

No. 02-89504-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

IN THE MATTER OF A.J.A., RESPONDENT-APPELLANT

**BRIEF OF APPELLANT
A.J.A.**

**APPEAL FROM THE DISTRICT COURT OF SEDGWICK COUNTY
HONORABLE TIMOTHY HENDERSON, JUDGE
DISTRICT COURT CASE NO. 01-JV-786**

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TABLE OF CONTENTS

STATEMENT OF THE CASE 1

STATEMENT OF ISSUES 1

STATEMENT OF FACTS 1

ARGUMENT 4

1. As a matter of law, and under the totality of the circumstances, insufficient evidence was presented to support a finding that A.J.A. operated a vehicle in a manner constituting a material deviation of the standard of care which a reasonable person would observe under the same circumstances, and his adjudication for the offense of vehicular homicide must be set aside. . . . 4

a. Standard of Review 4

State v. Krovvidi, ___ Kan. ___, ___ P.3d ___ (Dec. 6, 2002) . . . 4

State v. Engles, 270 Kan. 530, 532-33, 17 P.3d 355 (2001) 4

b. No aggravating conditions or circumstances exist to compound A.J.A.’s failure to comply with a traffic signal due to inattention and support an adjudication for vehicular homicide. 5

K.S.A. 21-3405. 5

State v. Randol, 226 Kan. 347, 353, 597 P.2d 672, 677-78 (1979) 5

State v. Choens, 224 Kan. 402, 580 P.2d 1298 (1978) 5

State v. Makin, 223 Kan. 743, 576 P.2d 666 (1978) 5

State v. Krovvidi, ___ Kan. ___, ___ P.3d ___ (Dec. 6, 2002) . . . 6

State v. Trcka, 20 Kan.App.2d 84, 884 P.2d 434 (1994) 6

State v. Burrell, 237 Kan. 303, 699 P.2d 499 (1985) 6

State v. Boydston, 4 Kan.App.2d 540, 609 P.2d 224 (1980) 6

State v. Gordon, 219 Kan. 643, 653, 549 P.2d 886 (1976). 7

2. Insufficient evidence was presented to support a finding that A.J.A. was driving left of center 8

a. Standard of Review 8

State v. Hartman, 27 Kan.App.2d 98, 998 P.2d 128 (2000) 8

State v. Haskins, 262 Kan. 728, 731, 942 P.2d 16 (1997) 8

b. Any finding that A.J.A. was driving left of center was not supported by substantial competent evidence. 8

CONCLUSION 9

CERTIFICATE OF SERVICE 9

STATEMENT OF THE CASE

A.J.A. appeals from his adjudication as a juvenile offender based on commission of the offense of Vehicular Homicide, in violation of K.S.A. 21-3405, a Class A person misdemeanor if committed by an adult.

STATEMENT OF ISSUES

1. Was sufficient evidence presented to adjudicate A.J.A. of Vehicular Homicide, in violation of K.S.A. 21-3405?
2. Did the trial court find that A.J.A. was driving left of center, and was sufficient evidence presented to support this finding?

STATEMENT OF FACTS

On December 23, 2000, A.J.A. and his cousin, Jeremy Starnes, left a family gathering at their grandparents' home eight (8) miles south of Haven, Kansas, driving both ways through Andale, in Sedgwick County, to pick up pizza in Colwich. Vol. II at 14. A.J.A. was driving his father's red diesel pickup truck. Vol. II at 14, 113.

A.J.A. and Jeremy returned through Andale at approximately 6:40 p.m., traveling from east to west on Rush Street, a four-lane street with a speed limit of 35 mph. Vol. II at 73, 117. Neither A.J.A. nor Jeremy had been drinking (or, presumably, taking drugs), nor was A.J.A. horsing around, speeding or showing off. Vol. II at 15, 22, 33, 115. Jeremy had ridden with A.J.A. before and had no cause for concern as a passenger regarding the manner in which A.J.A. was driving. Vol. II at 22-23.

A.J.A. was traveling about 30 mph as he approached the stop sign on Rush Street at its intersection with Main Street. Vol. II at 25, 122. Neither A.J.A. nor Jeremy observed any traffic whatsoever: no cars, no pedestrians, no one in the east crosswalk. Vol. II at 25, 117. Jeremy testified that A.J.A. was driving really, really slow, and although A.J.A. slowed down substantially as he approached the stop sign, he did not come to a full and complete stop, but instead did a “California” stop, which Jeremy defined as, “where they see a stop sign, but they come to it, and they come to a roll, and they’re almost getting ready to stop, you know, around like two miles an hour, and then you go.” Vol. II at 16, 18, 20, 26, 27. A.J.A. then started to accelerate, but not very fast. Vol. II at 30. A.J.A. testified that he slowed down and thought he came to a stop, but agreed he might have rolled it; he was not sure. Vol. II at 117. Regardless, testimony was uniform that A.J.A. could not have been traveling more than 15 to 20 mph as he exited the west side of the intersection. Vol. II at 38, 117-18. Deputy Ben Blick of the Sedgwick County Sheriff’s Department observed skid marks too faint to show up in a photograph, indicating a low rate of speed. Vol. II at 76, 77. Deputy James Prunier of the Sedgwick County Sheriff’s Department observed no evidence of any kind of hard braking, not unusual at slow speeds, anywhere under 20 mph. Vol. II at 99.

