



IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDREY ZHURBIN,)
)
 Defendant-Below,)
 Appellant)
)
 v.) No. 681, 2013
)
)
)
 STATE OF DELAWARE)
)
 Plaintiff-Below,)
 Appellee.)

APPELLANT'S OPENING BRIEF

**ON APPEAL FROM THE SUPERIOR COURT IN AND OF NEW CASTLE
COUNTY**

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DATE: May 7, 2014

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NATURE AND STAGE OF PROCEEDINGS

On March 18, 2013, Andrey Zhurbin, (“Zhurbin”), was indicted on Driving Under the Influence; Leaving the Scene of an Accident; Removal of Vehicle from Accident Scene; and No Proof of Insurance. A1, 5-7. He went to jury trial on October 17, 2013. The jury acquitted him of Driving Under the Influence. However, it convicted him of the remaining motor vehicle offenses. The State then entered a *nolle prosequi* on No Proof of Insurance because Zhurbin provided proof at trial. A3.

On December 6, 2013, Zhurbin was sentenced as follows: Leaving the Scene of an Accident - 6 months Level 5 suspended after 30 days for 4 months of Level 2 probation; Removing a Vehicle from Accident Scene - \$75 fine; and Careless Driving - \$75 fine. He was also ordered to pay restitution in the amount of \$384.04 to Delaware Park Casino “for the damage that they sustained[.]” *See* Sentence Order, Ex.A.; A59.

Zhurbin filed a timely notice of appeal. This is his Opening Brief in support of that appeal.

SUMMARY OF ARGUMENT

1. The State acted as the *de facto* attorney for the Delaware Park Casino, (“the casino”), in a tort action when it prosecuted Zhurbin for Leaving the Scene of an Accident. That alleged accident occurred solely on the casino’s private road and resulted in damage to the casino’s property. As a result of Zhurbin’s conviction, the State was able to obtain a court order for him to pay restitution to the casino.

While the driver of the car may be liable to the casino for damages, he cannot be found guilty of the offense of Leaving the Scene of an Accident. In order for him to be guilty of that offense, the State must prove beyond reasonable doubt that the collision occurred on a public highway. The State failed to do so. Its witnesses told the jury that the collision occurred on the casino’s property. Because the collision at issue did not occur on a public highway, Zhurbin’s conviction of Leaving the Scene of an Accident must be vacated.

STATEMENT OF FACTS

On October 9, 2012, at about 10:45 p.m., Andrey Zhurbin, (“Zhurbin”), was at the “blackjack” table at Delaware Park Casino, (“the casino”), when James Delaney, (“Delaney”), a security guard, responded to a claim of disorderly conduct. A9-10. Delaney saw Zhurbin arguing with the dealer, but did not see him do anything “too outrageous.” A9-10. Even so, Delaney asked a reluctant Zhurbin to leave the casino’s property. A10. Delaney testified that he was concerned about letting Zhurbin drive home because he believed he had been drinking. A10. When a female patron offered to give him a ride, Zhurbin agreed to leave. A10.

To make sure Zhurbin left the casino’s property, Delaney followed him and the female down an escalator and out the building. A11-12, 13. Zhurbin did not need any assistance walking or negotiating the escalator. A12, 13. Delaney watched Zhurbin get into the passenger side of a dark sedan while the female got in the driver’s side and drove the two out of the parking lot. A11-13. The security guard then followed the sedan in a patrol vehicle up to the casino’s exit on to Route 7. A10, 14. He never saw Zhurbin behind the wheel of any car. A12.

Shortly thereafter, Anthony Marks, (“Marks”), was exiting the casino’s property from the parking lot when he saw either a Trans-Am or

Camaro go over 2 guardrails/barriers and into a ditch while it was spinning. The car then left the casino's property. He could not see who was driving or how many people were in the "car in the parking lot[.]" A14-15. He followed the car off the property and called 911. A15. He lost sight of the car on Route 273. When he got to a parking lot near Denny's he saw a car parked that he believed to be the one he saw at the casino. A15. He told police he saw someone walking away from the car. However, he could not say if that person had been driving or whether he had even had been in the car. A15.

