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DISTRICT II

May 2, 2018

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You are hereby notified that the Court has entered the following opinion and order:

2016AP2366-CR State of Wisconsin v. Aaron M. Gillett (L.C. #2015CF152)

Before Neubauer, C.J., Reilly, P.J., and Hagedorn, J.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Aaron M. Gillett pled not guilty by reason of mental disease or defect (NGI) to charges stemming from a motor vehicle accident in which he drove his vehicle across the center line and collided with an oncoming vehicle, mortally injuring the other driver. Effectively gutting his

affirmative defense, *see* WIS. STAT. § 940.09(2)(a) (2015-16),[1] the circuit court granted the State's motion to exclude in the guilt phase of the bifurcated trial all evidence of Gillett's documented post-traumatic stress disorder (PTSD), which Gillett claimed triggered an anxiety attack. Over the State's objection, this court granted Gillett's petition for leave to appeal the non-final order. Upon reviewing the briefs and the record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. Pursuant to our decision in ***State v. Raczka***, 2018 WI App 3, 379 Wis. 2d 720, 906 N.W.2d 722, released after the circuit court's ruling here, we reverse and remand for further proceedings.

The crash occurred about noon on a two-lane rural road, injuring the other driver and his passenger. The driver died four days later. An investigation showed Gillett had been speeding and had not applied his brakes in the eight seconds before the accident. Gillett is a veteran of multiple tours of duty in Iraq and Afghanistan. Veterans Administration doctors have diagnosed him with PTSD, panic attacks, and generalized anxiety disorder for which he has received inpatient and outpatient treatment. He claimed a municipal siren triggered a flashback that precipitated a panic attack and loss of consciousness.

A blood test revealed the presence of Delta-9-THC and difluoroethane (DFE). DFE, a chemical in common aerosolized household dusting agents, is known to be abused as an inhalant. Delta-9-THC is a restricted controlled substance (RCS); both it and DFE are intoxicants. *See* WIS. STAT. § 939.22(33), (42). Police found a can of "Ultra Duster" in Gillett's car.

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

A seven-count complaint charged Gillett with, among other crimes, homicide by intoxicated use of a vehicle, homicide by use of a vehicle with a detectable amount of an RCS, and first-degree reckless homicide, contrary to WIS. STAT. §§ 940.09(1)(a), (am), and 940.02(1). He sought to present evidence as an affirmative defense under § 940.09(2)(a) that a PTSD attack, not the RCS, caused the accident. The State moved to exclude from Gillett's trial all evidence of PTSD or an anxiety attack. The State argued that such evidence was speculative and irrelevant and, under ***State v. Caibaiosai***, 122 Wis. 2d 587, 595, 363 N.W.2d 574 (1985), driving despite knowing he was prone to anxiety attacks was negligence per se. The circuit court agreed but concluded the evidence could be introduced in the responsibility phase of the trial. We granted interlocutory review.

To prove guilt under WIS. STAT. § 940.09(1)(a), the State must prove that the defendant operated a vehicle, which caused the death of another, and the defendant was under the influence of an intoxicant. WIS JI—CRIMINAL 1185.[2] But to prove guilt under WIS. STAT. § 940.09(1)(am), after establishing that the defendant's operation of a vehicle caused the death of another, the State must prove only that he or she had a detectible amount of an RCS in his or her blood. WIS JI—CRIMINAL 1187. Thus, where a blood test reveals "a detectable amount" of an RCS such as Delta-9-THC, homicide by intoxicated use of a vehicle essentially is a strict-liability offense. *See* ***Raczka***, 379 Wis. 2d 720, ¶8. The statute affords an affirmative defense, however, if the defendant proves by a preponderance of the evidence that the accident would

[2] As relevant to Gillett, "under the influence of an intoxicant" means that his ability to operate his vehicle was materially impaired because of his consumption of a hazardous inhalant or controlled substance or any combination thereof. WIS. STAT. § 939.22(15), (42).

have occurred even if he or she had been exercising due care and had not had a detectable amount of an RCS in his or her blood. Sec. 940.09(2)(a); *see* ***Raczka***, 379 Wis. 2d 720, ¶11.

Raczka strongly parallels Gillett's case. Raczka had a history of seizures but did not regularly take his prescribed medication. ***Raczka***, 379 Wis. 2d 720, ¶5. While driving between work assignments one morning, he crashed into a tree, killing his co-worker passenger; Raczka tested positive for two RCSs. ***Id.***, ¶¶1-2. He sought to present evidence that the accident was caused by a seizure, not the RCSs in his system. ***Id.***, ¶1. The circuit court concluded that such evidence was inadmissible because Raczka's decision to go untreated and still drive was negligent as a matter of law and a total bar to a defense. ***Id.***, ¶6.

This court reversed. We said that, if otherwise admissible, WIS. STAT. § 940.09(2)(a) allows Raczka to present evidence that the accident would have occurred even if he had been exercising due care and not driving with RCS in his blood, as it is relevant to his defense, and the jury is entitled to hear it. ***Raczka***, 379 Wis. 2d 720, ¶¶13-16. We held it was for the jury to determine whether, with a known seizure history, choosing to drive unmedicated was negligent and whether the alleged seizure was an intervening cause of the passenger's death. ***Id.***, ¶19.

Gillett will have a bifurcated trial on his NGI plea. The circuit court found some significance in a series of Wisconsin NGI cases limiting expert opinion testimony bearing on the capacity to form intent to the responsibility phase. *See generally* ***Steele v. State***, 97 Wis. 2d 72, 294 N.W.2d 2 (1980), ***State v. Repp***, 122 Wis. 2d 246, 362 N.W.2d 415 (1985), and ***State v. Flattum***, 122 Wis. 2d 282, 361 N.W.2d 705 (1985). We are not persuaded this body of law applies, as the parties failed to address the applicability to this case. Those cases arose in the

context of first- or second-degree homicides under WIS. STAT. §§ 940.01 and 940.02 and do not implicate a WIS. STAT. § 940.09(2)(a) affirmative defense based on causation.

In sum, we see scant legal difference between Raczka's situation and Gillett's. Just as we rejected as an error of law the circuit court's conclusion that Raczka's choice to drive with an untreated seizure condition was negligent as a matter of law, *see* ***Raczka***, 379 Wis. 2d 720, ¶6, we reject the court's ruling here that, as a matter of law, Gillett did not exercise due care because he drove despite a known history of PTSD and a predilection to anxiety attacks.

Finally, similar to Raczka, Gillett also was charged with reckless homicide. To prove first-degree reckless homicide, the State must show that he caused the victim's death by criminally reckless conduct the circumstances of which showed utter disregard for human life. WIS JI–CRIMINAL 1020. Showing that the crash resulted from a PTSD episode would tend to negate the elements of criminally reckless conduct and utter disregard for human life.

A defendant's own negligence is not an affirmative defense. ***Caibaiosai***, 122 Wis. 2d at 600. Gillett is entitled to the opportunity to show that—and to have the jury to decide whether—his PTSD was an intervening cause between the operation of his vehicle with a detectable amount of an RCS in his blood and the death and injury to the victims.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily reversed and cause remanded for further proceedings, pursuant to WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals