

FILED

IN THE COURT OF APPEALS OF IOWA MAR 24 1981 482

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

Filed March 24, 1981

vs.)

JAMES C. FARMER,)

0-328

Defendant-Appellant.)

64392

Appeal from Webster District Court - R. K. Richardson, Judge.

Defendant appeals from conviction of involuntary manslaughter in violation of section 707.5(1), The Code 1979. REVERSED AND REMANDED.

Louie F. Beisser of Bennett, Beisser & Wilke, Fort Dodge, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; John P. Messina, Assistant Attorney General; and Monty L. Fisher, Webster County Attorney; for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant appeals from conviction of involuntary manslaughter in violation of section 707.5(1), The Code 1979. On appeal he asserts: (1) that the juvenile court should not have transferred the proceedings to adult criminal court; (2) that the jury was improperly instructed regarding recklessness, failure to have his motor vehicle under control, and driving on the wrong side of the road; and (3) that it was error to admit a photograph upon which a witness had made a mark indicating point of impact where it appeared this location had been determined, in part, based on hearsay statements to the witness. We consider these issues separately.

I. We first consider defendant's claim that error was committed in the transfer of his case from juvenile court to adult criminal court. Specifically, he claims that the court erred in ordering transfer because there was no probable cause to believe that defendant had committed a delinquent act and that the juvenile court abused its discretion in finding that such transfer was in the best interest of the public and the defendant.

Defendant's argument involving "probable cause" has validity, if at all, only to the extent that a showing of prosecutive merit is a matter to be considered at a juvenile transfer hearing.¹ As so characterized, we believe the testimony offered at the transfer hearing by a state trooper as to circumstances surrounding a fatal collision between a pedestrian and a motor vehicle operated by defendant was sufficient to satisfy any required probable cause showing.

As to defendant's claim that the State failed to establish that the transfer was in the best interest of the public and the defendant, we note at the outset that because of defendant's age at the time of the transfer hearing, he would have been subject to the jurisdiction of the juvenile process for a mere two and one-half months. An official of the Webster County Probation Office testified that there were not adequate facilities or programs available in the juvenile system to effectively serve defendant's rehabilitative needs in such a short time frame. Given these circumstances it cannot be

¹ Defendant's transfer hearing took place prior to the effective date of the new juvenile justice code. That code specifically requires the establishment of probable cause in a transfer proceeding. § 232.45(6)(b), The Code 1979. Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966), indicates that prosecutive merit is one of the factors to be considered with respect to a juvenile transfer proceeding. Because the waiver inquiry focuses partly on the nature of the offense, it seems logical that there should be some minimum showing of the juvenile's involvement in the offense prior to the time that transfer is ordered.

said that the juvenile court abused its discretion in ordering transfer of the case to adult criminal court.

II. We next consider defendant's contention that the jury was improperly instructed regarding recklessness, failure to have the motor vehicle under control, and driving on the right-hand side of the roadway. We disagree with these contentions.

The trial court in its instructions in the present case presaged the result in State v. Conner, 292 N.W.2d 682, 686 (Iowa 1980). In that case it was determined that the legislature, in enacting section 707.5(1), intended to preserve the common law element of recklessness as a necessary requirement in involuntary manslaughter prosecutions. The trial information in the present case asserted that the defendant caused the death of one Craig Michehl by committing one or more of the following public offenses: reckless driving in violation of section 321.277, The Code; failure to have vehicle under control in violation of section 321.288(1), The Code; and failure to drive on the right-hand side of the roadway in violation of section 321.297, The Code. In its instructions to the jury, the trial court set forth the proper elements for each of these public offenses. In addition, it instructed: "The operation of a motor vehicle in violation of one or more of the rules of the road is not in and of itself sufficient to constitute the crime of manslaughter, even though a person is killed as a result. The State must also prove beyond a reasonable doubt that the violation or violations were done in a manner that shows a wanton, reckless and utter disregard for and indifference to the safety of others." The foregoing separate instruction was substantially repeated in the marshalling instruction as an essential element which the state must prove beyond a reasonable doubt in order to sustain a conviction.

Our review of the record leads to the conclusion that submission of these issues in the manner in which it was accomplished in the court below finds support in the evidence and was consistent with controlling legal principles. We therefore find no instructional error in the manner claimed.

III. The final issue relates to whether reversible error resulted from a state trooper marking on a photograph the point of impact between defendant's motor vehicle and the victim. The making of this determination involved opinion testimony because the witness did not see the collision. It is claimed on appeal that the record shows that the witness's determination in this regard was based on hearsay.

