Washington Law Review

Volume 31
Number 2 *Washington Case Law - 1955*

6-1-1956

Criminal Law

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Recommended Citation
Theordore D. Zylstra, Washington Case Law, *Criminal Law*, 31 Wash. L. Rev. & St. B.J. 128 (1956).
Available at: https://digitalcommons.law.uw.edu/wlr/vol31/iss2/7

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the estate. Although the court did not expressly state why it was impossible for a lien to attach, the apparent reason is that if the lien was allowed this would be indirectly charging the estate for the contract which was directly unenforceable. The decision is one of first impression in Washington but is in harmony with the holdings of other jurisdictions which have passed on the question. *San Francisco Paving Co. v. Fairchild,* 134 Cal. 220, 66 Pac. 255 (1901); *Ness v. Wood,* 42 Minn. 427, 44 N. W. 313 (1890).

CRIMINAL LAW

Bigamy—Necessity of Proving Continued Cohabitation. In *State v. Lewis*[1] the court found it necessary to interpret the bigamy statute,[2] which reads in part: "Every person who, having a husband or wife living, shall marry another person, or continue to cohabit with such second husband or wife in this state, shall be guilty of bigamy. . . ."

The information charged that the defendant, having a wife living, did cohabit with a second wife in this state. The trial judge sustained the defendant's demurrer. The supreme court affirmed the trial court ruling that the allegation failed to charge a criminal offense. The court said that where the second marriage was entered into in this state, an act prohibited by the first provision of the statute, cohabitation need not be alleged or proved. The second provision was placed in the Act to meet those situations where a person contracts a bigamous marriage in another state and thereafter moves into this state and continues to cohabit with the second spouse in this state. Under that provision the prosecution must allege and prove, not merely that the defendant has cohabited with second wife in this state, but that the defendant *continues* to so cohabit.

The court stated that, under the statute, cohabitation must have commenced in another state and continued in this state. Under this interpretation we have two situations which are not prohibited but which the legislature no doubt intended to include within the statute. First, if the accused entered into the second marriage in another state and immediately brought his second spouse into Washington where cohabitation commenced, the accused's conduct would not come within the scope of the statute as there could be no cohabitation in another state which could be continued into Washington. The court in the *Lewis* case was not willing to follow the reasoning of the Iowa court[3] which assumed that because a marriage took place in another state, cohabitation commenced. Secondly, if the accused[4] entered into the

[1] State v. Lewis, 46 Wn.2d 438, 282 P.2d 297 (1955).
[2] RCW 9.15.010.
[3] State v. Nadal, 69 Iowa 478, 29 N.W. 451 (1886).
[4] The accused may be either a man or a woman, as the case may be. For the purpose of this discussion it is convenient to speak of the accused as the male spouse.

second marriage in another state, commenced cohabitation in that state, and subsequently brought the second spouse into Washington where he visited her at intervals, he would not be subject to conviction under the statute since the cohabitation would not be continuous. Such a result would be in accord with the holding of the Tennessee case[5] cited by the court in the *Lewis* case. The quoted language states in part: "... the question of statutory intention in this regard is freed from all doubt by the use of the word 'continue', so that the proof must show, not only a cohabitation, that is, a living or abiding together as man and wife in a fixed location, as distinguished from a mere occasional contact, or temporary association, however sexually intimate, but the express language of the statute requires that the cohabitation must be of the continuing and not the transitory type...."[6]

The writer submits that the two situations set forth above were intended by the legislature to be included within the scope of the statute. The language of the Iowa court logically and adequately summarizes this position: "The letter and spirit of the statute declare that cohabitation in this state, under a void marriage in another state is a crime. The courts will not draw such subtle distinctions as are made by counsel, for the purpose of shielding the violaters of the law and contemners of good morals."[7]

Aiding and Abetting—Presence with Intent to Render Assistance. In the recent case of *State v. Kelly*[8] the state attempted to obtain the conviction of certain employees of an after hours night club under RCW 66.44.100 which declares the opening of packaged liquor or consumption of liquor in a public place to be a misdemeanor, and RCW 9.01.030 which provides that those persons aiding and abetting the commission of a misdemeanor shall be punished as principals. The court held that the doorkeepers, the hostess, and the waitresses who did not actually serve mixers to the patrons, the principals in the crime, merely assented but did not perform any service or other overt act necessary for conviction as an accessory. The court states, "The doorkeepers, the hostess, and the waitresses who did not actually serve 'mixers' to the particular individuals named in the various counts may have been ready, willing, and able to assist those individuals to consume

[5] Jones v. State, 182 Tenn. 60, 184 S.W.2d 167 (1944).
[6] *Ibid.*, 184 S.W.2d at 169.
[7] State v. Nadal, *supra*, note 3, 29 N.W. at 452. The Iowa court, in interpreting a similar statute, reached a result contrary to the result of the Lewis case.
[8] 46 Wn.2d 594, 283 P.2d 684 (1955).

liquor in a public place, but did they aid and abet them in doing so?"[9] The court then answered their question in the negative.

