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COURT OF APPEALS
STATE OF NEW YORK

DAVE LEWIS,

Appellant,

-against-

NO. 53

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
August 31, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 53, the
2 People of the State of New York v. Dave Lewis.

3 Let's wait a moment, Counsel, until your
4 colleagues get organized.

5 Okay. Good afternoon, Counsel.

6 MR. MARMUR: Good afternoon, and may it please
7 the court, my name is Nathaniel Marmur, and I represent
8 Dave Lewis.

9 I begin, of course, by what we need to do is
10 recognize what happened here was a terrible tragedy, and
11 that our sympathies go out to the victim's family.

12 Of course, it is still incumbent on this court to
13 interpret the law and interpret the meaning of due care,
14 and the only proper interpretation of that is criminal
15 negligence. That is the only interpretation consistent
16 with the common law, consistent with the intent of the
17 drafters as reflected in the Bartlett Commission, that is
18 consistent with the official commentary Denzer & McQuillan,
19 and, most importantly, consistent with the plain language
20 of the statute. Section 15.15(2) says in no uncertain
21 terms, a statute defining a crime - - - 19-190 is a crime -
22 - - unless clearly indicating a legislative intent to
23 impose strict liability - - - not the case - - - should be
24 construed as defining a crime of mental culpability. And
25 this applies within and without the chapter.



1 JUDGE GARCIA: But I guess it depends on what
2 mental culpability means, right? You're reading that to
3 say that means the penal law mental culpability, but why
4 doesn't it just mean a state of mental culpability and
5 putting, you know, negligence can be a state of mental
6 culpability, so it - - - it doesn't apply.

7 MR. MARMUR: Look, first of all, 15.00(6) says,
8 culpable mental state means, that's what it's interpreted,
9 it means, doesn't - - -

10 JUDGE GARCIA: But that means that in the
11 chapter, right?

12 MR. MARMUR: No. It means - - - it says that
13 from the chapter, and it's incorporated into 15.15(2),
14 15.15 sub 2. How do we read that? Mental culpability,
15 right? We've just - - -

16 JUDGE GARCIA: But I - - -

17 MR. MARMUR: - - - defined the term, and we now
18 incorporate it into other crimes throughout the
19 Consolidated Laws and the Administrative Code.

20 JUDGE GARCIA: So under your view of this
21 statute, could the state do this?

22 MR. MARMUR: No. Right. It says, in this - - -
23 this applies outside the chapter. And let's assume for the
24 minute, Your Honor's other question, which is: why does
25 mental culpability not mean due care? It is well



1 understood that mental culpability, and this is absolutely
2 clear from the history, from the context of this particular
3 law, and of course, the penal law in general, that mens rea
4 is the - - - looks at the mind of the actor, not the
5 objective actions of a reasonable man. If that were the
6 case, it wouldn't need to put it in here to begin with, but
7 it's telling the other drafters of the other chapters or
8 other municipalities throughout the state, is look, if
9 you're going to make it a crime - - - if you're going to
10 make it to punish people for up to sixty days or a year, or
11 thirty days under a B misdemeanor, you have to take special
12 care. You cannot impose it based on ordinary civil
13 negligence.

14 JUDGE WILSON: I just want to follow up on Judge
15 Garcia's question for a second. So - - - over here.

16 MR. MARMUR: Yes.

17 JUDGE WILSON: So Hayley and Diego's Law, enacted
18 long after the penal code section, article 15, seems to me
19 to impose misdemeanor liability on a negligence standard.
20 If I understood your answer to Judge Garcia correctly,
21 you're saying that through operation, it's not really
22 preemption, I guess, it's - - -

23 MR. MARMUR: No.

24 JUDGE WILSON: - - - you've got two statutes that
25 conflict, and you're reading the penal law even though it



1 was enacted earlier to bar the legislature from enacting
2 Hayley and Diego's Law.

