

**IN THE
SUPREME COURT OF APPEALS
OF WEST VIRGINIA**

DOCKET NO. 3320

MARJORIE V. GREEN,

APPELLANT

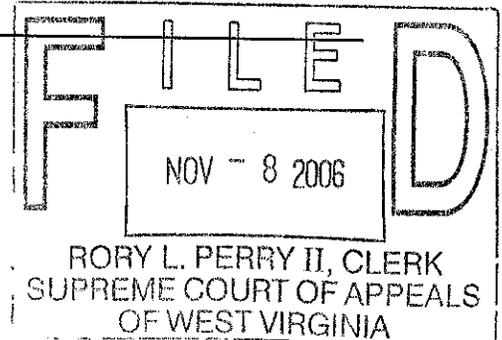
v.

Hampshire County Case No. 05-M-01

STATE OF WEST VIRGINIA,

APPELLEE

APPELLANT'S BRIEF



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I. TYPE OF PROCEEDING AND RULING BELOW.

This is a criminal proceeding from the Circuit Court of Hampshire County, West Virginia, wherein Appellant was convicted of two (2) counts of negligent homicide in violation of W. Va. Code §17C-5-1(a).

On October 7, 2005, Appellant was sentenced to serve two (2) consecutive 12 month sentences in the Regional Jail. Appellant then filed a Motion for a Stay of Execution Pending Appeal. While the circuit court granted the stay of Appellant's jail sentence, it simultaneously revoked Appellant's bail and remanded her to the regional jail.

More than a year later, by order entered on October 25, 2006, the circuit court granted Appellant post-conviction bail, and set terms for her release, including electronic monitoring and a complete ban on driving. However, to date Appellant has been unable to secure an approved home in the State of West Virginia, as her own home was sold for terms of the civil settlement, and she remains incarcerated in the regional jail.

II. STATEMENT OF FACTS.

On September 19, 2004, Appellant, Marjorie V. Green, was operating a Dodge van mini-motorhome, traveling east on U.S. Route 50 in Hampshire County, West Virginia, following an automobile operated by Rhonda Dante. Mrs. Green was driving alone. Rhonda Dante had her daughter Kaitlyn as a passenger. The Dantes were on the way to church, which required them to make a left hand turn, across the west-bound lane of U.S. Route 50. As Ms. Dante approached the turn, she stopped to allow a procession of motorcyclists, who were traveling west, to pass.

Although the motorcyclists tried to make a space for Ms. Dante to turn, she did not complete her turn. *Appeal Record*, at pp. 34, 43. While Ms. Dante was waiting for the motorcycles to pass, she was struck by the vehicle operated by Mrs. Green.

The impact of the collision caused the Dante vehicle to travel into the west-bound lane, where it collided with a motorcycle ridden by Janeann Stehle. The result of this second collision was that the driver of the motorcycle, Janeann Stehle, and the passenger in the Dante vehicle, Kaitlyn Dante, were both killed.

At trial, the state's evidence, introduced primarily through eyewitnesses who were at the scene of the accident, was that Mrs. Green did not seem to slow down nor to brake before the impact. These witnesses testified that they could see that the Dante car was stopped to make a turn, that Mrs. Green's van did not appear to be slowing down, and it appeared that an accident was imminent. The state also introduced the statement made by Mrs. Green through Trooper Whisner, which indicated that she had applied her brakes.

Apparently Mrs. Green did not recognize the peril until the very last second and then was unable either to stop her vehicle or to maneuver it in such a way as to avoid the accident. The investigating officer testified that the distance between the east-bound lane and the guard rail was approximately 4 ½ feet, which was not large enough for Mrs. Green's vehicle to pass the Dante vehicle on the right. *See* Testimony of Trooper Whisner, *Appeal Record*, at p. 316.

Testimony varied regarding the distance between the Green and the Dante vehicles. Sara Watts, a passenger on one of the motorcycles, testified that Mrs. Green's van was three (3) car lengths behind the Dante vehicle when she first noticed the van. Watts was able to observe Mrs. Green, and testified that she "was looking out the driver's side window towards the oncoming

traffic.” *Appeal Record*, at p. 344. Watts also testified that Mrs. Green was going the speed limit, approximately 55 mph, but she did not appear to be slowing down. *Appeal Record*, at pp. 345-346.

Jason Adam Judy testified that he first noticed Mrs. Green’s van when it was “a couple of hundred yards” behind Dante’s vehicle. He testified that it appeared that Mrs. Green did not apply her brakes prior to the impact. *Appeal Record*, at p. 341. His father, Allen Judy, riding on another motorcycle, heard no pre-impact braking by Mrs. Green. *Appeal Record*, at p. 354.