It is well settled that assent alone does not constitute aiding and abetting;[10] the courts do not punish a guilty mind without some related physical acts.[11] However, the court in the *Kelly* case seemed to take a limited view as to acts which are necessary to constitute one an accessory. It seems that a conviction could have been sustained in the *Kelly* case had the court been willing to accept the view adopted in many jurisdictions, that a person is an accessory when assistance is rendered or when such person is present to render assistance if necessary.[12] It seems that the facts of the *Kelly* case would uphold the conclusion that the named defendants were present at the scene of the misdemeanor with the intent to assist the various principals even if such assistance was not actually rendered.

The Washington court has recognized this "presence to render assistance if necessary" concept in *State v. Gollihur*.[13] The court qualified the rule by stating that for one who is merely present for the purpose of rendering assistance if necessary to be an accessory, his presence must have been by preconcert.[14] Such language would lead us to believe that absent a conspiracy, one cannot be convicted as an accessory in the case where he is merely present for the purpose of rendering assistance if necessary.[15] If we were to stop here for the purpose of the *Kelly* case,

[9] 46 Wn.2d at 599, 283 P.2d at 687.

[10] State v. Peasley, 80 Wash. 99, 141 Pac. 316 (1914); State v. Linden, 171 Wash. 92, 17 P.2d 635 (1932).

[11] In State v. Linden, note 10, *supra*, the court held that it was not error to refuse an instruction that mere knowledge or assent without positive overt acts would not warrant a conviction of grand larceny. The court stated that while mere knowledge or assent as a rule, unaccompanied by anything more, is not sufficient to constitute aiding and abetting, it is not always necessary that aiding and abetting be accompanied by overt acts. However, the court did find that overt acts were committed in this case. In making the statement the court quotes from State v. Thomas, 156 Wash. 583, 287 Pac. 667 (1930), where the court held that failure to exercise a legal duty to prevent the commission of a crime is more than mere acquiescence.

[12] People v. Hymer, 118 Cal. App.2d 28, 257 P.2d 63 (1953) ("or have been present for the purpose of assisting in its consummation"); Territory of Hawaii v. Ebarra, 39 Hawaii 488 (1952) ("and who stand ready to assist in its perpetration should the necessity arise"); Raiford v. State, 59 Ala. 106 (1877); State v. Berger, 121 Iowa 581, 96 N.W. 1094 (1903).

[13] 159 Wash. 206, 292 Pac. 421 (1930). In this case the defendant kept watch for the perpetrator of the crime of rape. Keeping a lookout or standing watch is consistently recognized as a sufficient overt act to constitute one an aider and abettor.

[14] This qualification is generally announced in other jurisdictions. Anderson v. State, 185 Okla. 355, 91 P.2d 974 (1939); West v. State, 25 Ala. App. 492, 149 So. 354 (1933); State v. Tally, 102 Ala. 25, 15 So. 722 (1894); People v. Walker, 17 Cal. App.2d 372, 62 P.2d 163 (1936); 22 C. J. S. 158, § 87 (b).

[15] *But see* Pereira v. U. S., 347 U. S. 1, 7 (1954). "Aiding, abetting, and counseling are not terms which presuppose existence of an agreement, but such terms have a broader application, making a defendant a principal when he consciously shares in a criminal act, regardless of existence of a conspiracy."

the defendants could not be convicted as accessories as there was no evidence of any expressed arrangement for assistance between the named defendants and the principals.

It would seem, however, that the necessity of preconcert would not be present when the principal had knowledge of the presence of the accessory and had knowledge of the latter's willingness to assist. Under such a rule one could be convicted as an accessory when the following conditions exist: (1) The accused is actually or constructively[16] present when the felony or misdemeanor is committed, and, (2) is either actually aiding, abetting, assisting, or advising in its commission, or, (3) is present for the purpose of rendering assistance if necessary, to the knowledge of the party actually committing the crime.[17]

The court in the *Kelly* case ruled that the state's evidence was insufficient to take the case to the jury. If the court had adopted the last mentioned rule there would have been a jury question as to whether the perpetrator of the crime had knowledge of the presence of the defendant and of their intention to render him service if necessary.[18] Such a result would seem to be desirable and would seem to be more in harmony with the objects sought to be accomplished by the enactment of RCW 66.44.100.

