

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH CARL WEEDER,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 217454

Oakland Circuit Court

LC No. 98-161065-FC

ON REMAND

Before: White, P.J., and Sawyer and Saad, JJ.

PER CURIAM.

This case is before us on remand from the Supreme Court. In lieu of granting leave to appeal, the Supreme Court vacated in part this Court's prior opinion,¹ overruling *People v McIntosh*, 400 Mich 1; 252 NW2d 779 (1977), on which the prior opinion relied. *People v Weeder*, 469 Mich 493; 674 NW2d 372 (2004). We affirm defendant's convictions and sentences for involuntary manslaughter, and deny defendant's motion to remand.

I

The facts as set forth in this Court's prior opinion are:

Defendant had no driver's license, and had been drinking, when he was pulled over by an Oakland County Sheriff's Deputy. As the deputy approached defendant's car on foot, defendant sped away, initiating a high-speed chase. Several miles later, defendant's vehicle collided with a car that crossed his path, killing the two occupants of the other car. [*Weeder*, slip op at 1.]

Defendant was charged with two counts of second-degree murder and various other offenses. A jury convicted defendant of two counts of the lesser included offense of involuntary manslaughter, two counts of operating a vehicle while under the influence of intoxicating liquor [OUIL] causing death, two counts of first-degree fleeing and eluding, and operating a vehicle with a suspended license, second offense. The court sentenced defendant as an habitual offender

¹ *People v Weeder*, unpublished opinion per curiam of the Court of Appeals, issued 7/31/01 (Docket No. 217454).

to concurrent terms of 15 to 22 ½ years for each of the manslaughter and OUIL causing death convictions, 5 to 7 ½ years for the fleeing and eluding convictions, and 219 days in jail for the driving with a suspended license conviction.

On appeal, defendant contended that the trial court erred by denying his request for a jury instruction on negligent homicide. This Court agreed, based on *McIntosh*, *supra*, which held that “if the jurors are or should be permitted to consider manslaughter committed with a motor vehicle, then, pursuant to MCL 750.325 . . . they should also be permitted to consider negligent homicide.” 400 Mich at 6. Accordingly, this Court reversed defendant’s involuntary manslaughter convictions and remanded, and addressed defendant’s other claims of error in light of the reversal of the manslaughter convictions.

The prosecutor appealed, and defendant cross-appealed. The Supreme Court concluded that *McIntosh* improperly construed MCL 750.325, which requires that the jury be instructed on negligent homicide when a defendant is charged with vehicular manslaughter. Because defendant in the instant case was charged with second-degree murder, and not vehicular manslaughter, the Court found MCL 750.325 inapplicable. *Weeder*, 469 Mich at 497-498. The Court overruled *McIntosh*, to the extent it was inconsistent with the interpretation of MCL 750.325 in *Weeder*, *supra*. 469 Mich at 498. Further, the Court noted:

This is not the end of the analysis, however. The result reached in *McIntosh* will still obtain if negligent homicide, MCL 750.324, is an inferior, or necessarily included lesser, offense of the charged offense of second-degree murder, and if there is the necessary evidentiary support for an instruction on negligent homicide. [*Weeder*, 469 Mich at 498-499, citing *People v Cornell*, 466 Mich 335; 646 NW2d 127 (2002), and MCL 768.32(1).]

The Court further stated:

If on remand the Court of Appeals affirms defendant’s convictions for involuntary manslaughter, it must also consider defendant’s challenge to his sentences of 15 to 22 1/2 years, which the Court did not consider in light of its reversal of the manslaughter convictions. Further, because the Court rejected defendant’s supplemental argument for a new trial (based on new evidence involving a witness’s testimony in a subsequent civil proceeding), in part because it reversed defendant’s manslaughter convictions, this issue should be reconsidered on remand if the Court of Appeals affirms defendant’s manslaughter convictions. [*Weeder*, 469 Mich at 499-500.]

II

As instructed by the Supreme Court, we first address whether negligent homicide is a lesser included offense of second-degree murder and, if so, whether there was evidentiary support for a jury instruction on negligent homicide. We conclude that although negligent homicide is a lesser included offense of second-degree murder, defendant was not entitled to a negligent homicide jury instruction.