3 MR. MARMUR: Yeah, so let me break that down.
4 It's not preemption, my argument.

5 JUDGE WILSON: Right.

6 MR. MARMUR: I don't believe it is necessarily a
7 conflict. What I understand and what the law makes clear,
8 is that statutes must be interpreted, must be construed to
9 mean that, and they're very careful. This one, unlike
10 others - - -

11 JUDGE WILSON: So let me stop you for a second.
12 So back to Judge Garcia's question, I think, could the
13 legislature enact a statute that said, notwithstanding the
14 penal law, we are criminalizing the ordinary negligence
15 standard hitting a pedestrian in a crosswalk when that
16 person has the right of way? Could they do that?

17 MR. MARMUR: Could a city do that?

18 JUDGE WILSON: No, no. State.

19 MR. MARMUR: Could the state do that?

20 JUDGE WILSON: That was his question.

21 MR. MARMUR: Well, I mean, I think you would have
22 a conflict between what sets forth in this chapter, which
23 is to say, no, and I think underlying - - -

24 JUDGE WILSON: And if the new statute said
25 notwithstanding the penal law, we are criminalizing



1 ordinary negligence in this circumstance, can the state do
2 that or no?

3 MR. MARMUR: I - - - I - - - take it one could
4 consider that to be an amendment to the current statutory
5 scheme, in which case one I suppose could do it that way,
6 but you know, one of the things that Denzer & McQuillan
7 talk about and what the drafters were saying is, look, we
8 have all these hazy adverbial terms that permeate this
9 state's law and other laws. And what we're trying to do
10 here is to simplify this. We're using the four basic terms
11 of mental culpability, right? We know those; criminal
12 negligence, recklessness, knowledge, and intent. So you
13 know, I don't know that simply adding the introduction
14 notwithstanding would necessarily conflict. I mean, I
15 don't think that's at issue here, especially since it's a
16 municipal ordinance, but I suppose there could be an issue
17 there about whether it's an amendment or it conflicts, or
18 which takes precedence.

19 JUDGE RIVERA: Let me go back to the way you're
20 analyzing 15.15(2) - - -

21 MR. MARMUR: Yes.

22 JUDGE RIVERA: - - - which is, in my view, not
23 taking into account 15.15(1), where (1) says, when the
24 commission of an offense defined in this chapter, or some
25 element of an offense, requires a particular culpable



1 mental state, such mental state is ordinarily, right, and
2 then it sets up the four that you're referring to, but you
3 don't have that kind of language in - - - in (2), right - -
4 -

5 MR. MARMUR: Right.

6 JUDGE RIVERA: - - - which is getting back to
7 Judge Garcia's point of culpable mental state just means
8 you need a culpable mental state without limiting it to the
9 four, and even (1) is saying ordinarily; it's not saying,
10 it is always.

11 MR. MARMUR: Correct. 15.15(1) says we
12 ordinarily do it.

13 JUDGE RIVERA: Right.

14 MR. MARMUR: And if we do it, it's got to apply
15 to each of those elements, right? That's the last - - -

16 JUDGE RIVERA: Yes, but that's my point. Then
17 (2) says, although no culpable state is expressly
18 designated.

19 MR. MARMUR: Right, so 15.15 - - -

20 JUDGE RIVERA: Right, (1) is saying well
21 ordinarily it's these, but (2) is saying if - - - if you
22 don't have one that expressly stated, then the following
23 follows.

24 MR. MARMUR: Right. Absolutely. 15.15(1) says
25 we ordinarily do it. 15.15(2) says if we don't do it, and



1 if we don't do it for a crime, in particular - - -

2 JUDGE RIVERA: No, because then wouldn't (2)
3 read, although none of these culpable mental states, or,
4 none of the culpable mental states referring back to (1) or
5 some other section. It would clarify that. I mean, what
6 would be the point of in (1) again listing the four if, as
7 you say, it is obvious that these are exclusive?

8 MR. MARMUR: Well, I don't - - - look, I can put
9 it aside. I'd like to address exclusivity in a moment, if
10 I may.

11 JUDGE RIVERA: All right.

12 MR. MARMUR: But what it's saying is look, when
13 we draft the statutes or we usually put this in, but there
14 are a couple of statutes that don't have that. What we do
15 is - - - and also what it introduces is this concept of if
16 a statute has one of the states, there also is sort of a
17 subspecies of mental culpability. For example, intent to
18 defraud, or in burglary it's the knowing entry into a
19 dwelling with the intent to commit a crime therein, and
20 Feingold, to some extent, is the same. What it's saying is
21 recklessness is the overall arching - - - overarching
22 mental state, but even within that, there is a depravity.
23 Now we learned that it's a mental state of depravity.

