People v. Decina, 2 N.Y.2d 133

Court of Appeals of New York

October 4, 1956, Argued ; November 29, 1956, Decided

No Number in Original

Reporter

2 N.Y.2d 133 | 138 N.E.2d 799 | 157 N.Y.S.2d 558 | 1956 N.Y. LEXIS 631 | 63 A.L.R.2d 970

The People of the State of New York, Appellant-Respondent, v. Emil Decina, Respondent-Appellant

Prior History: *People* v. *Decina*, 1 A D 2d 592.

Appeal by the People, by permission of a Justice of the Appellate Division of the Supreme Court in the fourth judicial department, from an order of said court, entered May 25, 1956, which (1) reversed, on the law, a judgment of the Supreme Court at a Trial Term held in Erie County (Lee L. Ottaway, J.), rendered upon a verdict convicting defendant of the crime of criminal negligence in the operation of a vehicle resulting in death in violation of section 1053-a of the Penal Law, and (2) granted a new trial. Appeal by defendant from so much of the order of said Appellate Division of the Supreme Court as affirmed an order of the Supreme Court, Erie County (Hamilton Ward, J.), which overruled a demurrer by defendant to the indictment.

Disposition: Order affirmed.

Core Terms

driving, indictment, patient, cases, license, reckless, driver, culpably negligent, consciousness, consequences, unconscious, conditions, district attorney, third person, conversation, demurrer, travel, guard, epilepsy, seizures, sidewalk, attacks, curb, reckless driving, confidential, convulsions, epileptic, jumping, viaduct, fatal

Case Summary

Procedural Posture

Prosecution appealed a judgment of the Appellate Division of the Supreme Court of New York, in the Fourth Judicial Department, which reversed a judgment against criminal defendant for violating N.Y. Penal Law § 1053-a.

Overview

Criminal defendant struck and killed a number of children after allegedly suffering a seizure while driving. Defendant was placed under arrest and taken to a hospital for treatment. While at the hospital, defendant related his medical history to a physician who diagnosed defendant as suffering from epilepsy. Defendant was charged with violating N.Y. Penal Law § 1053-a. At trial, the physician testified as to his conversation with defendant. Defendant argued that his actions were not sufficiently culpable to violate § 1053-a and that the physician's testimony should have been inadmissible. The court first held that defendant's conduct arguably fell within the statute's requirement that defendant exhibit a disregard for the consequences that would ensue from his actions. The court then held that, as the physician diagnosed defendant and defendant was given no reason to believe their communication was not confidential, the conversation was barred under N.Y. Civ. Prac. Act § 352.

Outcome

The court affirmed the reversal of the judgment against criminal defendant in fatal automobile accident, because physician's testimony at trial was inadmissible.

LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Knowledge

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Negligence

HN1 To state a violation of N.Y. Penal Law § 1053-a, it is not required that a defendant must deliberately intend to kill a human being. Nor does the statute require that a defendant knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, when the defendant's conduct manifests a disregard of the consequences that may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > ... > Accusatory Instruments > Indictments > General Overview

HN2 A reviewing court must assume the truth of an indictment, to which a demurrer has been entered. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes

> General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea

> Negligence

HN3 A defendant's awareness of a condition which he knows may result in the deaths of others, and his disregard of those consequences, renders him liable for culpable negligence under N.Y. Penal Law § 1053-a. *Shepardize* - Narrow by this Headnote

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses

> General Overview

Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes

> General Overview

Criminal Law & Procedure > ... > Vehicular Crimes > License Violations

> General Overview

Criminal Law & Procedure > Defenses > General Overview

HN4 The mere possession of a driver's license is no defense to a prosecution under N.Y. Penal Law § 1053-a; nor does it assure continued ability to drive during the period of the license. Section 1053-a places a personal responsibility on each driver of a vehicle -- whether licensed or not -- and not upon a licensing agency. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > General Overview

HN5 Under N.Y. Civ. Prac. Act § 352, a physician shall not be allowed to disclose any information which he acquired while attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview

Healthcare Law > Medical Treatment > General Overview

HN6 Under New York law, the testimony of a physician describing an examination of defendant in jail may be admissible when there are no circumstances from which it might be inferred that the defendant was led to accept the examining doctor as a physician and consequently to disclose to him information that perhaps would not otherwise have been given. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview

HN7 In determining whether or not information necessary for medical treatment is privileged, the question as to whether or not actual treatment is undertaken is not decisive. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview
Healthcare Law > Medical Treatment > General Overview

HN8 The provisions of N.Y. Civ. Prac. Act § 352, which bars a physician from disclosing information he acquired while attending to a patient in a professional capacity, are to be liberally construed. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview
Healthcare Law > Medical Treatment > General Overview

HN9 Evidence of a prior medical history of a disease for which a defendant is treated is information necessary for treatment. Thus the communication is within the conditions set forth in N.Y. Civ. Prac. Act § 352, which bars a physician from disclosing information he acquired while attending to a patient in a professional capacity. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview
Healthcare Law > Medical Treatment > Patient Confidentiality
> General Overview
Healthcare Law > Medical Treatment > General Overview

HN10 N.Y. Civ. Prac. Act § 352, which bars a physician from disclosing information he acquired while attending to a patient in a professional capacity, does not in so many words require that a communication be confidential or confidentially given in order to be privileged. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview
Evidence > Privileges > Doctor-Patient Privilege > Scope

HN11 Under N.Y. Civ. Prac. Act § 352, the physician-patient privilege extends to any information which he acquired in attending a patient, since such information may be acquired from third persons -- and third persons who have some definite relationship to the patient are often present. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > General Overview
Evidence > Privileges > Attorney-Client Privilege > Exceptions
Evidence > Privileges > Doctor-Patient Privilege > General Overview
Healthcare Law > Medical Treatment > Patient Confidentiality
> General Overview

