STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED December 4, 2003
v	No. 242564 Allegan Circuit Court
MARTY ALAN FRENCH, Defendant-Appellee.	LC No. 01-012287-FH

Before: Griffin, P.J., and Neff and Murray, JJ.

PER CURIAM.

The prosecution appeals as of right from the circuit court's order granting defendant's motion to quash the felony information charging him with operating a motor vehicle while his operator's license was suspended or revoked and causing death, MCL 257.904(4), and negligent homicide, MCL 750.324. We affirm.

I. Material Facts[1] and Proceedings

On January 3, 2001, defendant was driving his automobile in either snow or freezing rain. The brakes on defendant's automobile apparently "locked up," and defendant's automobile began to slide. The passenger's side of the automobile hit a train, which was traveling at approximately thirty-eight miles per hour. As a result of the collision, defendant's passenger and girlfriend, nine-month pregnant Kara Hanford, was ejected through the passenger's side window. Testimony revealed that defendant was driving under a suspended license.

Hanford was transported to the Spectrum Health Downtown/Butterworth Campus, during which time it was determined that the fetus had a low heart rate, a sign of fetal stress. Testimony revealed that the placenta separated from the uterus, and a caesarian section was performed. Xavyor French was delivered from Hanford, and was immediately placed on life support. On January 7, 2001, Xavyor was pronounced dead and was then disconnected from life support. The cause of death was determined to be hypoxic encephalopathy, or the lack of oxygen to the

[1] These facts are taken from the preliminary examination transcript. This case has not been tried, and we treat these facts as true only for the purpose of this opinion. *People v Carlson*, 466 Mich 130, 132 n 2; 644 NW2d 704 (2002).

brain causing severe brain damage caused by an interruption in the blood flow to the fetus as a result of the placenta separating from the uterus.

A preliminary exam was held by the district court. Testifying at the hearing were Ricky Feenstra, a witness to the accident; Kenneth Ownby, the conductor of the train involved in the accident; Ron Haverdink and Steve Nyboer, Allegan County Deputy Sheriffs; and Kara Hanford, the mother of Xavyor. Dr. Stephen Cohle, the physician who prepared the medical examiner report, was qualified by the district court as an expert in forensic pathology, and was the only medical witness. His report was also admitted into evidence.

In binding defendant over for trial, the district court held that (1) "the record established by the prosecuting attorney contains facts that reasonably develop a live birth," and (2) the prosecution established probable cause that a crime was committed and that defendant committed the crime. In the circuit court, defendant brought a motion to quash the information, which the court granted in a written opinion and order. After a thorough review of controlling precedent, the circuit court indicated that there was no evidence that a point existed after extraction from the mother where Xavyor was not brain dead, and found no proof that Xavyor was alive after birth. The trial court concluded that the testimony revealed that Xavyor had an irreversible cessation of brain activity, and as a result, held that the district court abused its discretion in binding defendant over for trial. This appeal followed.

II. Standard of Review

This Court reviews de novo a circuit court's decision to grant or deny a motion to quash charges. *People v Wilson*, 257 Mich App 337, 341; 668 NW2d 371 (2003). Additionally, this Court reviews a district court's decision to bind over a defendant for an abuse of discretion. *People v Hudson*, 241 Mich App 268, 276; 615 NW2d 784 (2000). In order for there to be an abuse of discretion, the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id*.

III. Analysis

The prosecution contends that the circuit court erred in quashing the felony information because there was sufficient evidence to determine that Xavyor was a person for purposes of the charged crimes. We disagree. The critical question is whether the prosecution submitted sufficient evidence to establish probable cause that the "death of another" under MCL 750.324, or the "death of another person" under MCL 257.904(4), occurred.[2] *Wayne Co Prosecutor v Recorder's Court Judge*, 92 Mich App 119, 122; 284 NW2d 507 (1979).