Conditions at the intersection of Rush Street and Main Street were described as being very dark. Vol. II at 19, 20, 75. Significantly, the street light just west of the west crosswalk at the intersection was not functioning on the night of the accident. Vol. II at 73. As A.J.A. went through the intersection, Helen Meyer was attempting to cross Rush Street, wearing a long, dark overcoat, approximately mid-thigh to knee length, and perhaps a black hat. Vol.

II at 19, 30, 74, 118. Deputy Blick, the accident investigator at the scene, concluded that Ms. Meyer may have been very difficult to see. Vol. II at 75, 85.

Neither A.J.A. nor Jeremy saw Ms. Meyer until it was too late. Vol. II at 16, 35, 117. Both A.J.A. and Jeremy testified that A.J.A. was driving in the leftmost of two westbound lanes and was not left of center. Vol. II at 29, 116, 128. Ms. Meyer was either within the crosswalk or just outside of it. Vol. II at 30, 123, 128. Neither Deputy Blick nor Deputy Prunier was able to determine the point of impact. Vol. II at 77, 94-95. A.J.A. panicked, swerved to the left to try to avoid Ms. Meyer, hitting the gas instead of the brake by mistake, then braked, ending up partially in the eastbound lanes. Vol. II at 32, 117-18, 127. After a firefighter asked that the truck be moved, Jeremy moved the truck straight back five (5) to ten (10) feet. Vol. II at 19. On the night in question, the exact position of the truck immediately after the accident was not preserved either by photograph or by pavement markings.

A.J.A. was charged with and adjudicated of only a single count of Vehicular Homicide, in violation of K.S.A. 21-3405, a Class A person misdemeanor if committed by an adult. Vol. I at 6-8, 14-15; Vol. II at 150. The parties stipulated that the cause of Ms. Meyer's death was the injuries she received in the collision (Vol. II at 107), which the trial court interpreted, along with the testimony of Jeremy and A.J.A., in finding that A.J.A. unintentionally killed Ms. Meyer and that A.J.A. operated a vehicle in a manner which created an unreasonable risk of injury to the person of Ms. Meyer. Vol. II at 145.¹ In

¹The transcript of the adjudication hearing actually reads, "The Court finds that [A.J.A.] intentionally (*sic*) killed Helen I. Meyer by the operation of a motor vehicle." Vol. II at 145. Because unintentional killing is a necessary element of the offense of Vehicular Homicide,

determining that A.J.A. operated the vehicle in a manner that constituted a material deviation from the standard of care which a reasonable person would observe under the same circumstances, and therefore adjudicating A.J.A. of the offense of Vehicular Homicide, the trial court found that Ms. Meyer was in a crosswalk, that A.J.A. crossed the center line, that A.J.A. failed to stop at the stop sign, that A.J.A. “due to his inattentiveness” failed to stop in time to avoid striking Ms. Meyer, and that it was very dark. Vol. II at 147-50.

ARGUMENT

1. As a matter of law, and under the totality of the circumstances, insufficient evidence was presented to support a finding that A.J.A. operated a vehicle in a manner constituting a material deviation of the standard of care which a reasonable person would observe under the same circumstances, and his adjudication for the offense of vehicular homicide must be set aside.

a. Standard of Review

Interpretation of a statute is a question of law, and an appellate court's review is unlimited and not bound by the district court's interpretation. *State v. Krovvidi*, ___ Kan. ___, ___ P.3d ___ (Dec. 6, 2002) (citing *State v. Engles*, 270 Kan. 530, 532-33, 17 P.3d 355 (2001)).

A.J.A. presumes in this Brief that either the trial court mis-spoke or the trial court's finding was mis-transcribed.

- b. No aggravating conditions or circumstances exist to compound A.J.A.'s failure to comply with a traffic signal due to inattention and support an adjudication for vehicular homicide.

In Kansas, vehicular homicide is the unintentional killing of a human being committed by the operation of a motor vehicle in a manner which creates an unreasonable risk of injury to the person or property of another and which constitutes a material deviation from the standard of care which a reasonable person would observe under the same circumstances. K.S.A. 21-3405. The “material deviation” required under K.S.A. 21-3405 has been defined as, “such a departure from the ordinary standards of due care to amount to more than simple or ordinary negligence yet less than gross and wanton negligence.” *State v. Randol*, 226 Kan. 347, 353, 597 P.2d 672, 677-78 (1979) (citing *State v. Choens*, 224 Kan. 402, 580 P.2d 1298 (1978); *State v. Makin*, 223 Kan. 743, 576 P.2d 666 (1978)). In *Randol*, the Court further discussed the degree of conduct necessary to satisfy the statute:

Material is a relative term which must be gauged by all the circumstances surrounding the transaction or event to which it refers. It imports a considerable amount in opposition to that which is inconsequential or small. It is serious as opposed to trivial or minimal. It is extraordinary as opposed to ordinary. It is major as opposed to minor. In short, when applied to the statute in question it is more than the everyday minimal departures from the ordinary standard of care required by our vehicle and traffic statutes and ordinances yet something less than the reckless disregard and complete indifference and unconcern which are inherent in the more serious offenses involving gross or wanton conduct.

