SUMMARY
October 19, 2023

2023COA97

No. 22CA2178, *People v. Tanner* — Crimes — Careless Driving — Unit of Prosecution

A division of the court of appeals concludes that the unit of prosecution under the careless driving statute, § 42-4-1402(1), C.R.S. 2023, is the act of driving in the manner described and not the number of victims harmed by that conduct. Because the district court declined to merge the defendant's careless driving convictions based on the harm caused to each victim, the division reverses the judgment and remands with directions to merge one of the two careless driving convictions into the other and vacate the sentence for the merged conviction.

As the special concurrence points out, however, inadequacies in the careless driving statute, as it now stands, preclude judicial discretion to impose consecutive sentences when more than one

victim is harmed by the defendant's conduct. Thus, the special concurrence urges the legislature to consider amending section 42-4-1402(2)(c) to allow for the possibility of consecutive sentences that recognize the loss of each victim under section 18-1-408(3), C.R.S. 2023.

COLORADO COURT OF APPEALS **2023COA97**

Court of Appeals No. 22CA2178
Larimer County District Court No. 21CR1606
Honorable Laurie K. Dean, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Brennan Fleet Tanner,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division A
Opinion by CHIEF JUDGE ROMÁN
Davidson*, J., concurs
Bernard*, J., specially concurs

Announced October 19, 2023

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2023.

¶ 1 Defendant, Brennan Fleet Tanner, appeals the judgment of conviction entered on two counts of careless driving. Tanner contends, the People concede, and we agree that the district court erred by declining to merge the two convictions. Accordingly, we reverse the judgment and remand for the district court to merge one of the convictions into the other, vacate the sentence corresponding to the merged conviction, and reinstate the judgment as to only one count of careless driving.

I. Background

¶ 2 Tanner was the driver in a single-car crash that killed his two passengers. Before the crash, witnesses observed Tanner's truck speeding and weaving into oncoming traffic. The prosecution charged him with two counts of vehicular homicide – reckless, two counts of criminally negligent homicide, and two counts of careless driving.

¶ 3 After a bench trial, the district court acquitted Tanner of the four homicide counts but convicted him of the two counts of careless driving.

¶ 4 Before sentencing, Tanner moved to merge his two careless driving convictions because the unit of prosecution for careless

driving is each driving incident, not each victim. The prosecution agreed. But the district court did not. Citing subsections (2)(b) and (2)(c) of the careless driving statute, § 42-4-1402, C.R.S. 2023, the court concluded that the unit of prosecution for careless driving is the harm caused to each victim, and, thus, merger was not required. The court imposed two one-year jail sentences, to be served consecutively.[1]

II. Discussion

¶ 5 Tanner contends that the court erred by not merging his two careless driving convictions because the unit of prosecution for that offense is each driving incident, not each person injured or killed as a result thereof. Reviewing this legal question de novo, *Magana v. People*, 2022 CO 25, ¶ 18, we agree.

¶ 6 The Double Jeopardy Clauses of the United States and Colorado Constitutions protect an accused against being twice placed in jeopardy for the same crime. *People v. Arzabala*, 2012 COA 99, ¶ 20. As pertinent here, the Double Jeopardy Clause

[1] After this appeal was filed, the district court granted an appeal bond and a stay of execution on the remainder of Tanner's sentence pending the outcome of this case.

protects not only against a second trial for the same offense, but also against multiple punishments for the same offense. *Id.* The double jeopardy prohibition does not, however, preclude the General Assembly from specifying multiple punishments based on the same criminal conduct. *Id.* at ¶ 21; *Magana*, ¶ 20. Rather, the General Assembly may establish and define offenses by prescribing the allowable "unit of prosecution." *Arzabala*, ¶ 21 (quoting *Woellhaf v. People*, 105 P.3d 209, 215 (Colo. 2005)).

¶ 7 "The unit of prosecution is the way the General Assembly, in drafting a criminal statute, divides a defendant's conduct 'into discrete acts for purposes of prosecuting multiple offenses.'" *Magana*, ¶ 19 (quoting *Woellhaf*, 105 P.3d at 215). To discern the unit of prosecution, we look to the plain language of the relevant statute. *Id.*

¶ 8 Section 42-4-1402(1) establishes the offense of careless driving. It provides, in relevant part, "A person who drives a motor vehicle . . . in a careless and imprudent manner, without due regard for the width, grade, curves, corners, traffic, and use of the streets and highways and all other attendant circumstances, is guilty of careless driving." § 42-4-1402(1). Careless driving is a

class 2 misdemeanor traffic offense. § 42-4-1402(2)(a). However, if the driver's actions proximately cause bodily injury or death to another, it is a class 1 misdemeanor traffic offense. § 42-4-1402(2)(b)-(c).

