FILE

State v. Tweedy

Office of the District Attorney

DeSoto County
83645 Washington Street
DeSoto, Franklin 33123
(901) 555-1294

TO: Applicant
FROM: Shirley Clay Scott, Assistant District Attorney
RE: Tweedy, James A.
DATE: July 30, 2002

I have been asked to recommend whether we should prosecute James A. Tweedy. The District Attorney has stated his belief that the case will be difficult to try and that it is unlikely that a conviction can be obtained. I, however, believe that this case is worth pursuing and want to seek a felony indictment against Mr. Tweedy for two counts of endangering the welfare of a child under Penal Code § 4304.

Please prepare for my signature a two-part memorandum to the District Attorney. The first part should persuade the District Attorney that we have sufficient admissible evidence to prove all the elements necessary to obtain a conviction. You may assume that we can avoid any hearsay problems that might arise. I know that additional facts may facilitate prosecution, but in this first part you should address only the question of whether we have enough evidence to proceed based on what we *already* know.

In the second part of the memorandum, which should be brief, identify any conflicting or incomplete facts in the File that we will need to further investigate or clarify to facilitate prosecution. Recommend the investigative steps this office should take to develop these additional facts.

INCIDENT NO. 02-3105	**DeSoto Police Department Incident Report**		DATE OF ARREST 7/17/02
NAME(LAST, FIRST, MIDDLE) OF PERSON GIVING STATEMENT Tweedy, James A.	DOB/AGE 8/3/76	RESIDENCE PHONE None	BUSINESS PHONE None
STREET ADDRESS 1376 Archer Ave, Apt. 27	CITY DeSoto	STATE Franklin	ZIP CODE 33123
STATEMENT TAKEN BY (NAME/BADGE) Mary Lou Higgerson #1361	IN PRESENCE OF		

On the evening of July 16, 2002, and the early morning hours of July 17, officer called to the scene of a fire to investigate possible criminal neglect. Two minor children (the older child three (3) years of age and the younger twenty (20) months) were left in their apartment unattended while father, James A. Tweedy, participated in a social evening with friends.

Before leaving, Tweedy put the children in the bedroom. According to his statement, he secured the bedroom door by inserting two table knives between the door and the jamb. In addition, he locked the main door to the apartment. Tweedy claims he spoke to neighbor, Mrs. England, who had consented to watch out for the children in his absence.

According to another neighbor, Glen Poshard, at approximately 12:05 a.m. a fire started in the building, possibly originating as a result of a defective television set in Tweedy's apartment. Tweedy returned to premises at 3:00 a.m. at which point investigating officer briefly interviewed Tweedy before Tweedy left for the hospital to see if he could find the children.

Firefighter Albert Malone informed officer that unknown visitor to the building, learning from a neighbor that the youngsters were trapped in the bedroom, attempted to remove them but was prevented from doing so by the manner in which the bedroom door had been fastened. Firefighters, upon entry, found the children apparently dead in the bedroom of the apartment.

Signature Mary Lou Higgerson

INCIDENT NO.	DeSoto Police Department Incident Report Addendum		DATE OF ARREST
02-3105			7/18/02

NAME(LAST, FIRST, MIDDLE) OF PERSON GIVING STATEMENT	DOB/AGE	RESIDENCE PHONE	BUSINESS PHONE
Wirthin, Harry P.	9/2/46	555-5678	same

STREET ADDRESS	CITY	STATE	ZIP CODE
1376 Archer Ave, Apt. 22	DeSoto	Franklin	33123

STATEMENT TAKEN BY (NAME/BADGE)	IN PRESENCE OF
Mary Lou Higgerson #1361	

Addendum to Incident Report dated July 17, 2002.

I spoke with Harry P. Wirthin, owner and superintendent of the building occupied by James Tweedy and family. He stated that Tweedy was a typical tenant. Only problem was that 4 years ago a small electrical fire occurred in Tweedy's apartment. Apparently, Tweedy's wife, who is now deceased, left a curling iron on in the bathroom and it overheated causing a short that started a fire. No one was in the apartment at the time.

Mr. Wirthin did indicate that on at least two prior occasions he knew the children were left alone in the apartment. He also indicated that the neighbor two floors up, a Mrs. England, occasionally watched the children. I spoke with Mrs. England who indicated that on one or two occasions she had watched the children. She indicated that she had been asked to watch them on the night in question, but that she declined.

A check of DeSoto Licensing & Inspection records indicates that Mr. Wirthin has been cited on 5 occasions within the last 5 years for code violations related to wiring problems in the building. All citations resulted from complaints from tenants about faulty wiring.