Daniel Watts, who was also operating a motorcycle in the west-bound lane, testified that he observed the accident. According to Watts, while the Dante vehicle was still slowing down, Mrs. Green’s van was only “two and a half, maybe three car lengths” behind. *Appeal Record*, at p. 358. The collision occurred at Watt’s side, causing him to be hit by flying debris. *Appeal Record*, at p. 359. Watts also testified that the Dante car did stop, but only “maybe a second” passed after the Dante car stopped before the collision occurred. *Appeal Record*, at p. 360.

The state also produced as its witness an accident reconstruction expert, Geoffrey S. Petsko, who testified that Mrs. Green was traveling, in his opinion, 59 mph in a 55 mph zone when the collision occurred. *Appeal Record*, at p. 372. This collision happened on a Sunday morning when the weather was clear and the road was dry. Shortly before the accident, Mrs. Green filled-up one of her van’s water compartments with water. However, there was no testimony regarding the weight the water added to the van, nor any testimony of the water’s possible contribution to the accident. The state’s accident reconstruction expert testified that, for purposes of his calculations, he added 50 pounds for both the water and the fuel in the van. *Appeal Record*, at p. 369. This is the average weight of an average-sized seven (7) year-old

child. See <http://www.cdc.gov/growthcharts>. Mrs. Green, in her statement made to Trooper Whisner, said that she had filled up one of her tanks with water and knew “what it would take to stop.” *Appeal Record*, at pp. 309-312.

There was no evidence that Mrs. Green was under the influence of either alcohol or a controlled substance, nor any other reports of reckless driving by her on the morning of the accident. The state’s evidence, and its theory, was that Appellant was inattentive and that inattention can be the basis of “reckless disregard.” Evidence also was presented to show that Mrs. Green was a 70 year-old lady, who had been a law-abiding citizen her entire life, and previously had driven her van to Canada and to the western states. *Appeal Record*, at pp. 388-389.

III. STATEMENT OF PROCEEDINGS.

At trial, at the close of the state’s evidence, Appellant filed a Motion for a Directed Verdict of Acquittal, pursuant to Rule 29(a), WVRCrP. The basis for this motion was that the state had failed to show that Appellant had exhibited reckless disregard of others in her driving, which is a required element of negligent homicide. The state responded that Appellant was inattentive and that her inattention caused the accident and deaths. *Appeal Record*, at pp. 378-379. The trial court denied the motion, citing Appellant’s inattention, as well as her statement made to Trooper Whisner, that Appellant knew that it would be more difficult to stop her vehicle because of the additional water, and so she should have exhibited additional care in her driving, and that her failure to do so constituted reckless disregard. *Appeal Record*, at pp. 379-380.

Subsequent to trial, pursuant to Rule 29(c), WVRCrP, Appellant made a Motion for Judgment of Acquittal after the discharge of the jury. This motion was heard prior to sentencing, on October 7, 2005. The trial court denied this renewed Motion for Judgment of Acquittal. The trial court then considered Appellant's Motion for Probation, which was also denied. Appellant was then sentenced to serve two (2) consecutive 12-month sentences in the Potomac Highlands Regional Jail. Appellant then filed a Motion for a Stay of Execution Pending Appeal. While the trial court granted the stay of Mrs. Green's jail sentence, the court revoked her bail and remanded Mrs. Green to the custody of the Potomac Highlands Regional Jail.

More than a year later, by order entered on October 25, 2006, the circuit court granted Appellant post-conviction bail, and set terms for her release, including electronic monitoring and a complete ban on driving. However, to date Appellant has been unable to secure an approved home in the State of West Virginia, as her own home was sold for terms of the civil settlement, and she remains incarcerated in the regional jail.

IV. ASSIGNMENT OF ERROR.

THE TRIAL COURT ERRED BY DENYING APPELLANT'S MOTIONS FOR JUDGMENT OF ACQUITTAL.

V. POINTS AND AUTHORITIES.

King v. Commonwealth, 217 Va. 601, 231 S.E.2d 312 (1977).

State v. Carter, 451 S.W.2d 340 (Mo. 1970).

State v. Craig, 31 W. Va. 714, 51 S.E.2d 283 (1948).

State v. Fisher, 158 W. Va. 72, 211 S.E.2d 666 (1974).

State v. Hose, 187 W. Va. 429, 419 S.E.2d 290 (1992).

State v. Lawson, 128 W. Va. 136, 36 S.E.2d 26 (1945).

State v. Linkous, 194 W. Va. 287, 460 S.E.2d 288 (1995).

State v. Lott, 170 W. Va. 65, 289 S.E.2d 739 (1982).

State v. Lyle, 143 W. Va. 838, 105 S.E.2d 538 (1958).

State v. Rice, 58 N.M.205, 269 P.2d 751 (1954).

