IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

STATE OF DELAWARE,	)	
	)	
V.	)	DEF. I.D.: 0809005908
	)	
KEITH SHARPLEY,	)	
	)	
Defendant.	)	

Date Submitted: January 28, 2009
Date Decided: January 30, 2009

MEMORANDUM OPINION.

*Opinion After Trial***.**

Defendant Guilty of Two Counts of Operation of a Vehicle Causing Death.

Shawn E. Martyniak, Deputy Attorney General. Attorney for the State of Delaware.

James A. Natalie, Jr., Esquire. Attorney for the defendant.

SLIGHTS, J.

I.

On the late morning of May 1, 2008, a two-car collision occurred at the intersection of Route 52 and Kirk Road in Greenville, Delaware. Tragically, both occupants of one of the vehicles were killed as a result of injuries sustained in the collision. The driver of the other vehicle, the defendant herein, was traveling in excess of the posted speed limit on northbound Route 52. He took his eyes off the road and entered the intersection with Kirk Road against a red light striking the other vehicle broadside. These facts were undisputed at trial.

The State charged the defendant with two counts of Criminally Negligent Homicide to which the defendant plead not guilty.[1] A non-jury trial was held on January 22, 2009. At the conclusion of the trial, the State asked the Court to find the defendant guilty as charged. The defendant asked the Court to find him guilty of the lesser included offense of Operation of a Vehicle Causing Death.[2] The State responded by arguing that Operation of a Vehicle Causing Death is not, as a matter of law, a lesser included offense of Criminally Negligent Homicide. According to the State, to the extent the Court will consider a lesser included offense in this case, any such offense must be a criminal offense (as opposed to a traffic violation) as

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[1] *See* 11 DEL. C. § 631.

[2] *See* 21 DEL. C. § 4176(A).

codified in Title 11 of the Delaware Code. As explained below, the disposition of this case depends upon the Court's resolution of this legal issue.

For the reasons that follow, the Court finds that the defendant is guilty of two counts of Operation of a Vehicle Causing Death. The Court is satisfied that when the operator of a motor vehicle causes death as a result of negligence (as opposed to criminal negligence), evidenced by a violation of one or more of the so-called "rules of the road" (codified in Title 21), that operator commits the offense of Operation of a Vehicle Causing Death and is subject to the criminal sanctions set forth in that statute. Judgments of conviction in accordance with this opinion will be entered by the Prothonotary forthwith.

II.

Based on the evidence presented at trial, the Court finds that the State proved the following facts beyond a reasonable doubt. On the morning of May 1, 2009, shortly before 11:00 a.m., the defendant, Keith Sharpley, was operating his Dodge Ram pickup truck northbound on Delaware Route 52 en route to West Chester, Pennsylvania. The weather was clear and the roadway was dry. Mr. Sharpley had not consumed any alcohol or medications that morning that would interfere with his ability to operate his truck. Nor was he using his cell phone or engaging in any other extraneous activity that would distract him from driving.

As he approached the intersection of Route 52 and Kirk Road, Mr. Sharpley was traveling approximately 66 miles per hour, 16 miles per hour in excess of the posted (50 miles per hour) speed limit. Mr. Sharpley believed he saw his alternator gauge "jump" (a problem he had encountered in the past) and looked down at the gauge to determine if there was a problem. This caused him to take his eyes off the road for approximately four seconds. When he looked down at the gauge, the traffic light controlling the intersection of Route 52 and Kirk Road was green for northbound Route 52 traffic. When he looked back up at the road, that same light was red. He attempted to stop by applying his brakes. In addition, as he entered the intersection, he attempted to swerve to the left to avoid the traffic entering the intersection from westbound Kirk Road. These efforts to avoid a collision with the victims' vehicle were not successful.

As Mr. Sharpley was traveling towards the intersection of Route 52 and Kirk Road, a Chrysler PT Cruiser occupied by the victims, Phyllis DiNardo and Bettyann DiSabatino, was stopped at a red light heading west on Kirk Road. When that light turned green, their vehicle paused for a moment and then entered Kirk Road's intersection with Route 52. The PT Cruiser was struck broadside on the driver's side by the vehicle operated by Mr. Sharpley. Both victims sustained multiple blunt force injuries in the collision and died shortly thereafter as a result of those injuries.

By all accounts, Mr. Sharpley immediately accepted responsibility for the collision before all present at the scene, including civilian witnesses and police officers. At various times while at the scene, he acknowledged that he had "run the red light" and that the accident "was [his] fault." Mr. Sharpley was not charged at the scene. Rather, on September 15, 2008, the grand jury indicted Mr. Sharpley on two counts of Criminally Negligent Homicide.[3]

III.

