

20-5768

THE UNITED STATES SUPREME COURT

ORIGINAL

RaySean D. Barber

Plaintiff-Appellant

v.

Todd Wasmer

Defendant-Respondent

Supreme Court, U.S.
FILED

AUG 10 2020

OFFICE OF THE CLERK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BRIEF FOR APPELLANT

RaySean D. Barber

P.O. Box 22800

Lincoln, NE 68542

Appellant, Pro Se.

QUESTIONS PRESENTED

1. Was Appellant denied Due Process of Law and Effective Assistance of Counsel where the charging document (information) did not include within the statement of the nature of the crime the words "proximate cause of the death of Betty Warren was RaySEan D. Barber's operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06 or words meaning the same as said words as prescribed in the statute and where trial counsel did not object to said information on that basis?

2. Was Appellant denied Due Process of Law and Effective Assistance of Counsel where the trial court, during its advisement to Appellant of the nature of the charge at the plea colloquy, omitted that the State must prove that the proximate cause of the death of Betty Warren was Appellant's operation of a motor vehicle in violation of section 60-6,196 or 60-6,197.06 and where trial counsel did not object to said advisement on that basis?

3. Was Appellant denied Due Process of Law and Effective Assistance of Counsel where the factual basis did not indicate, in the trial court's subjective view of the evidence, that death was a foreseeable consequence of the impaired ability to operate a motor vehicle in a prudent and cautious manner to some appreciable degree due to impairment from alcohol on Appellant's behalf and where trial counsel did not object to the factual basis on that basis?

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LIST OF PROCEEDINGS

CRIMINAL PROCEEDING

1. Court in Question: Douglas County District Court
2. Docket Number: CR13-1138
3. Caption: State v. Barber
4. Date of Entry of Judgment: Appellant entered a plea of no contest and was found guilty of a Class III felony motor vehicle homicide on June 24, 2013; Appellant was Sentenced on October 1, 2013.

POSTCONVICTION PROCEEDINGS

1. Court in Question: Douglas County District Court
2. Docket Number: CR13-1138
3. Caption: State v. Barber
4. Date of Entry of Judgment: The trial court denied postconviction relief to Appellant on December 02, 2016 with respect to one issue, and May 10, 2017 with respect to all other issues.

POSTCONVICTION APPEAL

1. Court in Question: Nebraska Court of Appeals
2. Docket Number: A-17-610
3. Caption: State v. Barber
4. Date of Entry of Judgment: on September 25, 2018, the trial court's judgment was affirmed.

HABEAS CORPUS

1. Court in Question: United States District Court for the District of Nebraska
2. Docket Number: 8:18CV571
3. Caption: Barber v. Hansen
4. Date of Entry of Judgment: The District Court dismissed Appellant's

claims with prejudice and denied Appellant a certificate of appealability on November 26, 2019.

HABEAS APPEAL

1. Court in Question: The 8th Circuit Court of Appeals for the United States
2. Docket Number: 20-1233
3. Caption: Barber v. Wasmer
4. Date of Entry of Judgment: The 8th Circuit Court of Appeals denied Appellant a certificate of appealability and dismissed the appeal on May 13, 2020; rehearing was denied July 14, 2020.

BASIS FOR JURISDICTION

1. Date of Judgment or Order Sought to be Reviewed: On May 13, 2020 the 8th Circuit Court of Appeals denied certificate of appealability.
2. Date of Any Order Respecting Rehearing: The 8th Circuit Court of Appeals denied rehearing on July 14, 2020.

JURISDICTION

1. Statutory Provision Confirring Jurisdiction: 28 U.S.C.A. §1254: Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

CONSTITUTIONAL PROVISIONS

1. U.S.C.A. Const.Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to... be informed of the nature and cause of the accusation...
2. U.S.C.A. Const.Amend. VI: In all criminal prosecutions, the accused shall enjoy the right to... have the assistance of counsel for his defense.
3. U.S.C.A. Const.Amend. XIV: ...nor shall any state deprive any person of life, liberty, or property, without due process of law...