"A district court must bind a defendant over for trial when the prosecutor presents competent evidence constituting probable cause to believe that a felony was committed and that the defendant committed that felony." *Wilson*, *supra* at 341. "'Probable cause requires a quantum of evidence "sufficient to cause a person of ordinary prudence and caution to

[2] Given the similarity in the language of these statutory provisions, we find that *People v Selwa*, 214 Mich App 451; 543 NW2d 321 (1995), discussed *infra*, is equally applicable to both statutes.

conscientiously entertain a reasonable belief" of the accused's guilt.'" *Id*, quoting *People v Yost*, 468 Mich 122, 126; 659 NW2d 604 (2003), quoting *People v Justice (After Remand)*, 454 Mich 334, 344; 562 NW2d 652 (1997). To bind a defendant over for trial, the magistrate must determine that there is evidence regarding each element of the crime charged or evidence from which the elements may be inferred. *Wilson*, *supra* at 341. In making this determination, the district court is to examine and make a decision based on the entire record. *People v King*, 412 Mich 145, 154; 312 NW2d 629 (1981), citing *People v Evans*, 72 Mich 367, 386-387; 40 NW 473 (1888).

In *People v Selwa*, 214 Mich App 451; 543 NW2d 321 (1995), which the parties and lower courts recognized as the controlling precedent, we addressed this identical issue.[3] In *Selwa*, the defendant was charged with negligent operation of a vehicle causing homicide, MCL 750.324, in connection with the defendant's involvement in an automobile accident. *Id*. at 454, 457. The defendant hit 6½ month pregnant Heide Mielke's car, and an emergency caesarean section was performed to deliver the child. Soon after being removed from the womb, the baby had a heart rate greater than 100 and made two to three gasping respirations. *Id.* at 455. The child was subsequently removed from a respirator two and a half hours after delivery and died. *Id*. at 456.

Similar to this case, the district court bound defendant over for trial. The circuit court, however, quashed the information. The prosecution then appealed. After determining that the "live birth" statutory definition, MCL 333.2804(3), did not provide guidance to the issue, the *Selwa* Court found such guidance from the statutory definition of "death." *Selwa*, *supra* at 462-463. The Court indicated, "if one is not 'dead,' one is 'alive,'" and further stated that "the definition of 'life' that logically flows from the definition of 'death' requires the *absence* of an irreversible cessation of circulatory and respiratory functions or brain functions." *Id*. at 463 (emphasis in original). The *Selwa* Court then held that "a child is 'born alive' and thus a 'person' under the negligent homicide statute if, following expulsion or extraction from the mother, there is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions." *Id*. at 464 (emphasis in original). Utilizing that definition, the *Selwa* Court held sufficient evidence existed, in the form of the child's recorded heart rate and spontaneous breaths, to provide probable cause that the child was "born alive." *Id.* at 467-469.

After reviewing the evidence presented at the preliminary examination in the instant case, we find that insufficient evidence was presented to support the district court's decision to bind defendant over for trial. Here, no evidence was presented to demonstrate that "following the expulsion or extraction from the mother, there is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions." *Selwa*, *supra* at 464. Indeed, quite unlike the evidence presented in *Selwa*, the evidence presented at the preliminary examination in this case

[3] We note that, subsequent to the incident in this case, the Legislature enacted MCL 750.90a, which provides criminal responsibility for intentional conduct, proscribed under sections eighty-one to eighty-nine of the Michigan Penal Code, that results in the death of an embryo or fetus. Given the enactment date, this section does not apply to the case at bar, nor is there any contention that this section applies to the instant case.

revealed quite the contrary. First, Dr. Stephen Cohle, who was both the only medical witness and the author of the medical examiner case report in connection with Xavyor's death, indicated in the report that "[t]he child *never* had brain activity and eventually the mother agreed to withdrawal of life support."[4] [Emphasis added.] Second, Dr. Cohle testified that Xavyor was "found to be brain dead without any expectation of living," and that it could be implied that Xavyor's Apgar[5] scores at one minute and five minutes were probably zero and zero.[6] Finally, Dr. Cohle testified affirmatively that, as of January 7, 2001, French was found to have no brain activity.

