*To be Argued by:*
NATHANIEL Z. MARMUR
*(Time Requested: 30 Minutes)*

APL-2020-00021
Criminal Court of the City of New York, New York County
Docket No. 2017NY054915

# Court of Appeals

*of the*

# State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent,*

– against –

DAVE LEWIS,

*Defendant-Appellant.*

## REPLY BRIEF FOR DEFENDANT-APPELLANT DAVE LEWIS

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Dave Lewis respectfully submits this reply brief in further support of his appeal.

## INTRODUCTION

In our opening brief, we advanced two main arguments: (1) that the lower court erred in applying a civil negligence standard to AC §19-190(b) and VTL §1146(c)(1); and (2) that the evidence did not establish guilt under the correct standard of criminal negligence. The People's response to the former misconstrues the statutes at issue. Their response to the latter is virtually non-existent: they spend more time addressing a straw man argument that we never made (that the evidence is insufficient to establish civil negligence), and the few criminal negligence cases they cite involve conduct far more egregious than the accident that occurred here.

For the reasons set forth below and in our opening brief, the convictions should be reversed.

## ARGUMENT

### POINT I
### (People's Point II)

### THE TRIAL COURT ERRED IN CHARGING A CIVIL STANDARD OF NEGLIGENCE RATHER THAN THE CRIMINAL STANDARD REQUIRED BY THE PENAL LAW

1. Before turning to the merits, we briefly address the People's suggestion that our argument is only partially preserved. See People's Br. at 28

("[t]o the extent that defendant suggested at trial that the court should charge itself on criminal negligence, defendant's contention appeared to be founded on the law of the case doctrine"). Although Lewis cited the law of the case doctrine, that was hardly the gravamen of his claim. To the contrary, he vehemently advocated that the constitutional and statutory law compelled a criminal negligence charge. See, e.g., 9/20/18 Defendant's Proposed Revisions to Charge, September 20, 2018, A156-A158 (arguing that to establish "due care" the People were required to prove "criminal negligence"). Indeed, he specifically relied on two prior cases, People v. Weckworth, 55 Misc. 3d 1210(A)(NY. Cty. Crim. Ct. 2017), and People v. Washington, 54 Misc. 3d 802, 819 (Kings Cty. Crim. Ct. 2016), both of which had applied a criminal negligent standard, as an alternative basis from the law of the case doctrine:

> If Your Honor is not inclined to apply a criminal negligence standard, as set forth in the criminal courts of New York (Weckworth) and Kings (Washington) counties, as well as the law of the case, over the Defendant's objection, the mens rea requirement must be something more than mere negligence.

A158. Next, Lewis sought a "criminal negligence" instruction at the charge conference, reiterating his request several times in response to the court's pointed questions. See A131-A134. In doing so, he relied not just on Judge Hanshaft's ruling, but also on prior cases that had applied that higher standard. See A131 (invoking Weckworth and Washington). Finally, Judge Cesare specifically ruled

on both the law of the case argument and the statutory argument, rejecting both. A17-A19. In fact, she wrote that Lewis based his request for a criminal negligence instruction on two distinct arguments: a statutory one based on PL §15.15(2) and one based on the law the case, and then proceeded to analyze each argument under separate sub-headings. Id. It could not be clearer that the trial court fully understood the defendant's position, and that alone is enough to preserve the issue for appeal. See CPL §470.05(2)(issue is preserved where, "in response to a protest by a party, the court expressly decided the question raised on appeal").

2. As we pointed out in our opening brief, New York has long distinguished ordinary negligence, which applies in civil cases, and criminal negligence, which applies in criminal prosecutions. See Opening Br. at 18-19; People v. Paris, 138 A.D.2d 534, 535 (2d Dep't 1988)("For centuries, the common-law courts have distinguished between ordinary negligence which should not form the basis of a criminal charge, and negligence so egregious as to be deserving of criminal punishment.").