State v. Richeson, 179 W. Va. 533, 370 S.E.2d 728 (1988).

State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978).

State v. Storey, 182 W. Va. 328, 387 S.E.2d 563 (1989).

State v. Vollmer, 163 W. Va. 711, 259 S.E.2d 837 (1979).

State v. West, 153 W. Va. 325, 168 S.E.2d 716 (1969).

Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001).

W. Va. Code § 17C-5-1(a).

W. Va. Code § 17C-7-6(a).

West Virginia Rules of Criminal Procedure, Rule 29.

VI. DISCUSSION OF LAW.

The trial court erred by denying Appellant's Motions for Judgment of Acquittal.

A. Standard of Review.

The proper standard of review in a criminal case is set forth in syllabus point 1 in State v. Starkey, 161 W. Va. 517, 244 S.E.2d 219 (1978). A verdict of guilt will not be set aside on the ground that it is contrary to the evidence where the state's evidence is sufficient to convince impartial minds of the guilt of the defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt on the ground of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done. This is such a case.

B. The state did not present sufficient evidence to support the conviction.

Upon motion to direct a verdict for the defendant, the evidence is to be viewed in light most favorable to prosecution. It is not necessary in appraising its sufficiency that the trial court or reviewing court be convinced beyond a reasonable doubt of the guilt of the defendant; the question is whether there is substantial evidence upon which a jury might justifiably find the defendant guilty beyond a reasonable doubt.

State v. West, 153 W. Va. 325, 168 S.E.2d 716 (1969); Syllabus Pt. 2, State v. Fisher, 158 W. Va. 72, 211 S.E.2d 666 (1974).

The negligent homicide statute, W. Va. Code § 17C-5-1(a), provides:

When the death of any person ensues within one year as a proximate result of injury received by the driving of any vehicle anywhere in this state **in reckless disregard of the safety of others**, the person so operating such vehicle shall be guilty of negligent homicide.

[Emphasis added].

This statute has been interpreted repeatedly as requiring something more than a mere act of ordinary negligence. In fact, the courts have found that the required standard is comparable with that used in involuntary manslaughter prosecutions brought for causing a death while operating a motor vehicle, i.e., “negligence so gross, wanton, and culpable as to show a reckless disregard of human life.” State v. Vollmer, 163 W. Va. 711, 716, 259 S.E.2d 837, 840-841 (1979).

Prior cases in this jurisdiction have illustrated that the act or omission of Mrs. Green of inattention, while amounting to ordinary negligence, does not rise to the level of reckless disregard. For example, it was held in State v. Lawson, 128 W. Va. 136, 36 S.E.2d 26 (1945), that the mere fact that a vehicle crossed the center line and was on the wrong side of the road at the time of a collision is not, alone, sufficient to support a negligent homicide conviction. In addition, a driver’s unexplained failure to see an oncoming vehicle was held to be not sufficient.

In State v. Richeson, 179 W. Va. 533, 370 S.E.2d 728 (1988), this court held that such acts or omissions [failing to be on the right side of the center line at the time of the accident, or failing to see an oncoming vehicle] “may evince a failure to exercise due care, but **they do not ordinarily amount to gross, wanton, or culpable negligence in the absence of aggravating circumstances** indicating rashness or a conscious indifference to the probable dangerous consequences of driving.” 179 W. Va. at 535. [Emphasis added].

The defendant in State v. Richeson had broken his arm. A friend drove him to the hospital for treatment. At the hospital, Richeson was prescribed Tylenol 3, which contains a controlled substance: codeine. After having one arm placed in a sling and having ingested Tylenol 3, Richeson left the hospital. The person who had driven him to the hospital was not feeling well; so at approximately 10:00 p.m., Richeson began driving. He drove his vehicle only

one-half mile before it drifted across the center line and struck the approaching vehicle, killing its driver.

The headlights of the approaching vehicle were lit, and there was no evidence that the approaching vehicle was being operated improperly. In spite of the headlights, Richeson testified that he did not even see the oncoming car until the moment of impact. The road was dry, the weather was clear, the traffic lanes were clearly marked, the intersection was illuminated by street lamp, and the approaching vehicle's lights were on. There were no skid marks nor other evidence indicating that Richeson had attempted to brake or to swerve to avoid contact.

In spite of all of this evidence against Richeson, the West Virginia Supreme Court of Appeals reversed his conviction, finding that the state had failed to show that he was operating the vehicle in reckless disregard of others.

