

**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA** \* **NO. 2003-K-0852**  
**VERSUS** \* **COURT OF APPEAL**  
**FREDERICK E. EVERHARDT** \* **FOURTH CIRCUIT**  
\* **STATE OF LOUISIANA**  
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\* \* \* \* \*

**SUPERVISORY WRITS DIRECTED TO**  
**ST. BERNARD 34TH JUDICIAL DISTRICT COURT**  
**NO. 256-624, DIVISION "D"**  
**Honorable Kirk A. Vaughn, Judge**  
\* \* \* \* \*  
**Judge Dennis R. Bagneris, Sr.**  
\* \* \* \* \*

(Court composed of Judge Joan Bernard Armstrong, Judge Dennis R. Bagneris Sr., and Judge Michael E. Kirby)

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**WRIT DENIED; JUDGMENT AFFIRMED**  
**STATEMENT OF THE CASE**

On September 5, 2001 the defendant-relator was charged by grand jury indictment with one count of violating La. R.S. 14:32 relative to negligent homicide. He was arraigned and entered a not guilty plea on February 25, 2002. In response to pretrial motions, the State afforded the defendant open file discovery. On March 25, 2003 the trial court heard argument in connection with a motion to quash the indictment, which was filed by the defendant. The court took the matter under advisement, and on April 8, 2003, the court denied the motion. The court then set trial for June 17, 2003.

On April 11, 2003 the defendant filed a written notice of intent to seek writs from the denial of the motion to quash. The court signed an order on April 14, 2003 setting a return date of May 16, 2003. This writ application was filed on May 7, 2003.

### **STATEMENT OF THE FACTS**

According to the police report provided by the relator, the victim in this case was killed when a trailer being towed by the defendant separated from his truck, bounced for approximately 260 feet, crossed the center line of the two-lane road, and struck the victim's car, causing catastrophic

damage and the victim's death. The narrative report prepared by the state trooper who investigated the accident reflects that the investigating officer believed the trailer became unhitched just before the defendant's vehicle crossed the set of railroad tracks on La. 39. The trailer weighed approximately 3000 pounds, and both vehicles were traveling at approximately forty miles per hour, the posted speed limit. The defendant's blood was tested and was negative for alcohol.

The investigating officer concluded that the defendant had failed to hook up the safety chains and properly secure the trailer to the truck, in violation of La. R.S. 32:384D. Furthermore, although the trailer was equipped with supplemental brakes, the trailer was not equipped with a breakaway cable as required by La. R.S. 32:341C. Additionally, because the evidence indicated that the victim had attempted evasive action, the officer believed that if the proper safety chains and breakaway cable (which would automatically cause the trailer's brakes to engage) had been used, the victim might have been able to avoid the crash.

The defendant gave statements insisting that he had properly hooked up the safety chains, but, based on the condition of the chains and other evidence, the investigating officer concluded that there was no evidence he had done so. The officer in his report concluded "that poor planning,

hurriedness, and violation of Louisiana Law (sic) on Mr. Everhardt's part were the primary causes of this crash."

## **DISCUSSION**

The relator filed a motion to quash the indictment and memorandum alleging that the bill of particulars (actually the entire file of the district attorney) shows that "the offense charged in the indictment was not committed" by the defendant and thus should be quashed pursuant to La. C.Cr.P. arts. 532(A)(5) and 485. Article 532(A)(5) provides that a motion to quash may be based on the grounds that the bill of particulars has shown a ground for quashing the indictment under La. C.Cr.P. art. 485. Article 485 states:

If it appears from the bill of particulars furnished under Article 484, together with any particulars appearing in the indictment, that the offense charged in the indictment was not committed, or that the defendant did not commit it, or that there is a ground for quashing the indictment, the court may on its own motion, and on motion of the defendant shall, order that the indictment be quashed unless the defect is cured. The defect will be cured if the district attorney furnishes, within a period fixed by the court and not to exceed three days from the order, another bill of particulars which either by itself or together with any particulars appearing in the indictment so states the particulars as to make it appear that the offense charged was committed by the defendant, or that there is no ground for quashing the indictment, as the case may be.