¶ 9 A statute sets out a sentence enhancer "if its proof, while raising the . . . level of an offense, is not necessarily required to secure a conviction." *People v. Leske*, 957 P.2d 1030, 1039 (Colo. 1998). A statutory sentence enhancer is not a substantive element of the charged offense for purposes of a double jeopardy and merger analysis. *Id.*

¶ 10 Bodily injury and death raise the level of the offense of careless driving from one class of misdemeanor to another; accordingly, they are sentence enhancers, not substantive elements of the offense. *See Armintrout v. People*, 864 P.2d 576, 580 (Colo. 1993) (a sentence enhancer is a statutory provision that raises the felony classification of a particular offense); *People v. Zweygardt*, 2012 COA 119, ¶¶ 16, 47 (applying this principle to conclude that bodily injury and death are not substantive elements of careless driving but declining to address whether multiple careless driving convictions based on one act of driving should merge because the

defendant did not present that issue for the court's review); *see also People v. Simon*, 266 P.3d 1099, 1108 (Colo. 2011) ("Whether the offense is committed as a class 3 or class 4 felony, the relevant unit of prosecution — and the substantive crime of which the defendant stands convicted — remains the act statutorily designated as 'Sexual assault on a child' or 'Sexual assault on a child by one in a position of trust.'").

¶ 11 Because subsection (1) of the careless driving statute evinces a legislative intent to criminally punish a certain type of driving, and subsections (2)(b) and (2)(c) describe sentence enhancers by raising the classification of the offense, we must conclude that the unit of prosecution for careless driving is the act of driving in the manner described and not the number of victims harmed by that conduct.

¶ 12 True, the unit of prosecution for some offenses is, as the district court noted, defined by each victim harmed. *See, e.g.*, *Magana*, ¶¶ 20-32. But each of those statutes requires proof that the defendant harmed "another" as a *substantive element* of the offense, not as a sentence enhancer. *See id.* at ¶ 8 (detailing statutory definitions of first degree, second degree, and fourth degree arson offenses).

¶ 13 Accordingly, we reverse the judgment and remand with directions to merge one of the two careless driving convictions into the other, vacate the sentence for the merged conviction, and reinstate the judgment as to only one count of careless driving.

III. Disposition

¶ 14 The judgment is reversed, and the case is remanded for further proceedings as stated herein.

JUDGE DAVIDSON concurs.

JUDGE BERNARD specially concurs.

JUDGE BERNARD, specially concurring.

¶ 15 Defendant's careless driving was the proximate cause of the deaths of two people. Yet, as the majority correctly points out, under the law as it now stands, he cannot receive consecutive sentences for those two deaths; rather, his two careless driving convictions must merge, and he will only receive one sentence. In other words, the trial court has no discretion to impose consecutive sentences that would recognize the harm that defendant caused to the two victims, to their families, to their friends, and to their communities. While I agree with the result and the rationale in the majority's opinion, I write separately to urge the General Assembly to take a fresh look at the careless driving statute, specifically section 42-4-1402(2)(c), C.R.S. 2023. Once it does, it can decide whether it wishes to amend that statute to give judges discretion to impose consecutive sentences in cases in which a defendant's careless driving was the proximate cause of the deaths of two or more people.

¶ 16 How did the result in this case come about? Before 1985, the careless driving statute, then found in section 42-4-1204, had a penalty provision, subsection (2), which said that "[a]ny person who

violates any provision of this section commits a class 2 traffic offense." § 42-4-1204(2), C.R.S. 1984. Effective July 1, 1985, the General Assembly amended subsection (2) by adding "[b]ut, if the person's actions are the proximate cause of bodily injury or death to another, such person commits a class 1 traffic offense." Ch. 333, secs. 1-3, § 42-4-1204(2), 1985 Colo. Sess. Laws 1325. This change was approved on May 31, 1985. *Id.* (Today, the class 1 traffic misdemeanor of careless driving that proximately causes the death of another is found in section 42-4-1402(2)(c).)