HN12 If a communication between a physician and a patient was intended to be confidential, the fact that it may have been overheard by a third person does not necessarily destroy the privilege. *Shepardize* - Narrow by this Headnote

Evidence > Privileges > Doctor-Patient Privilege > General Overview
Healthcare Law > Medical Treatment > Patient Confidentiality
> General Overview

HN13 The true test in determining whether a physician-patient communication is privileged under N.Y. Civ. Prac. Act § 352 appears to be whether in the light of all the surrounding circumstances, and particularly the occasion for the presence of a third person, the communication was intended to be confidential and complied with the other provisions of the statute. *Shepardize* - Narrow by this Headnote

▼ Headnotes/Syllabus

Headnotes

Crimes -- criminal negligence in operation of vehicle -- indictment which stated that defendant, knowing that he was subject to epileptic seizures, was culpably negligent in consciously operating automobile and while so doing suffered seizure causing his automobile to drive over sidewalk and kill 4 persons (Penal Law, § 1053-a), sufficient -- communications between defendant and hospital doctor, who took his medical history while other hospital doctors treated him, privileged under Civil Practice Act (§ 352) -- presence in hospital room of police guard within hearing of communications did not destroy such privilege; judgment of conviction improper for erroneous admission of communications.

1. An indictment which stated that defendant, knowing that he was subject to epileptic attacks rendering him likely to lose consciousness, was culpably negligent in that he consciously operated his automobile and while so doing suffered an epileptic attack causing his automobile to drive over a sidewalk, causing the death of 4 persons (Penal Law, § 1053-a), is sufficient.

2. Defendant, after he was arrested, was sent to a county hospital in custody of policemen, a police guard was stationed in the doorway of his room, and a staff doctor visited defendant. Although the doctor testified that he personally did not treat defendant, he admitted that other doctors in the hospital did treat him for Jacksonian epilepsy, and he admits he made that diagnosis. A physician-patient relationship existed between the doctor and defendant even though there was a division of duties among the staff of the hospital.

3. The communications made to the doctor by defendant relating to his epileptic seizure and his past medical history were necessary for the doctor to act in his professional capacity, and were therefore privileged under section 352 of the Civil Practice Act.

4. The presence of the police guard in the doorway of the hospital room where he could overhear the conversation between the doctor and defendant did not destroy the privilege arising under section 352 of the Civil Practice Act. Accordingly, defendant's communications to the doctor should not have been admitted in evidence and the judgment of conviction was properly reversed.

5. Defendant cannot raise the question that the hospital record was improperly received in evidence before the Grand Jury, and that the indictment should therefore be dismissed, where he made no motion for an inspection of the minutes of the Grand Jury and such minutes are not part of the present record and the court is not in a position to know what other proper evidence may have been adduced as a basis for the indictment.

Counsel: *John F. Dwyer, District Attorney* (*Leonard Finkelstein* of counsel), for appellant-respondent. I. The medical testimony was properly received. (*People* v. *Schuyler*, 106 N. Y. 298; *People* v. *Koerner*, 154 N. Y. 355; *People* v. *Austin*, 199 N. Y. 446; *People* v. *Barnes*, 197 Misc. 477; *Bloodgood* v. *Lynch*, 293 N. Y. 308; *Thomas* v. *Morris*, 286 N. Y. 266; *People* v. *Ward*, 307 N. Y. 73; *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185; *Griffiths* v. *Metropolitan St. Ry. Co.*, 171 N. Y. 106; *Kelly* v. *Dykes*, 174 App. Div. 786; *People* v. *Sliney*, 137 N. Y. 570; *People* v. *Hoch*, 150 N. Y. 291; *People* v. *Austin*, 199 N. Y. 446; *Meyer* v. *Supreme Lodge Knights of Pythias*, 178 N. Y. 63, 198 U.S. 508; *Edington* v. *AEtna Life Ins. Co.*, 77 N. Y. 564; *Green* v. *Metropolitan St. Ry. Co.*, 171 N. Y. 201; *Klein* v. *Prudential Ins. Co.*, 221 N. Y. 449; *Sparer* v. *Travelers Ins. Co.*, 185 App. Div. 861; *Patten* v. *United Life & Acc. Ins. Assn.*, 133 N. Y. 450; *People* v. *Leyra*, 302 N. Y. 353.) II. Defendant's demurrer and motion in arrest of judgment were properly overruled and denied. (*People* v. *Eckert*, 1 A D 2d 903.) III. The evidence was sufficient to prove the crime charged. (*People* v. *Bearden*, 290 N. Y. 478; *People* v. *Rosenheimer*, 209 N. Y. 115; *Brown* v. *Shyne*, 242 N. Y. 176; *People* v. *Pace*, 220 App. Div. 495; *People* v. *Angelo*, 246 N. Y. 451; *People* v. *Carlson*, 176 Misc. 230; *State* v. *Gooze*, 14 N. J. Super. 277; *Matter of Jenson* v. *Fletcher*, 277 App. Div. 454.)

Charles J. McDonough for respondent-appellant. I. Dr. Wechter's testimony was privileged and incompetent under section 352 of the Civil Practice Act. (*People* v. *Murphy*, 101 N. Y. 126; *Thompson* v. *Prudential Ins. Co.*, 266 App. Div. 783; *Lorde* v. *Guardian Life Ins. Co.*,

252 App. Div. 646; *Meyer v. Supreme Lodge Knights of Pythias*, 178 N. Y. 63; *Renihan v. Dennin*, 103 N. Y. 573; *People v. Leyra*, 302 N. Y. 353.) II. The indictment does not charge a crime. (*People v. Bearden*, 290 N. Y. 478; *People v. Eckert*, 1 A D 2d 903.) III. The People's evidence of criminal negligence was insufficient. (*State v. Gooze*, 14 N. J. Super. 277; *People v. Gardner*, 255 App. Div. 683; *People v. Fox*, 271 App. Div. 936.)

