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IN THE SUPREME COURT OF THE STATE OF DELAWARE

GABRIEL F. PARDO, Defendant Below, Appellant, v. STATE OF DELAWARE Plaintiff Below, Appellee.	)	No. 68, 2016

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

APPELLANT'S REPLY BRIEF

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ARGUMENT ON THE MERITS

I. 21 *Del. C.* § 4202 is an Unconstitutional Strict Liabilty Statute

Despite prolific briefing by both parties in the Superior Court, and a decision by the Superior Court, defending the constitutionality of 21 *Del. C.* § 4202 under a *Morissette* analysis for strict liability crimes, the State is now saying that 21 *Del. C.* § 4202 is not strict liability. Respectfully, the State is incorrect.

Black's Law Dictionary, 10th Edition, defines strict liability as follows:

> "An offense for which the action alone is enough to warrant a conviction, with no need to prove a mental state; specifically, a crime that does not require a mens rea element, such as traffic offenses, and illegal sales of intoxicating liquor."[1]

Under 21 *Del. C.* § 4202 liability attaches without intent, making it a strict liability crime. Liability attaches if a driver of any vehicle is involved in a collision resulting in injury or death to any person and does not immediately stop.

While the State is correct that there is "strong judicial tradition…in support of a presumption of the constitutionality of a legislative enactment,"[2] in

[1] *Black's Law Dictionary, (*10th ed. 2009).
[2] *Snell v. Engineered Systems & Design, Inc.,* 669 A.2d 13, 17 (Del. 1995).

Morrissette v. United States,[3] the United States Supreme Court examined a strict liability crime and provided a rubric under which to analyze statutes to determine if they violate due process. *Morrissette* demonstrates that statutes that may appear valid on their face could nevertheless be violative of the 14th Amendment.

In *Hoover v. State*, this Court specifically opined on offenses in Title 21 and that they did not require a state of mind.

Section 4202 is part of Title 21and a *Morissette* analysis is appropriate. This case is poised for this Court to now make a complete determination as to whether a Title 21 offense that results in up to five years in prison and a felony conviction violates the due process rights of the defendant.

To that end, the Superior Court focused only on the minimum mandatory sentence of six months rather than full range of imprisonment. Pardo argues that in a due process evaluation the entire penalty should be considered. A conviction under 21 *Del. C.* § 4202 can result in up to five years imprisonment, not a "relatively small" amount of time.[4]

Furthermore, Pardo argues that the reputation of a convicted felon is "gravely besmirched" as evidenced by the loss of significant civil rights.

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[3] 342 U.S. 246 (1952).

[4] Pardo was sentenced to three years imprisonment – not a "relatively small" amount of time.

Knowledge That Accident Resulted in Injury or Death

The State attempts to steer this Court away from strict liability by citing to *State v. Ogilvie*[5], a Georgia Supreme court case, that holds that "strict liability traffic offenses are not offenses with no criminal intent element" and then goes into a discussion that because § 4202 requires knowledge of the accident, it is not a strict liability crime.

If this Court determines that 21 *Del. C.* § 4202 is not a strict liability crime, and that having knowledge of the accident suffices as a mental state as the State argues, then Pardo submits that in order to sustain a conviction, that State had to prove that Pardo knew he had been involved in a collision *resulting in injury or death to a person.*

The State suggests that "it is clear that the legislature did not intend to enact a statute that imposes a criminal penalty on a driver who, regardless of their knowledge of an accident or injury, would be strictly liable for the outcome."[6] Pardo argues that the legislative debate does not apply to the constitutionality of § 4202, but rather, bolsters his argument that the driver must have knowledge that he has been in a collision that results in injury or death – not just knowledge that there was a collision.

The State also argues that 21 *Del. C.* § 4201 and § 4202 must necessarily

[5] 734 S.E.2d 50 (Ga. 2012).
[6] *Answ. Br.* at 15.

be read together and that the words "apparent damage" demonstrates that the driver must have knowledge of the accident (because the damage is apparent).[7] Again, there is an important distinction between knowledge of the accident and knowledge of an accident resulting in injury or death of a person.

Turning back to the legislative debates, if the legislature had been concerned with people fleeing to avoid liability for damage to property or a person, it would seem logical that the concern would be first for the person that was struck and then for the property of *that person* or perhaps a third party.

