

SUPREME COURT OF NEBRASKA

State of Nebraska v. Denise R. Welch, 275 Neb. 517

747 N.W.2d 613 (2008) · No. No. S-07-289 · Decided April 18, 2008

SUMMARY

The Supreme Court of Nebraska considered whether the evidence supported a jury instruction imposing a heightened duty on a driver who observed an obviously confused or incapacitated pedestrian. The court held that the evidence did not support that instruction, that the error was prejudicial, and that the conviction for misdemeanor motor vehicle homicide must be reversed. The court remanded for a new trial on permissible alternative bases, while holding that double jeopardy barred retrial on the unsupported theory.

CASE DETAILS

COURT	Supreme Court of Nebraska
WRITING FOR THE COURT	Miller-Lerman, J.; Heavican, C.J.; Wright, J.; Connolly, J.; Gerrard, J.; Stephan, J.; McCormack, J.
JURISDICTION	Nebraska
DECIDED	April 18, 2008
DOCKET	No. S-07-289
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Welch was convicted by a jury in Lancaster County Court of misdemeanor motor vehicle homicide. The Lancaster County District Court affirmed the conviction on appeal. The Nebraska Supreme Court reversed and remanded for a new trial.
STANDARD OF REVIEW	The correctness of jury instructions is a question of law reviewed independently. The defendant bears the burden of showing that an erroneous instruction was prejudicial or adversely affected a substantial right.
PRECEDENTIAL VALUE	Published opinion; precedential decision of the Supreme Court of Nebraska.
PARTIES	Denise R. Welch v. State of Nebraska

TOPICS

jury instructions

criminal procedure

statutory interpretation

double jeopardy

appellate procedure

PRACTICE AREAS

criminal law

criminal procedure

appellate practice

QUESTIONS PRESENTED

1. Whether the county court erred by instructing the jury that Welch could be guilty based on failure to exercise proper precaution toward an obviously confused or incapacitated person when the evidence did not support that theory.
2. Whether the erroneous instruction was prejudicial and required reversal when the jury was not required to unanimously agree on which alternative unlawful act supported the motor vehicle homicide conviction.
3. Whether double jeopardy barred a retrial on the remaining alternative unlawful-act theories after reversal.

HOLDINGS

1. An instruction imposing the heightened duty of exercising proper precaution toward an obviously confused or incapacitated person under Neb. Rev. Stat. § 60-6,109 requires evidence that the person was actually confused or incapacitated and that the condition was objectively obvious to a reasonable driver. The evidence here did not satisfy that requirement.
2. Giving the instruction on failure to exercise proper precaution toward an obviously confused or incapacitated person was prejudicial error requiring reversal because the jury could convict without unanimously agreeing on the particular unlawful act and could have relied on the unsupported theory.
3. Double jeopardy barred the State from retrying Welch for motor vehicle homicide on the unsupported theory that she failed to exercise proper precaution toward an obviously confused or incapacitated person, but it did not bar retrial on the remaining theories supported by the evidence or not challenged on appeal.

KEY QUOTATIONS

“We conclude that in order for a driver to be held to the higher standard of care in § 60-6,109, there must be evidence both that the person was actually confused or actually incapacitated and that such condition was objectively obvious to a reasonable driver.” (at 620)

“Because the jury was given an improper basis upon which to convict Welch and was not required to specify the basis or bases on which it found Welch guilty, we conclude that subparagraph (C) was prejudicial.” (at 622)

“We therefore conclude that the evidence did not support giving subparagraph (C) of instruction No. 6.” (at 623)

FACTUAL BACKGROUND

On October 7, 2005, Denise Welch was driving a van through an intersection in Lincoln, Nebraska, when the van struck Mitchell Fitzgibbons, a pedestrian who later died from head injuries. Welch had seen Fitzgibbons near the intersection and stated that she thought he was "not all there" or possibly mentally retarded, but the evidence did not objectively establish that he was confused or incapacitated before the collision. Witnesses described the collision and the parties presented competing accident-reconstruction evidence concerning whether Fitzgibbons was in the roadway and how the impact occurred.

PROCEDURAL HISTORY

Welch was charged under Neb. Rev. Stat. § 28-306 after her van struck and killed a pedestrian. The county court instructed the jury on several alternative unlawful acts, including failure to exercise proper precaution toward an obviously confused or incapacitated person, and the jury returned a guilty verdict. After the district court affirmed, the Nebraska Supreme Court held that the evidence did not support the challenged heightened-duty instruction, that the error was prejudicial because the jury need not agree on the specific unlawful act, and remanded for a new trial subject to double-jeopardy limitations.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The Nebraska Supreme Court remanded to the Lancaster County District Court with directions to reverse Welch's conviction and remand the matter to the Lancaster County Court for a new trial. On retrial, the State may proceed on the remaining supported or unchallenged theories, but may not seek conviction based on failure to exercise proper precaution toward an obviously confused or incapacitated person. The court also directed that any new version of instruction No. 6(B) specify that the pedestrian must be upon a roadway.

CASES CITED

- State v. Fischer, 272 Neb. 963, 726 N.W.2d 176 (2007)
- State v. Gutierrez, 272 Neb. 995, 726 N.W.2d 542 (2007)
- Hines v. Pollock, 229 Neb. 614, 428 N.W.2d 207 (1988)
- Dutton v. Travis, 4 Neb. App. 875, 551 N.W.2d 759 (1996)
- State v. Stark, 272 Neb. 89, 718 N.W.2d 509 (2006)
- State v. Mattan, 207 Neb. 679, 300 N.W.2d 810 (1981)
- State v. Palmer, 257 Neb. 702, 600 N.W.2d 756 (1999)
- Burks v. United States, 437 U.S. 1, 98 S. Ct. 2141, 57 L. Ed. 2d 1 (1978)