

STATE OF INDIANA)
) SS:
COUNTY OF BOONE)

IN THE BOONE SUPERIOR COURT II
CAUSE NO. 06D02-2001-F5-000057

STATE OF INDIANA)
)
) Plaintiff,)
)
) VS)
)
) MATTHEW LEWIS SMALL,)
)
) Defendant.)

FILED

OCT - 2 2020

Jessica J. Fouts
CLERK BOONE SUPERIOR COURT II

ORDER ON DEFENDANT'S MOTION TO DISMISS

On July 1, 2020, hearing was held on Defendant's Motion to Dismiss. The State of Indiana appeared by Deputy Prosecutor Brandon Knight. The Defendant, Matthew Lewis Small, appeared in person and by counsel, Todd Meyer. Evidence was presented and arguments heard. The Court having earlier taken this matter under advisement, now FINDS AND ORDERS as follows:

1. The Defendant seeks dismissal of this criminal prosecution on two (2) grounds. The first contends that the Charging Information as filed is defective because it does not state the offense with sufficient certainty to allow the Defendant to mount a defense and afford protection against double jeopardy, so it should be dismissed pursuant to I.C. 35-34-1-4(a)(4). The second ground for dismissal claims that the recited facts in the Charging Information and Probable Cause Affidavit do not constitute a criminal offense, as defined in the state of Indiana so this action should be dismissed pursuant to I.C. 35-34-1-4(a)(5).

2. The State responds that the Charging Information need only allege the statutory language of the offense, time, place, and name of victim to be sufficient and detailed factual allegations are not required. Laney v. State, 868 N.E.2d 561, 567

(Ind. Ct. App. 2007). The State further argues that the issue as to whether the Defendant's purported actions amount to recklessness as contemplated by I.C. 35-42-1-5 is a question of fact to be determined at trial. Schutz v. State, 413 N.E.2d 913, 916 (Ind. 1981). The State contends that it is improper to raise these questions of fact in a Motion to Dismiss. State v. Morgan, 60 N.E.3d 1121, 1125-1126 (Ind. Ct. App. 2016).

3. The only evidence presented at hearing was the Probable Cause Affidavit filed by the State of Indiana concurrent with the filing of the Charging Information, which was admitted into evidence as Defendant's "Exhibit 2" without objection. There was also a thumb drive containing video of the accident that is the subject of this prosecution which was admitted into evidence as Defendant's "Exhibit 1" without objection. The Court had an opportunity to view Defendant's "Exhibit "1" after conclusion of the hearing.

4. The Defendant is charged with three (3) Counts of Reckless Homicide (I.C. 35-42-1-5) resulting from an accident occurring on Interstate 65, Boone County, Indiana, when his semi-tractor and trailer traveling northbound on Interstate 65 struck a number of passenger vehicles waiting on the interstate to get off at the Zionsville exit. The facts surrounding these collisions will be discussed in greater detail hereafter. These collisions resulted in the tragic death of three (3) persons.

5. The State argues it has generally been held that charging a defendant in the general language of the statute if including time, place and identification of victims is acceptable. However, when the statute defines a crime in general terms, then the Information must specify facts and circumstances which inform the accused of the particular offense filed under the general description with which he is charged. Gebhard v. State, 459 N.E.2d 58 (Ind. Ct. App. 1984); State v. Laker, 937 N.E.2d 1259 (Ind. Ct.

App. 2010); Moran v. State, 477 N.E.2d 100 (Ind. Ct. App. 1985). Further, when guilt depends on specific identification of facts, the statutory language alone is not sufficient to charge the Defendant. Hamling v. United States, 418 U.S. 87, 118 (1974) citing Russell v. United States, 369 U.S. 749 (1962).

6. In Gebhard, the Court found that the crime of Disorderly Conduct (tumultuous conduct) was a crime that is defined by statute in general terms. As such, because "tumultuous conduct" encompasses a large realm of activity which would be potentially prohibited, the Charging Information must contain additional facts and circumstances in order to fully apprise the defendant of the nature of the offense with which he is charged *Id.* at 60-61.