Judges: Conway, Ch. J., Dye and Burke, JJ., concur with Froessel, J., Desmond J., concurs in part and dissents in part in an opinion in which Fuld and Van Voorhis, JJ., concur.

Opinion by: FROESSEL

Opinion

[135] At about 3:30 p.m. on March 14, 1955, a bright, sunny day, defendant was driving, alone in his car, in a northerly direction on Delaware Avenue in the city of Buffalo. The portion of Delaware Avenue here involved is 60 feet wide. At a point south of an overhead viaduct of the Erie Railroad, defendant's car swerved to the left, across the center line in the street, so that it was completely in the south lane, traveling 35 to 40 miles per hour.

It then veered sharply to the right, crossing Delaware Avenue and mounting the easterly curb at a point beneath the viaduct and continued thereafter at a speed estimated to have been about 50 or 60 miles per hour or more. During this latter swerve, a pedestrian testified that he saw defendant's hand above his head; another witness said he saw defendant's left arm bent over the wheel, and his right hand extended towards the right door.

A group of six schoolgirls were walking north on the easterly sidewalk of Delaware Avenue, two in front and four slightly in the rear, when defendant's car struck them from behind. One of the girls escaped injury by jumping against the wall of the viaduct. The bodies of the children struck were propelled northward onto the street and the lawn in front of a coal company, located to the north of the Erie viaduct on Delaware Avenue. Three of the children, 6 to 12 years old, were found dead on arrival by the medical examiner, and a fourth child, 7 years old, died in a hospital two days later as a result of injuries sustained in the accident.

After striking the children, defendant's car continued on the easterly sidewalk, and then swerved back onto Delaware Avenue once more. It continued in a northerly direction, passing under a second viaduct before it again veered to the right and remounted the easterly curb, striking and breaking a metal lamppost. With its horn blowing steadily -- apparently because defendant was "stooped over" the steering wheel -- the car proceeded on the sidewalk until it finally crashed through a 7 1/4-inch brick wall of a grocery store, injuring at least one customer and causing considerable property damage.

[136] When the car came to a halt in the store, with its horn still blowing, several fires had been ignited. Defendant was stooped over in the car and was "bobbing a little". To one witness he appeared dazed, to another unconscious, lying back with his hands off the wheel. Various people present shouted to defendant to turn off the ignition of his car, and "within a matter of seconds the horn stopped blowing and the car did shut off".

Defendant was pulled out of the car by a number of bystanders and laid down on the sidewalk. To a policeman who came on the scene shortly he appeared "injured, dazed"; another witness said that "he looked as though he was knocked out, and his arm seemed to be bleeding". An injured customer in the store, after receiving first aid, pressed defendant for an explanation of the accident and he told her: "I blacked out from the bridge".

When the police arrived, defendant attempted to rise, staggered and appeared dazed and unsteady. When informed that he was under arrest, and would have to accompany the police to the station house, he resisted and, when he tried to get away, was handcuffed. The foregoing evidence was adduced by the People, and is virtually undisputed -- defendant did not take the stand nor did he produce any witnesses.

From the police station defendant was taken to the E. J. Meyer Memorial Hospital, a county institution, arriving at 5:30 p.m. The two policemen who brought defendant to the hospital instructed a police guard stationed there to guard defendant, and to allow no one to enter his room. A pink slip was brought to the hospital along with defendant, which read: "Buffalo Police Department, Inter-Departmental Correspondence. To Superintendent of Meyer Memorial Hospital, from Raymond J. Smith, Captain, Precinct 17. Subject, *Re*: One Emil A. Decina, 87 Sidney, CD-553284, date 3-14-55. Sir: We are forwarding one Emil A. Decina, age 33, of 87 Sidney Street, to your hospital for examination on the recommendation of District Attorney John Dwyer and Commissioner Joseph A. De Cillis. Mr. Decina was involved in a fatal accident at 2635 Delaware Avenue at 3:40 P.M. this

date. There were three fatalities, and possibly four. A charge will be placed against Mr. Decina after the investigation has been completed."

On the evening of that day, after an interne had visited and treated defendant and given orders for therapy, Dr. Wechter, a **[137]** resident physician in the hospital and a member of its staff, came to his room. The guard remained, according to his own testimony, in the doorway of the room -- according to Dr. Wechter, outside, 6 or 7 feet away. He observed both Dr. Wechter and defendant "on the bed", and he stated that he heard the entire conversation between them, although he did not testify as to its content.

Before Dr. Wechter saw defendant, shortly after the latter's admission on the floor, he had read the hospital admission record, and had either seen or had communicated to him the contents of the "pink slip". While he talked with defendant, another physician came in and left. After giving some additional brief testimony, but before he was permitted to relate a conversation he had with defendant which was contained in the hospital notes, defense counsel was permitted with some restriction to cross-examine the doctor. In the course of that cross-examination, the doctor testified as follows:

That he saw defendant in his professional capacity as a doctor but that he did not see him for purposes of treatment. However, it was shown that at a former trial at which the jury had disagreed, he stated that the information he obtained was pursuant to his duties as a physician; that the purpose of his examination was to diagnose defendant's condition; that he questioned the defendant for the purpose of treatment, among other things; that in the hospital they treat any patient that comes in.

He further testified at this trial that ordinarily the resident on the floor is in charge of the floor, and defendant was treated by more than one doctor; that he took the medical history. At the previous trial, when he was asked whether he represented the police and the district attorney, he replied: "I don't know. I just seen him as a patient coming into the hospital". He now stated that he saw defendant as part of his routine duties at the hospital; that he would say that defendant "was a patient"; that he was not retained as an expert by the district attorney or the Police Department, and was paid nothing to examine defendant; that his examination was solely in the course of his duties as a resident physician on the staff of the hospital, and that, whether or not he had a slip from the police, so long as that man was on his floor as a patient, he would have examined him.

