APL-2020-00020

To be argued by
KATHARINE SKOLNICK
(15 Minutes)

Court of Appeals

State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

CARLOS TORRES,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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STATE OF NEW YORK
COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,	:
Respondent,	:
-against-	:
CARLOS TORRES,	:
Defendant-Appellant.	:

- -x

PRELIMINARY STATEMENT

Carlos Torres submits this brief in reply to Respondent's brief (hereinafter "RB").[1]

[1] Citations to the Mr. Torres's opening brief are preceded by "AB."

ARGUMENT

POINT I

THE DUE CARE PROVISION IS UNCONSTITUTIONAL AND MUST BE STRUCK DOWN (answering RB, Point I).

Respondent makes a number of procedural and substantive claims in response to Mr. Torres's argument that he was improperly criminally punished for committing a tort. But, the conclusion is inescapable that the City Council overreached in enacting the Due Care Provision, and Mr. Torres's conviction must accordingly be reversed.

A. The Due Care Provision Plainly Employs a Civil Negligence Standard.

As a preliminary matter, this Court should not entertain Respondent's claim that this statute is one of strict liability (see RB: 31–35), a position Respondent has explicitly disavowed, including in an earlier section of its brief before this Court (see RB: 12 ("The parties are in accord that in order to sustain a conviction under AC § 19-190, the People are required to prove, among other things, that the defendant failed to exercise due care.")). Before the trial court, the prosecution never argued that the statute was one of strict liability, and thus cannot now argue this unpreserved theory as an alternative basis for sustaining Mr. Torres's conviction (see A43 (explicitly stating that failure to exercise due care—i.e., negligence—is required for criminal liability under the Due Care Provision); A45

("A clear legislative intent to impose strict liability does not appear from the plain language of AC § 19-190.")). See People v. Nieves, 67 N.Y.2d 125, 136 (1986).

In any event, that the Due Care Provision is one of strict liability contradicts the text and regulations of driving to which Respondent now points. Textually, the Due Care Provision employs the classic tort-law formulation: that a person act without due care. Plainly, then, this cannot be a strict-liability offense, as otherwise the simple act—driving and causing harm—would be what is proscribed. The trial court's finding that driving without due care is a "manner of driving" turns those last three critical words into surplusage, in clear violation of the rule that all words in a statute must be given effect (A163). See, e.g., People v. Pabon, 28 N.Y.3d 147, 152 (2016) (quoting McKinney's Statutes § 98(a)).

Respondent argues that Mr. Torres was driving a "loaded truck" in an attempt to characterize what he was doing as inherently more dangerous than driving an ordinary car (RB: 33). However, the Due Care Provision itself contains no such textual limitation. In doing so, Respondent only highlights the slippery slope that results from its proposed interpretation of this law as a "public welfare offense:" the criminalization of any driver's negligent act that results in injury.

Even Respondent's example of the Clean Water Act ("CWA") is of limited utility in understanding the Due Care Provision, as the jurisprudence around the CWA is unsettled. Contrary to what Respondent argues, courts have cast doubt

upon whether the CWA is a public welfare statute. For example, when the Supreme Court was asked to review the decision in United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999), the Court denied certiorari, but Justices Thomas and O'Connor dissented from that decision. They wrote unequivocally, "it is erroneous to rely, even in small part, on the notion that the CWA is a public welfare statute." 528 U.S. 1102 (2000) (Thomas, J., and O'Connor, J., dissenting). They continued, "Although provisions of the CWA regulate certain dangerous substances, this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities." Id. (emphasis added); accord United States v. Ahmad, 101 F.3d 386, 391 (5th Cir. 1996) (finding that the CWA is not a public welfare statute).

Furthermore, as the Supreme Court has squarely held, even seemingly dangerous items can be difficult to regulate where they also have legitimate uses. See Staples v. United States, 511 U.S. 600, 611 (1994) ("Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation."). Driving a car, whether or not we as a society believe vehicles are normatively good, is nothing if not an everyday activity.