STATUTORY PROVISIONS

1. Neb.Rev.Stat. §28-306(1): A person who unintentionally causes the death of another while engaged in the operation of a motor vehicle in violation of the law of the State of Nebraska or any city or village ordinance commits motor vehicle homicide.
2. Neb.Rev.Stat. §28-306(3)(b) (Reissue 2011): If the proximate cause of the death of another is the operation of a motor vehicle in violation of §60-6,196 or §60-6,197.06 motor vehicle homicide is a Class III feloney....
3. Neb.Rev.Stat. §60-682.01(f): Any person who operates a vehicle in violation of any maximum speed limit established for any highway or freeway is guilty of a traffic infraction and upon conviction shall be fined: (f) Three hundred dollars for traveling over thirty-five miles per hour over the speed limit.
4. Neb.Rev.Stat. §60-6,196: It shall be unlawful for any person to operate or be in actual physical control of any motor vehicle:(a) while under the influence of alcoholic liquor or any drug; (b) when such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per one hundred milliliters of his or her blood; or (c) when such person has a concentration of eight-hundredths of one gram or more by weight of alcohol per two hundred ten liters of his or her breath. (2) Any person who operates or is in the actual physical control of any motor vehicle while in a condition described in subsection (1) of this section shall be guilty of a crime and upon conviction punished as provided in sections 60-6,197.02 to 60-6,197.08.
5. Neb.Rev.Stat. §60-6,197.06
6. Neb.Rev.Stat. §60-6,213: Any person who drives any motor vehicle in such a manner as to indicate an indifferent or wonton disregard for the safety of persons or property shall be guilty of reckless driving.

STATEMENT OF THE CASE

On April 15, 2013, an information was filed in the Douglas County District Court in Omaha, Nebraska, alleging that: "On or about 3, February 2013, in Douglas County, Nebraska RAYSEAN D. BARBER did then and there unintentionally cause the death of BETTY WARREN while engaged in the unlawful operation of a motor vehicle, and while in violation of section 60-6,196 or 60-6,197.06, in violation of Neb.Rev.Stat. §28-306(1) & (3)(b) a Class III felony." (Filing no. 11-11 at CM/ECF p. 4.) On June 24, 2013, a plea colloquy was held in said court. During this plea colloquy the trial court advised Appellant of the nature of the charge as follows: "Do you understand the charge to which you are pleading no contest is the charge of motor vehicular homicide. In order to convict you of this charge, the State would have to prove that: On or about the 3rd day of February 2013, here in Douglas County, Nebraska, you did then and there unintentionally cause the death of Betty Warren while engaged in the unlawful operation of a motor vehicle and while in violation of §60-6,196 or §60-6,197.06, and this is a Class III felony. Do you understand that?" To which Appellant answered "Yes." (Filing no. 11-13 at CM/ECF p. 8 & 9.)

The prosecutor, Matthew M. Kuhse, thereafter made a statement of the factual basis for the plea as follows: "On February 3rd, 2013, here in Douglas County, Nebraska, the defendant was observed by witnesses traveling southbound on Saddle Creek Road in excess of the speed limit. The defendant approached the area of Saddle Creek and Poppleton Streets, where he was traveling approximately 98 miles per hour in a 35 miles-per-hour zone. The defendant hit a curb, allowing him to lose control of his vehicle. He struck another car being driven by Betty Warren. Betty Warren was pronounced dead. An autopsy conducted by the Douglas County Coroner revealed that she died of internal injuries attributable to this car accident.

"The police suspected that the defendant was under the influence of a controlled substance and/or alcohol. His blood was tested, by virtue of him being transported for medical treatment, where he had a blood alcohol content of .146.

"All of these events occurred here in Douglas County, Nebraska." (Filing no. 11-13 at CM/ECF p. 13.)