The People's failure to address this point is telling because the common law provides a critical background for the interpretation of statutes. See, e.g., Hechter v. New York Life Ins. Co., 46 N.Y.2d 34, 38 (1978)("It is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law."); Spectrum Systems Intern. Corp. v. Chemical Bank,

78 N.Y.2d 371, 377 (1991)("courts still must look to the common law" to interpret statute); People v Clark, 19 Misc. 3d 6, 9 (App. Term 1st Dep't 2018)("penal statutes are to be construed in light of the common law")(citing 1 McKinney's Cons. Laws of N.Y., Statutes §271(f)).

Simply put, to interpret VTL §1146 and AC §19-190 and the relevant Penal Law provisions without recognizing New York's robust common law history is to employ unsound reasoning.

3. As to our statutory interpretation argument, it proceeds as follows: (a) PL §15.15(2) provides that "[a] statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability"; (b) VTL §1146 and AC §19-190 are not strict liability offenses; (c) accordingly, they must "be construed as defining a crime of mental culpability" under §15.15(2); (d) the Penal Law provides only four culpable mental states, see PL §15.05 ("intentionally," "knowingly," recklessly," and "criminal negligence"); and (e) criminal negligence most obviously applies here.

The People largely avoid the relevant provisions and, instead, primarily focus on constitutionality and preemption. When the People finally join issue on our statutory interpretation argument, their discussion is both brief and analytically lacking. To begin, the People do not disagree that Article 15

enumerates only four mental states, and not civil negligence. Nor do they dispute that the statutes here are not "strict liability" offenses. Accordingly, the key area of disagreement is whether a statute outside the Penal Law must employ at least one of those mental states. It must.

The People principally argue that Article 15 leaves room for a civil negligence standard. They note that PL §15.00(6) and PL §15.05, which, respectively, define "[c]ulpable mental state" and the four enumerated mental states (intent, knowledge, recklessness, and criminal negligence), provide that the definitions are "applicable to this chapter." People's Br. at 32. The People read the quoted language to mean that the definitions are applicable only to this chapter. Of course, that is not what the statute says, nor is it how Article 15 works.

Rather, consistent with definitional provisions in general, §15.00 and §15.05 provide for short-form incorporation of specific terminology into other statutes. See People v. Duggins, 3 N.Y.3d 522, 528 (2004)(defined words are "legislative term of art" to be applied when they appear in other statutes); 1 McKinney's Cons. Aws of N.Y., Statutes §75 ("[i]t is well established. . . that the Legislature may, in enacting a law, define the terms used therein . . . [and as] . . . to such meaning all other parts of the statute must yield").

Accordingly, §15.00 and §15.05 must be read in conjunction with PL §15.15(2), which is entitled "Construction of statutes with respect to culpability

requirements." Section 15.15(2), which the People barely discuss, requires all penal statutes, wherever they are located, to employ one of the four enumerated culpable mental states. It provides, in relevant part, as follows:

> A statute defining a crime, unless clearly indicating a legislative intent to impose strict liability, should be construed as defining a crime of mental culpability. This subdivision applies to offenses defined both in and outside this chapter.

Id. (emphasis added).

The underscored clause implements this State's long-held policy of uniform construction of penal statutes, wherever they are found in the law. See Opening Br. at 22-24; People v. Hildebrandt, 308 N.Y. 397, 400 (1955)(Vehicle and Traffic Law); People v. Byrne, 77 N.Y.2d 460, 467 (1991)(Alcohol Beverage Control Law); People v. Owles, 191 Misc. 2d 275, 279 (Kings Cty. Sup. Ct. 2002)(holding that Administrative Code provision silent on mens rea must be read to include knowledge requirement). Moreover, as we showed in our opening brief, several lower courts have specifically applied this principle to the statutes at issue here. See, e.g., People v. Weckworth, 55 Misc. 3d 1210(A)(NY. Cty. Crim. Ct. 2017)("even though A.C. § 19–190(b) is an offense defined outside the Penal Law, P.L. §15.15(2) requires that A.C. § 19–190(b) be construed as a crime of 'mental culpability,'" i.e., criminal negligence); People v. Washington, 54 Misc. 3d 802, 819 (Kings Cty. Crim. Ct. 2016)("because AC § 19–190(b), being an offense

defined outside the Penal Law, is not clearly designated as a crime of strict liability, its mens rea must conform to the Penal Law's definition of "mental culpability"). The People discuss none of these cases.