Tellingly, Respondent also points to regulations that require that drivers carry liability insurance as evidence of the danger of driving (RB: 33). But, of course, their existence just speaks to the likelihood that someone might wind up civilly liable for events that occur when they are driving. Mr. Torres's argument is not that driving cannot be regulated; indeed, it can and should be.[2] Rather, the question in this appeal is whether imposing criminal liability for an everyday act committed with ordinary negligence is a constitutional type of regulation. For the reasons fully explored in Mr. Torres's opening brief and in Sections C and D, infra, it is not.

B. Mr. Torres, by Contrast, Has Preserved and not Waived his Claims.

Respondent attempts to argue that Mr. Torres has not preserved and has waived his claims (RB: 11). Of course, by emphasizing that Mr. Torres is "reiterat[ing]" the claims he made below (RB: 3), Respondent acknowledges this Court's jurisdiction to hear these preserved claims now. There can be no dispute that Mr. Torres argued the precise questions at issue here: whether, by criminalizing driving without due care and causing harm, the City Council adopted a standard preempted by State law and proscribed by due process (A25–39).

Furthermore, as he argued in his opening brief, Mr. Torres's constitutional claims are not waived by his guilty plea (see AB: 28). To extent this Court does

[2] In fact, the City would have avoided any constitutional problems by employing a criminal negligence standard in its enactment.

find the facial constitutional claims waived despite Mr. Torres's very clear desire to proceed only on the condition that they survive the guilty plea, it should then find his plea unknowing and involuntary. As the People concede (RB: 11 n.3), if this Court finds that his constitutional claim cannot be reached on the merits, he is entitled to plea vacatur. See People v. Di Raffaele, 55 N.Y.2d 234, 241 (1982).

C. The Due Care Provision Is Preempted.

Respondent attempts to characterize Mr. Torres's argument about Penal Law § 15.15 as one of mental-state exclusivity, but this is not so (RB: 14). Rather, what Penal Law Art. 15 makes clear is that any crime (versus violation or infraction) must have at least one of the delineated mental states. Thus, it is no answer to say that depraved indifference is an acceptable mental state, as the cases Respondent relies on all relate to statutes that require proof of depraved indifference and one of the four Penal Law Art. 15 mentes reae (see RB: 14[3]). Nor is it accurate to say that Mr. Torres provides no support for this argument, as Penal Law § 15.15 itself, viewed as a whole, along with the legislative history from

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[3] Respondent also tries to gain mileage from the statement in People v. McGrantham, 12 N.Y.3d 892 (2009), that the conduct there did not rise to the level of criminally negligent homicide (RB: 15–16). But, V.T.L. § 1212 expressly requires recklessness, or driving while ignoring a substantial risk of endangering others. See Penal Law § 15.05(3). What Respondent omits from its analysis, however, is the risk of death element. In McGrantham, the Court found no evidence that the defendant there had failed to perceive that particular risk such that a homicide charge was warranted, even though a person had died. Thus, V.T.L. § 1212 cannot be said to contain a "lesser" mental state than criminal negligence (RB: 30); rather, the degree of risk is what distinguishes a reckless driving charge from a negligent homicide or manslaughter charge.

the time of the modern Penal Law's enactment, both suggest a clear intent to occupy the field and to require at least one of these mental states for crimes both within the Penal Law and without it. See Bartlett Commission Staff Notes, proposed Penal Law § 45.05 (A315) (criticizing as "one of the main defects of the existing New York statutes defining offenses involving culpability" as "their use of "largely undefined and frequently hazy adverbial terms," without limiting such criticism to the Penal Law alone).

