CRIMINAL LAW:
INDICTMENTS:

A plea of former jeopardy may not successfully be interposed in bar to a prosecution for manslaughter where the defendant has previously been acquitted on the charge of careless and reckless driving; it is improper to join two separate and distinct offenses of manslaughter against the same defendant in one indictment.

June 19, 1953

FILED
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Honorable Joe H. Miller
Prosecuting Attorney of
Carroll County
Carrollton, Missouri

Dear Sir:

Reference is made to your request for an official opinion of this office which request reads as follows:

> "Some time ago in Carroll County two persons were killed in a highway accident while riding a motorcycle.
>
> "The other party involved in the accident was arrested for careless driving and on a change of venue was acquitted. The parents of the dead boy and girl have appeared before a Grand Jury in Carroll County asking the Grand Jury to indict the driver of the automobile that hit the motorcycle with manslaughter or whatever is the proper charge under the circumstances.
>
> "The question that arises in my mind is whether or not the party has been placed in jeopardy, having been charged with careless driving arising out of the accident.
>
> "If it is proper to indict on a manslaughter charge is there any law to prohibit a charge indicting for each person killed in the accident?"

The first question to be determined is whether a person standing trial upon an indictment for manslaughter may successfully interpose a plea of former jeopardy having once been tried on a charge of careless and reckless driving, as a bar to said prosecution. That no one shall be twice put in jeopardy for the same offense is of ancient origin, having appeared early in the common law and being part of the universal law of reason, justice and conscience. 22 C.J.S., Criminal Law, Section 238. The common law rule has been preserved and carried forward at least in part in the Constitution of the United States and of the State of Missouri; while, although we need not refer to the provisions of the United States Constitution, since it does not govern trials in the State courts (Ex parte Dixon, 52 S.W. (2d) 181), we do wish to refer to Section 19 of Article I of the Constitution of Missouri, 1945. Said section provides as follows:

> "Self incrimination and double jeopardy.- That no person shall be compelled to testify against himself in a criminal cause, nor shall any person be put again in jeopardy of life or liberty for the same offense, after being once acquitted by a jury; but if the jury fail to render a verdict the court may, in its discretion, discharge the jury and commit or bail the prisoner for trial at the same or next term of court; and if judgment be arrested after a verdict of guilty on a defective indictment or infomration, or if judgment on a verdict be reversed for error in law, the prisoner may be tried anew on a proper indictment or information, or according to the law."

We are not enlightened by any appellate court decisions of this state bearing upon the precise question at hand, however, the courts have on occasions stated and explained the correct application of a plea of former jeopardy. In the case of State v. Toombs, 34 S.W. (2d) 61, the court said:

> "In 16 C.J., Sec. 443, p. 263, the rule is stated to be that 'the prohibition of the common law and of the constitutions is against a second jeopardy for the same "offense," that is, for the identical act and crime; or as expressed in a number of cases,

> to entitle a defendant to plead successfully former jeopardy, the offense charged in the two prosecutions must be the same in law and in fact.' See, also 8 R.C.L. Sec. 128, p. 143, and State v. Gustin, 152 Mo. 108, 53 S.W. 421. But the rule is well settled that the state cannot split up a single crime and prosecute it in parts, and that a prosecution for any part of a single crime bars any further prosecution cased upon the whole or another part of the same crime. 16 C.J., Sec. 448, p. 270; 8 R.C.L., Sec. 130, p. 145. Many cases in support of the texts are cited in the notes in both the above-mentioned authorities."

In the case of State v. Gustin, 152 Mo. 108, cited with approval in the Toombs case it is stated:

> "The Constitution of this state guarantees that 'no person after being once acquitted by a jury, shall again be put in jeopardy of life or liberty for the same offense,' and the defendant invokes this provision as a protection against the trial and conviction in this case. It will be observed that the Constitution used the words 'for the same offense.' Such also was the rule of common law. The former acquittal or conviction must have been 'for the same identical act and crime.' (4 Blackstone, Com. 336). Chitty in Vol. I, Criminal Law, 452, says, 'To entitle the defendant to this plea, it is necessary that the crime charged be precisely the same.' In Com. v. Roby, 12 Pick. loc. cit. 504, Chief Justice Shaw says, 'In considering the identity of the offense, it must appear by the plea, that the offense, charged in both cases was the same in law and in fact.'"