Other than the fact of the accident itself [Richeson drifted across the center line and did not see an oncoming vehicle], the only aggravating circumstances pointed to by the state in that case was that Richeson was driving with a disabled right arm after having ingested a lawfully prescribed controlled substance. However, the appellate court found that the state presented no evidence that Richeson's ability to drive was affected, either by his broken arm or by his use of prescription medicine. Richeson admitted that he used only his left arm to drive; but there was no showing that his inability to use his right arm affected his driving performance. It was not even shown that Richeson was right-handed. Neither was there any evidence of the effect of the Tylenol 3, nor that Richeson should have been aware that the drug would have affected his ability to drive, or even apparently to stay awake. Yet clearly Richeson should not have been driving, as he only made it a half mile down the road before his collision, and never saw the oncoming car.

As with Richeson's broken arm and prescription medicine, in the present case the state failed to show any additional stopping requirements for the weight of the water in Mrs. Green's vehicle. It should be noted that vehicles like Mrs. Green's Dodge van mini-motorhome have water storage as a design feature, and the brakes and other systems of the vehicle are designed to absorb this additional weight. Nonetheless, there was no showing by the state either what this water weighed, or what effect it would have in Mrs. Green's attempt to stop her vehicle.

In both Richeson and the instant case, there were no skid marks; and in both cases it does not appear that the wrong-doing driver realized there was going to be an impact until at least just before the impact. In this case, the state argued that Mrs. Green was inattentive, and that this inattention for a few seconds could be recklessness. In Richeson, the driver was also inattentive; but in that case, the driver crossed the center line when another car was coming. Obviously, crossing the center line is far more dangerous driving than hitting someone from the rear, yet those facts were held to not amount to reckless disregard.

In State v. Vollmer, 163 W. Va. 711, 259 S.E.2d 837 (1979), the court cites King v. Commonwealth, 217 Va. 601, 606-607, 231 S.E.2d 312, 316 (1977), for the following proposition:

Inadvertent acts of negligence without recklessness, while giving rise to civil liability, will not suffice to impose criminal responsibility. Thus, we have held that **mere failure to keep a proper lookout is insufficient to support a conviction of involuntary manslaughter.**
[Emphasis added].

163 W. Va. at 714, 259 S.E.2d at 840. State v. Vollmer also cites State v. Lawson, *supra*, which case explicitly states that West Virginia courts place a great reliance on Virginia cases in dealing with involuntary manslaughter charges.

It should be noted that many of the cases decided by the Court dealing with this area of the law are *per curiam* cases, *i.e.*, State v. Richeson, State v. Lott, State v. Storey, State v. Linkous, all discussed *infra*. However, a *per curiam* opinion may be cited as support for a legal argument. As this Court held in syllabus points 3-4, in Walker v. Doe, 210 W. Va. 490, 558 S.E.2d 290 (2001), *per curiam* opinions have precedential value as an application of settled principles of law to facts differing from those in signed opinions. The value of *per curiam* opinions come from the guidance they provide to the lower courts of the application of syllabus points of law used to reach those decisions, as well as their validation of those cited syllabus points. But they also may be relied upon to argue that previously announced points of law set forth in syllabus points should nonetheless apply to alternate factual scenarios, which may significantly parallel but still partially diverge from the facts of the previously-decided opinion. 210 W. Va. at 496. That is how they are used here.

In State v. Lott, 170 W. Va. 65, 289 S.E.2d 739 (1982), the West Virginia Supreme Court of Appeals found that the state had proven the elements of involuntary manslaughter. Lott was driving an automobile when he rear-ended a farm tractor. This collision occurred after dark. The tractor was equipped with a "cab, back-up mirror, front bumper, fanny flag, and lights." Apparently, the decedent's father was operating another farm tractor in front of her. The father saw Lott approaching them from the rear and motioned for his daughter to move to the right to give Lott's truck more room to pass on the left.

In Lott, the court found five (5) facts which, when viewed in the light most favorable to the state, were sufficient to sustain a conviction of involuntary manslaughter. The court found the facts to be that the road conditions were clear and dry; decedent's tractor was properly

equipped as required by state law; no vehicles were traveling in the south-bound, or oncoming, lane of traffic at the time of the collision; Lott's truck struck the decedent's tractor twice; and Lott later was found unfit to drive because of poor eyesight. 170 W. Va. at 67. In fact, if one examines earlier discussion in the opinion, the court states:

... certain key facts are uncontroverted. First, it is clear that at the time of the accident it was dark, the weather was clear and the roads were dry. Second, it is clear that the appellant was required to submit to a re-examination for his operator's license, the result of which indicated that he was unfit to drive because of poor eyesight.

170 W. Va. at 66.

Accordingly, in order to prove involuntary manslaughter, it was quite important for the state that Lott was later found unfit to drive because of poor eyesight. Clearly, Lott should not have been operating a motor vehicle on the highways. Presumably, he should have been aware of his poor eyesight; his poor eyesight obviously contributed to the accident; and anyone who operates a vehicle when they cannot see properly is clearly a hazardous driver.