Randol, 226 Kan. at 354. Each case must be considered upon its own set of facts and circumstances to determine whether the alleged conduct constitutes such a deviation from the norm as to fall within the proscribed conduct. *Randol, id.*

Recently, the Kansas Supreme Court reviewed case law interpreting K.S.A. 21-3405 and set aside a defendant's conviction for vehicular homicide, specifically holding that mere inattentiveness, such as running a red light, without additional aggravating factors, does not as a matter of law constitute a "material deviation" from the standard of care which a reasonable person would observe under the same circumstances. *State v. Krovvidi*, ___ Kan. ___, ___ P.3d ___ (Dec. 6, 2002). The Court reviewed the facts and circumstances supporting the decisions in *State v. Trcka*, 20 Kan.App.2d 84, 884 P.2d 434 (1994), *State v. Burrell*, 237 Kan. 303, 699 P.2d 499 (1985), and *State v. Boydston*, 4 Kan.App.2d 540, 609 P.2d 224 (1980), and noted that while important factors in those cases were running a stop sign and inattentiveness, there were additional aggravating factors not present in the case before it. The Court commented further:

In this case, there are no aggravating factors present. Krovvidi had not been drinking and was not under the influence of any drug, both factors which may provide the additional evidence to establish a material deviation. None of the passengers in his vehicle warned him as he was about to enter the intersection; none were concerned that his driving appeared reckless or that he was accelerating or speeding as he approached the intersection. Krovvidi was not speeding and proceeded through the intersection thinking his light was green. Absent additional aggravating factors, we conclude that his conduct does not amount to the material deviation required under the provisions K.S.A. 21-3405.

Krovvidi, ___ Kan. at ___.

There is a similar absence of aggravating factors here, which the State of Kansas essentially conceded in its summation, admitting that failure to stop at a stop sign, failure to yield to a pedestrian in a crosswalk and left of center, if committed by A.J.A., all individually amounted to simple negligence (Vol. II at 133), but apparently arguing that their cumulative

effect somehow brought the instant case within the bounds of *Trcka*. Regardless, the egregious facts present in *Trcka*, *Burrell*, and *Boydston* are not present here. A.J.A. had not been drinking and was not under the influence of any drug. Jeremy, his passenger, saw no reason to warn A.J.A. as he entered into and proceeded through the intersection, nor was Jeremy concerned that A.J.A.'s driving appeared reckless. A.J.A. was not speeding and proceeded through the intersection knowing that he had slowed down and thinking he had come to a stop. Certain other factors are present in mitigation, such as the darkness due to the time of day (6:40 p.m. on December 23rd) the fact that the street light closest to the sidewalk was out, and the long, dark overcoat worn by Ms. Meyer,² all of which lead to the conclusion, as Deputy Blick testified, that Ms. Meyer may have been very difficult to see.

The trial court found that A.J.A. failed to stop in time to avoid striking Ms. Meyer “due to his inattentiveness” (Vol. II at 149) which, as a matter of law, cannot constitute a “material deviation” from the standard of care which a reasonable person would observe under the same circumstances, and for want of any additional aggravating factors, this Court must vacate A.J.A.’s adjudication and sentence.

²While contributory negligence is no defense in a prosecution for an offense of vehicular homicide, it is a circumstance to be considered along with all other evidence. *State v. Gordon*, 219 Kan. 643, 653, 549 P.2d 886 (1976).

2. Insufficient evidence was presented to support a finding that A.J.A. was driving left of center.

a. Standard of Review

Review of a trial court's findings of fact is limited to determining whether substantial competent evidence supported the trial court's findings and whether the findings are sufficient to support the trial court's conclusions of law. *State v. Hartman*, 27 Kan.App.2d 98, 998 P.2d 128 (2000) (citing *State v. Haskins*, 262 Kan. 728, 731, 942 P.2d 16 (1997)).

b. Any finding that A.J.A. was driving left of center was not supported by substantial competent evidence.

In its ruling, the trial court concluded that A.J.A. “crossed the center line”, which A.J.A. conceded to a certain extent with the testimony of A.J.A. and Jeremy that, in the course of the accident, the truck breached the center line before it came to rest. So much is made of this point by both the State of Kansas and the trial court, as though it were some indication of recklessness or aggravating conduct, that it warrants discussion here.

Therefore, to the extent that the trial court’s finding can be interpreted that A.J.A. was driving westbound fully within one or more of the eastbound lanes, it is not supported by substantial competent evidence. No testimony was presented to contradict the testimony of both A.J.A. and Jeremy that A.J.A. was driving westbound in the leftmost of two *westbound* lanes and was not left of center, including the testimony of Deputy Blick and Deputy Prunier, neither of whom was able to determine a point of impact.