Trial counsel, Leslie Cavanaugh, had nothing to add for the factual basis and found no reason to object to the colloquy. Appellant was thereafter found guilty of the charge.

On October 1, 2013, Appellant had his sentencing hearing. At this hearing, the trial court mad a statement in which he stated that the conduct done by Appellant that night, as far as driving 98 miles-per-hour (mph) on Saddle Creek Road at midnight while intoxicated "...was more than just bad judgment. That was more than just a mistake." (Filing no. 11-13 at CM/ECF p. 23.)

Appellant was then sentenced to serve 20 years to 20 years imprisonment, to be served in the Nebraska Department of Correctional Services (NDCS).

Appellant thereafter filed a direct appeal, challenging the sentence as being excessive, to the Nebraska Court of Appeals. The conviction and sentence was affirmed, and further review was denied by the Nebraska Supreme Court.

On October 17, 2016, Appellant filed his postconviction motion titled "Second Amended Motion for Postconviction Releif". In this motion he alleged several things, including that trial counsel was ineffective for failing to object to the information, failing to object to the advisement of the nature of the crime by the trial court, and failing to object to the factual basis. He alleged that the proximate cause element was missing from the information and that trial counsel should have therefore objected with a motion to dismiss. Appellant also alleged that because the trial court advised him that the State

had to prove that he intentionally caused the death of Betty Warren, where the crime requires that the death be caused unintentionally, and because the trial court omitted from its advisement that the State had to prove that the proximate cause of the death of Betty Warren was Appellant's operation of a motor vehicle in violation of Neb.Rev.Stat. §60-6,196 or §60-6,197.06 as is also required by the crime, trial counsel should have objected to said advisement. Appellant further alleged in his second amended motion for postconviction relief that because the statement of the factual basis did not establish that the proximate cause of the death of Betty Warren was Appellant's operation of a motor vehicle in violation of §60-6,196, the factual basis was insufficient and trial counsel should have objected to it therefor. These claims were alleged in grounds one, two, and three of the Appellant's second amended motion for postconviction relief. (Filing no. 11-12 at CM/ECF p.214-218.)

A hearing was held for Appellant's claim regarding the trial court's use of the word "intentionally" at the plea colloquy. There, it was found that the court reporter accidentally typed in the word "intentionally" and that the trial court actually said the word "unintentionally". The trial court thereafter filed an order on December 2, 2016, addressing only the part of Appellant's claim having to do with the trial court's improper advisement of the nature of the charge where the court reporter accidentally typed in the word "intentionally". The Court denied relief of this issue without making findings of fact and conclusions of law on whether the omission of the proximate cause element was prejudicial to Appellant. (Filing no. 11-12 at CM/ECF p. 232 to 234.)

On May 10, 2017, the trial court addressed the remaining issues of the second amended motion for postconviction relief. Regarding claims one, two, and three of this motion, the trial court found that they all had to do with

the court reporter's mistake with regard to typing the word "intentionally" and denied the relief requested for the same reason as that set forth in the trial court's December 2nd order. (Filing no. 11-12 at CM/ECF p. 250-253.) Issues one, two, and three were all distinct in that issue one had to do with the trial court's improper advisement, issue two had to do with the insufficient factual basis, and issue three had to do with trial counsel's failure to object to the insufficient information, the trial court's improper advisement of the nature of the charge at the plea colloquy, and to the insufficient factual basis. The trial court denied relief on all other issues.

Appellant appealed the trial court's order to the Nebraska Court of Appeals through his postconviction counsel, A. Michael Bianchi. Appellant argued in his appeal several issues including that the information and the trial court's advisement failed to mention the words "proximate cause" and that the factual basis mentions nothing of causation; and that trial counsel was ineffective for failing to object to these infirmities. (Replacement Brief of Appellant p. 21-24.) The court of Appeals held that the information was sufficient to charge motor vehicle homicide under §28-306; that the trial court's advisement was proper in light of the fact that the court reporter made a mistake (the Court of Appeals did not opine on the trial court's omission of the proximate cause element); that the factual basis was sufficient and did show causation; and that trial counsel was not ineffective for not objecting. The Court of Appeals found these claims to be without merit. (Opinion of the Nebraska Court of Appeals p. 9.) Appellant then sought review in pro se from the Nebraska Supreme Court. Review was denied.

