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STATE OF WISCONSIN
SUPREME COURT
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CASE NO. 2015AP001782-CR

STATE OF WISCONSIN,
PLAINTIFF-RESPONDENT,

-vs- **Case No. 2015 CF 766**
(Rock County)

SAMBATH PAL,
DEFENDANT-APPELLANT-PETITIONER.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND THE ORDER DENYING POSTCONVICTION RELIEF, BOTH ENTERED IN ROCK COUNTY CIRCUIT COURT, THE HONORABLE RICHARD T. WERNER PRESIDING.

DEFENDANT-APPELLANT-PETITIONER'S REPLY BRIEF

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I. AS DEFENDANT'S TWO CONVICTIONS FOR LEAVING THE SCENE OF AN ACCIDENT, CAUSING DEATH ARE MULTIPLICITOUS, ONE OF HIS CONVICTIONS SHOULD BE VACATED.

A. **Defendant Pal's interpretation of Wis. Stat. §346.67 does not affect the holding of *Rabe*.**

The State repeatedly suggests the court's decision in *State v. Rabe*, 96 Wis.2d 48, 291 N.W.2d 809 (1980), which authorized multiple convictions for violating Wis. Stat. §940.09 during a single accident with multiple victims, strongly supports its argument that multiple convictions for violating Wis. Stat. §346.67 are appropriate upon a defendant's flight from a single accident with multiple victims (State's brief at 10, 16, 19, 22). As previously argued, the language of the relevant statute in *Rabe,* Wis. Stat. §940.09, is qualitatively different than that of Wis. Stat. §346.67:

> **940.09 Homicide by intoxicated use of a vehicle or firearm.** (1) Any person who does any of the following may be penalized as provided in sub. (1c): (a) causes the death of another by the operation or handling of a vehicle while under the influence of an intoxicant.

The "another" from this statute is singular. The "any person" language from Wis. Stat. §346.67 can be singular or plural. As the statutory constructions are dissimilar, the *Rabe* decision does not compel a similar result in this case.

B. **The legislature could have drafted §346.67 in a way authorizing multiple counts of leaving the same accident**.

The State argues in three separate places that if the legislature had intended that a defendant could be only be charged with one violation of §346.67 for each accident, it could have easily structured the statute to make that clear (State's brief at 10, 28, 29). Of course, the opposite is also true. Nothing about the statutory structure of Wis. Stat. §346.67 suggests that multiple convictions resulting from a defendant's flight from the same accident is authorized. The

fact the legislature used the term "any person," as opposed to "another" or "a person" suggests the contrary is true. If the legislature had intended multiple counts arising out of the same accident, it could have easily used these singular terms, as was done with Wis. Stat. §940.09 ("another"), the relevant statute in *Rabe*.

C. **The two charges in this case are the same in law and in fact.**

Using a *Blockburger* analysis, the State argues the two charges are not the same in fact (State's brief at 12-13). The State argues there can be no serious dispute about this because there is a different victim for each of the charged offenses (State's brief at 9-10, 15-16). However, as previously argued, the gravamen of a violation of Wis. Stat. §346.67 is the flight from the accident, not the injury of one or more victims. *See Tooke v. Commonwealth*, 47 Va.App. 759, 627 S.E.2d 533, 536 (2008). As the two offenses are identical in law and fact, consistent with the law cited by the State from *State v. Ziegler*, 2012 WI 73, ¶60, 342 Wis.2d 256, 816 N.W.2d 238, then the State bears the burden of demonstrating by a clear indication of legislative intent that the Lesislature intended to authorize cumulative punishments (State's brief at 13).

While one cannot argue with the State's cite to the general precept that where there are multiple victims, there can be multiple, chargeable counts, that precept is not without many exceptions. For example, take the offense of burglary of the residence of a family of four, a husband, wife, daughter and son. The husband and wife co-own the residence. All four are home when a defendant enters the residence to steal household items. An element of the offense of burglary is that the defendant's entry into the residence without the consent of the person in lawful possession of the property.[1] There are four persons who are in lawful possession of the residence. Under the State's analysis, there are four victims, and thus four counts of burglary are chargeable. That obviously is not logical or authorized.

[1] *See WIS JI-CRIMINAL 1421*, Element 2.

The gravamen of the offense of burglary is the entry with intent to steal, not the violation of any one specific person. *See Holland v. State*, 87 Wis.2d 567, 597, 275 N.W.2d 162, 177 (Ct.App. 1979), rev'd on other grounds, 91 Wis.2d 134, 280 N.W.2d 288 (1979), cert. denied 445 U.S. 931 (1980). That said, in order to prove the single offense of burglary, the State would have the burden of showing that a person lawful on the premises did not consent to the entry to the property, in the hypothetical, at least one of the four persons violated by the defendant's conduct, husband, wife, daughter or son.

In this case, the State had to show at least one person was struck and killed during the accident. *See WI-CRIMINAL 2670.* Like in the burglary example above, the State would have to show at least one of the two victims were struck and killed as a result of the accident. Like in the burglary example, there are not multiple offenses of leaving the same accident simply because multiple persons were directly affected or victimized by the defendant's criminal activity.

In a similar vein, quoting *Hartnek*, the State raises the concern that that multiple layers of violations of Wis. Stat. §346.67 are possible in a single accident (State's brief at 14-15, 20). In reality, that is not much of a concern. Prosecutors ultimately have to decide what they can prove when they make any charging decision. Even a brief physical altercation between a defendant and victim could involve conduct by the defendant that causes bodily harm, substantial bodily injury and great bodily harm. Presumably, the prosecutor will charge the most serious battery charge he or she believes can be proven. Likewise, in this situation, had one of the victims suffered bodily harm, but the other one had been killed, presumably, the State would have alleged the Class D felony associated with death (Wis. Stat. §346.74(5)(d)), rather than the Class A misdemeanor associated with bodily injury (Wis. Stat. §346.74(5)(b)). This is the type of decision a prosecutor has to make every day. There is nothing unfair or illogical about this type of charging decision having to be made by a prosecutor.

D. **The State's *Tappa* analysis is flawed**.

The parties agree that if the two offenses are not the same in law and in fact, then one must determine legislative intent by performing an analysis using the four factors spelled out in *State v. Tappa*, 127 Wis.2d 155, 165, 378 N.W.2d 883, 887 (1985):

> In *Manson v. State*, 101 Wis.2d 413, 422, 304 N.W.2d 729 (1981), this court deemed the following four factors as being relevant to the determination of legislative intent: (1) the language of the statute; (2) the legislative history and context of the statute; (3) the nature of the proscribed conduct; and (4) the appropriateness of multiple punishment for the conduct.

As to factor 1, the language of the statute, for all of the reasons previously argued, defendant Pal asserts the language of the statute is unambiguous. The offense is spelled out in Wis. Stat. §346.67. The gravamen of the offense is the flight from the accident, not the degree of injury to those affected by the accident. The penalty for violating the statute is set forth in Wis. Stat. §346.74. Not surprisingly, the more serious the resulting harm, the more serious the penalty.

As to factor 2, the legislative history, the State goes through a discussion of the enactment of Wis. Stat. §347.67 (State's brief at 24-25). Ultimately, the State is not able to point to anything within the legislative history that would suggest multiple counts of leaving the same accident are appropriate. As previously conceded by the defense, there simply is no guidance that can be gleaned from the legislative history.

As to factor 3, the nature of the proscribed conduct, as previously argued by defendant Pal, the gravamen of the offense is the flight from the accident, not the causation of injuries to the victims. The State correctly points out that a person can violate Wis. Stat. §346.67 in a myriad of ways, including by failing to immediately stop at the scene of the accident, by failing to provide information to those directly harmed by the accident, by failing to provide aid to all injured persons and by failing not to obstruct traffic (State's brief at 26). Of course, if one flees an accident scene, he or she is not going to be able to do most of these things. That still is the gravamen of the offense, not the specific injuries to persons.

As to factor 4, the appropriateness of multiple punishments, the State's argument essentially falls back to a second analysis of factor one, the statutory language (State's brief at 28-29). The penalty for leaving the scene of an accident resulting in a death is 25 years in prison. This is a substantial penalty that can be imposed on an offense where there was no intent to directly harm anyone. To double that penalty when there are two dead victims is unnecessary.