In State v. Storey, 182 W. Va. 328, 387 S.E.2d 563 (1989), this court again found that the state produced sufficient evidence to sustain a negligent homicide conviction. In Storey, the defendant, a professional truck driver operating a tractor trailer, attempted to pass a string of four or five vehicles which were on the road behind the decedent. Storey did not see the decedent's turning vehicle until shortly before Storey arrived at the intersection; and when he did see her, he was unable to stop or to end his passing maneuver and return to his proper lane. Storey's truck collided with the decedent's vehicle and she was killed, and her three passengers injured.

The state's position was that Storey "had acted in reckless disregard for the safety of others in attempting to pass a line of traffic while going down a hill when his view of the road at

the bottom of the hill was at least partially obstructed by a curve and when there was some indication that there was an intersection ahead.” 182 W. Va. at 329.

The Storey court cited cases in other jurisdictions where “. . .it has been recognized that passing where a view is obstructed amounts to the degree of negligence sufficient to justify an involuntary manslaughter conviction. See *e.g.*, State v. Carter, 451 S.W.2d 340 (Mo. 1970); State v. Rice, 58 N.M.205, 269 P.2d 751 (1954).” 182 W. Va. at 331.

In Storey, the court found that a jury could have concluded that the road on which the collision occurred curved before it reached the point of collision, and the jury could have concluded that the view of the intersection was obstructed by the curve. The court also found that the jury could have concluded that a prudent driver would have known that the road was approaching an intersection or a turn-off because of signs in the area. The court then concludes:

In spite of these circumstances, the defendant undertook to pass a long string of vehicles, an action which is clearly more hazardous and more time-consuming than attempting to pass a single vehicle. Clearly, he did not engage in the maneuver in such a way to complete it before he arrived in the area potentially obscured by the curve and clearly marked by double lines as a no-passing zone. He likewise could not complete it before he reached the intersection.
182 W. Va. at 331.

The court further found that Storey’s violation of a safety statute was relevant, inasmuch as W. Va. Code 17C-7-6(a) prohibits “passing where a driver’s view is obscured by a curve in a highway, and where there might be a possibility of a collision.” The court further noted that this statute “also prohibits passing within one hundred feet of an intersection.” Citing State v. Vollmer and State v. Lawson, *supra*, the court found they indicate that actions violative of traffic safety statutes can constitute recklessness sufficient to support a negligent homicide verdict.
182 W. Va. at 331.

In conclusion, the court found that Storey,

clearly attempted to pass in an area where his ultimate view was obstructed. In so doing, he violated a traffic safety statute. . . [T]he jury could have concluded that if he had been driving in a prudent and non-reckless fashion he should have known of the approaching intersection and the accompanying no-passing zone. The jury likewise could have concluded that it was recklessness to attempt to pass a large number of vehicles under the circumstances.

182 W. Va. at 331.

In State v. Linkous, 194 W. Va. 287, 460 S.E.2d 288 (1995), the court also found the state had introduced sufficient evidence to sustain a negligent homicide conviction. Linkous was operating a pickup truck which crossed the center line and struck another pickup, killing its driver. In addition to having crossed the center line, the court found that Linkous

. . . was seen shortly before the accident driving recklessly at a high rate of speed. In addition, he and his cousin attempted a ruse to fool the police and jury regarding who was actually driving. The cousin initially claimed that a third person was the driver; later on, he stated that he became the driver because the defendant "had drunk a couple of beers" and he "wouldn't let his cousin drive under the influence." In the defendant's voluntary statement, he also stated that his cousin drove because the defendant had been drinking.

194 W. Va. at 293.

The state also presented testimony contradicting the cousin's statements concerning the condition of the victim after the accident. Two witnesses testified regarding the defendant's driving shortly before the accident. One saw Linkous' truck "spinning out, carrying on, slid sideways and went on down towards town." Another testified that he was standing beside the road and saw "a Ford truck come through town at a high rate of speed, . . . he swerved on the edge of the road, crossed the center and hit another truck." Still another witness testified that 15 or 20 minutes before the accident, he saw Linkous get into the truck and drive away.

Based on this testimony, one can understand why the court found sufficient evidence in the Linkous case, while it did not find sufficient evidence in the Richeson case. Accordingly, it was not the fact that the Linkous vehicle crossed the center line which sustained the conviction. In addition, it was shown that Linkous had been drinking and operating his vehicle in a reckless manner right before the accident. None of those type facts exist in the present case.

Unlike the defendants in the above cases, Mrs. Green's only fault on the day in question was an act of ordinary negligence. She was not drinking nor using any controlled substances. She was not operating her vehicle in a reckless manner prior to the accident. She was not shown to have any physical characteristics which would limit her driving ability, such as poor eyesight. She was not cited for violation of any safety statute.