Although Dr. Cohle indicated several times that French "lived" for four days, such testimony was conclusory, and does not demonstrate that there "is *lacking* an irreversible cessation of respiratory and circulatory functions or brain functions." *Id*. at 464. The difficulty we have with Dr. Cohle's testimony is that he offered no *factual basis* for his conclusions, and in fact, his testimony established when viewed under *Selwa* that the child was not born alive. As the circuit court bluntly stated, "there is no evidence that a point existed where the child was not brain dead."

For a number of reasons, we respectfully disagree with our dissenting colleague. First, we believe the dissent's statement that "the underlying evidence that supports or refutes Dr. Cohle's opinion is incomplete" is both an understatement and an example why the circuit court must be affirmed. Dr. Cohle offered no evidence to allow the district court to draw a factual conclusion that Xavyor lived for four days. Moreover, that the prosecution's only witness on this issue provided "incomplete" evidence only further proves the lack of evidentiary support for the prosecution's case. Second, the district court is charged with making a decision "after an examination of the entire record," *People v Woodland Oil Co, Inc*, 153 Mich App 799, 804; 396 NW2d 541 (1986), which includes deciding the competency of the evidence presented. *King, supra* at 153-154. Here, there was no competent evidence supporting Dr. Cohle's conclusion, and for the district court to bind defendant over without such evidence was an abuse of discretion. We reemphasize that this is not a case involving conflicting expert witness testimony, where a court would be faced with questions of fact that are properly reserved for resolution at trial. Instead, this case only involves the testimony of one medical witness.

Third, and finally, the divergence in view between our opinion and that of the dissent comes down to the legal effect of a single expert's conclusory testimony that has no factual support.[7] We do not believe that the prosecution in this case established probable cause by

---

[4] Although his testimony was cut off by counsel, Dr. Cohle further testified that on January 7, Xavyor did not have any brain activity "and apparently never did have any brain activity from the time of the . . ."

[5] The Apgar test is performed at one and five minutes following the delivery of a child, and tests five different functions of the child, including alertness, responsiveness to pain, heart rate, and respiration. If each of the five functions are intact, a maximum of two points per item may be scored for a maximum total of ten points.

[6] In *Selwa*, the child had an Apgar score of at least two (out of twelve). *Id.* at 455.

[7] Indeed, the only "evidence" noted in the dissent's opinion is Dr. Cohle's testimony that (1) the

(continued…)

simply having an expert testify to a conclusion when that expert's testimony and writings reveal facts leading to the opposite conclusion. In fact, if that were sufficient, a district court could blindly follow such a conclusory opinion without regard to whether there was a factual basis for that opinion. We conclude in this case that the district court failed to properly exercise its judgment by relying solely on the expert's conclusion, rather than looking at the facts (or lack thereof) underlying the expert's opinion. Additionally, the district court erred by failing to draw the legal conclusion that the prosecution failed to establish probable cause that the "death of another" occurred under *Selwa, supra*. See *People v Richardson*, 469 Mich __, n 15; 669 NW2d 797 (2003) (Markman, J., joined by Taylor and Cavanagh, JJ., dissenting from the denial of leave).

In reaching this decision we have not disregarded the deferential standard of review applicable in these cases. We are fully cognizant that the district court viewed the testimony and could have made credibility determinations (though the district court made no mention of any). However, our review of the rather minimal evidentiary record in this case causes us to come to the same inescapable conclusion as the circuit court: the prosecution did not present *any* evidence establishing that the child had *any* brain activity, respiration, etc., once removed from the mother, and therefore, there are no facts to rely upon in concluding that Xavyor was born alive as defined in the controlling case of *Selwa, supra.* Accordingly, the circuit court properly determined that the district court's decision to bind defendant over for trial was an abuse of discretion.

Affirmed.

/s/ Christopher M. Murray
/s/ Janet T. Neff

(…continued)

child lived for four days and (2) died on January 7, 2001, four days after the caesarean. This testimony entails the ultimate factual conclusion, but provides a court with no evidence regarding Xayvor's actual condition between extraction and removal from life support.