A. Criminally Negligent Homicide

The statute defining Criminally Negligent Homicide reads:

> A person is guilty of criminally negligent homicide when, with criminal negligence, the person causes the death of another person.[4]

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[3] At the close of the case, the Court inquired of the prosecutor why the defendant had not been charged with Vehicular Homicide Second Degree. Vehicular Homicide Second Degree, identical in its elements to Criminally Negligent Homicide except for the requirement that the State prove that death was caused by a motor vehicle, is classified as a F Felony while Criminally Negligent Homicide is classified as an E Felony (more serious). *Compare* 11 DEL. C. § 631 (criminally negligent homicide) with 11 DEL. C. § 630 (vehicular homicide second degree). Clearly, the General Assembly intended that death caused by criminal negligence while operating a motor vehicle should be treated differently (with less serious potential consequences) than death caused by criminal negligence in the handling of other instruments of death. The prosecutor responded to the Court's inquiry by explaining that his practice is to charge the crime that fits the facts *and* that requires the State to prove the fewest elements. This, of course, rings hollow when the only additional element to be proven here is that the defendant was operating a motor vehicle, a fact that was never in dispute. Clearly, the State elected to charge the defendant with the more serious of two available charges, even though the facts as alleged by the State fit most squarely into the elements of the less serious charge. The prosecutor admitted as much upon inquiry by the Court. At the end of the day, this "charging decision" has no bearing on the outcome of this case. It is, nevertheless, troubling to the Court.

[4] 11 DEL. C. § 631.

A person acts with "criminal negligence with respect to an element of an offense when the person fails to perceive a risk that the element (in this case the risk of death) exists or will result from the conduct."[5] In applying this definition, the fact finder must consider whether "the risk [is] of such a nature and degree that failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."[6]

In this case, both parties agree that the Court's verdict will turn on whether the Court finds that the defendant acted with criminal negligence, i.e., in a manner that constituted a *gross* deviation from the standard of conduct of a reasonable person, or whether he acted with negligence, i.e., in a manner that constituted a "fail[ure] to exercise the standard of care" of a "reasonable person."[7] During its closing argument, and again in a post-trial submission, the State cited to cases in which courts have determined that "inattention [while driving] could constitute criminal negligence depending on the circumstances in which the inattention occurred."[8] The Court does not disagree with this general proposition. Of course, the general proposition begs

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[5] 11 DEL. C. § 231 (d).

[6] *Id.*

[7] *Compare* 11 DEL. C. § 231(d) (defining "criminal negligence") with 11 DEL. C. § 231(e) (defining "negligence").

[8] *State v. Donato*, 1990 WL 140073 (Del. Super.). *See also Hazzard v. State*, 456 A.2d 796, 797 (Del. 1983)(finding that failure to stop at a stop sign can constitute criminal negligence).

the question: under what circumstances did the inattention occur?

In *State v. Knight*,[9] a case cited by the State, the court found criminal negligence when the defendant failed to stop at a stop sign while traveling at a high rate of speed and collided with a bus that had entered the intersection lawfully. Significant to the court's decision was evidence that the defendant had been racing around the area at reported speeds of 85-90 miles per hour, and evidence that the defendant had not made a meaningful attempt to stop or slow his vehicle prior to impact.[10] In *Donato,* the court considered whether inattentiveness could constitute criminal negligence in the context of the very deferential standard of review implicated by a motion for judgment of acquittal after a jury verdict of guilty.[11] Noting that, on a motion to acquit, all "legitimate inferences" must be drawn in favor of the State, the court concluded that it could not set aside the jury's guilty verdict, even though the court "disagreed" with it.[12] In *State v. Hudson,*[13] the court concluded

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[9]1999 WL 1427766 (Del. Super.).

[10]*Id.* at *5.

[11]*Donato,* supra, at *1.

[12]*Id.* at *2 (The defendant was found to be criminally negligent after colliding with a vehicle that had come to a stop in front of him; the evidence revealed that the defendant was traveling in excess of 20 miles over the speed limit and was not paying attention to the road at the time of impact).

[13]Cr. A. No. S97-10-0231, Lee, R.J. (Del. Super. March 9, 1998).

that the "fact that the defendant was operating his motor vehicle (apparently intentionally) on the wrong side of the roadway, while entering a curve on a rural highway, is, standing alone, a gross deviation from the standard of conduct that a reasonable person would observe in a situation."[14] As an aside, it should be noted that each of these cases was decided prior to the enactment of the Operation of a Vehicle Causing Death statute in 2003.[15]

In this case, the Court finds that the State did not prove beyond a reasonable doubt that the defendant's failure to perceive the risk of death resulting from his conduct constituted a "gross deviation" from the standard of conduct that a reasonable person would observe in the situation. Was there a "deviation?" Absolutely. The Court cannot, however, conclude that the defendant's excessive speed and distraction from the road to attend to a perceived problem within his vehicle rises to the level of "gross" or "criminal negligence." Unlike the defendant in *Knight*, for instance, this defendant was not racing around rural roads as an exhibitionist or otherwise driving without lawful purpose.[16] Rather, the defendant was traveling purposefully with a specific destination in mind and, up to the time

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[14] *Id.* at 1-2.