¶ 17 Looking at the plain language of the amended subsection (2) of section 42-4-1204, *see Garcia v. People*, 2023 CO 41 ¶ 14, it appears to me that the General Assembly intended to create a sentence enhancer, not a crime in which the proximate cause of the death of another is an element of the offense, *see People v. Leske*, 957 P.2d 1030, 1039 (Colo. 1998). The General Assembly was presumptively aware of the difference between elements of an offense and sentence enhancers, *see Vaughan v. McMinn*, 945 P.2d 404, 409 (Colo. 1997), because Colorado's appellate courts had discussed the distinction between sentence enhancers and substantive offenses before 1985, *see, e.g.*, *People v. Beigel*, 646

P.2d 948, 949-50 (Colo. App. 1982), *reversed on other grounds*, 683 P.2d 1188 (Colo. 1984).

¶ 18 But, even if I were to decide that the 1985 amendment to section 42-4-1204(2) is ambiguous as to whether it created a substantive offense or a sentence enhancer, the legislative history behind this amendment would still support a conclusion that it is a sentence enhancer. *See Pellegrin v. People*, 2023 CO 37, ¶ 23 (if a statute is ambiguous, a court may employ other aids in statutory construction, including the statute's legislative history).

¶ 19 When testifying about this amendment, the Senate sponsor said that

> what this bill does [is to] . . . toughen . . . up the penalty on careless driving from a class 2 to a class 1 offense. That doesn't mean the judges are going to make any . . . tougher sentencing, but it gives them the latitude to do it if they so choose. Right now, the maximum penalty under class 2 [traffic offenses] is 2 to 10 days in [jail] or $100 or both. We'd move that the maximum would be 1 year in [jail] or $1000 fine or both. Right now, it seems to be that in a case of death or serious bodily injury, the penalties are a little bit too light. And with that we would just like to toughen up this penalty a little bit.

Hearings on S.B. 85-81 before the Senate Judiciary Committee, 55th Gen. Assemb., 1st Reg. Sess. (Feb. 11, 1985) (statement of Senator Arnold).

¶ 20 The House sponsor said something similar during his testimony. He observed that the penalty for careless driving,

> whether you hit a bumper or whether you hit a deer . . . the penalty for that is the same as if you are [driving carelessly] and you cause serious bodily injury or death in an accident in which they can't show criminal culpability but they can show careless driving.

Hearings on S.B. 85-81 before the House Judiciary Committee, 55th Gen. Assemb., 1st Reg. Sess. (Mar. 19, 1985) (statement of Representative McInnis). The legislation's intent, he continued, was not to increase the penalty for all instances of careless driving, but to give a judge an option, in a careless driving case involving death or bodily injury, to impose a stiffer sentence. *Id.*

¶ 21 There was, however, no mention in the language of the amended subsection (2) or in the legislative discussions about it concerning whether the 1985 General Assembly intended that a court should have discretion to impose consecutive sentences if a defendant's careless driving was the proximate cause of the deaths

of two or more people. The prosecution filed two counts of careless driving against defendant, adding the sentence enhancer to each. I have not found anything that categorically resolves this question one way or the other. I respectfully submit, however, that there is some tantalizing evidence of such intent in another change that the General Assembly made in 1985.

¶ 22 Section 18-1-408(3), C.R.S. 2023, gives courts discretion to impose consecutive sentences if two or more "offenses" are "supported by identical evidence" and "multiple victims are involved." The language referring to giving courts such discretion in cases of multiple victims was added in 1985, becoming effective on July 1 of that year. Ch. 147, sec. 1-3, § 18-1-408(3), 1985 Sess. Laws 661. It was approved on April 24, 1985, *id.*, or about a month *before* the amendment to subsection (2) of the careless driving statute was approved.

¶ 23 There is a further hint of the General Assembly's intent in a 1997 amendment to Colorado's Crime Victim Compensation Act. In it, the General Assembly amended the definition of "compensable crime" to include cases of careless driving that are the proximate cause of "the death of another person." Ch. 266, sec. 3,

§ 24-4.1-102(4)(a)(II), 1997 Colo. Sess. Laws 1560. According to testimony before the Senate Judiciary Committee, the reason for this change, as is pertinent to this case, is that some victim compensation boards were not awarding compensation to the survivors of persons who were killed in careless driving cases, so the statute should be amended to make it clear that such compensation was appropriate. Hearings on S.B. 97-84 before the S. Judiciary Comm., 61st Gen. Assemb., 1st Reg. Sess. (Jan. 27, 1997). During the second reading in the Senate, the bill's sponsor said that it

> expands the definition of compensable crimes to include careless driving that results in the death of another person . . . . There is a little glitch in the law, reckless driving is already covered, careless [driving] is not, so [the legislative amendment was designed to reach] the same result when someone has been killed. . . . [T]he local . . . boards realized that they couldn't do anything for the victims of crime and this again only allows them to apply . . . .