He also stated he *never* told defendant that he had any pink **[138]** slip, or that he was examining him for the district attorney or the Police Department, or that defendant was

under no duty to talk, or that anything he said might be used against him at a later trial. He further testified that he was a doctor at the hospital at which defendant was a patient; that he personally wrote items in the hospital record, after his conversations with defendant; that he saw defendant three times; that he was asked by the district attorney to submit a voucher for consideration by the comptroller's office, but that was not done until *after* the first trial. He also stated at this trial that the discharge summary was made out by him, and that of the four sheets of progress notes, at least the first two sheets were in his handwriting.

The direct examination was then continued, the doctor being permitted to state the conversation with defendant over objection and exception. He asked defendant how he felt and what had happened. Defendant, who still felt a little dizzy or blurry, said that as he was driving he noticed a jerking of his right hand, which warned him that he might develop a convulsion, and that as he tried to steer the car over to the curb he felt himself becoming unconscious, and he thought he had a convulsion. He was aware that children were in front of his car, but did not know whether he had struck them.

Defendant then proceeded to relate to Dr. Wechter his past medical history, namely, that at the age of 7 he was struck by an auto and suffered a marked loss of hearing. In 1946 he was treated in this same hospital for an illness during which he had some convulsions. Several burr holes were made in his skull and a brain abscess was drained. Following this operation defendant had no convulsions from 1946 through 1950. In 1950 he had four convulsions, caused by scar tissue on the brain. From 1950 to 1954 he experienced about 10 or 20 seizures a year, in which his right hand would jump although he remained fully conscious. In 1954, he had 4 or 5 generalized seizures with loss of consciousness, the last being in September, 1954, a few months before the accident. Thereafter he had more hospitalization, a spinal tap, consultation with a neurologist, and took medication daily to help prevent seizures.

On the basis of this medical history, Dr. Wechter made a diagnosis of Jacksonian epilepsy, and was of the opinion that defendant had a seizure at the time of the accident. Other members of the hospital staff performed blood tests and took **[139]** an electroencephalogram during defendant's three-day stay there. The testimony of Dr. Wechter is the only testimony before the trial court showing that defendant had epilepsy, suffered an attack at the time of the accident, and had knowledge of his susceptibility to such attacks.

Defendant was indicted and charged with violating section 1053-a of the Penal Law. Following his conviction, after a demurrer to the indictment was overruled, the Appellate Division, while holding that the demurrer was properly overruled, reversed on the law, the facts having been "examined" and found "sufficient". It granted a new trial upon the ground that the "transactions between the defendant and Dr. Wechter were between physician and patient for the purpose of treatment and that treatment was accomplished", and that evidence thereof should not have been admitted. From its determination both parties have appealed.

We turn first to the subject of defendant's cross appeal, namely, that his demurrer should have been sustained, since the *indictment* here does not charge a crime. The indictment states essentially that defendant, *knowing* "that he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness for a considerable period of time", was culpably negligent "in that he *consciously* undertook to and *did operate* his Buick sedan on a public highway" (emphasis supplied) and "while so doing" suffered such an attack which caused said automobile "to travel at a fast and reckless rate of speed, jumping the curb and driving over the sidewalk" causing the death of 4 persons. In our opinion, this clearly states a violation of section ***HN1*** 1053-a of the Penal Law. The statute does not require that a defendant must deliberately intend to kill a human being, for that would be murder. Nor does the statute require that he knowingly and consciously follow the precise path that leads to death and destruction. It is sufficient, we have said, when his conduct manifests a "disregard of the consequences which may ensue from the act, and indifference to the rights of others. No clearer definition, applicable to the hundreds of varying circumstances that may arise, can be given. Under a given state of facts, whether negligence is culpable is a question of judgment." (***HN2*** *People v. Angelo*, 246 N. Y. 451, 457.)

Assuming the truth of the indictment, as we must on a demurrer, this defendant knew he was subject to epileptic **[140]** attacks and seizures that might strike *at any time*. He also knew that a moving motor vehicle uncontrolled on a public highway is a highly dangerous instrumentality capable of unrestrained destruction. With this *knowledge*, and without anyone accompanying him, he deliberately took a chance by making a conscious choice of a course of action, in disregard of the consequences which he knew might follow from his conscious act, and which in this case did ensue. How can we say as a matter of law that this did not amount to culpable negligence within the meaning of section 1053-a?

To hold otherwise would be to say that a man may freely indulge himself in liquor in the same hope that it will not affect his driving, and if it later develops that ensuing

intoxication causes dangerous and reckless driving resulting in death, his unconsciousness or involuntariness at that time would relieve him from prosecution under the statute. ***HN3*** His awareness of a condition which he knows may produce such consequences as here, and his disregard of the consequences, renders him liable for culpable negligence, as the courts below have properly held (*People* v. *Eckert*, 2 N Y 2d 126, decided herewith; *People* v. *Kreis*, 302 N. Y. 894; *Matter of Enos* v. *Macduff*, 282 App. Div. 116; *State* v. *Gooze*, 14 N. J. Super. 277). To have a sudden sleeping spell, an unexpected heart or other disabling attack, without any prior knowledge or warning thereof, is an altogether different situation (see *Matter of Jenson* v. *Fletcher*, 277 App. Div. 454, affd. 303 N. Y. 639), and there is simply no basis for comparing such cases with the flagrant disregard manifested here.