In State v. Hose, 187 W. Va. 439, 419 S.E.2d 690 (1992), another *per curiam* case, the court found there was sufficient evidence to sustain a negligent homicide conviction when a tractor-trailer driver, going into a turn, passed through a guardrail into the median of the road. After traveling on the median for approximately 230 feet, the driver's truck became airborne for approximately 40 feet, and landed against a station wagon coming from the opposite direction. The impact killed a couple and their two (2) young children. Even though four (4) individuals were killed, the trial court suspended the sentences on two (2) counts and granted concurrent sentencing on the remaining two (2) counts, essentially sentencing the defendant to serve one (1) year in the county jail followed by five (5) years probation.

The evidence produced by the state against Mr. Hose clearly showed, "that the defendant had exceeded the fifteen-hour on-duty requirement of both state and federal laws regulating drivers of tractor trailers at the time of the accident. . . The amount of time that the defendant had

been on-duty markedly exceeded the fifteen-hour limit provided by state and federal law and did constitute a simple technical violation.” 187 W. Va. at 432-433. In addition to the on-duty violation, this court found the state had also introduced evidence “which could have been construed by the jury as showing that the defendant was proceeding at an excessive rate of speed and that he failed to maintain control of his vehicle while on the road.”

In State v. Lyle, 143 W. Va. 838, 105 S.E.2d 538 (1958), in an opinion by Judge Browning, the court summarizes the development of the law of voluntary manslaughter in Virginia and West Virginia. *See* discussion at 105 S.E.2d 541-542. Justice Browning takes care in making the following pronouncement:

There must be either some unlawful act, or the performance of a lawful act in an unlawful manner, before a defendant can be convicted of involuntary manslaughter. As indicated above, violation of the statute, or wanton or reckless misconduct, and many other species of conduct, if established by the evidence, might justify a holding that a lawful act had been performed in an unlawful manner. For illustrate, everyone has a lawful right to travel the highways of this state, but when anyone violates the statute law of the state regulating travel on the highways, he exercises his lawful privilege in an unlawful manner.
106 S.E.2d at 542.

The necessity for this type of analysis is caused by the fact negligent homicide is, by definition, a crime which does not involve any intent. Nonetheless, in order for a defendant's act to become a criminal act, there must be some evidence of an act which normally would substitute in the common law for intent. In State v. Lyle, the evidence in support of his conviction was, “that he drove his truck in a hazardous manner at a greater speed than was reasonably prudent under the circumstances; that he drove across the center of the highway; that he was driving under the influence of intoxicating liquor; and that he was driving in a reckless and wanton manner.” 105 S.E.2d at 539.

In State v. Craig, 131 W. Va. 714 51 S.E.2d 283 (1948), citing State v. Lawson, *supra*, the court reiterates that, "The crime of involuntary manslaughter occurs when an unintentional homicide committed by a person results from his unlawful act, or his lawful act performed in an unlawful manner, and that **a person's mere negligence which causes the unintentional death of another person does not constitute that offense.**" In Craig, the state sought to show that the defendant was in violation of the law in effect at that time, W. Va. Code § 17-8-18:

That no person shall drive a vehicle upon a highway at a greater speed than is reasonable and prudent, with due regard to the traffic, the surface and the width of the highway, the hazard at intersections, and any other then existing conditions, and that no person shall drive at a greater speed than will permit the driver to exercise proper control of a vehicle and to decrease speed or to stop as may be necessary to avoid colliding with any person, vehicle or other conveyance upon or entering a highway in compliance with legal requirements and with the duty of drivers and other persons using the highway to exercise due care.

131 W. Va. at 724.

The court found the evidence presented was insufficient to sustain Craig's conviction, when he was unable to stop his vehicle so as to prevent striking a state road employee and pinning him between Craig's vehicle and a state road truck. The court found that, "The conduct of the defendant in the operation of his automobile cannot be held to constitute anything more culpable than negligence. In acting as he did, he did not violate any provision of the statute or commit an unlawful act or lawful act in an unlawful manner." 131 W. Va. at 725.

This is the crux of the matter. Inattention while driving may certainly give rise to civil liability, but it is not an unlawful act. There is no statute that makes "driving while inattentive" a crime. The Appellant, Marjorie Green, was not operating her vehicle in an unlawful manner. She merely took her eyes off the road for a few disastrous seconds.