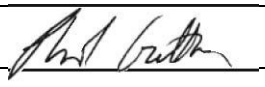
Signature Mary Lou Higgerson

INCIDENT NO.	DeSoto Fire Marshal Report De Soto, Franklin	DATE OF INVESTIGATION
02-3105		7/17/02

An investigation was conducted on the above-referenced date into the fire at 1376 Archer Ave, Apt. 27.

Cause of fire was electrical problem located in defective television set. This conclusion was easily reached with examination of set and surrounding area. There existed little actual fire damage. Damage was limited to television set and curtains located near the set. Internal part of television set received extensive damage.

Smoke and water damage in contrast was extensive. Level of smoke commensurate with high use of synthetic materials in apartment.

NAME (LAST, FIRST, MIDDLE) OF PERSON MAKING REPORT	TITLE		BUSINESS PHONE
Gatton, Phil	Deputy Fire Marshal		555-8463
STREET ADDRESS	CITY	STATE	ZIP CODE
1376 Archer Ave, Apt. 27	DeSoto	Franklin	33123
Signature 			

OFFICE OF THE DESOTO COUNTY MEDICAL EXAMINER

Marsha Ryan, J.D., M.D.
Chief Medical Examiner
9765 Garwin Street
DeSoto, Franklin 33123

July 22, 2002

TO: Shirley Clay Scott, Assistant District Attorney

FROM: Marsha Ryan, Chief Medical Examiner

RE: Alma & Fred Tweedy

I got your voice mail concerning the autopsies on the Tweedy children. The autopsies are complete, and I'll send you a copy of the report. The important details, however, are pretty straightforward.

Fred: White male, approximately three years old. General health was good. No evidence of any disease process. Cause of death was smoke inhalation resulting from fire.

Alma: White female, approximately twenty months old. General health was poor. Evidence of congenital heart malformation, which if remained undetected would be life threatening. Cause of death was smoke inhalation resulting from fire.

Let me know if you need anything else.

Transcript of Interview of James Tweedy
by Officer Higgerson
July 22, 2002

Officer: Thank you for coming down, Mr. Tweedy. The night of the fire was horrible and I understand your difficulty in answering all my questions then.

Tweedy: Well, of course, I wanted to get to the hospital as soon as possible, but it was too late.

Officer: Yes, I know. I'm sorry. Now, Mr. Tweedy, I want to state on the record that you do not have to talk with me. Anything you say can and will be used against you. You have the right to be represented by a lawyer. If you cannot afford to hire a lawyer, one will be appointed to represent you.

Tweedy: I know my rights.

Officer: And you are willing to talk to me?

Tweedy: Yes**.**

Officer: Why did you leave the children alone?

Tweedy: I didn't.

Officer: What do you mean?

Tweedy: I asked Mrs. England to watch them. She said she would be happy to.

Officer: But she didn't come down to the apartment, did she?

Tweedy: Not right when I asked, but she said she'd be down there in a few minutes, after she finished her dishes.

Officer: Then why did you jam the bedroom door the way you did?

Tweedy: This is not a safe neighborhood. The landlord doesn't keep the place in the best shape and I could not trust the locks on the door to the apartment. Look, I did what I could. I even left the TV on to make people think I was home.

Officer: But, it was the bedroom door jamb that you stuck the knives into.

Tweedy: Well, I couldn't very well do that on the outside door.

Officer: Was it your habit to leave the children unattended?

Tweedy: No.

Officer: Had you ever done it before?

Tweedy: Like I said, I didn't do it this time. I'd asked Mrs. England to watch them.

Officer: Mrs. England denies being asked.

Tweedy: Well, she's lying. Obviously she's afraid that she's going to be blamed. In fact, rather than sitting here and accusing me, you should be asking her why she didn't do what she said she would.

Officer: Mr. Tweedy, were you drinking the night of the fire?

Tweedy: I went to a club that night. Yes, I had a couple beers. I was not drunk. I'm sorry, I think I should talk to an attorney.

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State v. Tweedy

Franklin Penal Code

§ 4304. Endangering Welfare of a Child

(a) Offense defined. A parent, guardian, or other person supervising the welfare of a child under 18 years of age commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

(b) Grading. An offense under this section constitutes a felony of the third degree.

Franklin Rules of Evidence

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the State of Franklin, by Act of the Franklin Legislature, by these rules, or by other rules prescribed by the Franklin Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

* * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

State v. Miller

Franklin Supreme Court (1992)

Appellant, Rachel Miller, was convicted under Franklin Penal Code § 4304, endangering the welfare of a child, following a non-jury trial. Miller was thereafter sentenced to two years' probation. This appeal ensued.