Appellant thereafter filed a petition for a writ of habeas corpus in the U.S. District Court for the District of Nebraska. In this petition, Appellant made three claims. First, Appellant claimed that the information was insuffi-

cient for failing to include the proximate cause element and that trial counsel was ineffective for failing to object to the information on that basis. Next, Appellant claimed that the trial court improperly advised him of the nature of the charge where the trial court omitted the essential element of proximate cause (Appellant abandoned the claim that the trial court used the word "intentionally" rather than "unintentionally") and that trial counsel was ineffective for failing to object to the advisement on that basis. Finally, Appellant claimed that the factual basis did not establish that the proximate cause of the death of Betty Warren was the operation of a motor vehicle in violation of §60-6,196 as it indicated that the proximate cause of the death of Betty Warren was Appellant's operation of a motor vehicle in violation of §60-682.01(f) or §60-6,213, and that trial counsel was ineffective for failing to object to the factual basis on that basis.

The district court dismissed Appellant's habeas petition by agreeing, in full, with the Nebraska Court of Appeals. The district court found that claim one was without merit. With regard to claim two, the district court did not address the merits of Appellant's claim. The court only addressed the holding and findings by the Court of Appeals regarding the court reporter's mistake, the fact that Appellant abandoned that part of this claim notwithstanding. Regarding claim three the court found in concert with the Court of Appeals. The court found, as in the previous claim, that Appellant "has failed to rebut, by clear and convincing evidence, the Nebraska Court of Appeals' factual findings. The court denied Appellant a certificate of appealability (COA).

Appellant then appealed the district court's denial of COA to the Eighth Circuit Court of Appeals, but COA was denied. Appellant filed a petition for rehearing, which was also denied.

REASONS FOR GRANTING THE WRIT

BECAUSE THE "PROXIMATE CAUSE" ELEMENT IS ESSENTIAL IN PROVING THAT THE CHARGE WAS COMMITTED, SAID ELEMENT SHOULD HAVE BEEN INCLUDED IN THE INFORMATION.

This Court has held in *Hamling v. United States*, 1974, 418 U.S. 87, 117 that "It is generally sufficient that [a charging document] set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense to be punished.'" Other courts have made similar holdings. See *Dutiel v. State*, 1939, 135 Neb. 811, 284 N.W. 321 (the Nebraska Supreme Court held that in order to charge a statutory offense, information or complaint must contain a distinct allegation of each essential element of the crime as defined by the law creating it, either in the language of statute or its equivalent). See also *Dickens v. State*, 1941, 139 Neb. 963, 290 N.W. 869 (holding the same); *State v. Grotzky*, 1992, Not reported in N.W.2d, 1 Neb. C.A. 914 (holding the same); *Goodloe v. Parratt*, 1979, 605 F.2d 1041 (holding the same); and *State v. Miller*, 1997, 5 Neb.App. 635, 362 N.W.2d 851 (holding the same).

The crime of a Class III felony motor vehicle homicide has a proximate cause element under Neb.Rev.Stat. §28-306(3)(b). Furthermore, in *Birdsly v. State*, 1956, 161 Neb. 581, 74 N.W.2d 377, the Nebraska Supreme Court put it simply: For conviction of crime of motor vehicle homicide, it is simply required that the unlawful operation of motor vehicle by accused be proximate cause of death of another. Additionally, as made clear in multiple Nebraska cases respecting motor vehicle homicide by driving under the influence (DUI), this would mean that one had consumed alcohol in an amount sufficient to impair to such an appreciable degree as to cause the death of another, the ability to operate

a motor vehicle in a prudent and cautious manner.