Respondent argues that Penal Law § 15.15(1) limits the applicability of the four principal categories of criminal liability to the Penal Law itself. While it is true that Penal Law § 15.15(1) deals expressly with offenses within the Penal Law, that rule is simply a default rule of construction, requiring that any crime in the Penal Law, where most criminal offenses are found, involve one of these four mens rea categories—ordinary negligence not among them. Similarly, Penal Law §§ 15.00 and 15.05, which also spell out the other baseline requirements for criminal liability "in this chapter," include such requirements as an "act" or "omission." Yet, it would be absurd to argue that a crime could be defined elsewhere in New York statutory law and not require an actus reus. Plus, New York has long has a policy of uniform construction of penal statutes, no matter their location within the law. See, e.g., People v. Hildebrandt, 308 N.Y. 397, 400 (1955) (noting that the

statutory and constitutional rules of criminal law apply to Vehicle and Traffic Law prosecutions).

In addition, Penal Law § 15.15(2), by expressly applying to the Penal Law and outside of it, is simply stating that any time a crime—i.e., a misdemeanor or felony—is defined, it is either one of "mental culpability" or "strict liability," with nothing in between. The definition of "mental culpability" can be found in Penal Law § 15.00(6); it is also referenced in Penal Law § 15.10—also is not limited "to this chapter"—which requires that criminal liability be predicated on, at minimum, an act (for strict liability offense), and an act and a "culpable mental state" (for any other offense). Without these requirements, all that would be left is a tort, yet there has always been a dividing line between the tort and criminal systems (see generally AB: 11–13).

Respondent's attempts to counter Mr. Torres's conflict preemption arguments are also unavailing. Initially, while some courts have held that simply imposing a harsher penalty does not violate state-supremacy principles, a locality making illegal what the State permits does violate conflict preemption principles. See People v. De Jesus, 54 N.Y.2d 465, 471 (1981). That is what happened here. While not lawful, failing to act with due care and causing physical or serious

physical injury is not a crime at the state level. See V.T.L. § 1146(b)–(c).[4] Accordingly, this case does not simply involve heightened local penalties.

Vehicle and Traffic Law §§ 1800(a) and 155, relied on by Respondent (RB: 25), if anything validate Mr. Torres's argument. Section 1800 states that localities can pass laws proscribing traffic infractions, but, in discussing "misdemeanors and felonies," refers only to laws of "this chapter" or "other law of this state" (emphasis added). Further, the specific prohibitions that Respondent holds up to support its theory provide little guidance to the Court. Vehicle and Traffic Law § 1182 criminalizes drag-racing by making it a misdemeanor. Thus, any harsher consequences for drag-racing at the local level are precisely that: penalties, rather than criminalization where none is present at the State level.[5]

D. Civil Negligence as a Basis for Criminal Liability Cannot Pass Constitutional Muster.

As Mr. Torres explained in his opening brief, New York has had a long tradition, dating back to the common law and expressly adopted in its

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[4] Respondent continues to press the claim that because V.T.L. § 1146(d) does create misdemeanor liability for a second offender, that is evidence that the City ordinance is in harmony with the State law (RB: 24). But, V.T.L. § 1146(d) is wholly different in kind, as it penalizes recidivist action, thereby incorporating a heightened culpability requirement (see AB: 17 n.6). In any event, Mr. Torres has no standing to challenge it, as he was charged with only the infraction under V.T.L. § 1146(c). It might very well be the case that V.T.L. § 1146(d) could be the subject of a future due process challenge, but that is not a question for today.

[5] To the extent there are due-process problems with either or both of these laws, no known constitutional challenges have been brought to explore them, as Respondent acknowledges (RB: 26–27 n.12).

Constitution, of requiring more than mere negligence for criminal liability (AB: 11–13).

Despite what Respondent attempts to argue (RB: 18–20), other jurisdictions' jurisprudence lend scant support to the argument that criminal liability can be predicated on ordinary negligence alone. For the most part, other states' cases either decide a different question or leave open the question of whether ordinary negligence is acceptable for criminal liability. For example, in a decision cited by Respondent to support the proposition that ordinary due care is an acceptable mental state (RB: 19 n.4), the Connecticut appeals court expressly found that "negligent homicide with a motor vehicle is not a 'crime' . . . but rather . . . a 'motor vehicle violation' . . . ." State v. Kluttz, 9 Conn. App. 686, 692–93 (App. Ct. Conn. 1987). In so finding, that court reasoned that because a violation of the statute required proof of no more than ordinary negligence, it was non-criminal. Id. at 693–98. Kluttz does not, as Respondent urges, provide proof that other states have allowed a civil negligence statute to confer criminal liability.