In State v. Byrd, pp. 18-19, 96-2302 (La. 3/13/98), 708 So. 2d 401, 411, the Supreme Court discussed a motion to quash based on Article 485:

A motion to quash is, essentially, a mechanism whereby pre-trial pleas are urged, i.e., pleas that do not go to the merits of the charge. At a hearing on such a motion, evidence is limited to procedural matters and the question of factual guilt or innocence is not before the court. La. C.Cr.P. art. 531 *et. seq.*; *State v. Rembert*, 312 So.2d 282 (La.1975); *State v. Patterson*, 301 So.2d 604 (La.1974).

In considering a motion to quash, a court must accept as true the facts contained in the bills of information and in the bill of particulars, and determine as a matter of law and from the face of the pleadings, whether a crime has been charged; while evidence may be adduced, such may not include a defense on the merits. *State v. Gerstenberger*, 260 La. 145, 255 So.2d 720 (1971); *State v. Masino*, 214 La. 744, 750, 38 So.2d 622 (1949) ("the fact that defendants may have a good defense is not sufficient grounds to quash the indictment").

As this Court held in *State v. Legendre*, 362 So.2d 570, 571 (La.1978), "[t]he question, then, is whether the indictment charges a valid offense. [FN19] If it does not, it is a defective indictment and its invalidity may be declared by a ruling on a motion to quash, for a motion to quash may be based on the ground that the indictment fails to charge an offense which is punishable under a valid statute." *Legendre* goes on to note "[i]t will not do to base an indictment for a serious offense ... upon an allegation of fact which cannot conceivably satisfy an essential element of the crime...." *Legendre*, 362 So.2d 570, 571.

At issue in *Legendre* was whether a dangerous weapon could encompass "Concrete on Parking Lot."

In Byrd, the defendants were indicted for knowingly storing hazardous waste without a permit. They attempted to have the indictment quashed on the grounds that the facility was in compliance with the existing regulations and that they did not own or operate the facility at the time of the conduct at issue. The Supreme Court found that these assertions were factual defenses and were not proper grounds for a motion to quash.

In State v. Nicholls, 00-1087 (La. App. 5 Cir. 10/31/00), 772 So. 2d 263, and several appeals consolidated with it, the defendants were charged with violating La. R.S. 37:219 which provides that it is unlawful for any attorney to pay money or give any other thing of value to any person in order to obtain representation of a client. The defendants were alleged to have been paid money by an attorney in exchange for referring personal injury clients. The bills of information did not allege nor did the State contend that the defendants were themselves attorneys. In their motions to quash, the defendants alleged that the bills of information were insufficient because they were not attorneys and the bills did not allege that they were. Thus, the defendants argued, from the face of the bills of information it could be determined as a matter of law that they had not committed the offenses

charged. The State responded by arguing that the defendants were principals to the crimes; the appellate court rejected this argument because there exist separate statutes, e.g. La. R.S. 14:356 et seq, which criminalize the receiving of compensation for referring clients to attorneys. The court ultimately held that the motions to quash were proper.

The relator contends here that a review of the investigating officer's report fails to show that he engaged in any reckless conduct, which could form the basis of a conviction for negligent homicide.

La. R.S. 14:32 provides that negligent homicide is the killing of a human being by criminal negligence and that the violation of a statute shall be considered only as presumptive evidence of such negligence. La. R.S. 14:12 states:

Criminal negligence exists when, although neither specific nor general criminal intent is present, there is such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

In State v. Martin, 539 So. 2d 1235, 1238 (La. 1989), the Supreme Court stated:

Unlike general or specific criminal intent, criminal negligence is essentially negative. Rather than requiring the accused intend some consequence of his actions, criminal negligence is found from the accused's gross disregard for the consequences of

his actions.

Proof of ordinary negligence does not constitute proof of criminal negligence, and the State is required to show more than a mere deviation from the standard of ordinary care. State v. Moak, 387 So. 2d 1108 (La. 1980); State v. Jones, 298 So. 2d 774 (La. 1974).