The rule in this state as appears from the foregoing authorities is that to sustain a plea of former jeopardy the two offenses charged must be the same in law and in fact, and as is noted in the Gustin case, this was the common law rule. 22 C.J.S., Criminal Law, Section 278.

Can it be said that careless and reckless driving and manslaughter are the same in law and in fact? Section 304.010, provides that "Every person operating a motor vehicle on the highways of this state shall drive the same in a careful and prudent manner, and shall exercise the highest degree of care, and at a rate of speed so as not to endanger the property of another or the life or limb of any person," Section 304.020 specifies certain so-called rules of the road such as keeping a vehicle as close to the right-hand side of the highway as practicable, etc. The violations of these provisions of Chapter 304 constitute a misdemeanor and punishable within the limits prescribed. Section 304.570, RSMo 1949, State v. Ball, 171 S.W. (2d) 787.

Manslaughter is defined by Section 559.070, to be "Every killing of a human being by an act, procurement or culpable negligence of another, not being declared to be murder or excusable or justifiable homicide." By Section 559.070, manslaughter is made a felony. The culpability necessary to support a manslaughter charge must be so great as to indicate a reckless or utter disregard for human life which exacts a higher degree of proof than that required to sustain a conviction under the provisions of Chapter 304. State v. Ruffin, 126 S.W. (2d) 218. It is sometimes stated in determining whether crimes are identical, that the test is whether the same evidence would sustain a conviction in each case and if the evidence required to convict under the first charge would not be sufficient to convict under the second, but proof of an additional fact would be necessary to constitute the offense charged in the second, then the former conviction or acquittal could not be pleaded as a bar. 22 C.J.S., Criminal Law, Section 279 and 285.

In 15 Am. Jur., Section 380, the rule is stated as follows:

> "Offenses are not the same if upon the trial of one proof of an additional fact is required, which is not necessary to be proved in the trial of the other although some of the same acts may be necessary to be proved in the trial of each."

It is of course obvious that additional evidence would be required to show the culpability needed to sustain a charge of manslaughter not required in a careless and reckless driving charge, State v. Ruffin, supra, State v. Midgett, 214 N.C. 107, State v. Bacon, 30 So. (2d) 744, in addition to the fact that in the former, the death of another must be shown. Further, and in the converse, to support a charge of careless and reckelss driving, it is necessary to prove that the defendant operated the

automobile upon the highway, an element not essential to a conviction of manslaughter. See Commonwealth v. Maguire, 313 Mass. 669, l.c. 672.

The rule to be followed as we understand it, is not whether the elements of the one offense might in a given case support the other, but rather whether the elements of the one are necessarily involved in the other. State v. Midgette, supra, State v. Huffman, 136 Mo. l.c. 62.

It is our opinion that careless and reckless driving is not a lesser degree of the crime of manslaughter, State v. Bacon and State v. Midgette, supra, and that one could not be convicted of driving an automobile in a reckless and imprudent manner upon trial of an indictment which charged him only with the crime of manslaughter. See State v. England 11 S.W. (2d) 1024. Manslaughter is the wrongful killing of another; whereas the careless and reckless driving statute was enacted to deter and thereby prevent collision and consequent injury to the property or person of others. The latter offense is complete before fatal injury to a person occurs. The mere fact that a death occurs as a result of careless and reckless driving does not make it an element of the offense. The two offenses are separate and distinct. In the case of State v. Wightman, 26 Mo. 515, the Missouri Supreme Court said:

> "An acquittal on an indictment for a felonious assault will not bar a prosecution for a common assault and battery before a justice of the peace, because the defendant, under the indictment, could not be convicted of the minor offense. * * *"

There have been several cases of other jurisdictions passing upon substantially the same question as here involved and these authorities have been uniform in holding that the offense of careless and reckless driving is not the same in law or in fact as the offense of manslaughter, even though they may arise from the same occurrence or transaction nor is it a lesser degree of the other. 172 A.L.R. 1058. Illustrative of such is the case of Commonwealth v. Jones, 288 Mass. 150. The defendant was tried in the district court and found not guilty on a charge of operating a motor vehicle negligently so that the lives or safety of the public might be endangered. Subsequently, the defendant was tired for manslaughter and brought to trial in the Superior Court. He interposed a plea of former jeopardy in bar which was overruled and a conviction was had. On appeal the Supreme Court of Massachusetts said:

