Submitted: April 28, 2003
Decided: May 6, 2003

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Re: *State v. Robert Greenley, ID#0207010713*
Upon Defendant's Motion for a New Trial -- ***DENIED***

Dear Counsel:

On April 17, 2003 a jury found Defendant guilty of Vehicular Homicide Second Degree and Driving Under the Influence. On April 24, 2003, under Super. Ct. Crim. R. 33, Defendant filed a Motion for a New Trial. His motion generally questions the verdict's fairness. And it specifically challenges the court's failure to provide, *sua sponte*, an instruction on "Emergency." Defendant's conviction was just, and another jury instruction would not have made a difference.

In summary, after several hours of drinking at different restaurants/bars, Defendant and an acquaintance climbed onto his motorcycle. Although Defendant did not believe that he was under the influence at the time, he recognized at trial that he clearly was over the legal limit. A blood test taken within four hours of driving showed that he was 0.17. Defendant performed a stunt

known by motorcyclists as a "burnout." He revved the engine, put the motorcycle in gear, and while applying the front brake Defendant popped the clutch. While this was going on, several fellow motorcyclists were doing the same thing. They all headed down the road leading from the Riverfront toward Wilmington. The victim, Diane Walley was Defendant's passenger. Almost immediately, according to Defendant, another motorcyclist passed him and as he did so, an on-coming vehicle appeared "out of nowhere." The other motorcyclist, according to Defendant, applied his brakes too quickly. So, Defendant locked his brakes, laid down his bike, and skidded into the oncoming vehicle. Defendant's passenger was thrown forty-six feet through the air, and killed.

The State's theory at trial primarily was that, paraphrasing, Defendant was startled by the on-coming vehicle and he overreacted, applying too much brake or over-steering. Defendant blamed the accident on the motorcyclist, who allegedly cut him off. Under either side's theory, the jury had ample evidence to convict. Even if the jury believed that the other motorcyclist cut-off Defendant, the jury probably also believed that, taking Defendant's experience as a motorcycle operator into account, but for his having been under the influence of alcohol Defendant would have stayed in control and remained upright. And but for Defendant's having lost control of his motorcycle, there would not have been a collision and Diane Walley would not have been killed. Thus, Defendant's conviction was supported by the evidence.

The court, to an extent on its own initiative, charged the jury with the definition of negligence and several related concepts. The instructions were based closely on the civil pattern jury instructions. The court also charged the jury, at Defendant's request, on accident. And the court gave a modified instruction based on 11 *Del. C.* § 263, concerning imputed negligence.[1] Finally, although the

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[1] *See Bullock v. State*, 775 A.2d 1043, 1049-1050 (Del. 2001) (*citing Witherspoon v. State*, 781 A.2d 697 (Del. 2001), Del. Supr., No. 460, 1999,

commentary to the criminal code states that the drafters chose not to use the civil, proximate cause standard in the criminal code, the court used the "but for" language.[2]

In summary as to the jury instructions, the court's charge was generous to the defense. Most importantly, the attorney's arguments and the instructions made it clear that if the other motorcyclist was entirely at fault, Defendant was not guilty. The jury had to have understood Defendant's claim that he was trying to avoid the other motorcyclist and the crash was a tragic accident. Meanwhile, as presented above, the jury must have believed that Defendant either failed to maintain a proper lookout for on-coming traffic, or he failed to maintain control of his motorcycle when the other motorcyclist cut him off. That negligence, coupled with Defendant's drinking, caused the fatal collision.

Finally as to the "sudden emergency doctrine,"[3] that concept "is not an exception to the general rule that [even in an emergency] one must act as a reasonably prudent person would act under the same circumstances."[4] Thus, an "Actions Taken in Emergency" instruction[5] was not supported by the evidence. Here, a group of motorcyclists, who had been drinking, poured out of a parking lot -- pell-mell. From the start, none of them could be said to have behaved like a reasonably prudent person. The undisputed fact that Defendant was driving while under the influence, with a passenger on his motorcycle, means he was not acting

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Steele J. (Feb. 14, 2001), 2001 WL 138499 (Del.)).

[2] *Bullock*, 775 A.2d at 1049.

[3] *Dadds v. Pennsylvania Railroad Company*, 251 A.2d 559, 560-561 (Del. 1969).

[4] *Id*. at 560.

[5] DEL. P.J. CIV. § 10.6 (2000).

prudently. Defendant was entitled to argue to the jury, as he did, that even a sober driver would have gone down as he did, under the circumstances. But he was not entitled to an instruction meant for sober drivers. The notion of the reasonably prudent, intoxicated motorcyclist is an oxymoron.

Frankly, it does not take much to be guilty of an alcohol-related Vehicular Homicide Second Degree.[6] When a driver operates a motor vehicle carelessly, while under the influence of alcohol, and if that causes a fatal accident, the driver is guilty. That is what happened in this case. Taking the vehicular homicide statute's elements and the virtually undisputed evidence into account, this was not a close case. Defendant was an experienced motorcyclist. If he had not been drinking heavily, he would have seen the on-coming traffic, or otherwise avoided colliding with the other motorcyclist without losing balance. And no one would have been killed.

For the foregoing reasons, Defendant's Motion for a New Trial is ***DENIED***.

IT IS SO ORDERED.

Very truly yours,

FSS/lah
oc: Prothonotary
pc: Investigative Services

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[6] *Del. Code Ann.* tit. 11, § 630(a)(2) (2001).

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