It is suggested in the dissenting opinion that a new approach to licensing would prevent such disastrous consequences upon our public highways. But would it -- and how and when? ***HN4*** The mere possession of a driver's license is no defense to a prosecution under section 1053-a; nor does it assure continued ability to drive during the period of the license. It may be noted in passing, and not without some significance, that defendant strenuously and successfully objected to the district attorney's offer of his applications for such license in evidence, upon the ground that whether or not he was licensed has nothing to do with the case. Under the view taken by the dissenters, this defendant would be immune from prosecution under this statute even if he were unlicensed. Section 1053-a places a personal **[141]** responsibility on each driver of a vehicle -- whether licensed or not -- and not upon a licensing agency.

Accordingly, the Appellate Division properly sustained the lower court's order overruling the demurrer, as well as its denial of the motion in arrest of judgment on the same ground.

The appeal by the People (hereinafter called appellant) challenges the determination of the Appellate Division that the testimony of Dr. Wechter was improperly admitted in contravention of ***HN5*** section 352 of the Civil Practice Act, which states that a physician "shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity".

Two questions are raised by this appeal. The first is whether a physician-patient relationship existed between Dr. Wechter and defendant, and, if so, whether the communications made by defendant to him were necessary for the doctor to act in his professional capacity. The second is whether the presence of the police guard in the

doorway of the room destroys any privilege arising under section 352 and permits the doctor to testify. It is not contested that defendant, as the party asserting the privilege, bears the burden of showing its application in the present case (*Bloodgood* v. *Lynch*, 293 N. Y. 308, 314; *People* v. *Austin*, 199 N. Y. 446, 452; *People* v. *Koerner*, 154 N. Y. 355, 366; *People* v. *Schuyler*, 106 N. Y. 298, 304). He claims to have sustained the burden on the basis of appellant's own evidence previously outlined.

Appellant contends that no professional relationship arose because the doctor was sent by the district attorney to examine, not treat, the defendant, and in fact he did not treat him. The cases upon which appellant relies are readily distinguishable from the one now before us. In *People* v. *Schuyler* (*supra*), for example, a jail physician was allowed to testify, over an objection based on the predecessor statute to section 352 of the Civil Practice Act, to his observations of the prisoner's mental condition. There was no evidence that the prisoner was ill, or that he was attended by, treated, or required any treatment by said jail physician while in custody.

The criterion to be applied in determining whether or not a professional relationship exists was stated in *People* v. *Austin* (199 N. Y. 446, *supra*). The ***HN6*** testimony of a physician describing **[142]** an examination of defendant in jail relating to his sanity was found admissible because there were no circumstances from which it might be inferred that the defendant "was led to accept him [the examining doctor] as a physician and consequently to disclose to him information that perhaps would not otherwise have been given" (p. 452). This rule the court derived from *People* v. *Stout* (3 Parker Cr. Rep. 670, 676).

In *People* v. *Koerner* (154 N. Y. 355, 365-366, *supra*), as in *People* v. *Furlong* (187 N. Y. 198, 208-209), testimony of physicians was admitted, but in each case the defendant was explicitly informed that the physician was not acting in his capacity as a doctor or that information obtained might be used against him in subsequent legal proceedings (see, also, *People* v. *Leyra*, 302 N. Y. 353, 363, which had an altogether different fact pattern, however).

People v. *Sliney* (137 N. Y. 570, 580) and *People* v. *Hoch* (150 N. Y. 291, 302-303) are consistent with the rule of the *Austin* and *Stout* cases (*supra*). They are additional instances where the testimony of physicians who held examinations in jails was admitted, since no evidence was adduced from which it might be found that the defendants could reasonably have regarded the physician as acting in a professional capacity towards them.

Appellant further contends that there can be no finding of physician-patient relation in this case because there is no evidence that Dr. Wechter actually treated defendant. The cases relied on by appellant are inapposite. They properly hold that where a physician does treat a person, regardless of whether it is at his request, or with his consent, the relation arises, but they do not hold the converse (*Meyer* v. *Knights of Pythias*, 178 N. Y. 63, affd. ***HN7*** 198 U.S. 508; *People* v. *Murphy*, 101 N. Y. 126). In determining whether or not information necessary for treatment is privileged, the question as to whether or not actual treatment is undertaken is not decisive (*Grattan* v. *Metropolitan Life Ins. Co.*, 24 Hun 43, 46).

In any event, although Dr. Wechter testified that he personally did not treat defendant, he admitted that other doctors and internes in the hospital did "treat" him for Jacksonian epilepsy. He himself made that diagnosis. To say that in a hospital, where there is division of duties among the staff, the relation of physician and patient does not arise with regard to those members of the staff who do not actually treat the patient **[143]** is unsound. It would place upon section 352 strictures that are opposed to our oft-expressed view ***HN8*** that the statute is to be liberally construed (*Buffalo Loan, Trust & Safe Deposit Co.* v. *Knights Templar & Masonic Mut. Aid Assn.*, 126 N. Y. 450, 455; *Matter of City Council of City of N. Y.* v. *Goldwater*, 284 N. Y. 296, 300; *Edington* v. *Mutual Life Ins. Co.*, 67 N. Y. 185, 194).

It is apparent that the information here given by the defendant was necessary for his treatment. Those cases allowing disclosure by physicians of information related to them by their patients deal with such nonprofessional matters as details of an accident entirely unrelated to treatment (*Griffiths* v. *Metropolitan St. Ry. Co.*, 171 N. Y. 106; *Green* v. *Metropolitan St. Ry. Co.*, 171 N. Y. 201; *Gray* v. *City of New York*, 137 App. Div. 316, 321; *Travis* v. *Haan*, 119 App. Div. 138; *Benjamin* v. *Village of Tupper Lake*, 110 App. Div. 426; *De Jong* v. *Erie R. R. Co.*, 43 App. Div. 427), or facts such as a layman might observe (***HN9*** *Klein* v. *Prudential Ins. Co.*, 221 N. Y. 449; *Sparer* v. *Travelers Ins. Co.*, 185 App. Div. 861). Evidence of a prior medical history of a disease for which defendant was treated cannot be said to be information unnecessary for treatment. The communication is therefore within the conditions set forth in section 352.