While it might seem outrageous to the court that the legislature, through its statute, only imposes a one-year sentence in a case where a human life is taken through another person's improper act, there still remains no intent. Mrs. Green is a law-abiding citizen, in good standing with the community, who would under no circumstances intentionally or recklessly harm other citizens. She has lived a law-abiding life. Most, if not all, members of society who have led a law-abiding life have, at one time or another, done something in the operation of a motor vehicle which was not at the time quite prudent. This may be nothing more than reaching down for a cup of coffee, or changing the radio, or being in a little bit of a hurry to get somewhere and speeding. Fortunately, for most of us, that moment or two when our mind and full attention were not on our driving, and when we may have strayed into the other lane for a few seconds, usually results in "negligence in the air," or at most a fender bender, where someone has slid off the road.

We should always drive as if, in the next few seconds, our tire might blow out; or a ball, with a small child following it, might roll out into the road; or a deer might pop out of nowhere. However, we don't. We take our eyes off the road to look at something that interests us; we multitask. Hopefully, we are not doing this when the ball rolls into the road with the small child behind it. If it does, we are then introduced to one of life's horrors: a decent person has done something temporarily foolish resulting in death or serious injury to another person.

Clearly, the legislature has accepted that with our modern methods of transportation there are going to be accidents where people are killed, but where nobody goes to jail, even though someone was at fault in the accident. The legislature recognizes that with ordinary negligence, the act is something of which many people are guilty; it is just that in the cases resulting in death, the act of negligence resulted in a death because of the circumstances. Since all drivers at one

time or another could be guilty of this ordinary negligence, it is not fair to punish criminally those drivers where the circumstances result in horrific injuries, unless it can be shown that the defendant was operating her vehicle in a willful, wanton, and reckless manner.

In a criminal case, a verdict of guilt will not be set aside on the ground that it is contrary to the evidence, where the state's evidence is sufficient to convince impartial minds of the guilt of a defendant beyond a reasonable doubt. The evidence is to be viewed in the light most favorable to the prosecution. To warrant interference with a verdict of guilt, on the grounds of insufficiency of evidence, the court must be convinced that the evidence was manifestly inadequate and that consequent injustice has been done." Syllabus Pt. 1, State v. Starkey, 161 W. Va 517, 244 S.E.2d 219 (1978).

A court when ruling on a motion for judgment of acquittal made at the conclusion of the state's case is limited to the evidence presented by the state. Rule 29(a), WVRCrP. *See also*, Rule 29(b), WVRCrP. In ruling upon Appellant's motion for post judgment verdict of acquittal, the trial court did not rely solely upon the evidence presented by the state. In fact, the court's primary justification for finding that Mrs. Green was guilty of greater than ordinary negligence was that she had filled her motor home

...with water and because of that she had some heightened awareness, the court believes, of the dangerousness of that vehicle. Even though her expert would indicate that it really didn't make much difference as far as stopping time is concerned, Mrs. Green in her statements, and I forget her exact words, but that she realized that she basically, for lack of a better word, needed to be more careful because of the fact that she had additional weight, that water in her vehicle. And its not because the water itself caused that much more weight but because that she had heighten awareness that it - it did. [sic].

Appeal Record, at p. 455.

To begin with, the state never argued that “additional” water in Mrs. Green’s vehicle actually made it difficult for her to stop. In fact, the state’s expert only added an additional 50 pounds for both the water **and** the fuel in the van. *Appeal Record*, at p. 369. Clearly, this is far less than a single passenger, even a child, would weigh. In addition, the trial court cannot cite evidence presented by the defense in support of the state’s case at the phase formerly known as “directed verdict.” When considering a motion for acquittal made at the conclusion of the state’s case, the state’s case must rest entirely on its own merits.

When the motion for acquittal was originally made at the conclusion of the state’s case in chief, the court cited the “additional” water as if it were somehow the cause of the accident. Even the defense expert stated that the estimated weight of the water and fuel, this additional 50 pounds, would have only caused the van to go a few more inches than it would have without the water. *Appeal Record*, at pp. 414-415. At any rate, the state would have had to have proven that, (1) there was additional water, and (2) that this additional water was a factor in the accident, and (3) that the defendant should have used additional care because of the heightened danger caused by the water, and (4) that she failed to use this additional care, and (5) that her failure to use this additional care was reckless disregard for the safety of others. A suitcase, a couple of bags of groceries, a seven year-old child, or an ice chest could all weigh fifty pounds. Clearly, the circuit court was grasping for straws when it attempted to develop additional evidence in the form of this “water.”

