STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Orangeburg County

Edgar Dickson, Circuit Court Judge

THE STATE,

RESPONDENT,

V.

DAISY LYNNE MIMMS,

APPELLANT.

Appellate Case No. 2012-212931

INITIAL BRIEF OF APPELLANT

April 4, 2013

Mark Wise
Assistant Public Defender

1st Circuit Public Defender's Office
Orangeburg County
PO Box 1112
Orangeburg, SC 29116
(803)531-7090

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STATEMENT OF ISSUES

I. **The trial court erred in ruling that there is no criminal intent required for the crime of driving under the influence.**

II. **The trial court erred in ruling that the mere veering off of a roadway on one occasion is sufficient to show impaired driving.**

STATEMENT OF THE CASE

This appeal arises out of Daisy Mimms' conviction for driving under the influence in violation of S.C Code § 56-5-2930. On April 11, 2011, Ms. Mimms was tried in the Magistrate's Court of Orangeburg County with the Honorable Meree D. Williamson presiding.

At the conclusion of the State's case, counsel moved for a directed verdict arguing the evidence was insufficient to show Ms. Mimms' driving was "materially and appreciably impaired." Counsel also moved for a directed verdict as there was no evidence Ms. Mimms possessed criminal intent. The motions were denied. (Mag. Return, p. 10).

At the conclusion of the evidence, counsel renewed the motions. The motions were again denied. Counsel requested the court instruct the jury on criminal intent. The court refused, ruling that driving under the influence is a strict liability crime. (Mag. Return, p. 3, p. 10).

Ms. Mimms was found guilty. The court imposed a sentence of thirty days incarceration, suspended upon the payment of a fine of $997.00.

The motions were renewed after the verdict.

A Notice of Appeal was filed on April 21, 2011.

STATEMENT OF THE FACTS

On the night of October 23, 2010, Trooper James H. Burriss of the South Carolina Highway Patrol was notified of a driver driving erratically on Interstate 26 (Mag. Return, p. 9). The Trooper testified he saw a car that fit the description and travelled behind the car. He saw the vehicle veer outside of the lane of travel, crossing the white line on the right side of the roadway but not leaving the paved portion of the roadway, and then return to the travel lanes (Tr. p. 4, l. 16-18). This occurred once whereupon he initiated his blue lights and stopped the vehicle (Tr. p. 4, l. 18-19). The Trooper testified he smelled the odor of alcohol (Mag. Return, Tr. p. 9).

At the scene, Ms. Mimms was given the horizontal gaze nystagmus test (Mag. Return, p. 9). Trooper Burriss testified Ms. Mimms was unable to keep her balance and that he felt the roadside was unsafe to administer any further field sobriety tests (Mag. Return, p. 9).

The Trooper testified that Ms. Mimms stated she was being treated for cancer and was taking chemotherapy as a result thereof (Mag. Return, p. 9, Tr. p. 4, l. 19-24). Trooper Burriss' testified he believed Ms. Mimms might be suffering from cancer as he observed that she did not have any hair. (Tr. p. 4, l. 21-24). The Trooper testified Ms. Mimms stated that she had consumed one alcoholic drink earlier (Tr. p. 4, l. 24-25). There was no evidence that Ms. Mimms knew that consuming a beer while undergoing chemotherapy would impact her ability to drive (Tr. p. 4, l. 25-p. 5, l. 2).

Ms. Mimms was arrested. She refused to take a breathalyzer test.

Ms. Mimms did not testify at the trial.

After deliberations, the jury returned a verdict of guilty.

ARGUMENT

I. The trial court erred in ruling that there is no criminal intent required for the crime of driving under the influence.

The law to be charged is determined from the evidence presented at trial, and if any evidence exists to support a charge, it should be given. State v. Burriss, 334 S.C. 256, 262, 513 S.E.2d 104, 108 (1999). The trial court in the instant matter declined to instruct the jury on the issue of criminal intent believing driving under the influence is a strict liability crime. This was error. When the lack of criminal intent is raised by the evidence, as it was in this case, due process requires the jury be instructed on criminal intent.

Driving under the influence is not a strict liability crime. Strict liability crimes, with few exceptions, are regulatory in nature and do not involve substantial terms of incarceration. At the trial, the crime of driving under the influence of alcohol was analogized to speeding. However, driving under the influence carries significant penalties including a potential prison sentence of up to five years for a fourth offense. Therefore, driving under the influence is not a crime with insignificant consequences and due process requires criminal intent.