The second question will now be dealt with. The problem here is what effect, if any, the presence of the police guard, pursuant to the orders of the district attorney, in or about the doorway of the hospital room, where he could overhear the conversation between Dr. Wechter and defendant, has upon the privilege under section 352. ***HN10*** That section does not in so many words require that a communication be confidential or confidentially

given in order to be privileged. So we turn to the cases. In *Matter of Coddington* (307 N. Y. 181, 187-191) (then) Conway, J., pointed out that Judge Earl attempted, in *Edington v. AEtna Life Ins. Co.* (77 N. Y. 564) to confine the statute to information of a confidential nature, but the court did not agree with him on that point. As a result of the cases that followed -- *Grattan v. Metropolitan Life Ins. Co.* (80 N. Y. 281) and *Renihan v. Dennin* (103 N. Y. 573) -- in the latter of which Judge Earl suggested legislation, section 836 of the Code of Civil Procedure (now Civ. Prac. Act, § 354) was amended to allow physicians in effect to testify as to nonconfidential communications of deceased patients where the privilege has been waived by persons **[144]** authorized by the section to do so. The language of those cases was exceedingly broad, and it was pointed out that, under the literal phraseology of code section 834, the physician was absolutely prohibited from testifying so long as the conditions of the statute were met.

Faced with the problem of the effect on the privilege of the *presence of third persons*, our Appellate Divisions turned to these decisions and found them authority for holding the testimony of the physicians privileged. In *Denaro v. Prudential Ins. Co.* (154 App. Div. 840, 843 [2d dept.]), a patient was examined by a doctor "in the presence of [his] * * * father or others near", and it was held that the physician could not testify; the persons present may testify, but the physician is bound by the rule. *Hobbs v. Hullman* (183 App. Div. 743 [3d dept.]) decided that where a conversation was had between a physician and a patient in the presence of a nurse, who was neither a professional nor a registered nurse, the doctor's testimony was inadmissible. A third case, *Sparer v. Travelers Ins. Co.* (185 App. Div. 861, 864 [1st dept.], *supra*), reached the same conclusion; it did not allow the testimony of a physician as to the details of an operation he performed to be received in evidence, although a medical student was present during its performance. And now the fourth department in the case at bar has impliedly held likewise in the case of a police guard. The present case falls clearly within the scope of these decisions. If anything, it presents an even stronger situation, for the guard's presence was ordered by command of the public authorities.

An opposite result is not indicated by those cases dealing with the effect of the presence of a third person upon the attorney-client privilege under section 353 of the Civil Practice Act (*Baumann v. Steingester*, 213 N. Y. 328; *People v. Buchanan*, 145 N. Y. 1, 26). The *Denaro* case (154 App. Div. 840, *supra*) expressly held that the situations were not analogous. It may be noted that the applicable statutes are not identical. Under section 353, relating to attorneys, the privilege extends only to "a communication, made by his client to him". ***HN11*** Under section 352 relating to physicians, however, the privilege

extends to "any information which he acquired in attending a patient"; since such information may be acquired from third persons -- and third persons who have some definite relationship to the **[145]** patient are often present -- the situation is not analogous to an attorney-client relationship.

Whether or not this distinction accounts for the fact that in attorney-client cases it has generally been held that the presence of a third person destroys the privilege, the cases suggest that even here there are exceptions (*Baumann v. Steingester, supra*, p. 332; *People v. Buchanan, supra*, p. 26). So ***HN12*** if the communication was intended to be confidential, the fact that it may have been overheard by a third person does not necessarily destroy the privilege (see *People v. Cooper*, 307 N. Y. 253, 259, n. 3; *Erlich v. Erlich*, 278 App. Div. 244, 245; Richardson on Evidence [8th ed.], § 438).

HN13 The true test appears to be whether in the light of all the surrounding circumstances, and particularly the occasion for the presence of the third person, the communication was intended to be confidential and complied with the other provisions of the statute. Applying this test, we hold that under section 352, and the cases construing it, the communication by defendant to Dr. Wechter was privileged, and admission of it by the trial court was error, as correctly stated by the Appellate Division.

Defendant raises the subsidiary question that the hospital record was improperly received in evidence before the Grand Jury, and the indictment should, therefore, be dismissed. A word may be said about that. He made no motion for inspection of the minutes of the Grand Jury. We do not know what evidence was adduced there, for the Grand Jury minutes are not a part of this record. Even if we assume that the hospital record was improperly before the Grand Jury, we have no way of knowing what other evidence may have been adduced and formed a sufficient basis for the indictment. There is a presumption that an indictment is based on legally sufficient evidence (see *People v. Eckert, supra; People v. Sweeney*, 213 N. Y. 37, 44; *People v. Sexton*, 187 N. Y. 495, 512; *People v. Glen*, 173 N. Y. 395, 403). We cannot here rule on the legal sufficiency of evidence before the Grand Jury without knowing what that evidence is. Defendant should have taken appropriate steps below and made a record so as to be in a position properly to raise the question on appeal.

Accordingly, the order of the Appellate Division should be affirmed.

Concur by: DESMOND (In Part)

Dissent by: DESMOND (In Part)

Dissent

[146] Desmond, J. (concurring in part and dissenting in part). I agree that the judgment of conviction cannot stand but I think the indictment should be dismissed because it alleges no crime. Defendant's demurrer should have been sustained.