For example, in State v. Back, 1992, 241 Neb. 301, 488 N.W.2d 26, Back was driving his parents' Dodge Aspen station wagon from Lincoln, Nebraska to Malcom via spur 55. Back testified that he was driving at approximately 45 mph when the accident happened. Back had at least .140 grams per 100 milliliters of blood of alcohol in his system at the time of the accident. Back hit a person standing next to a stalled car on the highway. The pathologist stated that as the level of alcohol in the blood rises, the senses of sight, smell, hearing, taste, and touch are affected, as are the brain and central nervous system. He said that at levels of .10 to .20 of 1 gram by weight of alcohol per 100 milliliters of blood, there is a deterioration of the above listed functions, which would effect such things as perception, judgment, reaction time, coordination, and sight. Additionally, he testified that as the level of alcohol in the blood increases, the cone of vision narrows, restricting more and more of the peripheral field of vision.

The Nebraska Supreme Court held that the facts of this accident, as related above, show circumstantially, at least, a limitation of vision, judgment, reaction time, and perception on Back's part which, based on the testimony of the pathologist, proximately resulted from the consumption of alcohol by Back. The Nebraska Supreme Court held in "Back" also that "There is relevant evidence to establish that at the time of the accident, Back was operating a motor vehicle while under the influence of alcohol. And the facts also support a finding by the jury that defendant's condition was contributing proximate cause of the accident and death of Krantz."

Thus, not only must a person be driving under the influence at the time that he or she causes the death of another, but the death must be caused as a result of the fact that a person was driving under the influence. Also, in

"Back", the Nebraska Supreme Court held that "proximate cause exists in motor vehicle homicide case if death was a foreseeable consequence of the unlawful conduct underlying the charge."

In this instant case, though, the information does not indicate that death was even a consequence of the fact that Appellant was driving under the influence of alcohol or drugs. It merely indicates that Appellant was in violation of the DUI or driving under suspension (DUS) statute at the time that Appellant caused the death of Betty Warren. Because there is a distinction between unintentionally causing the death of another while driving under the influence of alcohol and proximately causing the death of another by driving under the influence of alcohol, due process required the information, which appeared to be using the words of the statute, to state the words "proximately caused the death of Betty Warren by operating a motor vehicle in violation of §60-6,196 or 60-6,197.06." For, the proximate cause element is also an element included in the statute that is essential in obtaining a conviction.

Furthermore, because the information did not include an allegation of the proximate cause element, Appellant was not put on notice of the true nature of the crime, and thus was not given a fair opportunity to defend himself. Therefore, trial counsel should have objected to this information on said ground so that the information could be dismissed, and the prosecution provided with an opportunity to file a new information making a distinct allegation of each essential element of the crime so as to give Appellant an opportunity to defend himself.

BECAUSE THE "PROXIMATE CAUSE" ELEMENT IS AN ESSENTIAL ELEMENT WHICH THE STATE MUST PROVE IN ORDER TO OBTAIN A CONVICTION, THE TRIAL COURT SHOULD HAVE ADVISED APPELLANT REGARDING THE PROXIMATE CAUSE ELEMENT.

The Nebraska Supreme Court held in *State v. Irish*, 1986, 223 Neb. 814, 394 N.W.2d 879, in headnote 4, that in order to support finding that plea of guilty or nolo contendre has been entered freely, intelligently, voluntarily, and understandingly, trial court must inform defendant concerning nature of charge, right to assistance of counsel, right to confront witnesses against defendant, right to jury trial, and privilege against self-incrimination, and trial court must establish that there is a factual basis for plea and defendant knew range of penalties for crime with which he or she is charged. This is a requirement under U.S.C.A. Cont. Amend. 5, 6, &14. And, surely, due process requires that the accused be advised of the true nature of the charge as indicated in *Henderson v. Morgan*, 1976, 426 U.S. 637, and *marshal v. Lonberger*, 1983, 459 U.S. 422.