Negligent Homicide—Degree of Negligence Required. The recent case of *State v. Partridge*[19] has made a significant change in the degree of negligence required to support a conviction under the negligent homicide statute.[20] Under the wording of this statute one may be convicted of the crime of negligent homicide if he causes the death of another person ". . . by the operation of any vehicle in a reckless manner or with disregard for the safety of others. . . ."

In the case of *State v. Dickert,*[21] the first case in which the negligent homicide statute was considered, the court clearly indicated that the term "reckless" did not mean the same thing in the negligent homicide statute as it meant under the section of the motor vehicle code defining

[16] A "constructive presence" at the commission of an offense, so as to make one an accessory, is such as would enable him to take part in aiding the escape of the perpetrator, or giving him information of approaching danger, if necessary, or to be so situated when the crime is committed as to be able to assist in commission or otherwise. 8A WORDS AND PHRASES 587. The term is commonly used in the "lookout" situation.

[17] This rule has been announced in many jurisdictions. State v. Minton, 234 N.C. 716, 68 S.E.2d 844, 31 A.L.R.2d 682 (1952); Spies v. People, 122 Ill. 1, 12 N.E. 865 (1887) as cited in 22 C.J.S. 161, § 88 (5); State v. Hart, 186 N.C. 582, 120 S.E. 345 (1923); State v. Ham, 238 N.C. 94, 76 S.E.2d 346 (1953); Davis v. State, 36 Ala. App. 573, 62 So.2d 224 (1952).

[18] State v. Gooch, 105 Mo. 392, 16 S.W. 892 (1891).

[19] 147 Wash. Dec. 575, 289 P.2d 702 (1955).

[20] RCW 46.56.040.

[21] 194 Wash. 629, 79 P.2d 328 (1938).

"reckless driving".[22] The court concluded that willful or wanton disregard for the safety of others was not one of the elements of negligent homicide. In the leading case of *State v. Stevick*[23] the court declared the rule in Washington to be that ordinary negligence is sufficient to sustain a conviction of negligent homicide. This has continued to be the rule in this jurisdiction. The holding of the *Partridge*[24] case however, specifically overrules the *Stevick*[25] case and all prior cases[26] holding that ordinary negligence will support a conviction of negligent homicide when the driver is charged with the operation of a motor vehicle in a reckless manner. The opinion states that to operate a motor vehicle in a reckless manner, as specified by the statute, requires something more than ordinary negligence. Reckless driving, for the purposes of the negligent homicide statute, was defined as "the operation of a motor vehicle in a heedless, careless or rash manner or in a manner indifferent to consequences."[27]

To fully appreciate the impact of the holding in the *Partridge* case, it is necessary to look into the motivation which prompted the legislature to enact the negligent homicide statute. The frequency of tragedies in connection with the operation of motor vehicles made legislation desirable, if not necessary.[28] The *Partridge* case indicates that the statute was passed at the request of the prosecutors who were having difficulty obtaining convictions under the existing manslaughter statute.[29] Juries are reluctant to convict negligent automobile drivers of manslaughter even though the evidence proves all of the elements of the crime. This is due to a popular feeling that manslaughter is not the proper label for cases of homicide committed through violation of traffic rules.[30] A conviction of manslaughter carries with it a mark of infamy, a token of disgrace, which commonly is not associated with a conviction of negligent homicide. The negligent homicide statute plainly was not enacted for the benefit of the accused.

Although the purpose of enacting the negligent homicide statute was to make it easier to convict the careless motorist who caused the death

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[22] RCW 46.56.020.
[23] 23 Wn.2d 420, 161 P.2d 181 (1945).
[24] 147 Wash. Dec. 575, 289 P.2d 702 (1955).
[25] 23 Wn.2d 420, 161 P.2d 181 (1945).
[26] State v. Dickert, 194 Wash. 629, 79 P.2d 328 (1938); State v. McDaniels, 30 Wn.2d 76, 190 P.2d 705 (1948); State v. Carlsten, 17 Wn.2d 573, 136 P.2d 183 (1943).
[27] State v. Partridge, 147 Wash. Dec. at 580, 289 P.2d 706.
[28] 99 A. L. R. 756; 3 AM. JUR. § 787.
[29] RCW 9.48.060.
[30] Note, *Negligent Homicide*, 25 CALIF. L. REV. (1936); see also, State v. Wojahn, ——Ore.——, 282 P.2d 675 (1955), a recent Oregon case giving an excellent coverage of the entire subject of negligent homicide.

