. He appeals as of right.

On October 17, 1995, after drinking alcohol and ingesting a controlled substance, phencyclidine (PCP), defendant drove a U-Haul truck at an immoderate rate of speed and in an erratic manner on the streets of Grosse Pointe Woods. He struck one car, causing it to spin around, then drove on, striking another vehicle head-on, killing the driver, Christina Comito. These events occurred on a clear fall day at approximately 3:30 p.m., just as a nearby middle school was dismissing students for the day and traffic on the roads was heavy. Blood tests performed later on defendant revealed the presence of PCP, but no alcohol.

The prosecutor charged defendant with second-degree murder, MCL 750.317; MSA 28.549 [Count I], operating a motor vehicle while under the influence of a combination of alcohol and a controlled substance thereby causing a death (OUI causing death), MCL 257.625(4); MSA 9.2325(4) [Count II], and driving on a suspended or revoked license [Count III]. The jury was permitted to consider, on Count I, the lesser offenses of involuntary manslaughter involving a motor vehicle, MCL 750.321; MSA 28.553, and negligent homicide, MCL 750.324; MSA 28.556, and, on Count II, negligent homicide was again given as a lesser included offense of OUI causing death. Understandably, the jury was confused and deliberated for a lengthy period of time. Ultimately, the jury convicted

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

defendant on Count II of negligent homicide and on Count III of operating a motor vehicle while his license was suspended or revoked, but was unable to reach a verdict on Count I. The trial court ordered a mistrial on that count. The prosecutor retried defendant on the second-degree murder charge, with the jury being instructed on the lesser offenses of involuntary manslaughter involving a motor vehicle and negligent homicide. The jury convicted defendant of involuntary manslaughter.

On appeal, defendant first argues that his retrial on a charge of second-degree murder was barred by double jeopardy principles. Our de novo review of this claim reveals a fundamental error in the proceedings below that has resulted in a violation of defendant's constitutional right to be free from double jeopardy. US Const, Am V; Const 1963, art 1, § 15. However, this conclusion is reached by way of a different analysis than that proposed by defendant.

The federal and state constitutional guarantees against twice being placed in jeopardy protect a defendant against both successive prosecutions for the same offense and multiple punishments for the same offense. US Const, am V; Const 1963, art 1, § 15; *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996). The purpose of the double jeopardy protections is to preserve the finality of criminal judgments and to protect the defendant from prosecutorial overreaching. *People v Sturgis*, 427 Mich 392, 398-399; 397 NW2d 783 (1986). In this case, both of these purposes were vitiated, leading to an inevitable double jeopardy violation. The prosecutor sought convictions against defendant Herron of both second-degree murder *and* OUI causing death for the death of Ms. Comito. Certainly, as our Supreme Court has acknowledged, the legislature's enactment of the OUI causing death statute was not intended to preclude a prosecutor from also charging an intoxicated driver with common-law offenses such as murder or involuntary manslaughter, *People v Goecke*, 457 Mich 442, 463 n 22; 579 NW2d 868 (1998); *People v Lardie*, 452 Mich 231, 246; 551 NW2d 656 (1996), but, where as here the defendant's drunken driving has caused the death of one person, he can be *convicted* of only one of these offenses. Hence, where the facts support separate charges of murder, involuntary manslaughter, or OUI causing death, the charges must be brought in the alternative, and presented to the trier of fact as such. *Id.* at 258 n 47.

Here, the prosecutor's overreaching, with the implicit concurrence of defendant and the trial court, led directly to the hung-jury mistrial on Count I as well as the eventual double jeopardy violation when defendant was retried on second-degree murder and convicted by the jury of involuntary manslaughter, despite the trial court's acceptance of the negligent homicide verdict rendered by the jury on Count II in the first trial. *Sturgis*, *supra*. Thus, at a minimum, a violation of defendant's double jeopardy protection against multiple punishments for the same offense has been established by his convictions of both involuntary manslaughter involving a motor vehicle and negligent homicide. In *People v McIntosh*, 400 Mich 1, 6; 252 NW2d 779 (1977), our Supreme Court noted that these two offenses—the former being a 15-year felony and the latter a 2-year misdemeanor—had been “affirmatively linked” by the legislature, citing MCL 750.325; MSA 28.557, which provides:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of

any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter, it may render a verdict of guilty of negligent homicide.

Where the legislature has created a nexus between two offenses, making one a necessarily included lesser offense of the other, it is well settled that a defendant cannot be convicted of both offenses for a single criminal act. To do so would impose multiple punishment for the same offense in violation of double jeopardy principles. *People v Harding*, 443 Mich 693; 506 NW2d 482 (1993) (opinion of Brickley, J); *People v Robideau*, 419 Mich 458; 355 NW2d 592 (1984); *People v Garcia (After Remand)*, 203 Mich App 420; 513 NW2d 425 (1994), *aff'd* by equal division 448 Mich 442 (1995).

The appropriate remedy to cure this constitutional violation is less clear. As a general rule, when a defendant is convicted of both a greater and lesser offense, the usual remedy is to vacate the conviction of the lesser offense and affirm the conviction of the greater offense. *Harding, supra* at 714. However, this rule is not absolute, and the remedy has been modified to accommodate the facts of a particular case. See *People v Davis*, 122 Mich App 597; 333 NW2d 99 (1983). In this case, we are compelled to conclude that the improper presentation of the charges to the jury in the first trial precludes use of the usual remedy, and that defendant's conviction of involuntary manslaughter in the second trial is tainted and cannot stand.