The relevant facts are straightforward and thoroughly tragic. On the evening of November 18, 1989, Miller, with her 22-month-old son, Clarence, visited Antonio Green, the father of the child. Green and Miller are not husband and wife. Green resided in a three- story rooming house. A restaurant was located on the first floor of the premises. Eugenia Orr lived on the second level and Green occupied the top floor.

Father, mother, and child met at a neighbor hood tavern and then returned to the rooming house. Earlier in the day, Green had accompanied Orr on a shopping trip; father, mother, and child went directly to Orr's apartment to examine that day's purchases. Miller was not well acquainted with Orr. After some time, Miller went upstairs to Green's room, leaving the child in Orr's apartment in the care of Green because the child was playing with his father's new shoes. When the child tired of this activity, Green took him upstairs to Miller and then returned to the Orr apartment.

Miller washed and changed the child and prepared him for bed. Green's room contained a double bed. Nearby was an electric space heater, which turned out to be in a damaged condition but was then operating. Miller put the child in the bed and then lay down with the child until he fell asleep. Once her son was asleep, Miller decided to go down to the first-floor restaurant to buy some juice for the child. She left Green's apartment with the child asleep in the bed, the space heater operating, and the door to the hallway stairs open. She also left her sweater in the apartment.

When Miller stopped on the second floor en route to the restaurant, Green asked Miller if she would "go clubbing" (visiting bars or nightclubs) with him. She declined, explaining that she had to watch the child and that she was tired and not dressed for the occasion anyway. While she was on the first floor, Green yelled down to her through the common hallway, repeating his request and saying that Orr had agreed to watch the child. Miller agreed to accompany him. She asked Green to bring down her sweater and did not return upstairs. Green brought her the sweater. He had, in fact, not spoken to Orr about watching the child and Orr did not do so.

Green and Miller left the rooming house at approximately 1:00 a.m. and visited two clubs. During this time, they were joined by friends. One of these friends was called as a witness and testified that Miller continually fretted about the child. Returning to the rooming house after 3:00 a.m., Green and Miller discovered police and fire trucks in the street

outside and the building ablaze. The only death resulting from the conflagration was Miller's infant son, who died of smoke inhalation and burns. The space heater was determined to be the cause of the fire. Green was convicted of various criminal charges in connection with the child's death. Miller was convicted of endangering the welfare of her child.

We must consider whether the evidence was sufficient to uphold the verdict of the trial court. We must accept all the evidence and all reasonable inferences that may be drawn from that evidence upon which the factfinder could have based its verdict. If the evidence, viewed in the light most favorable to the state, is not sufficient to establish guilt beyond a reasonable doubt of the crime charged, then the conviction should be overturned.

Miller claims that the evidence presented at trial was insufficient to prove the intent element of the crime with which she was charged. Under Penal Code § 4304, a parent or other person supervising the welfare of a child commits a felony if he or she *knowingly* endangers the child. Section 302(b) of the Penal Code defines knowingly:

> (2) A person acts knowingly with respect to a material element of an offense when:
>
> > (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist;
> >
> > and
> >
> > (ii) if the element involves the result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

It is clear that § 4304 contemplates endangerment either by act or by omission to act. In *State v. Cardwell* (1986), this court established a three-pronged standard for testing the sufficiency of evidence of the intent element under § 4304:

> We hold that evidence is sufficient to prove the intent element of the offense of endangering the welfare of a child when the accused is aware of his or her duty to protect the child; is aware that the child is in circumstances that are reasonably likely to result in harm to the child; and has either failed to act or has taken actions so lame or meager that such actions cannot reasonably be expected to be effective to protect the child from physical or psychological harm.

If proof fails on any one of these prongs, the evidence must be found insufficient.

Employing this test, the *Cardwell* court found sufficient evidence of intent where a mother was aware that her child was being subjected to sexual abuse by the stepfather and took wholly ineffectual remedial actions. Specifically, she wrote letters to the stepfather expressing outrage and warning that she would not tolerate such conduct and she made an aborted attempt to move the child to a relative's house.

On the other hand, in *State v. Louie* (1990), this court found insufficient evidence to convict a husband and wife where they knew that their 13-year-old daughter was engaging in sexual activity with an adult and became pregnant against the express warnings of a physician. *Louie* differed from *Cardwell* in that the parents did not allow the child to remain in a potentially dangerous situation; they simply failed to stop the child from surreptitiously seeking out sexual activity. The court was unwilling to extend culpability, noting that parents could not know everything about their child's activities nor was § 4304 intended to punish parents merely because their child becomes pregnant.