of another,[31] this purpose was accomplished in Washington solely by placing a euphemism before the jury. Other states accomplished this purpose by requiring a lesser degree of negligence to convict the careless motorist under a negligent homicide statute than was required to convict under a manslaughter statute.[32] This was not the case in Washington; at the time that the negligent homicide statute was enacted, this jurisdiction allowed a conviction under the manslaughter statute upon a showing of ordinary negligence.[33] Manslaughter statutes of other states similar to Washington's are rare. Most of them require a finding of at least gross negligence.[34]

The negligent homicide statutes of most states provide for a less severe punishment than is found under existing manslaughter statutes.[35] In Washington, however, the punishment provided under the negligent homicide statute is equal to that provided under the manslaughter statute. In each case the offender may be sentenced to not more than twenty years in the state prison, or not more than one year in the county jail, or a fine of $1000, or both fine and imprisonment. The careless motorist who fatally injures another in Washington stands to pay a stiffer penalty than would be imposed in most other jurisdictions.[36]

Acts which will sustain a conviction under the negligent homicide statute will also sustain a conviction under the manslaughter statute. The state can elect under which statute it desires to proceed.[37] But since it was easier to obtain a conviction by labeling the offense negligent homicide, the state nearly always would elect to proceed under that statute. However, the ruling of the *Partridge* case has undermined the reasons which led to the enactment of the negligent homicide

[31] This would seem to be the reasoning behind similar statutes in other jurisdictions. Rex v. Preusantanz, D.C.R. 421, 65 Can. Crim. Cases 129 (1936); People v. Pociask, 14 Cal.2d 679, 96 P.2d 788 (1939).

[32] People v. Campbell, 237 Mich. 424, 212 N.W. 97 (1927). This was also true under the first California statute, Cal. Stats. 1935, p. 2141.

[33] State v. Hedges, 8 Wn.2d 652, 113 P.2d 530 (1941); State v. Sill, 147 Wash. Dec. 581, 289 P.2d 720 (1955).

[34] Reg. v. Swindall, 2 Car. & K. 230, 2 Cox C. C. 141; Copeland v. State, 154 Tenn. 7, 285 S.W. 565, 49 A. C. R. 605 (1926); State v. Gutheil, 98 Utah 205, 98 P.2d 943 (1940); State v. Whately, 210 Wis. 157, 245 N.W. 93, 99 A. L. R. 749. And see the exhaustive supplemental note following this case, 99 A. L. R. 756.

[35] Vt. Stats. 1921, p. 217 (5 years or $2000 or both); La. Stats. 1930, p. 141 (5 years); N. H. STATS. 1931 (Special Session 1930), p. 85; State v. McComb, 33 Wyo. 346, 239 Pac. 526 (1925).

[36] Oregon, for example, has a maximum penalty of not more than 3 years or $2500. ORE. REV. STAT. § 163, 090, amended by Oregon Laws 1953, c 676, § 192, Statutes 195, c 1006.

[37] See the concurring opinion of Justice Mallery in State v. Stevick, *supra*, note 23. But apparently the state must make an election as he indicates that the state cannot allege an offense under one statute and sustain a conviction upon proof of the other.

statute. Since a higher degree of negligence is required to sustain a conviction of negligent homicide than is required to sustain a conviction of manslaughter in Washington, it may, in all probability, now be easier to convict a careless driver of manslaughter than to convict him of negligent homicide. If the true reason for enacting the negligent homicide statute was to enable the prosecutors to get more convictions, the purpose of the legislature has been defeated by the Partridge case. Prosecutors will now be more willing to proceed under the manslaughter statute.

The court has taken the first step in putting Washington in line with the majority of jurisdictions as far as the degree of negligence required to support a negligent homicide conviction is concerned.[38] The next step is for the legislature[39] to put us in line with other jurisdictions as far as manslaughter is concerned by requiring something more than mere ordinary negligence to support a manslaughter conviction. The legislature might also look into the propriety of imposing the same penalty under the negligent homicide statute as is imposed under the manslaughter statute.

It must be noted that the *Partridge* case decided only the degree of negligence required to constitute reckless driving. The court clearly pointed out that they were not dealing with the further language of the negligent homicide statute. Therefore, the degree of negligence required to sustain a conviction of negligent homicide when the motorist is charged with operating a motor vehicle "with disregard for the safety of others" must remain an open question.