Secondly, the trial court in attempting to sustain and justify the conviction, completely misread and misinterpreted Mrs. Green’s statement, to make it sound as if she personally chose to hit the car. This is not at all what Appellant told the state trooper. She did not in any way

whatsoever indicate that she had a choice. All she said was that she could not get by on the left, and she could not get by on the right, so she basically did the only thing that she could. It was clear from all of the testimony of the eyewitnesses, and from the physical evidence at the scene of the accident, that Mrs. Green did not realize that there was a stopped car in front of her until she was just upon that car. Mrs. Green barely had enough time to brake. She clearly did not have enough time to swerve, either to the right or to the left. If she had swerved to the left, she would have run into the motorcycles. The evidence was clear at trial that there was not enough room for her to go to the right of the Dante vehicle even if she had the time to do so. She still would have rear-ended the Dante vehicle, albeit at perhaps a different point, which would have still knocked the Dante vehicle across the highway into the oncoming motorcycle traffic. The resting-point of her van though does indicate that she had maneuvered to that side of the road. *Appeal Record*, at p. 18.

If the trial court would be correct about this interpretation of Mrs. Green's actions, then Appellant would almost be guilty of an intentional crime, because she "chose" to rear-end the Dante vehicle rather than avoid it. If there had been sufficient time and opportunity to avoid this vehicle once Mrs. Green recognized the peril, then obviously she would have, as no one chooses to rear-end another vehicle.

In addition, the trial court completely misread the State v. Richeson opinion. The trial court read Richeson to say that in Richeson the state presented no evidence concerning the defendant's broken arm nor that he was using prescription medicine. In fact, the state in Richeson presented to the jury the evidence that Richeson had a broken arm and that he was on prescription medicine. What the state failed to do was introduce evidence to the jury to show,

that the Appellant's ability to drive was either affected by either his broken arm or by his use of prescription medicine. Although the Appellant admitted that he used only his left arm to drive, there was no showing that his inability to use his right arm affected his driving performance. It was not even shown that the Appellant was right handed. Nor was there any evidence as to the effects of Tylenol 3 or that the Appellant was or should have been aware that the drug would effect his ability to drive, either because he was advised to refrain from such conduct by the dispensing physician or because of previous experience with the drug.

179 W. Va. at 536.

The court in Richeson then concludes, "While we might agree that the evidence... demonstrate a lack of due care on the part of the Appellant in driving under these circumstances, in absence of any showing that the Appellant was or should have been aware of the probable tragic consequences of his actions, the record simply does not support the conclusion that he took the wheel "in reckless disregard of the safety of others." 179 W. Va. at 536.

Accordingly, the trial court misread Richeson. In addition, just as the state in Richeson failed to show how the broken arm or prescription medicine would have affected Richeson's ability to drive, the state here did not show, nor attempt to show, nor even argue that the additional water made the van more dangerous. The state did not even show how much water it would take to fill up the van, how much water was in the van, the weight of that water, the impact of that much weight of water in trying to slow down, etc.

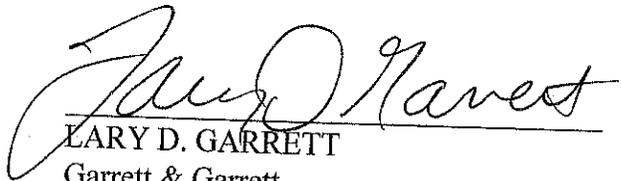
Thus, the trial court here clearly attempted to base its refusal to grant the motion of acquittal upon Mrs. Green's inattention and the fact that there was an **estimated** weight of 50 pounds of **both** water **and** fuel in her van. Clearly, this is insufficient.

VII. RELIEF REQUESTED.

Whereupon, Appellant prays that this Court give this matter careful and mature consideration, and find that the evidence introduced against Appellant at her trial is insufficient as a matter of law to sustain a conviction of negligent homicide, and to set aside the verdict and enter a judgment of acquittal, or to grant her the appropriate relief, as the Court deems meet and just.

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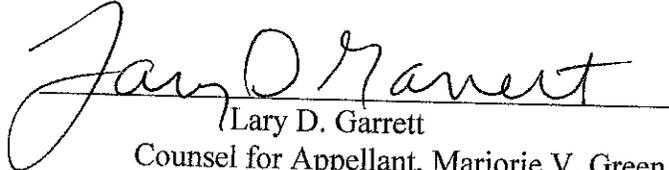
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VIII.

CERTIFICATE OF SERVICE

I, the undersigned, Lary D. Garrett, hereby certify that I served the foregoing *Appellant's Brief* upon the State of West Virginia, by mailing a true copy thereof to its Assistant Attorney General, Dawn E. Warfield, at the office address of Office of the Attorney General, Capital Building 1, Room E-26, Charleston, West Virginia, 25305, and by mailing a true copy thereof to the Prosecuting Attorney of Hampshire County, Stephan W. Moreland, at his address of P. O. Drawer 1000, Romney, West Virginia, 26757, all done by U.S. Mail, postage prepaid, on this the 7th day of November, 2006.


Lary D. Garrett
Counsel for Appellant, Marjorie V. Green