Here, the trial court, sitting as factfinder, determined that when Miller left with Green to go clubbing, she was aware that her infant son was in the third-floor room with the space heater on. The court found that by failing to question Green's statement that Orr would watch the child, Miller has evidenced the requisite intent for purposes of § 4304. We have difficulty in finding that the evidence is sufficient to satisfy the *Cardwell* tripartite test. It is undisputed that appellant was aware of her duty to protect her child. However, merely leaving the child alone is insufficient to establish the requisite intent. We cannot find as a matter of law that she was aware that she had placed her child in circumstances that were likely to result in harm to the child or that her failure to check on the alleged babysitting arrangements was unreasonable under *Cardwell.*

The trial court specifically credited Miller's testimony that she believed Green when he told her that Orr was watching her child. The logical inference based on this finding is that Miller was not aware that she had left her child unattended. There was no evidence presented at trial that Green was an inherently dishonest person or that Miller had cause to disbelieve him. The trial court has based Miller's culpability under § 4304 not on the fact that Miller knowingly left her child alone, but rather that she should not have been so gullible as to believe Green. Undeniably, Miller may have exercised poor judgment on the night in question, and perhaps she is guilty of reckless or negligent conduct in connection with her son's death. However, this is not sufficient for a finding of guilt under § 4304. If Miller in fact believed that her son was in the care of another, she did not knowingly place him in circumstances that were reasonably likely to result in harm, and her conduct cannot be adjudged criminal.

Judgment reversed. Appellant discharged.

State v. Shoup
Franklin Supreme Court (1993)

Joseph C. Shoup was tried by jury and was found guilty of homicide by vehicle while driving under the influence of alcohol. Shoup asserts that the trial court committed reversible error by refusing to give the instruction requested by the defense on the issue of causation.

On January 3, 1990, at about 8:00 p.m., appellant was operating an automobile on Oak Street, a narrow alleyway located in the town of Vienna. The passengers in appellant's vehicle were Michelle Shoup, his wife, who was seated in the front passenger seat, and Jean Moll and John Rush, who were in the back seat. Appellant was observed failing to stop for three consecutive stop signs, and the speed of his vehicle was estimated to be approximately 50 to 55 miles per hour.

Appellant drove through the intersection of Oak and Williams Streets without stopping at the stop sign. His vehicle collided with a large dump truck parked in the alleyway near a loading dock at a garment factory. The site of the accident was about 30 to 35 feet from the intersection.

Upon being summoned to the scene of the accident, Charles Harris, the Police Chief for the town of Vienna, observed that appellant smelled strongly of alcohol and that there were several beer cans on the floor of the vehicle. All of the vehicle's occupants were transported for medical treatment.

Appellant's wife suffered massive internal injuries and died shortly after being taken by helicopter to Cardinal Medical Center. Appellant was taken to Ashland State Hospital, where, at 9:30 p.m., blood samples were drawn at the request of Chief Harris for the purpose of determining appellant's blood alcohol level. Two blood tests measured appellant's blood alcohol content at 0.176% and 0.175%.

At trial, the defense contended that the legal cause of Michelle Shoup's death had been the illegal parking of the dump truck with which appellant's vehicle collided. Police Chief Harris testified that there had been a no parking sign posted at the loading dock where the dump truck was parked. However, according to Chief Harris, this sign had been placed there by the garment factory and not by the town. Therefore, he was without legal authority to issue tickets for illegal parking at that location. Other testimony established that, despite poor lighting conditions, the dump truck could be seen from the intersection at Oak and Williams Streets. Additionally, both Jean Moll and John Rush described appellant's driving prior to the accident as erratic.

Causation is an essential element of a criminal charge, which the State must prove beyond a reasonable doubt. The tort concept of proximate cause plays no role in a prosecution for criminal homicide. Rather, the State must prove a more direct causal relationship between the defendant's conduct and the

victim's death. However, it has never been the law of this State that criminal responsibility must be confined to a sole or immediate cause of death. Criminal responsibility is properly assessed against one whose conduct was a direct and substantial factor in producing the result even though other factors combined with that conduct to achieve the result. Thus, a defendant cannot escape the natural consequences of his act merely because of foreseeable complications.

In this case, a jury could find that appellant's conduct was a direct and substantial factor in bringing about the death of Michelle Shoup. The evidence disclosed that, while intoxicated, appellant drove his vehicle down a narrow, dimly lit alleyway, erratically and at a high rate of speed, failing to stop at three consecutive intersections where stop signs had been posted. Moreover, the evidence suggested that had appellant obeyed the stop sign at the intersection of Oak and Williams Streets, he would have been able to observe the dump truck parked in the alleyway. The fact that the dump truck was parked in the alleyway undoubtedly contributed to the accident. Appellant's conduct started an unbroken chain of causation that directly and substantially led to his wife's death. Because the fact that another vehicle may have been parked in a hazardous manner was a foreseeable circumstance, appellant is not relieved from the natural consequences of his conduct.

Affirmed.