7. In the present case, the Defendant is charged with three (3) Counts of Reckless Homicide, a Level 5 Felony. In the Charging Information, all three (3) Counts recite the statutory language of I.C. 35-42-1-5, that the Defendant did recklessly kill another human being, while also alleging the date, location and name of the victim for each Count. No other specific facts or details are contained in the Charging Information.

8. Recklessly, as it applies to the crime of Reckless Homicide is defined as follows: A person engages in conduct "recklessly" if he engages in the conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a substantial deviation from acceptable standards of conduct. I.C. 35-41-2-2. The element of recklessly has been found to require a conscious choice of a course of action which injures another, either with knowledge of the serious danger to others involved or with knowledge of facts which would disclose the danger to a reasonable man. Beeman v. State, 115 N.E.2d 919, 922-923 (Ind. 1953); McClain v. State, 393 N.E.2d 261 (Ind. Ct. App. 1979). Proof that an accident arose out of the inadvertence, lack of attention, forgetfulness or thoughtlessness of the driver

of a vehicle or from an error in judgment on his part will not support a charge of Reckless Homicide. Beeman, Id. at 922; Whitaker v. State, 778 N.E.2d 423 (Ind. Ct. App. 2002).

9. Based upon the statutory definition of recklessly and the above-referenced case law interpretations, this Court finds that the charge of Reckless Homicide brought pursuant to I.C. 35-42-1-5 is precisely the type of statute which describes a crime in general terms as contemplated by Gebhard. As such, the charges require the State to specify facts and circumstances which inform the Defendant of the particular offense coming under the general description with which he is charged *Id.*

10. As discussed earlier, the Charging Information filed by the State did not contain specific facts upon which the allegation of "recklessly" was based. However, it is appropriate to look to the Probable Cause Affidavit to supplement facts not contained in the Charging Information. Patterson v. State, 495 N.E.2d 714 (Ind. 1986); Woods v. State, 980 N.E.2d 439 (Ind. Ct. App. 2012). In Patterson, the Court found that the defendant was aware of what she was charged with from the information contained in the Probable Cause Affidavit and her substantial rights were not prejudiced by the lack of information in the charging complaint *Id.* at 719.

11. The Court must now turn to the Affidavit for Probable Cause filed on January 7, 2020. In that Affidavit, there was a general description of the collision and injuries resulting therefrom. The State also set out the facts upon which they rely to support the charges of Reckless Homicide. It should be noted that the majority of these facts and details came from the Defendant in his voluntary statements to investigating officers. The pertinent facts concerning Defendant's conduct are as follows:

a) The Defendant, Matthew Lewis Small, was operating his semi-tractor trailer northbound on I-65 on January 5, 2020, at

approximately 11:00 a.m.

b) Before the accident, the Defendant had clear lanes around him.

c) The Defendant took a drink of coffee while talking to his wife hands-free with a headset connected to his cell phone.

d) When the Defendant started to set the cup of coffee down, all of the sudden he noticed a line of stopped traffic ahead of him. This line of traffic was in lane three (3), the right-most travel lane of I-65, not in the exit lanes which were to the right of lane three (3).

e) Due to the weight the Defendant was hauling, he was not able to stop his rig and collided with the automobiles stopped in travel lane three (3) of northbound I-65. At that time, the Defendant stated that he blacked out until he was roused by people beating on the door of his truck asking for a fire extinguisher and telling him to exit the semi.

f) During a second interview, the Defendant advised that he began his trip on Friday, January 3rd from West Virginia to Minnesota (the accident occurred on a Sunday, January 5, 2020). His trailer was carrying a load weighing approximately thirty thousand (30,000) pounds with an entire scale weight for the truck and load of approximately seventy-five thousand (75,000) pounds.