Conversely, the focus would not necessarily be on the property of the driver. In this case, Pardo thought he struck a limb and that his vehicle was the only thing damaged. Given that he could still see through the windshield because it was night, his house was less than one mile away, he had young children in his vehicle and the road had no shoulder, he assessed the damage at his own house.

Pardo argues that in order to "know the facts that make his conduct illegal"[8] he would have to *know* that a person had been injured or killed and that the Superior Court was wrong in its conclusion that he did not need to know that the collision involved injury or death.

If a person is going to be convicted of a felony, and face up to five years

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[7] *Answ. Br.* at 12.

[8] *See AR-1*, Excerpt from Verdict .

in jail, without intent, at a minimum it has to be proven that the driver knew he was in a collision involving injury or death – not a collision that he thought was with a large limb or branch.

II. Superior Court Abused Its Discretion When It Permitted an Addition to the Manslaughter Pattern Jury Instruction Involving Voluntary Intoxication Rather Than Consumption of Alcohol

In the Answering Brief, the State completely mischaracterized Pardo's argument regarding the additional language in the jury instructions. The State referenced 11 *Del. C.* § 421 when Pardo referenced 11 *Del. C.* §231.

11 *Del. C.* § 421 provides:

> "The fact that a criminal act was committed while the person committing such act was in a state of intoxication, or was committed because of such intoxication is no defense to any criminal charge if the intoxication was voluntary."

11 *Del. C.* § 231 provides:

> "[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto."

The issue is not whether or not a voluntary intoxication defense was presented, but rather, that there was *no evidence* of voluntary intoxication yet the manslaughter elements were amended to include an additional element that established recklessness per se if the defendant was voluntarily intoxicated.

By including the additional language regarding voluntary intoxication, a mechanism was provided for the Superior Court to find the requisite state of mind necessary for manslaughter without concluding that Pardo *consciously*

disregarded an unjustifiable risk. Put another way, the language regarding voluntary intoxication undermined the need for the State to demonstrate that the defendant's conduct was a conscious decision under the facts and circumstances because if he was voluntarily intoxicated he didn't have to be conscious of the risk.

In the Answering Brief, the State has also mischaracterized Pardo's argument by stating that "the trial judge was not permitted to consider his alcohol consumption at all."[9] That is not what Pardo is arguing. Pardo is arguing that the Superior Court equated consumption of alcohol to voluntary intoxication when there is a difference.

The State is correct to cite that "[A] fundamental underpinning to all jury instructions [is that] there must be a factual basis in the record to support the instruction."[10] The problem is that there is not a factual basis for voluntary intoxication. Had the amendment been about consumption of alcohol it would be completely different because there is a factual basis of consumption of alcohol.

There is no dispute that evidence was submitted that Pardo consumed alcohol. Significantly, though, is that even with the testimony concerning alcohol consumption, there was no evidence submitted that Pardo was under the

[9] *Answ. Br.* at 18.
[10] *Answ. Br.* at 17, *citing Erskine v. State*, 4 A.3d 391, 394-95 (Del 2010).

influence, impaired or intoxicated. Yet, the Superior Court found Pardo to be under the influence.

Although the Superior Court stated that it found that Pardo was under the influence but not voluntarily intoxicated, there was no evidence that Pardo's conduct met the definition of "under the influence." The Court referred to Pardo's consumption of alcohol several times in the verdict and sentencing and was clearly influenced by it.[11]

[11] *Opening Br.* at 16.

III. The Superior Court Abused Its Discretion When It Denied Pardo's Motion for Judgment of Acquittal

In order to sustain the sufficiency of the conviction of the count of Manslaughter, the evidence must reveal that the State has established, beyond a reasonable doubt, that the defendant's driving of his vehicle at or about the place and time of the crime charged was "…aware of and consciously disregarded a substantial and unjustifiable risk that the death of another person will result from the manner in which he operated his vehicle.[12]

The State argues that the Superior Court considered Pardo's driving strategy decision and disregarded it.[13] The problem is that there is nothing in the record to indicate that the Superior Court actually considered all the evidence presented.[14]

Even more significant, though, is that the Superior Court relied on evidence that it should not have considered because it was either erroneous or inadmissible.