“A necessarily lesser included offense is an offense whose elements are completely subsumed in the greater offense.” *People v Mendoza*, 468 Mich 527, 540; 664 NW2d 685 (2003). In other words, the lesser offense does not contain any element not found in the greater offense. In *Mendoza*, the Supreme Court held that voluntary and involuntary manslaughter are necessarily included lesser offenses of murder. *Id.* at 541. The Court defined involuntary manslaughter as “the unintentional killing of another, without malice, during the commission of an unlawful act not amounting to a felony and not naturally tending to cause great bodily harm; or during the commission of some lawful act, negligently performed; or in the negligent omission to perform a legal duty.” *Id.* at 536.

“Negligent vehicular homicide is a lesser included offense of involuntary manslaughter.” *People v Malach*, 202 Mich App 266, 277; 507 NW2d 834 (1993), citing MCL 750.325. MCL 750.325 states:

The crime of negligent homicide shall be deemed to be included within every crime of manslaughter charge 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.

Thus, by statute, negligent homicide is a necessarily included lesser offense of involuntary manslaughter. See also *People v Herron*, 464 Mich 593; 628 NW2d 528 (2001), holding that a defendant’s convictions of both involuntary manslaughter and negligent homicide violated double jeopardy, and *People v Lardie*, 452 Mich 231, 247 n 24; 551 NW2d 656 (1996), noting that MCL 750.325 defines negligent homicide as a lesser included offense of vehicular manslaughter.

Significantly, in *People v McKee*, 15 Mich App 382, 385; 166 NW2d 688 (1968), this Court stated that the only difference between involuntary manslaughter and negligent homicide was the degree of culpability, or the difference in mens rea. This is identical to the analysis employed in *Mendoza, supra*, to distinguish involuntary manslaughter from murder. Therefore, it must be concluded that negligent homicide is a necessarily included lesser offense of murder because it is a necessarily included lesser offense of involuntary manslaughter, which is itself a necessarily included lesser offense of murder. The only difference between the three offenses is the degree of mens rea required: ordinary negligence for negligent homicide, gross negligence for involuntary manslaughter, and wanton and willful disregard of the danger for murder.

Even though negligent homicide is a necessarily included lesser offense of murder, defendant was not entitled to a jury instruction on this charge unless it was supported by the facts at trial. *People v Cornell*, 466 Mich 335, 365-366; 646 NW2d 127 (2002). The trial court concluded that the facts did not support such an instruction.

Defendant’s argument is premised on his assertion that he was not going as fast as the officer said he was, but only five or ten miles per hour over the speed limit. This argument fails to acknowledge that defendant was driving drunk, had no valid license, and was leading the police in a high-speed chase. This conduct cannot be characterized as ordinary negligence.

Consequently, we conclude that the trial court did not err in refusing to give the negligent homicide instruction.

III

We reject defendant's challenge to the sentences imposed for his involuntary manslaughter convictions. The trial court did not abuse its discretion in sentencing defendant to 15 to 22 ½ years in prison for the involuntary manslaughter convictions. *People v Cervantes*, 448 Mich 620, 627-628; 532 NW2d 831 (1995). In imposing sentence, the court noted that in addition to his previous felony conviction, defendant had numerous prior driving violations; the court also cited the fact that defendant was driving drunk and without a license, ran several traffic signals and was fleeing from police when he hit the car. A fifteen year minimum sentence, the maximum allowable, was not excessive under these circumstances. Although defendant cites other cases where this Court found an abuse of discretion in sentencing, the concept of discretion necessarily involves a range of alternatives; under the facts of this case, that range reasonably includes the maximum sentence. Further, given that defendant has not challenged his identical sentences for OUIL causing death, and the sentences are concurrent, the challenge to his involuntary manslaughter sentences is academic.

IV

Finally, we reject defendant's argument that he is entitled to a new trial based on newly discovered evidence. Defendant is not entitled to a new trial based on Deputy Glover's deposition testimony in the subsequent civil trials that defendant was traveling at speeds between 55 and 65 miles per hour through most of the chase. Glover's deposition did not contradict his testimony at trial, but merely showed that he was somewhat confused as to the speeds the cars reached during different parts of the chase. One of defendant's passengers testified that defendant was driving at speeds of 65 to 90 miles per hour, while the other passenger estimated his speed as 70 to 90 miles per hour. A civilian passenger in Glover's vehicle testified that defendant's speed was between 70 and 90 miles per hour as the vehicles traveled north on Sashabaw Road past Maybee Road. Thus, even if Deputy Glover's deposition testimony had been made available to the jury, it would not have affected the outcome of the case.

We affirm defendant's convictions and sentences for involuntary manslaughter. We deny defendant's motion to remand.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Henry William Saad