The State concedes that under Iowa law the factual foundation supporting an expert's opinion cannot be based, to any extent, on hearsay. See State v. Galloway, 275

N.W.2d 736, 742 (Iowa 1979); Dougherty v. Boyken, 261 Iowa 602, 611-12, 155 N.W.2d 488, 495 (1968). In the present case, a dispute exists in the evidence as to the side of the center line on which the collision occurred. This was an important issue affecting the State's claim that a public offense had been committed as well as the underlying requirement of recklessness. If the defendant's claim that the trooper's opinion was based on hearsay is correct, a reversal is in order.

Before discussing the merits of this issue, we consider and reject the State's contention that error has not been preserved. This contention is predicated upon the fact that the photograph in question was not objected to when offered in evidence. But the record shows that this was before the opinion testimony as to point of impact was given and before the point of impact was marked on the photograph. Strenuous objection was made at the proper time as to these subsequent happenings and error has been preserved on the issue being considered.

The record reflects that the following occurred at trial:

Q. Trooper Rowland, again looking at State's Exhibit 15, does that photograph contain where in your opinion the point of impact took place?

MR. BEISSER: Now, wait a minute. There's been no proper foundation having been laid here as to how he arrived at this opinion, the fact that he talked to other witnesses who establish his opinion so we can object to it. Hearsay.

THE COURT: Well, I guess the point of impact hasn't been established. That should be an objection.

MR. BEISSER: No foundation.

THE COURT: No foundation. Sustained. The objection is sustained.

Q. Trooper Rowland, in the course of your investigation, did you arrive at an opinion as to where in your opinion the point of impact between the pedestrian and the defendant's car took place?

MR. BEISSER: You can answer that with just--

THE COURT: Yes or no.

A. Yes.

Q. Okay. Does State's Exhibit 15 contain therein the physical location of where you feel the point of impact took place?

MR. BEISSER: Now, Your Honor, this is objected to once again because there's been no foundation.

THE COURT: Sustained.

Q. You did form an opinion as to where the point of impact took place?

A. I did.

Q. Okay. And State's Exhibit 15, does State's Exhibit 15 contain the—the photograph of the area where you in your opinion the point of impact took place?

MR. BEISSER: Hold it, Your Honor. No foundation. Same objection.

THE COURT: Sustained.

Q. Sergeant Rowland, what factors did you consider in arriving at an opinion as to where the point of impact took place?

A. The factors that I've previously testified to as to the debris, I had mentioned, the articles of clothing, apparel that were found, glass, so on, so forth, led me to reach that conclusion.

Q. I will again ask you if that photograph contains a physical picture, contains a picture of the area where you in your opinion feel the point of impact took place.

MR. BEISSER: Your Honor, may we voir dire the witness a moment?

THE COURT: You may.

MR. BEISSER: I believe when we were here, this particular matter earlier, that you testified that you interrogated the various witnesses in the car. You questioned them, you talked to them?

THE WITNESS: That's correct.

MR. BEISSER: And that you got information from them and this helped you form your opinion.

THE WITNESS: I testified that that's correct.

MR. BEISSER: Then, Your Honor, we'll object because among other things, once again it's material that is hearsay that was given to him out of the presence of the defendant here; and we don't have an opportunity to cross examine these individuals and the foundation therefore is not sufficient. The other matters urged herein.

THE COURT: The objection is overruled. He may answer.

THE WITNESS: Would your read the question back again?

(The preceding question was read by the reporter.)

A. It does.

Q. Trooper Rowland, would you please mark an "X" and put a circle around it where you feel the point of impact took place, then?

MR. BEISSER: Your Honor, may our objection stand with regard to this matter of being hearsay, among other things taken into consideration to make this determination of talking to some of the witnesses?

THE COURT: It may stand.

MR. BEISSER: And we are--It's hearsay, and that we are in no position to cross examine them with regard to their particular determination of information they gave him.

MR. BENNETT: And the foundation is improper. And no sufficient.

THE COURT: The objection may stand.

Q. Sergeant Rowland, would you please write in the back of this photograph the circle stands for what is in your opinion the point of impact, and the "X" stands for the course of travel, tracks?

MR. BEISSER: Well, State's Exhibit 15--I believe it's been offered.

THE COURT: It has been offered and received.

Admittedly, the foregoing record is not entirely satisfactory for purposes of resolving the issue before us. We are forced to conclude, however, that as a result of the questions propounded to the trooper on voir dire by defendant's counsel and the trooper's answers to such questions, it was made to appear that the witness's opinion as to point of impact was based in part on hearsay. The defendant, having established this circumstance in this manner and to this extent, it was then incumbent on the State to specifically rephrase its questions so as to negate any reliance on hearsay by the witness in order to permit the challenged opinion testimony to be given. Because the State failed to do this, the objections should have been sustained. The failure to do so necessitates the granting of a new trial. The judgment of conviction is reversed and the cause is remanded for this purpose.

REVERSED AND REMANDED.