24 But I want to address, I think the first question
25 posed to my predecessor was Feingold. And the extent this



1 isn't clear in the brief, but whatever, I want to talk
2 about Feingold in the following sense. It doesn't matter
3 whether Feingold expanded the number of culpable mental
4 states. It certainly wasn't briefed or argued or Article
5 15 wasn't decided, but let's put that aside. Let's say
6 that Feingold said there can be five, there can be ten,
7 there can be a hundred mental states, you're still required
8 under 15.15(2) to construe a statute that defines a crime,
9 which this is, to include a culpable mental state, and this
10 goes back to Judge Garcia's question, a mental state
11 requires mens rea. That is the point of the - - - of the
12 statute. That is the point of the drafters. And that is
13 the point of - - - which, you know - - - which the common
14 law of the state has always recognized.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MR. MARMUR: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel?

18 MS. REGAN: May it please the court, Amanda Regan
19 on behalf of the People. We ask this court to affirm
20 defendant's conviction. New York City Administrative Code
21 19-190 and Vehicle and Traffic Law 1146 both contain a mens
22 rea of failure to exercise due care. Due care is commonly
23 understood to be defined using a simple ordinary negligence
24 definition, and due care this court defined in *People v.*
25 *Grogan* that due care is the amount of care that a



1 reasonable person in a similar situation would exercise.

2 Turning to the statutory interpretation issue,
3 the plain language of the penal law makes it clear that the
4 enumerated culpable mental states are only applicable to
5 the penal law and do not apply outside. Both 15.00 and
6 15.05 both explicitly state that they only apply to the
7 penal law. Additionally - - -

8 JUDGE GARCIA: What about his - - - what about
9 your adversary's point about 15.05 - - - 15.15(2)?

10 MS. REGAN: Yes. So a crime of mental
11 culpability is a much broader term than culpable mental
12 states, because a crime of a culpable mental state must
13 apply to every element of the crime, and if the culpable
14 mental state does not apply to every element of the crime,
15 then it is one of strict liability, and for - - - maybe not
16 for constitutional purposes, but certainly for statutory
17 application purposes.

18 Strict liability, in other words, is the catch
19 all. And a clear example of this would be second degree
20 assault of a police officer. The defendant has to intend
21 to impede a police officer conducting their lawful duty but
22 with regards to causing injury to that officer, it's strict
23 liability. They could accidentally cause the injury. It
24 could be intentional. We don't really care.

25 Moreover, 15.15(1) makes it very clear that the



1 culpable mental states listed, again, only are applicable
2 to the penal law. And 15.15(2) just simply means that
3 strict liability crimes can exist both inside and outside
4 the penal law. And we know this to be true because in
5 other parts of the - - - the state law, the legislature has
6 used culpable mental states such as due care that are not
7 defined in the penal law. Again, in the Agriculture and
8 Markets Law 370 due care is used. Again, Hayley and
9 Diego's Law, that's the law at issue here, VTL 1146, due
10 care is used. So the legislature - - -

11 JUDGE RIVERA: Let me just interrupt you on this
12 point about 15.15(2) and your argument about 15.00(6) being
13 limited to the penal law. It does say definitions are
14 applicable to this chapter, but 15.15(2) is part of the
15 chapter, so why is it that 15.15(2) when it uses the
16 terminology culpable mental state, which is defined in
17 15.00, isn't limited to that definition in 15.00?

18 MS. REGAN: I think because it's referring back
19 to crimes of mental culpability, which again, is a broader
20 category, and I think the import of subsection 2 is that
21 it's - - - it's allowing strict - - - for strict liability
22 crimes, and it's saying that strict liability crimes can
23 exist inside and outside - - -

24 JUDGE RIVERA: So you're saying the second
25 sentence, because it says crimes of mental culpability as

1 opposed to culpable mental state, should be read
2 differently from the first sentence?