g) The Defendant had stopped in Richmond, Indiana, around 6:00 p.m. on Saturday evening where he spent the night. He resumed his trip the morning of the accident at approximately 10:00 a.m. traveling westbound on I-70 to northbound I-65. When he entered northbound I-65 from 865, he observed that I-65 was a four (4) lane highway and moved to the right travel lane. Everything ahead of him looked clear when he entered I-65. He was not driving on cruise control at

that time.

h) The Defendant reiterated in his second interview that he was talking to his wife on a headset and as he put his coffee cup down after taking a drink, he saw traffic stopped ahead of him, which caused him to drop the cup and grab his steering wheel.

i) The Defendant did not remember striking the vehicles but knew that he needed to get over to the emergency berm. The next thing he recalled was the people beating on his door. The Defendant did not think he blacked out or suffered a seizure before the collision, but felt that everything just happened too quickly.

j) The occupant of vehicle four (4) as identified in the Probable Cause Affidavit advised that he was sitting in traffic in lane three (3) (travel lane) awaiting to exit the interstate. The traffic was extremely heavy that morning and vehicles were stopped behind his in travel lane three (3).

k) The occupant of vehicle nine (9) as identified in the Probable Cause Affidavit stated that he had merged from 865 onto I-65 northbound and was going to exit at the Zionsville exit. To do so, he moved from lane four (4) to lane three (3) of I-65. Traffic was slowing to a stop as he approached the exit. Once he stopped, he observed the Defendant's semi coming from behind and it appeared that it was not stopping or slowing down. The occupant of vehicle nine (9) pumped his brakes for three (3) to four (4) seconds in an attempt to alert the driver of the semi. When it was clear the semi was not going to stop, the occupant of vehicle nine (9) attempted to move his vehicle to travel lane four (4) to avoid getting hit but was clipped in the rear by the semi.

l) The video of the accident (Defendant's Exhibit "1")

showed traffic slowing and stopping in lane three (3) of I-65 periodically. The traffic in lane four (4) was flowing normally and unimpaired by the vehicles attempting to exit I-65. Vehicle nine (9) had been stopped in lane three (3) for approximately fifteen (15) seconds before being struck by the Defendant.

12. The Affidavit of Probable Cause did not contain any additional information alleging that the Defendant was impaired, that toxicology results from samples taken from the Defendant were positive for the presence of any substances, or that the Defendant was overly tired or otherwise debilitated to the extent that he should not have been driving. No evidence of adverse weather conditions was contained in the Probable Cause Affidavit or at hearing. The State relies solely on the Probable Cause Affidavit and video as a basis for filing the charges.

13. A determination as to whether an accused's actions rise to the level of reckless as contemplated by our criminal statutes is generally a question of fact that must be decided by the trier of fact at a trial. State v. Beckman, 37 N.E.2d 531 (Ind. 1941); Schutz v. State, 413 N.E.2d 913 (Ind. 1981); State v. Morgan, 60 N.E.3d 1121 (Ind. Ct. App. 2016). If the State has evidence that the trier of fact can reasonably conclude, beyond a reasonable doubt, that the Defendant is guilty, the prosecution should be allowed to proceed. State v. Gillespie, 428 N.E.2d 1338 (Ind. Ct. App. 1981). The facts set out in the State's Probable Cause Affidavit must be taken as true when determining whether the Charging Information constitutes an offense. Gutenstein v. State, 59 N.E.3d 984 (Ind. Ct. App. 2016).

14. In reviewing the facts alleged in the Charging Information and Probable Cause Affidavit, the Court must be able to find that under any interpretation of those facts, the Defendant's actions could have amounted to reckless disregard for

the safety of others and that he had knowledge of facts which would disclose the danger to any reasonable man. Beeman v. State *Id.* The accused must have engaged in conduct in plain, conscious, and unjustifiable disregard of harm that might result and the disregard involves a **substantial deviation from acceptable standards of conduct**. I.C. 35-41-2-1 (*emphasis added*). The accident cannot be a result of inadvertence, lack of attention, forgetfulness, thoughtlessness, or from error in judgment to sustain a conviction for Reckless Homicide. Whitaker v. State, 778 N.E.2d 423 (Ind. Ct. App. 2002); Beeman v. State, 115 N.E.2d 919 (Ind. 1953).