Lawfully Riding was Erroneous

The State indicates that "the trial judge did not make a specific

[12] *Motion for Judgment of Acquittal Pursuant to Rule 29 of the Superior Court,* pg. 1
[13] *Answ. Br*. at 23
[14] *See Opening Br*. at 19-21.

determination about Bishop's lighting."[15] That is exactly the point. In order to draw a conclusion that Bishop was lawfully riding, there needed to be a determination as to whether he was properly illuminated because Delaware law specifically enumerates what constitutes lawful illumination for a bicyclist.[16] Pardo argues that in an analysis as to whether his conduct was reckless, whether or not Bishop was lawfully riding must be determined and not just assumed because it goes to the "unjustifiable" risk that was consciously disregarded.

The Superior Court Considered Improper Hearsay Evidence

In the Opening Brief, Pardo argued that the Superior Court considered improper hearsay evidence, specifically double hearsay.

D.R.E. 805 provides:

> "Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules."

Nine year old John Pardo made an out of court statement when he was interviewed after the accident wherein he referred to something that Gabriel Pardo, Jr. allegedly said. In order for that statement to comply with D.R.E. 805, it would mean that John's statement was admissible pursuant to 11 *Del. C.* §

[15] *Answ. Br.* at 23
[16] 21 *Del. C.* § 4198F

3507 and that Gabriel's statement met a hearsay exception.[17]

In 11 *Del. C.* § 3507, the General Assembly created a statutory exception to the hearsay rule which allows for the admission of out-of-court statement as long as the statement was made voluntarily, the witness is present and subject to cross examination and the in-court testimony touches on both the events the witness perceived and the content of their prior out-of-court statement.[18] This statute must be construed narrowly in order to preserve "a defendant's right to confront and cross-examine witnesses providing testimonial evidence."[19]

After the direct examination of John Pardo, the State sought to introduce his CAC statement. The Court found that the State failed to lay a sufficient foundation under § 3507 because John had not yet touched upon the statement. The State argued that it had laid a sufficient foundation because John "contradicted himself" by stating that he didn't remember the events of the night.

"The admission of out-of-court statements is inextricably linked to the witness' ability to at least touch on the events perceived.[20] Defense counsel objected to the viewing of the CAC video based on an improper foundation of

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[17] *See Demby v. State*, 695 A.2d 1152, 1162 (Del. 1997) "If double hearsay is being offered into evidence, each aspect must qualify independently as an exception to the hearsay rule."
[18] *Collins v. State*, 56 A.3d 1012, 1015 (Del. 2012).
[19] *Hassan El. v. State*, 911 A.2d 385, 396 (Del. 2006).
[20] *Ray v. State*, 587 A.2d 439, 444 (Del. 1991).

"touching upon" the night of the accident. The Court required the State to elicit more testimony that "touched" on the night of the accident. The State elicited additional testimony that did not provide any additional details but the Court nevertheless held that a sufficient foundation had been laid and allowed the video to be played.

The video was then played and in the video John told the interviewer that he heard his brother Gabe say "Did you kill a person?" At trial, John stated that he didn't remember much about the interview and did not remember saying that he heard his brother say "Did you hit a person?"[21]

In *Keys v. State,* Chancellor Quillen authored a concurring opinion that stressed the important of having the declarant touch on the events perceived due to the "value to the fact finder of contradictions which [are] the consequence of live testimony."[22] The concurrence also underscored how imperative it is that a declarant's prior statements not become a substitute for substance testimony.[23]

In this case, Gabriel Pardo, Jr.'s alleged prior statement was absolutely used as a substitute for his substantive testimony.

Gabriel Pardo's Statement

As discussed infra, the out of court statement of John Pardo, was viewed

[21] *See* AR11-AR-12.
[22] *Keys v. State,* 337 A.2d 18, 26 (Del. 1975.).
[23] *Id.* at 27.

by the Court pursuant to 11 *Del. C.* § 3507. In the proffer at sidebar, the State indicated that it believed John made a statement that the State posited was either a present-sense impression or an excited utterance. AR-10. As the video had not yet been viewed, the Court did not rule on whether the statement (that it had not yet seen) was permissible hearsay as a present-sense impression or excited utterance. Had the Court considered whether the statement was admissible it would have undoubtedly realized that if John were going to testify to Gabriel Jr.'s alleged present sense impression that he would have to do so in live testimony. John testified that he though a branch struck the car. AR-12.

The issue with Gabriel Pardo, Jr.'s statement is that there is no proof that he said it. Gabriel Pardo, Jr. was subject to direct and cross testimony and clearly and consistently testified that he thought the car struck a branch.[24] This was *consistent* with his CAC video[25] and therefore there was no need to seek admission of the video pursuant to § 3507. It is significant that Gabriel Pardo, Jr.'s CAC video was not admitted into evidence because in *his* CAC video he did not mention anything regarding his father hitting a person.[26]

There is no doubt that the State wanted this statement before the Superior Court. Interestingly, when Gabe, the actual Declarant of the proffered

[24] AR-2…AR-7.
[25] Superior Court Exhibit 4
[26] Appellant Counsel is stating this upon information and belief as the actual video was not available for viewing to Appellant Counsel.

statement, testified in the State's case he *was not asked* if he said "Did you kill a person" the night of the accident. The State used § 3507 in order to introduce a hearsay statement of John, violating Pardo's right to confront the statement.

Pardo argues that there is an inherent problem with admitting a statement that John said Gabriel said and not asking Gabriel if he actually made the statement and that John's out of court statement was used for an improper purpose.

In *Sanabria v. State*,[27] this Court reversed a conviction where an out of court statement was introduced because the out of court statements were "not merely cumulative evidence" but instead were "a principal factor in [the] conviction."[28]

John Pardo's out-of-court statement is the only reference by any of the occupants in the vehicle that gave any indication that a person may have been struck. The State used a variation of the statement in its closing argument[29] and then in the verdict, the Court clearly relied on it by stating:

> ". . . Mr. Bishop was thrown over the roof of the Audi in full view of the rear seat passenger, Gabriel Pardo, through the open sunroof. This young son exclaimed, 'Dad, did you kill a person?'"[30]

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[27] *Sanabria v. State*, 974 A.2d 107, 112 (Del. 2009).
[28] *Williams v. State*, 98 A.3d 917, 922 (Del. 2014), citing *Sanabria v. State*, 974 A.2d at 120.
[29] The prosecutor incorrectly stated "You just killed a person" (AR-16, pg 135).
[30] AR-17, pg 22.

Gabriel Pardo, Jr. did not testify that saw anything through the open sunroof. Gabriel Pardo, Jr. did not testify that he said anything referring to hitting a person.

The Superior Court said that it would "only consider that evidence that is appropriate,"[31] yet this hearsay statement was obviously considered in the assessment of whether or not Pardo *knew* he struck a person rather than a limb.

Pardo argues that the John's out of court statement was a principal factor in the conviction and constitutes reversible error.

[31] AR-11, pg 143.

IV. A Missing Evidence Instruction Was Required

When evidence is not collected or not preserved, the Court must undertake the analysis of (1) the degree of negligence or bad faith involved; (2) the importance of the evidence that is lost; and (3) the sufficiency of other available evidence.[32]

Pardo disputes that the police "collected" the pieces of plastic recovered by the *News Journal* reporter. It is clear that the State did not treat this evidence as it treated the rest of the evidence of the accident scene because Corporal Hussong testified to the procedure for collecting evidence at a scene and noting the exact location of each piece of evidence.[33]

Here, the Superior Court considered the fact that the police merely obtained the evidence from the *News Journal* reporter as collecting the evidence. Pardo asserts that "collecting" evidence from a reporter rather than the accident scene, and not even inquiring as to where the evidence was located does not qualify as "collected" for the purpose of a *Deberry* analysis and that in a case where paint chips were used to determine the location of the impact that plastic pieces could have been extremely relevant.

The State's characterization of Pardo's argument as being analogous to a concerned citizen turning in a murder weapon not being considered "collected"

[32] *Deberry v. State*, 457 A.2d 744, 754 (Del. 1983).
[33] *Opening Brf.* at 29.

misses the essential point that the location of the accident was in dispute throughout the trial and that calculations were made based on the debris field. The plastic pieces were not considered in that debris field and could have potentially affected the calculations used to determine the point of impact.

CONCLUSION

Pardo maintains that this was a horrible accident and that he did not know that he struck a human being on September 12, 2014.

Pardo argues that he was found guilty of all charges on the basis of errors made by the Superior Court and that the errors were of such a nature and degree that his convictions should be reversed.