In another case cited by Respondent, the statute at issue involved causing a traffic death while under the influence of alcohol (see RB: 19 n.4 (citing State v. Mollman, 2003 S.D. 150 (2003)). This is an aggravating circumstance of dangerousness not present in this appeal or included in the statute at issue here.

In yet another example, the New Mexico high court, instead of deciding the constitutionality of a statute criminalizing "negligence," found that the term had to mean heightened, or criminal, negligence, not ordinary negligence. See Santillanes v. State, 115 N.M. 215, 222–23 (1993). Further, there the statute at issue, which defined child abuse as causing or permitting a child to be placed in an enumerated dangerous situation "knowingly, intentionally or negligently," did not expressly use the "due care" language of the Due Care Provision. Thus, Santillanes cannot help resolve today's question.[6]

Moreover, a federal decision analyzing the New Mexico statute at issue in Santillanes does lend support for Mr. Torres's position. In Lopez v. Williams, the Tenth Circuit granted a writ of habeas corpus where it was clear that the petitioner had been convicted on the assumption that proof beyond a reasonable doubt of civil negligence would suffice. 59 Fed.Appx. 307, 313 (10th Cir. 2003).[7]

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[6] Other states have upheld statutes, but they offer little guidance on the question before this Court. In upholding a statute that proscribed causing death while operating a vehicle "at an immoderate rate of speed or in a careless, reckless or negligent manner," the Michigan Court of Appeals relied on federal precedent to hold that "the elimination of the element of criminal intent does not violate the due process clause" where the penalty is relatively small or the "conviction does not gravely besmirch" a person's reputation. People v. Olson, 181 Mich.App. 348, 352–53 (1989) (internal quotation and citation omitted). However, simply looking to elimination of "intent" does not answer the question, as gross negligence and recklessness—which require no intent—are cognizable mental states under the Penal Law, as is strict liability in certain very limited circumstances.

[7] After petitioner's conviction, Santillanes had clarified that "negligence" meant gross negligence; nonetheless, a conviction predicated on proof of ordinary negligence was found to violate Lopez's rights. Lopez, 59 Fed. Appx. at 313–14. To the extent some

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As the foregoing illustrates, the Due Care Provision is fatally flawed, and this Court must strike it down.

POINT II

BECAUSE MR. TORRES WAS NOT ADVISED OF A DIRECT CONSEQUENCE OF HIS CONVICTION, HIS PLEA WAS INVOLUNTARY AND MUST BE VACATED (answering RB, Point II).

Respondent's procedural claims regarding the voluntariness of Mr. Torres's can be dispatched quickly. As this Court has said in no uncertain terms, where there is no opportunity to object, such as in a scenario where the plea and sentencing proceedings take place on one date, a post-plea motion for plea withdrawal is not required to later make a claim of involuntariness on appeal. See People v. Tyrell, 22 N.Y.3d 359, 364 (2013); see also People v. Louree, 8 N.Y.3d 541, 545–46 (2007) (providing an exception to the preservation rule where a defendant is claiming on appeal that because he was not advised of direct

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states have found statutes predicated on civil negligence constitutional, see State v. Smith, 90 N.C. App. 161 (N.C. App. 1988), aff'd 323 N.C. 703 (1989); State v. Hazelwood, 946 P.2d 875 (Alaska 1997), this Court should reject those decisions. While the Smith Court found the statute not unconstitutional "as applied to this defendant," it questioned "the wisdom of the challenged statute" as "inconsistent with traditional theories of criminal justice." 90 N.C. App. at 166. And, in Hazelwood the Alaska Supreme Court found a civil negligence standard appropriate under the Alaska Constitution—which has no bearing on a determination under New York's. In other instances, state high courts looked to their unique statutory schemes to conclude that a statute criminalizing causing a traffic death while driving could be, for example, classified as a public welfare offense, or require just ordinary negligence. See, e.g., Hoover v. State, 958 A.2d 816 (Del. 2008); State v. Tabigne, 88 Hawai'i 296, 303 (1998).

consequences during the plea colloquy, his plea is involuntary). Respondent ignores this clear, binding precedent.