A legislative intent to do away with a mens rea requirement should not be lightly inferred and courts have imposed a mens rea requirement when one was not written into the statute. The crime of kidnapping is such a situation.

In Morissette v. United States, 342 U.S. 246 (1952), the defendant was charged with violating a criminal statute. At the trial and in the lower appellate courts, it was asserted that if no mens rea appeared in the statute that there was no criminal intent required. The Supreme Court found that although there was no mens rea element in the statute, a court could impose such a requirement. The court stated, "We hold that mere omission ... of any mention of intent will not be construed as eliminating that element from the crimes denounced." Id at 263. The court explained its rationale with the following language:

> Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil. As the states codified the common law of crimes, even if their enactments were silent on the subject, their courts assumed that the omission did not signify disapproval of the principle but merely recognized that intent was so inherent in the idea of the offense that it required no statutory affirmation.

Id at 251.

In State v. Ferguson, 302 S.C. 269, 395 S.E.2d 182 (1990), the defendant was charged with distribution of cocaine. The trial court ruled there was no mens rea requirement for the offense of distribution of cocaine. Our Supreme Court determined that even though a mental state was not included in the statute, the court could determine the required mental state. The court imposed a criminal intent requirement although one was not written into the statute.

The issue in this case was whether Ms. Mimms knew her chemotherapy treatment and the consumption of one beer would impact her ability to drive. As there was no evidence that she was aware of any potential negative impact on her ability to drive, the issue of criminal intent was an appropriate one for submission to the jury. The trial court was empowered to instruct the jury on criminal intent and due process required it do so.

II. The trial court erred in ruling that the mere veering off of a roadway on one occasion is sufficient to show impaired driving.

Driving under the influence is therefore established by proof that defendant's ability to drive was materially and appreciably impaired. State v. Kerr, 330 S.C. 132, 498 S.E.2d 212 (Ct. App. 1998)

The testimony was unequivocal that Ms. Mimms only left the main lane of travel on one occasion when she traveled over the white line on the right side of the roadway. She never left the paved portion of the roadway and never veered over the yellow line on the left side of her lane. Her driving was not enough to meet the requirement of "materially and appreciably

impaired" driving. South Carolina law only requires a driver maintain a lane in travel as much as practicable.

The relevant statute is S.C Code § 56-5-1900(a) which provides, "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." (Emphasis added.) The statute does not penalize the act of leaving a lane of travel on one occasion.

As the only driving witnessed was the one occurrence of leaving her lane of travel, appellant submits her driving was not impaired and her motion for directed verdict should have been granted.

CONCLUSION

The trial court erred in ruling there is no criminal intent required for the crime of driving under the influence. The issue of whether the appellant possessed criminal intent was presented in testimony at the trial. The jury should have been instructed on criminal intent. Additionally, driving under the influence is a criminal statute with the potential for significant periods of incarceration. Due process requires that before an individual can be convicted and punished for a violation of such a statute, a jury should be required to find the individual possessed criminal intent.

The trial court erred in ruling that veering off of a roadway is sufficient to show impaired driving. Driving that is materially and appreciably impaired is a requirement for a conviction for driving under the influence. Leaving a lane of travel on one occasion and then returning to the travel lane is simply insufficient to show driving that is materially and appreciably impaired.

Respectfully Submitted,

Mark Wise
Assistant Public Defender
ATTORNEY FOR APPELLANT

This 4th day of April 2013.

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RECEIVED
APR 0 5 2013
SC Court of Appeals

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DESIGNATION OF MATTER TO BE INCLUDED IN RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Notice of Appeal to Circuit Court
2. Notice of Appeal to Appellate Court
3. Magistrate Return
4. Tr. 4-5
5. Order Denying Appeal

I certify that this designation contains no matter which is irrelevant to this appeal.

April 4, 2013

Mark Wise

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CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Initial Brief of Appellant and Designation to be Included in Record on Appeal in the above referenced case has been served upon Anne Peterson Hutto, Esq., attorney for Respondent, by depositing a copy of same in the United States Mail, postage prepaid, on this 4th day of April, 2013, addressed to Anne Peterson Hutto, Esq., Office of the Solicitor, First Judicial Circuit, Post Office Box 1525, Orangeburg, SC 29116 and Daisy Lynn Mimms, Appellant, by depositing a copy of same in the United States Mail, postage prepaid, on this 4th day of April, 2013, addressed to Daisy Lynn Mimms, 1150 Rosemead Road, Mount Pleasant, SC 29464.

Mark Wise
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ATTORNEY FOR APPELLANT

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