E. **Stare decisis is not a barrier to overruling Hartke**.

The State suggests this court should be deferential to the decision in *Hartnek* under the principle of stare decisis (State's brief at 30). In *State v. Grawien*, 123 Wis.2d 428, 432, 367 N.W.2d 816, 818, (Ct.App. 1985), the court wrote:

> The Wisconsin Court of Appeals serves the primary "error correcting" function in our two-tiered appellate system. (citation omitted). The Wisconsin Supreme Court, unlike the court of appeals, has been designated by the constitution and the legislature as a law declaring court. (citation omitted). While the court of appeals also serves a law declaring function, such pronouncements should not occur in cases of great moment.

The defendant is asking the Wisconsin Supreme Court to determine whether a defendant can be charged with multiple offenses of leaving the same accident scene. The decision will likely have statewide implications. Regardless of the length of time passing since the *Hartnek* decision, the Wisconsin Supreme Court has not weighed in on the issue.

F. **The cases cited from other jurisdictions are relevant to the analysis.**

The State argues the cases holding a defendant can only be convicted once of leaving the scene of the same accident are not relevant to the analysis because either a different analysis was used by the other state or the statutory language was different. The language utilized in *State v. Stone*, 728 S.E.2d. 155 (2012), the West Virginia case, analyzed a statute nearly identical to the one in this case. The other cases cited used similar statutory schemes. The fact several other States have concluded one cannot be convicted of multiple offenses of leaving the scene of the same accident certainly goes to the issue of what a reasonable prosecutorial unit is in this situation. In the process of their analyses, the other States weighed many of the same considerations set forth in *Tappa*.

II. AS DENDANT PAL'S SENTENCES WERE UNDULY HARSH, HIS SENTENCES SHOULD BE VACATED AND HE SHOULD BE GRANTED A RESENTENCING.

On this issue, the State argues that because the sentence imposed in this case was within the statutory maximums, the sentence should be upheld (State's brief at 31-34). Defendant argues the sentence imposed in this case is so disproportional to the offense that it would shock the public sentiment and would violate the judgment of reasonable people concerning what is right and proper under the circumstances, the standard set forth in *Ocanas v. State*, 70 Wis.2d 179, 185, 233 N.W.2d 457 (1975).

Defendant Pal argues this standard is akin to the hard-core pornography definition penned by Justice Stewart in his concurrence in *Jacobellis v. Ohio*, 378 U.S. 184 (1964):

> I have reached the conclusion, which I think is confirmed at least by trying to define what may be indefinable. I have reached the conclusion, which I think is confirmed at least by negative implication in the Court's decisions since *Roth* and *Alberts*, that under the First and Fourteenth Amendments criminal laws in this are constitutionally limited to hard-core pornography. I shall not today attempt further to define the kinds of material I understand to be

> embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.

While there is no way to know for sure how the public would weigh the sentence imposed in this case, there is a reasonable likelihood the average member of the general public objectively looking at the conduct by the defendant and the penalty imposed for the conduct, would be shocked. The informed public is inundated with stories of criminal wrongdoers on a daily basis. Many of the offenses committed by these persons involve vile motivations and cruel conduct toward others. Yet many receive far shorter sentences than the one imposed in this case. Defendant Pal may end up serving two actual decades in prison for making a hasty and ill-advised decision that did not involve the deliberate infliction of harm on two people. While there is no easy way to define an excessive sentence, this one falls into the "I know it when I see it" parameter. The sentence is excessive.

CONCLUSION

For the reasons set forth above, defendant should be granted the relief sought.

Dated: January 12, 2017

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CERTIFICATION AS TO FORM AND LENGTH

I certify that this brief meets the form and length requirements of Rule 809.19(8)(b) and (c) in that it is: proportional serif font, minimum printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of minimum 2 points and maximum of 60 characters per line of body text. The length of this brief is 3157 words.

Dated: January 12, 2017

_____
Philip J. Brehm
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CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I certify that I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of Rule 809.19(12). I further certify that: This electronic brief is identical in content and format to the printed form of the brief filed on or after this date and that a copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated: January 12, 2017

_____
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