We also demonstrated that the drafters of the Penal Law expressly provided that the four mental states listed in PL §15.05 were exclusive. The People barely address that critical point of statutory interpretation, relegating it to a one-paragraph discussion on the penultimate page of their brief. See People's Br. at 43. But ignoring legislative history does not make it go away. As we showed, a core purpose of the recodification of the Penal Law was to ensure that the mental culpability rules would apply to crimes defined throughout the State. The People's approach would fatally undermine that policy. In that vein, the People do not respond to our observation that, under their approach, New York City could impose criminal liability for assault, drug possession and larceny committed with civil negligence. Their silence on that point is telling.

In sum, because VTL §1146 and AC §19-190 are "offenses defined . . . outside [the Penal Law]," they "should be construed as defining a crime of mental culpability," i.e., criminal negligence. PL §15.05(2).[1]

[1] The People also reason that since the Penal Law recognizes "strict liability" offenses, it must allow also for conviction based on civil negligence, as that is a higher standard of culpability. See People's Br. at 32. Whatever the merits of that logic as a constitutional matter, it simply does not hold as a matter of statutory

4. In defending their non-exclusivity argument, the People rely on §15.15(1), undoubtedly because, by its terms, it applies only to "offense[s] defined in this chapter." People's Br. at 32-33, 43. But that provision has no bearing here. It states in relevant part that when only one mental state "appears in a statute defining an offense, it is presumed to apply to every element of the offense unless an intent to limit its application clearly appears." But the issue here is not whether "due care" applies to every element of the offense. The provision critical to our analysis is §15.15(2), which directs that all non-strict liability crimes utilize one of the four defined mental states. Again, that subsection "applies to offenses defined both in and outside this chapter [the Penal Law]."

The People press their error by citing People v. M&H Used Auto Parts & Cars, Inc., 22 A.D.3d 135, 143 (2d Dep't 2005), for the proposition "the 'clear language' of Penal Law §15.15[1] 'suggests' that it 'does not apply to

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interpretation. If anything, that the Legislature included one mental state (strict liability) in Article 15, see PL §15.10, while excluding another (civil negligence), demonstrates that civil negligence finds no place in our criminal laws. See People v. Page, -- N.Y.3d --, 2020 WL 3084481, at *4 (June 11, 2020)(employing "the maxim expressio unius est exclusio alterius such that 'where a law expressly describes a particular act, thing or person to which it shall apply, an irrefutable inference must be drawn that what is omitted or not included was intended to be omitted or excluded'")(citing 1 McKinney's Cons Laws of N.Y., Statutes §240). Indeed, if the People were correct, one might think they could point to a criminal case applying a civil liability standard, but they don't identify any. (We note that the trial court also could not find cases on point, and thus drew its "due care" charge from a Third Department tort case.).

crimes defined outside the Penal Law.'" People's Br. at 32-33; see also People's Br. at 43 (making same argument). To reiterate, §15.15(1) is not relevant here. If anything, M&H supports our position because the court there specifically recognized that, although §15.15(1) is restricted to Penal Law offenses, §15.15(2) would apply to the Environmental Conservation Law crimes at issue there because that subsection also applies outside the Penal Law. See 22 A.D.3d at 143.[2]

5. Unable to counter the plain language of Article 15, the People seek refuge in People v. Feingold, 7 N.Y.3d 288, 294 (2006), and People v. Haney, 30 N.Y.2d 328 (1972), but neither case furthers their argument.