In State v. Crawford, 471 So. 2d 778 (La. App. 2 Cir. 1985), the defendant was convicted of negligent injuring when his vehicle veered abruptly to the left and crossed the centerline while rounding a curve. The defendant also had a blood alcohol level of .029 per cent. The Second Circuit reversed the defendant's conviction because there was no evidence that the defendant's action in driving across the centerline was anything more than inadvertent carelessness or negligence. The court stated that this did not constitute gross, criminal negligence or that the defendant's conduct reflected a reckless disregard for the safety of another.

The court in Crawford also looked at other cases dealing with criminal negligence involving the operation of a motor vehicle. In State v. Jones, 298 So. 2d 774 (La. 1974), the Supreme Court reversed the defendant's conviction for negligent homicide where he struck the vehicle ahead of his car when he pulled back into his lane of travel after attempting to pass the other vehicle. The court stated that although the negligence of the defendant



caused the accident, he was not criminally negligent.

In State v. Calvin, 337 So. 2d 500 (La. 1976), the Supreme Court affirmed the defendant's conviction for negligent homicide where witnesses testified that the defendant had been driving erratically for several miles and drove into the opposite lane where he collided head-on with the victim's car. The court stated that the defendant's conduct under the circumstances amounted to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances.

In State v. Moak, 387 So. 2d 1108 (La. 1980), the defendant saw what he believed to be the headlights of an oncoming car; after applying his brakes, he eased his car to the right and onto what he thought was the shoulder of the road. Instead, there was a ditch; and, the defendant's car bounced up and hit a car parked on the defendant's side of the road. The defendant also hit a twelve-year-old boy standing beside the parked car and killed him. Testing showed that the defendant had a blood alcohol level of .05 percent. The defendant was convicted of negligent homicide, but the Supreme Court reversed his conviction. The court found that the defendant's conduct was not in reckless disregard for the safety of others. The court stated that even though the defendant did not reapply his brakes once his car hit the ditch, the wrong choice of action in an emergency did not meet the

test of criminal negligence.

In State v. Reynolds, 436 So. 2d 1275 (La. App. 1 Cir. 1983), the First Circuit affirmed the defendant's conviction for negligent injuring. The defendant made a left-hand turn and struck another car, injuring its occupants. The defendant had a blood alcohol level of .056 percent, and he did not remember seeing the oncoming vehicle that he struck. In affirming the conviction, the court stated that the defendant violated the law with regard to the execution of a left-hand turn and that a rational trier of fact could have reasonably found that the defendant was guilty of more than a mere deviation from the ordinary standard of care in the operation of his vehicle.

In State v. Martin, 539 So. 2d 1235 (La. 1989), the Supreme Court affirmed the defendant's conviction for negligent homicide where the defendant had been drag racing with another person whose car struck the victim's vehicle. The court stated that the defendant's conduct in driving at a high rate of speed, weaving in and out of traffic, and following very closely the vehicle of his competitor was a gross deviation below the standard of care.

In State v. Garrett, 525 So. 2d 1235 (La. App. 1 Cir. 1988), the defendant struck and killed a pedestrian who was walking on the side of the

road. The pedestrian had a blood alcohol level of .19 percent, and the defendant testified that she had drunk less than a quarter of one beer. The First Circuit reversed the defendant's negligent homicide conviction. The court noted that there was no evidence that the defendant had been drinking or that she was speeding or driving erratically prior to the accident. The court held that evidence that the defendant left the roadway and struck the victim on the shoulder of the road did not prove criminal negligence as a matter of law.

In State v. Pearson, 529 So. 2d 406 (La. App. 1 Cir. 1988), the defendant crossed the centerline while negotiating a left turn and struck an oncoming vehicle, killing a passenger. The defendant claimed that another vehicle ran two stop signs at a crossroad and pulled into the oncoming lane. He further testified that the headlights from this vehicle blinded him, but the driver of the vehicle he struck testified that he did not see this other vehicle. The defendant also asserted that the intersection where the accident occurred was known to be dangerous because other accidents had occurred there. The defendant testified that he had drunk only two small "lite" beers, but the state trooper who investigated the accident testified that the defendant appeared to be intoxicated. The First Circuit affirmed the defendant's negligent homicide conviction, finding sufficient evidence that the defendant's conduct

was criminally negligent. The court stated that the jury could have reasonably found that the defendant's testimony was not credible. The court also specifically rejected the defendant's claim that the State could prove gross negligence only by showing that he was intoxicated, stating:

"Intoxication is *not* an element of the offense of negligent homicide...."