"The only question involved is whether or not the trial and acquittal of the defendant in the District Court for the statutory misdemeanor operate as a bar to the trial for manslaughter arising out of the same transaction. The defendant relies upon the ancient principle of the common law and the provision of G. L. (Ter.Ed.) v. 263, Sec. 7, to the effect that a person shall not be held to answer on a second indictment or complaint for a crime of which he had been acquitted upon the facts and merits. He also relies upon the rule that, when a person is brought to trial and jeopardy has attached, he cannot be tried thereafter for a greater offence arising out of the same criminal act. It is commonly said that the crimes are the same if the facts necessary to prove the second crime would have warranted a conviction upon the first. Commonwealth v. Roby, 12 Pick. 496, 503. Commonwealth v. Crowley, 257 Moss. 590, 595. This principle is subject to the equally recognized exception that a single act may be legislative fiat be an offence against two statutes or against a single statute and the common law, if the statute or the common law requires proof of an additional act. This rule is also subject to the exception that a conviction or acquittal of a minor statutory offence in a inferior court does not bar prosecution for a higher crime of which the inferior court has no jurisdiction. See statement of the reasons of this exception and a collection of cases supporting the proposition in Commonwealth v. McCan, 277 Mass. 199, 205, 206. In the case at bar the offence of which the defendant was acquitted was a misdemeanor. G.L. (Ter. Ed.) c. 900, Sec. 24, as amended by St. 1932, c. 26, Sec. 1. A conviction required proof of specific violation of said Section 24, or proof of negligent operation of a motor vehicle so that the lives or safety of the public might be endangered. The indictment under which the defendant was convicted could be satisfied only by proof that the defendant was guilty of wanton, reckless and wilful misconduct.

> The offense charged in the complaint differs in kind and in the proof required to support it from the offence charged in the indictment. Altman v. Aronson, 231 Mass. 588. The inferior court had no jurisdiction to consider the offence charged in the indictment. It follows that the acquittal of the defendant of the offence charged in the complaint was not a bar to the trial ff the defendant on the indictment for relony. The plea was rightly overruled."

To the effect that the same act may be an offense against two statutes, see State v. Taylor, 214 S.W. (2d) 34. Likewise, see State v. Gustin, 152 Mo. 108, where the court, by way of dictum, indicated that a conviction for a misdemaanor in a court having no jurisdiction over felonies, would not constitute a bar to a felony charge based upon the same act.

In summary, we wish to state; the offense of careless and reckless driving and manslaughter are not the same either in law or in fact; nor is the one a lesser degree of the other; they differ both in grade and kind; the one is a misdemeanor made so by statute, the other a felony; and, additional facts must be alleged and proved to establish the greater charge which need not appear on the trial of the lesser offense.

You next inquire whether there is "any law to prohibit a charge indicting for each person killed in the accident?" We assume that you are asking whether the grand jury may file two separate indictments, one for the death of A and another for the death of B, where both deaths are the result of the same transaction. We wish to state that we find no law which would prohibit such action. A person who by a single act, or as a result of the same transaction, kills two human beings which is not declared murder or excusable or justifiable homicide, would be guilty of two offenses. One for the killing of A, and another for the killing of B. Section 559.070, noted supra, with limitation, declares manslaughter to be the killing of a human being. A person could not be convicted of killing B on a charge for the killing of A, and vice versa. The proof required on the one would not support a conviction of the other because in each, the death of a different human being must be shown which would not be required in the other. Not only do we think that it is proper within the discretion of the grand jury to file two separate indictments, but on the contrary, it is our opinion that it would be improper

to incorporate the two separate charges in the same indictment. See State v. Kurtz, 295 S.W. 747, l.c. 749, in regard to the rule of joinder of offenses.

CONCLUSION

Therefore, it is the opinion of this office that under the provisions of Article I, Section 19, Constitution of Missouri, 1945, an acquittal on the charge of careless and reckless driving, under the provisions of Chapter 304, RSMo 1949, would not constitute a bar to subsequent prosecution for manslaughter where both charges arise out of the same transaction, since the two offenses are separate and distinct, nor is the one a lesser degree of the other.

We are further of the opinion that there is no law to prohibit the grand jury within its discretion from filing two separate indictments for manslaughter, one for the death of A, and another for the death of B, where both deaths are a result of the same unlawful act or transaction.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Mr. D. D. Guffey.

Very truly yours,

JOHN M. DALTON