2d Reading on S.B. 97-84 before the S., 61st Gen. Assemb., 1st Reg. Sess. (Apr. 17, 1997) (statement of Senator Hopper).

¶ 24 The 1997 amendment suggests to me that the General Assembly, at least for victims' compensation purposes, wanted to

ensure that, for example, compensation be paid to *all* the families of victims of one careless driving offense that was the proximate cause of the death of more than one person. Such legislative intent would be consistent with, although certainly not definitively probative of, giving judges the discretion to impose consecutive sentences when a defendant's careless driving was the proximate cause of more than one person's death. I therefore think that, based on the preceding analysis, it is at least reasonably possible that, in 1985, it was the General Assembly's intent to give a judge such discretion.

¶ 25 I recognize that the General Assembly did not choose to amend the careless driving statute itself in 1997 to give judges such express discretion. If, however, it thought that such discretion had existed since 1985, there would be no need for such an amendment.

¶ 26 But, as the majority points out, that is not the end of the story in this case. It is not apparent to me that, in 1985, the legislature understood the possibility that, because of the concept of "unit of prosecution," consecutive sentences would not be available if the prosecution charged a defendant with two counts of careless driving

proximately causing the deaths of two people based on one incident of careless driving.

- The exploration of the boundaries of unit-of-prosecution law by Colorado appellate courts in 1985 was in its infancy. *See, e.g.*, *People v. Williams*, 651 P.2d 899, 903 (Colo. 1982).
- Our supreme court's major decisions describing the relationship between a unit of prosecution and the prospect of multiple punishments, such as *Magana v. People*, 2022 CO 25; *People v. Arzabala*, 2012 COA 99; *People v. Abiodun*, 111 P.3d 462 (Colo. 2005); *Woellhaf v. People*, 105 P.3d 209 (2005); and *Quintano v. People*, 105 P.3d 585 (Colo. 2005), lay many years in the future.
- Although *People v. Zweygardt*, 2012 COA 119, ¶ 47, recognized the existence of the issue that multiple careless driving convictions based on one act of driving might merge, the division did not address it.
- It was not until *this case* that a Colorado appellate court has held that two or more careless driving convictions based on one act of driving should merge.

¶ 27 Considering the General Assembly's 1985 amendments to what is now section 42-4-1402(2)(c) and to section 18-1-408(3), and its 1997 amendments to section 24-4.1-102(4)(a)(II), it is my view that the evolution of the judiciary's unit-of-prosecution law has rendered moot any original intent that the General Assembly may have had to give a judge discretion to impose consecutive sentences if one act of careless driving is the proximate cause of two or more deaths. I do not mean to suggest that there is anything wrong with such evolutionary changes in the law; they are an integral part of the process of judicial decision-making, and they happen all the time. What I do mean to suggest is what the legislature may have intended in 1985 is now no longer possible because of that evolution.

¶ 28 I believe that this situation points out a present-day inadequacy in section 42-4-1402(2)(c) that did not exist in 1985. I therefore write separately, *see* C.A.R. 35(e)(3), to urge the General Assembly to consider amending that subsection to allow for the possibility of consecutive sentences under section 18-1-408(3). That possibility exists in many statutes, and one way to allow for such a possibility is to rewrite the careless driving statute to make

the death of another a substantive element of the offense, similar to the arson statute discussed in *Magana*, ¶ 8. (The same reasoning would apply to careless driving that is the proximate cause of bodily injury to another, which is found in section 42-4-1402(2)(b).)

¶ 29 The fact pattern in this case — the deaths of multiple victims proximately caused by one act of careless driving — is not unprecedented. Indeed, there is a reasonably foreseeable possibility that there can be acts of careless driving resulting in the deaths of more than two victims. What if a defendant is a school bus driver and her careless driving is the proximate cause of the deaths of a dozen school children? What if a defendant is driving on a busy downtown street and his careless driving results in his car jumping up on a sidewalk into a crowd in front of a theater, proximately causing the deaths of four or five people? We certainly hope that such events do not occur, but experience teaches otherwise.

¶ 30 I respectfully submit, now that the proverbial chicken — here, the issue of whether a defendant's careless driving convictions merge — has come home to roost, that the General Assembly may wish to act to address this statutory inadequacy so that section

42-4-1202(2)(c) can again be consistent with what may have been the General Assembly's intent in 1985.