Trooper Crisman heard the dispatch about a "red vehicle that was involved in a collision on Delaware Park property." A20. At 11:43 p.m. he went to the parking lot near Denny's and spoke with Marks. A16, 26. Marks said that the man whom he saw walk away from the car was inside the Denny's. The trooper went into the restaurant and spoke to Zhurbin. A21. Zhurbin denied owning or driving the car Marks had just claimed he saw at the casino- a red Firebird. He stated, in his thick Russian accent, that "Bob" drove that car. A21, 26.

Zhurbin and the trooper went outside the restaurant. The trooper discovered that Zhurbin owned the car and that he had keys to it in his pocket. He also had insurance, although the card was expired. However, no

one ever saw Zhurbin drive that night. A21, 27, 28. The trooper told the jury that the Firebird suffered quite a bit of damage on all sides. Also, the tires were going flat, there was smoke in the car and fluids were leaking from under the car. A22. The trooper also saw small pieces of glass, cuts and a little bit of blood on Zhurbin. A21.

After the car was towed, the trooper took Zhurbin to Troop 6 where he administered field sobriety tests. He then released Zhurbin to a friend.¹ At trial, the trooper opined that Zhurbin was intoxicated that night. However, the jury rejected that opinion when it acquitted him of the charge of Driving Under the Influence. A25, 46.

After he was done with Zhurbin, the trooper went to the casino because, as he testified, the “actual scene of the accident happened at Delaware Park[.]” A27. He drove over to the self-park parking lot on the property where there were barricades that lined the end of the lot up to the entrances. A26. Some of the barricades were twisted and plastic pieces were scattered. There were skid marks going across the roadway over a speed bump. And, there was a “caution” sign that had been knocked flat. A26.

¹ Zhurbin refused to take a Breathalyzer test. A23, 24, 25, 26, 30.

I. THE TRIAL COURT’S FAILURE TO ENTER A JUDGEMENT OF ACQUITTAL NOTWITHSTANDING THE VERDICT ON THE CHARGE OF LEAVING THE SCENE OF AN ACCIDENT WAS SO CLEARLY PREJUDICIAL TO ZHURBIN’S SUBSTANTIAL RIGHTS THAT IT JEOPARDIZED THE FAIRNESS AND INTEGRITY OF HIS TRIAL.

Question Presented

Whether a defendant is guilty under 21 *Del.C.* § 4201 (a) of Leaving the Scene of an Accident² when the collision which he allegedly “left” occurred on a private road and not a public highway as defined in 21 *Del.C.* §4101 (a). *Supreme Court Rule 8.*

Standard and Scope of Review

Generally this Court “review[s] a sufficiency of evidence claim *de novo* to determine whether any rational trier of fact, viewing the evidence in the light most favorable to the State, could find a defendant guilty beyond a reasonable doubt.” *Wright v. State*, 25 A.3d 747, 751 (Del. 2011). However, when the sufficiency of the evidence claim is not raised below, this Court reviews it for plain error. *Id.*; *Supreme Court Rule 8.*

² The indictment reveals that the State apparently failed to note the Legislature amended the statute by deleting the word “accident” and adding the word “collision.”

Argument

The State acted as the *de facto* attorney for the Delaware Park Casino, (“the casino”), in a tort action when it prosecuted Zhurbin for Leaving the Scene of an Accident. That alleged accident occurred solely on the casino’s private road and resulted in damage to the casino’s property. As a result of Zhurbin’s conviction, the State was able to obtain a court order for him to pay restitution to the casino.

While the driver of the car may be liable to the casino for damages, he cannot be found guilty of the offense of Leaving the Scene of an Accident. In order for him to be guilty of that offense, the State must prove beyond reasonable doubt that the collision occurred on a public highway. The State failed to do so. Its witnesses told the jury that the collision occurred on the casino’s property. Because the collision at issue did not occur on a public highway, Zhurbin’s conviction of Leaving the Scene of an Accident must be vacated.

Title 21, section 4201(a) provides that “[t]he driver of any vehicle involved in a collision resulting in apparent damage to property shall immediately stop such vehicle at the scene of the collision.” A5-6. Unless otherwise stated, this provision, as well as others in Chapter 41, applies only

to “public highways.”³ Nothing in the motor vehicle code provides an exception that allows for application of section 4201 (a) to collisions occurring on private property.⁴ In fact, the judge in our case instructed the jury that to find Zhurbin guilty of the offense, the State was required to prove beyond reasonable doubt that he “drove a motor vehicle on a public roadway” when he left the scene. A40.