In Feingold, the Court of Appeals held that "depraved indifference to human life" is a culpable mental state for purposes of PL §120.25 (reckless endangerment in the first degree). As we anticipated, see Opening Br. at 22 n.8, in the People's view, this holding demonstrates that criminal offenses are not limited to the four mental states enumerated in PL §15.05 and, therefore, an offense may properly include a civil negligence standard. People's Br. at 33. But Feingold did not address Article 15 and, in any event, it is fully consistent with our argument.

Article 15 requires that each criminal statute containing a mens rea element "be construed as defining a crime of mental culpability." PL

[2] The Appellate Term in People v. Torres, 65 Misc. 3d 19, 23 (App. Term 1st Dep't 2019), similarly erred in its citation to M&H.

§15.15(2)(emphasis added). In other words, a criminal statute, irrespective of any other elements, must include intent, knowledge, recklessness, or criminal negligence. The statute in Feingold does just that. Penal Law §120.25 provides that "[a] person is guilty of reckless endangerment in the first degree when, under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person." (Emphasis added). As can be seen, the statute requires proof of recklessness. See Feingold, 7 N.Y.3d at 295, 297 (reducing conviction to reckless endangerment in the second degree, which requires mere recklessness); id. at 304 n.2 (Kaye, C.J., dissenting)("Of course, reckless endangerment in the first degree, like depraved indifference murder, also requires recklessness, which involves the conscious disregard of a known risk (see Penal Law §15.05[3])."). Vehicle and Traffic Law §1146 and AC §19-190, by contrast, contain only a failure to exercise due care standard. That standard is not listed in Article 15 and thus must be interpreted as requiring proof of criminal negligence.[3]

The decision in Haney is likewise inapposite. There, the Court of Appeals held that the grand jury evidence was sufficient to establish criminally negligence homicide, PL §125.10. Interpreting the relatively-new Penal Law, the

[3] We have no doubt that the Feingold majority, which thought it was affording defendants extra protection, would be stunned to learn that its opinion was being cited in an effort to afford them less.

Court first reviewed the common law and statutory distinctions between civil and criminal negligence, holding that the latter was necessary for conviction of an offense. It was in the midst of this scholarly discourse that the Court observed that "[c]riminal liability for death caused by ordinary negligence is sometimes imposed by statute." 30 N.Y.2d at 334 n.7. In writing that footnote the Court was not interpreting Article 15 or announcing new law, but, as is clear from its citations to general treatises and a 1936 California Law Review article, it was merely discussing historical principles of liability recognized in different jurisdictions.

Read properly, Haney strongly supports our position. In the text of the opinion, the Court observed that "criminal liability cannot be predicated upon every careless act merely because its carelessness results in another's death." Id. at 335. And it observed that the statute there required proof of criminal negligence, i.e., "[w]hether . . . the act or acts causing death involved a substantial and unjustifiable risk, and whether the failure to perceive it was such as to constitute a gross deviation from the standard of care which a reasonable man would have observed under the same circumstances." Id. Finally, in reinstating the indictment, the court held as follows:

> [I]t should be abundantly clear that [the defendant's] conduct cannot be characterized as mere carelessness, sufficient only to establish liability for ordinary civil negligence.

Id. at 336. That is perhaps the most powerful statement in support of our position.[4]

6. Finally, the People's response to our preemption claim merely rehashes their earlier, misguided arguments about the workings of Article 15. They casually sweep aside the clear legislative history that demonstrates that the four mental states in PL §15.05 are exclusive and that, for purposes of state-wide uniformity, those mental states were intended to apply to crimes both inside and outside the Penal law. They rely on PL §15.15(1) rather than grapple with the applicable statute, §15.15(2), and when they finally cite that latter provision, they mistakenly rely, once again, on M&H Used Auto Parts, 22 A.D.3d at 142, which supports our position. Finally, they cite federal cases for the proposition that criminal liability may be imposed on the basis of civil negligence, People's Br. at 43, but that does not speak to whether §AC 19-190 conflicts with the Penal Law's