The indictment charges that defendant knowing that "he was subject to epileptic attacks or other disorder rendering him likely to lose consciousness" suffered "an attack and loss of consciousness which caused the said automobile operated by the said defendant to travel at a fast and reckless rate of speed" and to jump a curb and run onto the sidewalk "thereby striking and causing the death" of 4 children. Horrible as this occurrence was and whatever necessity it may show for new licensing and driving laws, nevertheless this indictment charges no crime known to the New York statutes. Our duty is to dismiss it.

Section 1053-a of the Penal Law describes the crime of "criminal negligence in the operation of a vehicle resulting in death". Declared to be guilty of that crime is "A person who operates or drives any vehicle of any kind in a reckless or culpably negligent manner, whereby a human being is killed". The essentials of the crime are, therefore, first, vehicle *operation* in a culpably negligent *manner*, and, second, the resulting death of a person. This indictment asserts that defendant violated section 1053-a, but it then proceeds in the language quoted in the next-above paragraph of this opinion to describe the way in which defendant is supposed to have offended against that statute. That descriptive matter (an inseparable and controlling ingredient of the indictment, Code Crim. Pro., §§ 275, 276; *People v. Dumar*, 106 N. Y. 502) shows that defendant did *not* violate section 1053-a. No *operation* of an automobile in a reckless manner is charged against defendant. The excessive speed of the car and its jumping the curb were "caused", says the indictment itself, by defendant's prior "attack and loss of consciousness". Therefore, what defendant is accused of is *not* reckless or culpably negligent driving, which necessarily connotes and involves consciousness and volition. The fatal assault by this car was after and because of defendant's failure of consciousness. To say that one drove a car in a reckless manner in that his unconscious condition caused the car to travel recklessly is to make two mutually contradictory assertions. One cannot be "reckless" while unconscious. One cannot while unconscious **[147]** "operate" a car in a culpably negligent manner or in any other "manner". The statute makes criminal a particular kind

of knowing, voluntary, immediate operation. It does not touch at all the involuntary presence of an unconscious person at the wheel of an uncontrolled vehicle. To negative the possibility of applying section 1053-a to these alleged facts we do not even have to resort to the rule that all criminal statutes are closely and strictly construed in favor of the citizen and that no act or omission is criminal unless specifically and in terms so labeled by a clearly worded statute (*People* v. *Benc*, 288 N. Y. 318, 323, and cases cited).

Tested by its history section 1053-a has the same meaning: penalization of conscious operation of a vehicle in a culpably negligent manner. It is significant that until this case (and the *Eckert* case, 2 N Y 2d 126, handed down herewith) no attempt was ever made to penalize, either under section 1053-a or as manslaughter, the wrong done by one whose foreseeable blackout while driving had consequences fatal to another person.

The purpose of and occasion for the enactment of section 1053-a is well known (see Governor's Bill Jacket on L. 1936, ch. 733). It was passed to give a new label to, and to fix a lesser punishment for, the culpably negligent automobile driving which had formerly been prosecuted under section 1052 of the Penal Law defining manslaughter in the second degree. It had been found difficult to get manslaughter convictions against death-dealing motorists. But neither of the two statutes has ever been thought until now to make it a crime to drive a car when one is subject to attacks or seizures such as are incident to certain forms and levels of epilepsy and other diseases and conditions.

Now let us test by its consequences this new construction of section 1053-a. Numerous are the diseases and other conditions of a human being which make it possible or even likely that the afflicted person will lose control of his automobile. Epilepsy, coronary involvements, circulatory diseases, nephritis, uremic poisoning, diabetes, Meniere's syndrome, a tendency to fits of sneezing, locking of the knee, muscular contractions -- any of these common conditions may cause loss of control of a vehicle for a period long enough to cause a fatal accident. An automobile traveling at only 30 miles an hour goes 44 feet in a second. Just what is the court holding here? No less than **[148]** this: that a driver whose brief blackout lets his car run amuck and kill another has killed that other by reckless driving. But any such "recklessness" consists necessarily not of the erratic behavior of the automobile while its driver is unconscious, but of his driving at all when he knew he was subject to such attacks. Thus, it must be that such a blackout-prone driver is guilty of reckless driving (Vehicle and Traffic Law, § 58) whenever and as soon as he steps into the driver's seat of a vehicle. Every time he drives, accident or no accident, he is subject to criminal prosecution for reckless driving or to revocation of his

operator's license (Vehicle and Traffic Law, § 71, subd. 3). And how many of this State's 5,000,000 licensed operators are subject to such penalties for merely driving the cars they are licensed to drive? No one knows how many citizens or how many or what kind of physical conditions will be gathered in under this practically limitless coverage of section 1053-a of the Penal Law and section 58 and subdivision 3 of section 71 of the Vehicle and Traffic Law. It is no answer that prosecutors and juries will be reasonable or compassionate. A criminal statute whose reach is so unpredictable violates constitutional rights, as we shall now show.

When section 1053-a was new it was assailed as unconstitutional on the ground that the language "operates or drives any vehicle of any kind in a reckless or culpably negligent manner" was too indefinite since a driver could only guess as to what acts or omissions were meant. Constitutionality was upheld in *People* v. *Gardner* (255 App. Div. 683). The then Justice Lewis, later of this court, wrote in *People* v. *Gardner* that the statutory language was sufficiently explicit since "reckless driving" and "culpable negligence" had been judicially defined in manslaughter cases as meaning the operation of an automobile in such a way as to show a disregard of the consequences (see *People* v. *Angelo*, 246 N. Y. 451). The *manner* in which a car is driven may be investigated by a jury, grand or trial, to see whether the manner was such as to show a reckless disregard of consequences. But giving section 1053-a the new meaning assigned to it permits punishment of one who did not drive in any forbidden manner but should not have driven at all, according to the present theory. No motorist suffering from any serious malady or infirmity can with **[149]** impunity drive any automobile at any time or place, since no one can know what physical conditions make it "reckless" or "culpably negligent" to drive an automobile. Such a construction of a criminal statute offends against due process and against justice and fairness. The courts are bound to reject such conclusions when, as here, it is clearly possible to ascribe a different but reasonable meaning (*People* v. *Ryan*, 274 N. Y. 149, 152; *Matter of Schwarz* v. *General Aniline & Film Corp.*, 305 N. Y. 395, 406, and cases cited).