[15] 74 DEL. LAWS ch. 99 §3 (2003).

[16] *See State v. Knight*, supra at *5.

immediately prior to this tragic accident, there is no evidence to suggest that he was operating his vehicle imprudently or unlawfully. This defendant made two mistakes in judgment, one upon the other, that ultimately caused a horrific result - - he brought his truck above the posted speed limit and then took his eyes off the road to check a vehicle gauge. The Defendant's poor judgment resulted in three violations of the rules of the road - - he exceeded the speed limit, ran a red light and was inattentive/careless - - at least two of which combined to cause this accident.[17] But these violations do not amount to criminal negligence. Accordingly, the Court must find the defendant not guilty of both counts of Criminally Negligent Homicide.

B. Lesser Included Offenses

Having determined that the State has not proven criminal negligence beyond a reasonable doubt, the Court need not consider whether Vehicular Homicide Second Degree, which also requires proof of criminal negligence, is a lesser included offense

[17]The Court notes that there was no clear evidence in the record to indicate that but for the excessive speed the accident would not have occurred, i.e., the court did not hear evidence that the defendant could have brought his vehicle to a stop prior to impact had he been traveling at the posted 50 miles per hour. Nor was there evidence presented that the victims would have had an appreciably better chance of survival had the impact occurred at 50 miles per hour versus 66 miles per hour, although the Court assumes that the chances of survival would be improved in an impact at the slower speed.

of Criminally Negligent Homicide.[18] The defendant has argued that Operation of a Vehicle Causing Death is a legally appropriate and fitting lesser included offense of the indicted charges. As explained below, the Court agrees.

In Delaware, lesser included offenses are governed by statute.[19] An offense will be included within "an offense charged in the indictment" when "[i]t is established by the proof of the same or less than all the facts required to establish the commission of the offense charged," or "[i]t involves the same result but differs from the offense charged only in the respect that ... a lesser kind of culpability suffices to establish its commission."[20] As explained below, Operation of a Vehicle Causing Death, as a lesser included offense of Criminally Negligent Homicide, fits squarely within either statutory definition of a lesser included offense.

In this case, the same facts required to establish Criminally Negligent Homicide establish the lesser offense as well. The State presented evidence that the defendant

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[18]During closing arguments, the Court asked the State if Vehicular Homicide Second Degree (a class F Felony) was a lesser included offense of Criminally Negligent Homicide (a class E Felony). The State said that it was. In a post-trial submission, however, upon further reflection, the State retracted that position and argued that Vehicular Homicide Second Degree could not be a lesser included offense of Criminally Negligent Homicide because the vehicular offense required the State to prove more elements. Because Vehicular Homicide Second Degree requires a finding of criminal negligence, an element already determined to be lacking here, the Court will leave the resolution of this question for another day.

[19]11 DEL. C. § 206. *See Lilly v. State*, 649 A.2d 1055, 1061 (Del. 1994).

[20]*Id.* at §§ (b)(1) & (b)(3).

operated his vehicle in a manner that violated certain of the rules of the road as set forth in Title 21 of the Delaware Code - - he failed obey a traffic control signal;[21] he operated his vehicle in excess of the posted speed limit;[22] and he operated his vehicle in a careless or inattentive manner[23] - - and that these violations caused the death of two people. According to the State, the circumstances surrounding the violations of the rules of the road justifies a finding of criminal negligence. The Court has rejected that contention. Having done so, however, does not mean that the Court has determined that the State has failed to prove that the defendant violated the rules of the road, as specified, or that these violations were not the cause of the victims' deaths. To the contrary, the Court is satisfied that the State proved the violations beyond a reasonable doubt, and also proved the causal connection between at least some of the violations and the death of the victims beyond a reasonable doubt. This proof constitutes the offense of Operation of a Vehicle Causing Death.[24]

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[21]21 DEL. C. §4107.

[22]21 DEL. C. §4168.

[23]21 DEL. C. §4176.

[24]*See* 21 DEL. C. §4176A(a)("A person is guilty of operation of a vehicle causing death when, in the course of driving ... a motor vehicle ... in violation of any chapter of this title [other than driving under the influence], the person's driving ... causes the death of another person.").