[4] The People claim that People v. McGrantham, 12 N.Y.3d 892 (2009), "tacitly acknowledge[d] that the misdemeanor of Reckless Driving defined in VTL §1212 has a lesser mental state than criminal negligence as defined in Penal Law §15.05." People's Br. at 43. Presumably, a statute that prohibits "reckless driving" requires proof of recklessness. See D'Amico v. Christie, 71 N.Y.2d 76, 84 (1987)(observing that law's meaning was "made plain even by its title"). In any event, McGrantham was a memorandum opinion decided on submissions pursuant to Rule 500.11 in which the Court held that the grand jury evidence did not support a charge of criminally negligent homicide where the defendant made an unwise U-turn across three lanes of traffic. Although the Court held that the evidence would support a charge of reckless driving under VTL §1212, the decision did not discuss Article 15 or address the exclusivity of the four mental states listed in PL §15.05, and thus has no import to this case.

requirement that all non-strict liability crimes contain one of the four enumerated culpable mental states. As we have shown, if "due care" means "civil negligence," there is an irreconcilable conflict and AC §19-190 must be struck down as preempted.[5]

* * *

For the reasons set forth above and in our opening brief, the statutes here require proof of criminal negligence or should be struck down.

## POINT II
## (People's Point I)

## THE EVIDENCE WAS INSUFFICIENT TO PROVE CRIMINAL NEGLIGENCE

In our opening brief, we showed that Dave Lewis was a conscientious driver; that he was as careful on June 12, 2017 as he always was; that he was sober, drove at a normal rate of speed, and did not swerve, stop suddenly, or accelerate; that no passenger voiced a concern that morning about his driving; and that he was shaken up, honest, and contrite when he was interviewed by the police. We also showed that the cases upholding findings of criminal negligence involve truly egregious behavior not present here. The People's brief does not show otherwise.

[5] As for the unconstitutionality of the AC §19-190 and VTL §1146, we continue to rely on the Defendant's briefs in the companion Torres case.

1. The People devote most of their sufficiency argument to establish that Lewis failed to exercise "due care" under "a civil negligence standard." People's Br. at 15-19. But that was never our claim, and thus the core of the People's argument is irrelevant.

2. When it comes to whether the evidence established criminal negligence, the People first argue that the issue is unpreserved. Nothing could be further from the truth. Lewis made a vigorous motion for a trial order of dismissal, arguing at length that the evidence did not meet the standard for guilt. See Opening Br. at 36; A144-A145, A163. The People, though, state that Lewis did not make clear at the time of the motion that he was seeking to dismiss under a criminal negligence standard. See People's Br. at 20. They claim that only "later" did Lewis "ask[] the trial court to charge itself with such a standard." Id. The record is to the contrary. The charge conference was held before the motion for a trial order of dismissal was made. See A129-A143, RA372-RA374 (charge conference); A144-A145 (motion for a trial order of dismissal). Thus, once the court had rejected his proposed charge, RA373 ("The defendant's request to charge that the mens rea . . . is criminal negligence as defined in the Penal Law is

denied."), Lewis appropriately argued straight from the statutory language that the People had failed to prove an absence of "due care."[6]

3. On the merits, the People's brief is wholly unpersuasive. To begin, the People concede that a New York City bicycle lane should measure five feet wide, see People's Br. at 21 ("it is true that New York City recommends that a bicycle lane measure five feet in width"), and that the evidence here established that Hanegby had five feet of space to maneuver his bicycle, see id. at 14, 16. That the bus and Hanegby shared a space that New York City finds more than suitable to safely accommodate a motor vehicle and a bicyclist is strong evidence that Lewis's decision to continue driving was not criminally negligent. But it is not just the width of the street that matters. As discussed above, Lewis was a thoroughly conscientious driver who, at most, made an error in judgment – one that is significantly below the exacting standard of criminal negligence.

The People, however, claim that an "error in defendant's judgment" is enough, see People's Br. at 21, but that is not the law. As we have shown, courts have held drivers criminally negligent only in extreme cases of gross misconduct, such as drag racing, intoxication, and driving with a gun drawn, and have rejected

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[6] For this reason, as we observed, see Opening brief at 36 n.14, the motion for a trial order of dismissal was arguably unnecessary because the court had already rejected the legal basis for Lewis's claim – that he did not act with criminal negligence – but the motion was nonetheless made in an abundance of caution.

findings of criminal negligence in circumstances far more egregious than what occurred here. See Opening Br. at 40-41. The People do not grapple with these cases, for the obvious reason that they set a standard of moral blameworthiness that Lewis fell far short of meeting. As to the cases they do cite, the People simply pick and choose generalized language regarding risk-taking behavior, none of which we dispute, without discussing the relevant facts. The following summary of all of the cases the People cite, which appear at pages 22-23 of their brief, demonstrates that they are wildly off point:

> a. In People v. Mitchell, 213 A.D.2d 562 (2d Dep't 1995), the Court held that the grand jury evidence was sufficient to establish a prima facie case of criminal negligence. The truck driver there was tailgating on a highway. When the several cars ahead of him stopped at a red light, he swerved around them, sped through the light six seconds after it had turned red and, without braking or blowing his horn, drove through medium to heavy traffic, crashing into a car and killing the driver.
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> b. In People v. Senisi, 196 A.D.2d 376, 379 (2d Dep't 1994), the Court held that the weight of the evidence supported a conviction for criminally negligent homicide where the driver was drag racing at an excessive speed.
>
> c. In People v. Paul V.S., 75 N.Y.2d 944 (1990), the Court upheld a conviction for criminally negligent homicide where the defendant was driving at least 90 miles per hour in a 55 miles per hour speed zone, accelerated after his passengers warned him to slow down, continued past a line of stopped cars, and ultimately struck and killed a State Trooper.[7]

[7] Paul V.S. is the only case in which the People mention the facts, and here is what they say occurred: "the defendant 'accelerated after being warned by his

d. In People v. Cabrera, 10 N.Y.3d 370, 378 (2008), the Court held that there was no criminal negligence where "a young and inexperienced driver[] entered a tricky downhill curve, the site of other accidents, at a rate of speed well in excess of the posted warning sign."

e. In People v. Boutin, 75 N.Y.2d 692 (1990), the Court held that there was no criminal negligence where, on a rainy and foggy night, the defendant smashed into a marked police car parked in the right lane of a highway with its emergency lights flashing.

The People's failure to locate a single case that remotely supports their position is proof that none exists – and that Dave Lewis was far from criminally negligent.

## CONCLUSION

In New York City, drivers and bicyclists regularly wend their way through narrow streets. Unfortunately, accidents sometimes occur, and the results, as here, can be tragic. But accidents by themselves do not imply criminal negligence. And no reasonable trier of fact could conclude that, on the morning of June 12, 2017, Dave Lewis's conduct was so "morally blameworthy" and reprehensible that society would label him a criminal. People v. Conway, 6 N.Y.3d 869, 872 (2006).

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passenger to slow down' before striking and killing someone." People's Br. at 23 (quoting Paul V.S., 75 N.Y.2d at 945). That truncated description grossly understates the seriousness of the misconduct there.

Accordingly, for the reasons set forth above and in our opening brief, the convictions should be reversed.

Dated: New York, New York
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## WORD COUNT CERTIFICATION

I certify that, excluding the Table of Contents and Table of Authorities, the foregoing brief was prepared on Microsoft Word using a 14-point Times New Roman font, and totals 4,341 words.

Nathaniel Z. Marmur