*State v. Doucet*, 443 So. 2d 777, 783 (La.App. 3d Cir.1983)." Pearson, 529 So. 2d at 409.

In State v. Prophet, 552 So. 2d 773 (La. App. 1 Cir. 1989), the defendant had been seen drinking with others at a gas station. His friend testified that when the defendant drove him home, the defendant slumped over the steering wheel as though he were asleep and crossed the center line of the highway two or three times. After reassuring the friend, who wanted to get out of the car, the defendant again drove over the center line and collided with another car, killing its driver. The First Circuit affirmed the defendant's negligent homicide conviction because the State introduced evidence that the defendant had been drinking on the morning of the accident, drove very erratically before the accident, refused to stop his vehicle at the request of his passenger, and veered four feet into the oncoming lane of travel. The court stated that these facts distinguished the case from Crawford.

In State v. Rock, 571 So. 2d 908 (La. App. 5 Cir. 1990), the defendant drove down the center of a steep two-lane bridge and crashed into another vehicle, killing two passengers. The bridge was posted with signs saying, "Do not pass." Photographs of the accident showed that the defendant's car was completely in the opposite lane at the point of impact. The defendant testified that he was driving within the speed limit and that he was in his own lane of travel. He stated that he could not recall crossing the centerline, but he did remember sneezing twice before the accident and then waking up on his steering wheel. The Fifth Circuit affirmed the defendant's negligent homicide conviction. The court stated that the case was distinguishable from Crawford because the defendant not only crossed the centerline; he was actually traveling in the opposite lane of a two-lane bridge.

In State v. Taylor, 585 So. 2d 655 (La. App. 4 Cir. 1991), the defendant struck and killed a pedestrian. The officer who investigated the incident testified that the defendant smelled strongly of alcohol, stumbled when he walked, was unable to stand without assistance, and was loud and argumentative. The coroner who performed the autopsy on the victim testified that the dismemberment of the victim's body indicated that the defendant's vehicle was traveling at sixty to seventy miles per hour on impact. The defendant's passenger denied that the defendant was either

drunk or speeding at the time of the accident; but the defendant himself admitted that he had been drinking. Two witnesses testified that they thought the defendant's car was traveling at thirty-five to forty miles per hour. This Court affirmed the defendant's conviction for negligent homicide, finding that there was sufficient evidence to support the conviction.

In State v. Wilcoxon, 26,126 (La. App. 2 Cir. 6/22/94), 639 So. 2d 385, the defendant was driving his pickup truck at seventy miles per hour when he attempted to pass another vehicle while going up a hill and around a curve in a clearly marked no-passing zone. The defendant saw an oncoming car and applied his brakes, but he struck the car and killed a passenger. The defendant claimed that the accident resulted when he hit a patch of water and lost control of his vehicle. The trial court rejected this version of the events and found the roadway to have been dry at the time. The Second Circuit affirmed the defendant's negligent homicide conviction, and the court distinguished the case from Crawford and Jones.

Here, the relator argues that, because there is no allegation that he was speeding or intoxicated, at most his conduct was ordinary negligence. However, as the above cases show, convictions for negligent homicide have been upheld on a sufficiency review even when there is no evidence of

speeding or intoxication, although the majority of cases, which lacked this type of evidence, were reversed. Furthermore, the record indicates that the investigating officer concluded that the defendant violated not one but two safety statutes, one pertaining to the use of safety chains and another pertaining to the requirement that a trailer have a breakaway cable. La. R.S. 14:32 permits a jury to accept evidence of a violation of a statute as evidence of criminal negligence depending upon all the facts and circumstances surrounding the violation, although the State still has the burden of proving all of the elements of the crime charged beyond a reasonable doubt. See State v. Lollar, 389 So. 2d 1315, 1317 (La. 1980). Thus, as a matter of law, the defendant committed the crime charged.

### **CONCLUSION**

Accordingly, we find that the trial court's decision to deny the motion was correct. Therefore, relator's writ application is hereby denied, and the trial court's ruling is affirmed.

**WRIT DENIED; JUDGMENT AFFIRMED**