For purposes of motor vehicle offenses, a “highway” is:

³ *McDonald v. State*, 947 A.2d 1073, 1079 (Del. 2008) (noting that failure to use turn signal on private property was not an offense). *See Carter v. Haley*, 1998 WL 960726 (Del.Super.) (att. as Ex.B) (finding that section 4182, unattended motor vehicle does not apply to vehicles in a private driveway); *State v. Watson*, 2012 WL 1415803 (Del. Super.) (att. as Ex.C) (noting that failure to have headlights was not a traffic offense as it occurred on private property).

⁴ Title 21, section 4101(a) provides:

The provisions of this title relating to the operation of vehicles refer exclusively to the operation of vehicles upon highways except: 1) Where a different place is specifically referred to in a given section. 2) That subchapter IX of this chapter shall apply upon highways and elsewhere throughout the State. 3) That subchapter VIII of this chapter and §4164 of this title shall apply upon highways and elsewhere throughout the State[.]

Thus, where the Legislature intends for a motor vehicle offense to apply regardless of whether the underlying conduct occurred on a private road or a public roadway, it makes it clear. *See State v. Brown*, 2010 WL 2878246 (Del. Super.) (att. as Ex.D) (distinguishing failure to stop from failure to use turn signal as the language in the provision for failure to stop specifically states that it applies “upon highways *and elsewhere throughout the State.*”)

[t]he entire width between boundary lines of every way or place of whatever nature open to the use of the public as a matter of right for purposes of vehicular travel, but does not include a road or driveway upon grounds owned by private persons, colleges, universities or other institutions.

21 *Del.C.* §101 (22). On the other hand, a private road or driveway “includes every road or driveway not open to the use of the public for purposes of vehicular travel.” 21 *Del.C.* §101 (49).

It is clear that when the State charged Zhurbin, it knew that the offense occurred on private property. In the indictment, the State charged that the collision “resulted in damage to the property of another on Delaware Park Blvd[.]” A5-6. Then, at trial, the State not only failed to establish that the collision occurred on a public highway, it established that the scene of the collision was on a private road owned by the casino.

The security guard at the casino testified that he had followed Zhurbin in a patrol vehicle until he exited the property on to Route 7. This indicates that the casino’s property includes Delaware Park Boulevard and extends to Route 7. A10. Marks testified that he was still on the casino property where the accident occurred near him. A15. Trooper Crisman received a call from dispatch about a “red vehicle that was involved in a collision on Delaware Park property.” He also testified that the “actual scene of the accident happened at Delaware Park[.]” A26-27. Later, when the trooper went to

the scene, he had to drive “over to the self-park parking lot” on the casino’s property. A26.

After Zhurbin was convicted, the judge ordered him to pay restitution in the amount of \$384.04 to the casino “for the damage that they sustained, [...], due to the defendant’s driving.” A50. The only damage that purportedly occurred, beyond that to Zhurbin’s car, was to a “caution” sign and some barricades that lined the end of the lot up to the entrances of the casino’s property. A26. Therefore, the traffic devices for the road were property that belonged to the casino. This reveals that Delaware Park Boulevard belongs to the casino and is, therefore, a private road for purposes of the motor vehicle code. A26, 27.⁵

Because the scene of the collision Zhurbin allegedly left was not on a public highway, his conviction of Leaving the Scene of an Accident must be vacated.⁶

⁵ See *Markland v. Baltimore & O. R. Co.*, 351 A.2d 89, 92-93 (Del. Super. 1976) (finding that, as defined in Title 21, a highway was not a proper description of the utility road belonging to a railroad).

⁶ Zhurbin was also convicted of Removal of a Vehicle from the Scene of a Collision under 21 *Del.C.* § 4206. Because he received only a \$75 fine for this conviction, this Court does not have jurisdiction to reverse that conviction. However, like Failure to Leave a Scene of a Collision, Zhurbin was improperly convicted of this offense because it did not occur on a public highway. More significantly, however, is that section 4206 exempts the driver or owner of the vehicle from liability. Because the State established

CONCLUSION

For the foregoing reasons and upon the authority cited herein, the undersigned respectfully submits that Zhurbin's convictions should be reversed.

\s\ Nicole M. Walker
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DATE: May 7, 2014

that Zhurbin was the owner of the car, it failed to establish his guilt of yet another offense in the indictment.