A whole new approach may be necessary to the problem of issuing or refusing drivers' licenses to epileptics and persons similarly afflicted (see Barrow and Fabing on Epilepsy and the Law, ch. IV; Restricted Drivers' Licenses to Controlled Epileptics, and see 2 U. C. L. A. L. Rev., p. 500 *et seq.*). But the absence of adequate licensing controls cannot in law or in justice be supplied by criminal prosecutions of drivers who have violated neither the language nor the intendment of any criminal law.

Entirely without pertinence here is any consideration of driving while intoxicated or while sleepy, since those are conditions presently known to the driver, not mere future possibilities or probabilities.

The demurrer should be sustained and the indictment dismissed.

Martin v. State, 31 Ala. App. 334

Court of Appeals of Alabama

January 18, 1944

No. 4 Div. 805

Reporter

31 Ala. App. 334 | 1944 Ala. App. LEXIS 298 | 17 So. 2d 427

MARTIN v. STATE

Subsequent History: Rehearing Granted March 21, 1944.

Prior History: Appeal from Circuit Court, Houston County; D. C. Halstead, Judge.

Cephus Martin was convicted of public drunkenness, and he appeals.

Disposition: Reversed and rendered on rehearing.

Core Terms

appears, drunken condition, public place, intoxicated, manifested, arrested, highway, profane, drunk, loud

Case Summary

Procedural Posture

Defendant appealed the judgment of the Circuit Court, Houston County (Alabama), which convicted him of public drunkenness.

Overview

Defendant was arrested at his home and taken into a public place by police where he allegedly manifested a drunken condition by using loud and profane language. Defendant was convicted of public drunkenness and he appealed. The court reversed defendant's conviction and concluded that an accusation of drunkenness in a designated public place could not be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by an arresting officer.

Outcome

The court reversed defendant's conviction of public drunkenness.

▼ LexisNexis® Headnotes

Criminal Law & Procedure > Criminal Offenses ▾ > Alcohol Related Offenses ▾ > General Overview ▾

Criminal Law & Procedure > ... > Alcohol Related Offenses ▾ > Public Drunkenness ▾ > General Overview ▾

Criminal Law & Procedure > ... > Crimes Against Persons ▾ > Disruptive Conduct ▾ > General Overview ▾

HN1 An accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was

involuntarily and forcibly carried to that place by the arresting officer. *Shepardize - Narrow by this Headnote*

Counsel: W. Perry Calhoun, of Dothan, for appellant.

The original arrest being unlawful and without a warrant, the subsequent happenings by appellant should not be used against him to make out a case of public drunkenness. If appellant's acts were the result of compulsion and duress, this is a good defense. Browning v. State, ante, p. 137, 13 So.2d 54; Gassenheimer v. State, 52 Ala. 313.

Wm. N. McQueen, Acting Atty. Gen., and Frank N. Savage, Asst. Atty. Gen., for the State.

It is no defense to the perpetration of a crime that facilities for its commission were purposely placed in the way. Nelson v. City of Roanoke, 24 Ala.App. 277, 135 So. 312. Compulsion which will excuse crime must be present, imminent and impending and of such nature as to induce a well-grounded apprehension of death or serious bodily harm if the act is not done. Such compulsion must have arisen without the fault or negligence of the person asserting it as a defense. 22 C.J.S., Criminal Law, page 99, § 44; 16 C.J. 91; Moore v. State, 23 Ala.App. 432, 127 So. 796; Thomas v. State, 134 Ala. 126, 33 So. 130; Browning v. State, ante, p. 137, 13 So.2d 54. Burden of proving defense of duress is upon accused. 22 C.J.S., Criminal Law, page 888, § 575.

Judges: Simpson, Judge.

Opinion by: SIMPSON

Opinion

[335] Appellant was convicted of being drunk on a public highway, and appeals. Officers of the law arrested him at his home and took him onto the highway, where he allegedly committed the proscribed acts, viz., manifested a drunken condition by using loud and profane language.

The pertinent provisions of our statute are: "Any person who, while intoxicated or drunk, appears in any public place where one or more persons are present, * * * and manifests

a drunken condition by boisterous or indecent conduct, or loud and profane discourse, shall, on conviction, be fined", etc. Code 1940, Title 14, Section 120.

Under the plain terms of this statute, a voluntary appearance is presupposed. The rule has been declared, and we think it sound, that HN1 an accusation of drunkenness in a designated public place cannot be established by proof that the accused, while in an intoxicated condition, was involuntarily and forcibly carried to that place by the arresting officer. Thomas v. State, 33 Ga. 134, 125 S.E. 778; Reddick v. State, 35 Ga. 256, 132 S.E. 645; Gunn v. State, 37 Ga. 333, 140 S.E. 524; 28 C.J.S., Drunkards, § 14, p. 560.

Conviction of appellant was contrary to this announced principle and, in our view, erroneous. It appears that no legal conviction can be sustained under the evidence, so, consonant with the prevailing rule, the judgment of the trial court is reversed and one here rendered discharging appellant. Code 1940, Title 7, Section 260; Robison v. State, 30 Ala.App. 12, 200 So. 626; Atkins v. State, 27 Ala.App. 212, 169 So. 330.

Of consequence, our original opinion of affirmance was likewise laid in error. It is therefore withdrawn.

Reversed and rendered.