THEODORE D. ZYLSTRA

Justifiable Homicide—Prevention of Commission of Adultery. In *State v. Nyland,* 147 Wash. Dec. 217, 287 P.2d 345 (1955), the court considered an appeal from a conviction of murder in the first degree and murder in the second degree. The defendant admitted that he shot his wife and her companion. The theory of his defense, on which the trial court refused instructions, was that the killings were necessary to prevent the commission of a felony against him, inasmuch as he had reasonable cause to believe that his wife and her companion were about to commit an act of adultery, which, under the rule of *State v. La Bounty,* 64 Wash. 415, 116 Pac. 1073 (1911), is a crime against the unoffending spouse. The court was not sufficiently impressed with the uniqueness of the defense. The court, in rejecting the defendant's contention, stated that the felony to be prevented must be one which threatens life or great bodily harm to the defendant's

[38] Most states require a showing of something more than mere ordinary negligence to convict the careless driver. 99 A. L. R. 756; 5 AM. JUR. 927, § 790; ILL. REV. STAT. 1951, c 38, § 364 a.

[39] In State v. Hedges, note 32 *supra,* the court suggested that if it be desirable to require a finding of gross negligence to convict, a statutory change must be made since the court could require no more than ordinary negligence under the existing manslaughter statute.

person. Adultery is not a crime which imperils the life of the unoffending spouse or threatens bodily harm to him. Although adultery is a crime against the unoffending spouse, adultery is not a felony committed *upon* the innocent spouse within the meaning of RCW 9.48.170, defining justifiable homicide.

DAMAGES

Punitive Damages—"Wilfulness" of Tort Feasor. In the recent case of *Grays Harbor County v. Bay City Lumber Co.*[1] the Washington Supreme Court construed the element of "wilfulness" in a conversion action very narrowly, and has, by so doing, removed a source of protection for owners of private and public timber lands in this state. The case involved an action by Grays Harbor County against an innocent purchaser of timber cut by a prior converter on county lands.[2] The value of the timber, as found by the trial court sitting without a jury, was $8 per thousand board feet at the time of the first conversion and $35 per thousand at the time of the purchase. The trial court expressly found that the first converter acted "wilfully"[3] and, as a result, assessed damages at the rate of $35 per thousand. In reversing the trial court in a six to three decision, the supreme court determined that since these greater damages would be punitive damages, which are not generally favored in Washington,[4] this result should be avoided. This result was achieved by strictly construing "wilfulness" as had been done in decisions[5] under the Washington treble damage statute.[6] The

[1] 147 Wash. Dec. 792, 289 P.2d 975 (1955).

[2] The facts of the case are as follows: A small group of "gypo" loggers acquired timber rights to a tract of land immediately adjacent to the plaintiff county land. Although the vendor described the timber sold, the loggers realized that a survey was necessary since the tract was unmarked. They were unable to secure the services of a surveyor as soon as they would have liked and so proceeded to survey the area themselves "using a compass and a length of rope" and with occasional reference to Geodetic Survey and Metzker maps. The loggers were unsuccessful in their efforts to determine the true boundaries and in cutting the timber, trespassed onto the county land and cut a substantial amount there. They then hauled the timber to defendant's sawmill and sold it. Plaintiff elected to bring suit against the lumber company. It, in turn, interpleaded the loggers as cross defendants.

[3] The exact words of the trial court were that the taking of the timber by the loggers was "heedless and wanton, not unintentional and inadvertent." 147 Wash. Dec. at 793, 289 P.2d at 977.

[4] Spokane Truck and Dray Co. v. Hoefer, 2 Wash. 45, 25 Pac. 1072 (1891); Anderson v. Dalton, 40 Wn.2d 894, 246 P.2d 853, 35 A.L.R.2d 302 (1952).

[5] Bailey v. Hayden, 65 Wash. 57, 117 Pac. 720 (1911); Hirt v. Entus, 37 Wn.2d 418, 224 P.2d 620 (1950); Martinson v. Gregorsen, 129 Wash. 701, 225 Pac. 243 (1924). "Not even where defendant knows his right is in question, are treble damages allowed." Gibon v. Thisius, 16 Wn.2d 693, 134 P.2d 713 (1943); Chappell v. Puget Sound Reduction Co., 27 Wash. 63, 67 Pac. 391 (1901); Tonsrud v. Puget Sound Traction Light and Power Co., 91 Wash. 660, 158 Pac. 348 (1916); Gardner v. Lovegren, 27 Wash. 356, 67 Pac. 615 (1902). *But see:* Harold v. Toomey, 92 Wash. 297, 158 Pac. 986 (1916).

[6] RCW 64.12.030. It would seem that RCW 79.40.030 would be applicable in cases where county lands are involved, depending upon how the phrase "public lands of the state" is construed. However, no cases seem to have done so.