Operating a motor vehicle with criminal negligence in a manner causing death is Criminally Negligent Homicide.[25] When the State proves that a defendant operated a vehicle with "a lesser kind of culpability," e.g., negligence *per se*,[26] and that the "lesser culpability" causes the death of another, the proper offense is Operation of a Vehicle Causing Death.[27] Thus, whether the question is considered under §206(b)(1)("proof of same or less than all the facts..."), or §206(b)(3)("same result but lesser kind of culpability"), under either analysis, it is clear that Operation of a Vehicle Causing Death is a lesser included offense of Criminally Negligent Homicide

[25]As noted above, in cases where alcohol or drugs are not factors, the conduct is more appropriately charged as Vehicular Homicide Second Degree.

[26]*See Nance v. Rees,* 161 A.2d 795, 797 (Del. 1960)(holding that a proven violation of a rule of the road is negligence *per se*).

[27]*See Lilly,* 649 A.2d at 1061(holding that a lesser included offense includes those offenses where the same result is the product of a "lesser kind of culpability" than that charged in the indictment, and noting that "there may be some dissimilarity in the elements necessary to prove the [lesser included] offense.")(citation omitted). *See also See Hoover v. State,* 958 A.2d 816, 820 (Del. 2008)(noting that "[t]he General Assembly's purpose in enacting section 4176A was to create an offense that required a ***less culpable*** state of mind than criminal negligence in those cases where a motor vehicle offense results in the death of another.")(emphasis supplied); *State v. Brower,* I.D. 0702000289, Carpenter, J. (Del. Super. March 28, 2008)(suggesting, without specifically holding, that Operation of a Vehicle Causing Death was a lesser included offense of Criminally Negligent Homicide and Vehicular Homicide Second Degree).

in motor vehicle death cases.[28]

The legislative history of the Operation of a Vehicle Causing Death Statute supports the Court's conclusion here. Interestingly, the Department of Justice took a very different view of the question *sub judice* when offering testimony in support of the proposed motor vehicle statute. During that testimony, the Deputy Attorney General who testified in support of then House Bill No. 190 clearly suggested that the new statute would be considered in the spectrum of charges that could be brought against a defendant who operates a motor vehicle in a manner causing death.[29] He went on to explain that while a violation of a rule of the road may not rise to the level of criminal negligence or recklessness, if the violation causes death, the new statute

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[28]The State has argued that, in order to instruct a jury that Operation of a Vehicle Causing Death is a lesser included offense of Criminally Negligent Homicide (or presumably Vehicular Homicide Second Degree), the Court would have to improperly comment on the evidence, in violation of the Delaware Constitution. *See* DEL. CONS. ART. IV, § 19. According to the State, the Court would be required to inject its own view as to the nature of the underlying motor vehicle violation that gives rise to the charge of Operation of a Vehicle Causing Death. The State misreads the Constitution. While it is true that "judges should not charge juries with respect to matters of fact," the Constitution expressly recognizes that judges may, and often do, "state the questions of fact in issue and declare the law." *Id.* In this case, the defendant argued that he committed at least three violations of the rules of the road. Had this case been tried to a jury, the court would have determined if there was a rational basis in the evidence to support these contentions and, if so, would have instructed the jury on the elements of the underlying motor vehicle offenses as part of its instruction on the charge of Operation of a Vehicle Causing Death. No improper comment on the evidence would be required to define the applicable law.

[29]*See* Del. H.B. 190, 142nd Gen. Assem., Senate Debate, at 1 (June 25, 2003)("This bill, what it specifically does is to fill the gap between normal motor vehicle violations which don't result in any personal harm to people and the vehicular crimes which are in our criminal code like vehicular homicide, manslaughter or criminally negligent homicide.")

would offer a means for our State to punish operators for the *results* of their violation beyond the punishment available for the violation itself.[30] That is precisely the scenario presented here. The defendant clearly violated at least three rules of the road and at least two of those violations caused, in the legal sense, the death of two innocent, blameless people. It is the *result* of these violations that is to be addressed and punished by virtue of his commission of Operation of a Vehicle Causing Death.[31]

IV.

Based on the foregoing, the Court finds the defendant guilty of two violations of Operation of a Vehicle Causing Death, in violation of 21 DEL. C. §4176A, as lesser included offenses of the indicted charges of Criminally Negligent Homicide. The Prothonotary is directed to enter the convictions on the docket forthwith. Sentencing will occur on Friday, April 3, 2009 at 9:30 a.m. The Investigative Services Office of the Superior Court shall prepare a pre-sentence investigation report in advance of sentencing.

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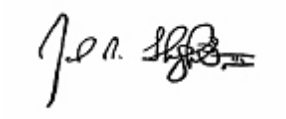
[30] *Id.* at 2. To be sure, the State may well determine in certain cases that it should ask for the lesser included offense in order to avoid the possible outcome of an outright acquittal on the homicide charge in a motor vehicle death case.

[31] *See Hoover,* 958 A.2d at 821 (noting that section 4176A punishes a violation of a motor vehicle statute when death results from the violation).

IT IS SO ORDERED.



Judge Joseph R. Slights, III

Original to Prothonotary