15. In Whitaker, the facts were very similar to those presented in this case. In Whitaker the Court found in reversing defendant's conviction that there was not sufficient evidence to support a conviction for Reckless Homicide arising out of a traffic accident where Whitaker's tanker truck rear-ended a driver stopped for a left turn, killing the driver of the stopped car *Id.* at 424-425. Whitaker had been following the car at a distance of two (2) to four (4) car lengths, he had been driving slightly over the speed limit, no weather or road conditions contributed to the collision and he was sober and well rested *Id.* The Court found under these facts that there was insufficient evidence that Whitaker had deviated from acceptable driving standards *Id.* at 427-428. Negligence or gross error in judgment is not sufficient to sustain a conviction for Reckless Homicide *Id.* at 428.

16. In the present case before this Court, the record is completely void of facts taken as true that would, under any implicit or explicit interpretation, allow a trier of fact to find the Defendant's actions on January 5, 2020, a substantial deviation from acceptable standards of conduct. As in Whitaker, Mr. Small was well rested and sober. There was no evidence alleged that Mr. Small was operating his truck over the speed limit or

driving erratically in any manner. Mr. Small was talking to his wife, but on a hands-free device and consuming coffee. Neither of those actions are a slight, let alone substantial, deviation from acceptable standards of conduct. Unlike in Whitaker, road conditions may have created a factor which substantially contributed to this accident. However, these conditions were not of the nature that would give Mr. Small early warning of their existence such as hard rain, snow, ice, or extreme darkness so that he could have an opportunity to modify his driving appropriately. Mr. Small came upon a situation, cars stopped in only one (1) travel lane of a major interstate, which rarely occurs and was not likely to be anticipated. Persons familiar with the exit involved in this accident may know of potential dangers created by cars attempting to exit I-65 to Zionsville, but there was no allegation that Mr. Small was familiar with this stretch of highway. While it is true that recklessness should be an issue determined at trial, when there are no set of facts alleged to support that finding, then a dismissal is appropriate. Grimes v. State, 84 N.E.3d 635 (Ind. Ct. App. 2017); State v. Laker, 937 N.E.2d 1259 (Ind. Ct. App. 2010). If facts do exist to support a possible finding of recklessness, the State has not provided the Defendant with those facts in the Charging Information or Probable Cause Affidavit. This places the Defendant in a prejudicial situation as the charges have not been plead with sufficient certainty to allow the Defendant to mount a defense and/or prohibit the danger that he may be subjected to double jeopardy. "Recklessly" encompasses a large realm of activity potentially prohibited and the act which is the basis for reckless behavior must be described. Gebhard v. State, *Id.* As in Whitaker, the Court finds that the allegations set out in the Charging Information and Probable Cause Affidavit filed by the State, as a matter of law, amount to negligent acts and not criminal culpability.

17. The Court would be remiss if it did not acknowledge the horrible tragedy which occurred the morning of January 5, 2020, in Boone County. This Court's heart goes out to the victims and their families for the devastating losses. However, the fact that a horrendous result comes from an individual's actions does not alone support the prosecution of criminal charges. The Rule of Law requires that we examine the act itself under a set of circumstances to determine criminality. As tragic as this accident was, it was just that, an accident caused by the Defendant's negligence but not criminal conduct.

18. The Court hereby grants Defendant's Motion to Dismiss and Orders this cause dismissed without prejudice. Should the State through future investigations uncover additional facts and evidence to support the accusations of Reckless Homicide, they are free and able to refile this prosecution.

So ORDERED this 2 day of October, 2020.



JUDGE, BOONE SUPERIOR COURT II

Distribution:

State of Indiana
Defendant's Counsel Todd Meyer