Further, Respondent argues that Mr. Torres should have brought a motion pursuant to C.P.L. § 440.10, but that is plainly not so, as his claim is exclusively record-based, and is therefore barred from consideration on collateral attack. See C.P.L. § 440.10(2)(b) (requiring a court to find a collateral motion procedurally barred where "[t]he judgment is, at the time of the motion, appealable or pending on appeal, and sufficient facts appear on the record with respect to the ground or issue raised upon the motion to permit adequate review thereof upon such an appeal").

Thus, there is no impediment to reaching Mr. Torres's claim that his plea was not knowing and voluntary. On the merits, Respondent characterizes the length of Mr. Torres's conditional discharge a "condition" of the sentence, but sentence length is the very core of the sentence itself, notice of which is required under any conceptualization of due process. See People v. Harnett, 16 N.Y.3d 200, 205 (2011) (noting that "a term of probation" must be disclosed to a defendant for his plea to be knowing and voluntary). In the case of a conditional discharge, as with probation or post-release supervision ("PRS"), it represents the duration of time for which a defendant remains subject to reincarceration or modification of conditions. See Penal Law §§ 65.00(4), 65.05(2), 70.45(1). And, as

the Penal Law makes clear by its plain terms, sentences of both probation and conditional discharge constitute the core component of the sentence, see Penal Law §§ 65.05(3), 65.00(3) (setting forth the permissible duration of conditional discharge and probationary sentences, respectively) with each bearing the potential of various discretionary conditions being imposed in conjunction with the term itself. See Penal Law § 65.10 (establishing conditions that may be imposed for both probation and conditional discharge).

Respondent also attempts to downplay this requirement by noting that a conditional discharge term can be terminated early for compliance, but so, too, may a probationary or PRS term, and this Court has never held that such later benefit vitiates the requirement that a defendant be told at the outset what his maximum sentence length will be. Nor has the Court found that just because other aspects of the plea were satisfactorily done, or because a defendant had constitutionally acceptable counsel, a court has no independent obligation to advise a defendant before it of the length of his sentence. See People v. Catu, 4 N.Y.3d 242 (2005) (requiring per se reversal for failure to advise of PRS). Yet, that is what happened here.

For these reasons, and those discussed in Mr. Torres's opening brief (AB:29–32), this Court should vacate his plea. Though Mr. Torres submits that no penological purpose would be served by remanding for further proceedings where

he has served his sentence and has no criminal history, there is no "gamesmanship" at play here (RB: 38); Mr. Torres is fairly arguing that his conviction should be vacated as unknowing and involuntary, as is his right to do where he has not been told a critical aspect of the sentence. At that point, the charges should be dismissed, or the case remanded for further proceedings.

CONCLUSION

FOR THE REASONS IN CARLOS TORRES'S MAIN BRIEF AND HERE, ADMIN. CODE § 19-190(B) MUST BE STRUCK DOWN, AND MR. TORRES'S CONVICTION UNDER THAT PROVISION REVERSED AND THE CHARGE DISMISSED. SEPARATELY, MR. TORRES'S CONVICTION MUST BE REVERSED, AND THE CHARGE SHOULD BE DISMISSED; ALTERNATIVELY, THE CONVICTION SHOULD BE REVERSED, THE PLEA VACATED, AND THE CASE REMANDED FOR FURTHER PROCEEDINGS.

Respectfully submitted,

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July 15, 2020

WORD-COUNT CERTIFICATION

I certify that, excluding the Table of Contents and Table of Authorities, the foregoing appellant's reply brief was prepared in Wordperfect®, using a 14-point Garamond font, and 13 points in the footnotes, and totaled 3,540 words.

Katharine Skolnick