As indicated above, the State must prove that the proximate cause of the death of another is the operation of a motor vehicle in violation of §60-6,196 or §60-6,197.06 in order to obtain a legal conviction for a Class III felony motor vehicle homicide. But the trial court only advised Appellant essentially that the State must prove that Appellant unintentionally caused the death of Betty Warren while driving in violation of §60-6,196 or §60-6,197.06. As also indicated above, there is a distinction between unintentionally causing the death of another while driving under the influence and proximately causing the death of another by driving under the influence. The former means that at the time of the causing of the death of another one was driving in violation of the DUI statute, while the latter means that death was a foreseeable consequence of the fact that one was driving under the influence. So, all that Appellant understood when he took his plea was that the State had to prove that he had consumed too much alcohol to legally drive and that he caused an accident which caused the death of Betty Warren. He did not understand that the fact that he

was allegedly under the influence must have been a factor in causing the accident because he was not put of notice of this.

Because Appellant was not notified or advised of the true nature of the crime he was not afforded due process of law, and trial counsel did have an obligation to object to the trial court's advisement on that basis. Appellant's plea couldnot be said to have been made freely, knowingly, intelligently, and voluntarily in light of the above facts.

THE STATE TRIAL COURT'S SUBJECTIVE OUTLOOK ON THE EVIDENCE OF THIS CASE INDICATES THAT SAID COURT WAS NOT REASONABLY SUBJECTIVELY SATISFIED THAT THE EVIDENCE INDICATED THAT APPELLANT COMMITTED THE OFFENSE.

The U.S. Court of Appeals held in multiple cases that a factual basis supporting a guilty plea exists where there is sufficient evidence to allow the district court to be subjectively satisfied that the defendant committed the offense. See U.S. v. Rea, 2002, 300 F.3d 952. See. also U.S. v. Gamble, 2003, 327 F.3d 662, U.S. v. Cheney, 2009, 571 F.3d 764, U.S. v. Johnson, 2013, 715 F.3d 1094, and U.S. v. Mitchell, 1977, 104 F.3d 649. The factual basis in this case indicated that Appellant was driving 98 mph in a 35mph zone when he hit a curb, causing him to lose control of his car and collide with Betty Waren's car. Appellant's blood alcohol content (BAC) was .146. The trial court believed that Appellant's conduct of driving 98 mph in a 35 mph zone at midnight on Saddle Creek Road while intoxicated was intentional. But if Appellant understood the nature of his unlawful conduct than alcohol cannot be blamed for said conduct. For, the only way that driving under the influence can be to blame for causing the death of another is if death occurred as a direct result of the impaired ability to operate a motor vehicle in a prudent and cautious

manner to some appreciable degree due to alcohol consumption. See "Back", supra.

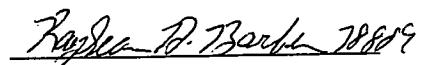
Here, the trial court clearly believed that this accident and death had occurred as a direct result of Appellant's desire to break the rules of the road by driving 98 mph in a 35 mph zone while intoxicated. The record also indicates that the trial court believed that speed plus intoxication caused this accident and death. But because Appellant's ability to drive in a prudent and cautious manner was not affected by Appellant's consumption of alcohol to any appreciable degree, and instead Appellant chose to speed on that Road, and because death was a foreseeable consequence of Appellant's intentional speeding, intoxication cannot be blamed for this accident.

So, in light of the trial court's subjective and reasonable outlook on the evidence in this case it cannot be said that there was sufficient evidence to allow the trial court to be reasonably subjectively satisfied that Appellant committed the crime. Trial counsel had an obligation to object to the factual basis on said basis so that Appellant could demand to take the case to trial.

CONCLUSION

In light of the foregoing, Appellant prays that this Honorable Court will grant Appellant a writ of certiorari.

Respectively Submitted:



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Appellant, Pro Se.