3 MS. REGAN: Yes, Your Honor.

4 JUDGE RIVERA: So these two sentences are not
5 linked in any way?

6 MS. REGAN: No, I think - - - I think that they
7 are - - - they are linked in the sense that they're
8 discussing when a crime is of strict liability or when it
9 is a crime of mental culpability, but again, a crime of
10 mental culpability is a broader category.

11 JUDGE RIVERA: And is that defined anywhere?

12 MS. REGAN: A crime of mental culpability?

13 JUDGE RIVERA: Yes, that phrase. Since you say
14 it's different from culpable mental state.

15 MS. REGAN: No, it's - - - it's mentioned in
16 15.10, but it's - - - it's not explicitly defined there.

17 And just - - - there are other crimes defined
18 outside of the penal law in federal statutes in other
19 states that also use a mens rea lower than criminal
20 negligence. We have VTL 1212 reckless driving, which
21 requires more than mere negligence but does not rise to the
22 level of criminal negligence. And again, if criminal
23 negligent - - - criminal negligence can't be the minimum
24 mental state since we have strict liability crimes.

25 Turning briefly to the argument that the list of



1 four - - - of culpable mental states is exhaustive, again,
2 we've covered this. There are other statutes within this
3 state that say that you can have a different mental state
4 than one of the four that is listed.

5 And I just briefly would like to touch on the - -
6 - the VTL preemption argument that was discussed earlier.
7 There are other parallel legislations between the VTL and
8 the Administrative Code where the Administrative Code
9 criminalizes conduct and the VTL does not. And those are
10 VTL 1144(a) and Administrative Code 10-164, failure to
11 yield to an emergency vehicle, and VTL 1234 versus
12 Administrative Code 19-176, riding a bicycle on a sidewalk.

13 JUDGE WILSON: Do you know whether the preemption
14 - - - that has been tested in court for either of those two
15 statutes - - - ordinances?

16 MS. REGAN: I believe it has not, Your Honor.

17 And unless Your Honors have any other questions,
18 we ask that you affirm.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 Counsel, do you care to exercise two minutes of
21 rebuttal time?

22 MR. MARMUR: If the court would indulge me.

23 CHIEF JUDGE DIFIORE: Sure.

24 MR. MARMUR: The last part of - - - of the
25 questioning to my adversary was, aren't there a few



1 statutes out there that don't specify a certain mental
2 state. The answer is, yes. One can scour the Consolidated
3 Laws, one can scour the Municipal Laws and find examples of
4 it. Two points on that.

5 Number one, as the final question was posed, are
6 there any cases affirming that in the Court of Appeals that
7 have actually said this is another mental state. The
8 answer is, to my understanding, no.

9 And the second point, it addresses Judge Rivera's
10 question, which is why does it say "ordinarily". And what
11 the drafters there recognized was that not all statutes are
12 necessarily going to include one of the four mental states
13 because the way that these things are drafted. And so if
14 we don't put it there, what we do is we turn to 15.15(2),
15 which it says if it doesn't appear, then this is what we do
16 with it, right? If it's an offense, right, which is a
17 lower category, we may require it, but if it's a crime,
18 which is a higher category, you must do it. And that is
19 what 15.15(2) is accomplishing.

20 And again, I think the way the statute - - - my
21 adversary is trying to park the statute, is not the way it
22 works. There's a definitional section, words are defined,
23 words get put into another section in that chapter; in
24 fact, another section in that article. It says, okay we're
25 using this, now we're saying it applies outside of the



1 city, outside of the state, or to other chapters in the
2 state. There's also - - - I mean, to suggest that mental
3 culpability and mental state are meaning different things
4 that have a bearing here, just doesn't follow with what the
5 - - - with what the drafters were intending. And in any
6 event, doesn't answer the question of what is the mens rea
7 here, which is required for any statute that is a crime,
8 and it clearly, in every case, in everything we know about
9 the distinction between the law, is that ordinary
10 negligence is not a mens rea; it's looking to the
11 reasonable person, not to the mind, not to the mens rea, of
12 the defendant.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Michelle S. Walker, certify that the foregoing transcript of proceedings in the Court of Appeals of Dave Lewis v. The People of the State of New York, No. 53 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Michelle S. Walker

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