At this stage, we cannot speculate what the result would have been had the case been properly presented to defendant's first jury—i.e., had the jury been given the option to convict on Count I or Count II, but not both. Nonetheless, given the fact that the jury convicted defendant on Count II of negligent homicide as a lesser included offense of OUI causing death, it appears highly improbable that the jury would have chosen to convict defendant of second-degree murder had they been presented the charges in the alternative. Compounding the fundamental error in the first trial, and apparently not satisfied with the jury's verdict of negligent homicide, the prosecutor was allowed a second bite at the apple by retrying defendant on the higher charge of second-degree murder with lesser included offenses of involuntary manslaughter and negligent homicide.¹ Given these facts, we hold that defendant's right against successive prosecutions for the same offense was implicated once the trial court accepted the first jury's verdict of negligent homicide and the prosecutor was allowed to retry defendant on the higher charges.

In further support of our decision to affirm defendant's negligent homicide conviction, despite the fundamental error in the first trial, we note that defendant specifically requested the instruction on negligent homicide as a lesser offense of OUI causing death in the first trial, and that the prosecutor concurred.² On appeal, defendant has requested that we affirm the negligent homicide conviction. The prosecutor has not filed a cross-appeal. Accordingly, we remand to the trial court with directions to vacate defendant's involuntary manslaughter conviction and sentence, affirm the negligent homicide conviction, resentence defendant on that conviction, and enter an amended judgment of sentence.

Next, defendant argues, and the prosecutor concedes, that, pursuant to *People v Paquette*, 214 Mich App 336; 543 NW2d 342 (1995), the trial court erred when it ordered defendant to pay restitution to the victim's family members for their wage loss. Accordingly, we remand this matter to the

trial court which shall recalculate the amount of restitution by subtracting the victim's parents' income loss from the original restitution figure.

Defendant also argues that his sentence for involuntary manslaughter was improperly enhanced because the prosecutor failed to file a proper notice of intent to seek an enhanced sentence pursuant to MCL 769.13; MSA 28.1085, as amended, and in the absence of this notice, the trial court failed to follow the pre-amendment procedure by taking defendant's guilty plea to the habitual offender charge set forth in the information. The prosecutor concedes on appeal that a notice of intent to seek enhanced sentencing was not filed in accordance with MCL 769.13; MSA 28.1085. However, the prosecutor did "charge" defendant in the information as an habitual offender, therefore, we find any procedural error to be harmless because defendant was on timely notice of the prosecutor's intent to seek an enhanced sentence.

We further note that this issue has not been rendered moot as a result of our decision to vacate defendant's underlying conviction of involuntary manslaughter. Rather, on remand, defendant's status as an habitual offender may be used by the trial court to enhance defendant's resentence on his negligent homicide conviction. Negligent homicide is defined by statute as a misdemeanor punishable by not more than two years of imprisonment and a fine of not more than \$2,000. MCL 750.324; MSA 28.556. However, Penal Code misdemeanors punishable by two years of imprisonment may be considered "felonies" for purposes of the habitual-offender sentencing statute, given that they fall within the definition of "felony" for purposes of the Code of Criminal Procedure. *People v. Smith*, 423 Mich 427, 434, 445 (Williams, CJ), 460 (Boyle, J), 464 (Riley, J, concurring); 378 NW2d 384 (1985). Accordingly, on remand, the trial court may enhance defendant's resentence on his negligent homicide conviction, given his status as an habitual offender, second offense, MCL 769.10; MSA 28.1082.

Defendant's involuntary manslaughter conviction and sentence are vacated and his remaining convictions are affirmed. We remand for resentencing and for amendment of the restitution order as directed. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.

/s/ John W. Fitzgerald

¹ We would further note that retrial on a charge of involuntary manslaughter was barred by double jeopardy because defendant was acquitted in his first trial on Count II of OUI causing death, under which gross negligence is presumed as a matter of law by a showing that the defendant "voluntarily chose to drive with knowledge that he had consumed alcohol" and that this "decision to drive while intoxicated produced a change in that driver's operation of the vehicle that caused the death of the victim." *Lardie, supra* at 252, 258. Thus, defendant's valid jury conviction of negligent homicide—which implicitly found him guilty of ordinary negligence, rather than gross negligence—barred his retrial on the higher charge of involuntary manslaughter. Clearly, also, retrial on a charge of negligent homicide was precluded where a valid conviction on that charge had already been accepted and entered by the trial court.

² At a discussion amongst the trial court, the prosecutor, and defense counsel regarding proposed jury instructions at the first trial in this matter, the following was stated on the record:

MR. PAIGE [defense counsel]: Your Honor, I think that on count two—we're at count two now?

THE COURT: Yeap.

MR. HUTTING [assistant prosecutor]: Um-huh.

MR. PAIGE: That we [sic] negligent homicide should be given--

THE COURT: So we will be giving negligent homicide as a lessor [sic] of both?

MR. PAIGE: Yes, your Honor. I believe that is a cognitive [sic, cognate] offense.

MR. HUTTING: It's fine. [Tr 2/27/96, 16.]