

**[J-205-2004]**  
**IN THE SUPREME COURT OF PENNSYLVANIA**  
**WESTERN DISTRICT**

COMMONWEALTH OF PENNSYLVANIA,	:	No. 7 WAP 2002
	:	
Appellant	:	Appeal from the Order of the Court of
	:	Common Pleas of Allegheny County
	:	entered March 12, 2002 at No. CC
v.	:	200114991.
	:	
	:	
GREGORY DAVID LUDWIG,	:	RESUBMITTED: September 27, 2004
	:	
Appellee	:	

**DISSENTING OPINION**

**MR. JUSTICE NIGRO**

**DECIDED: MAY 19, 2005**

I agree with the majority that 18 Pa. C.S. § 2506 is not unconstitutionally vague because it fails to specify whether an offender has to possess a certain *mens rea* to commit the offense of drug delivery resulting in death. However, contrary to the majority, I would find that the default culpability provision in section 302(c) of the Crimes Code, 18 Pa. C.S. § 302(c), supplies the requisite *mens rea* for section 2506. Moreover, as section 302(c) only requires a *mens rea* of recklessness, I would also find that the Commonwealth adequately established a *prima facie* case of guilt against Appellee Gregory Ludwig for the offense of drug delivery resulting in death.

As the majority concedes, section 2506 does not contain an express element of culpability. See Slip Op., at 8. I therefore agree with the Attorney General that we must turn to the default culpability provision, which states as follows:

**(c) Culpability required unless otherwise provided.** -- When the culpability sufficient to establish a material element of an offense is not prescribed by

law, such element is established if a person acts intentionally, knowingly or recklessly with respect thereto.

18 Pa. C.S. § 302(c). Through this provision, the General Assembly has ensured that where, as here, an offense fails to either specify a *mens rea* or indicate that it is a strict liability offense,<sup>1</sup> it will not suffer from vagueness problems because section 302(c) supplies the necessary *mens rea*.<sup>2</sup> See id.; Commonwealth v. Mayfield, 832 A.2d 418, 427 (Pa.

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<sup>1</sup> "Absolute criminal liability statutes are an exception to the centuries old philosophy of criminal law that imposed criminal responsibility only for an 'act coupled with moral culpability.'" Commonwealth v. Parmar, 710 A.2d 1083, 1089 (Pa. 1998) (citations omitted). Thus, the General Assembly enacts strict liability offenses only in limited circumstances, such as for public welfare offenses, which "do not fit neatly into any of such accepted classifications of common-law offenses, such as those against the state, the person, property, or public morals." Morisette v. U.S., 342 U.S. 246, 255 (1952); see also DaPra v. Pennsylvania Liquor Control Bd., 227 A.2d 491, 494 (Pa. 1967). "[T]hese offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty." Morisette, 342 U.S. at 255. Furthermore, "violations of such [offenses] result in no direct or immediate injury to person or property but merely create the danger or probability of it which the law seeks to minimize." Id. at 255-56. Another characteristic of these offenses is that they tend to impose relatively small penalties and conviction does not grave[ly] damage . . . an offender's reputation." Id.; see also 18 Pa. C.S. § 302(a)(1) (excepting summary offenses, which are offenses for which a convicted person may only be sentenced to a term of imprisonment of 90 days or less, from default culpability provision). Notably, none of these characteristics concerning strict liability offenses are present with respect to the offense of drug delivery resulting in death. Unlike typical strict liability offenses, the offense of drug delivery resulting in death concerns a crime of aggression in which another person is fatally injured as a direct result of consuming an illegal substance sold to her by the person charged with violating the offense. Moreover, the offense imposes a stringent penalty of at least five years of imprisonment and a fine of \$15,000. See 18 Pa. C.S. § 2506(b). Accordingly, under these circumstances, I agree with the apparent conclusion of the majority that the General Assembly did not intend the offense of drug delivery resulting in death to be a strict liability offense.

<sup>2</sup> Notably, the trial court also found that section 2506 was unconstitutionally vague because it does not provide sufficient guidelines regarding the element of causation. However, I also disagree with the trial court's conclusion in this regard because, just like section 302 of the Crimes Code provides the culpability element for section 2506, section (continued...)

2003) (holding that trial court erroneously found that statute was vague for failing to include a specific *mens rea* element because section 302(c) supplied the necessary *mens rea* element); Commonwealth v. Moss, 852 A.2d 374, 380-81 (Pa. 2004) (finding that section 302(c) provided the scienter requirement for statute which did not include a scienter requirement and thus the statute was not unconstitutionally vague); Commonwealth v. Pond, 846 A.2d 699, 705-06 (Pa. Super. 2004) (holding that section 302(c) provided the element of culpability for offense where statute was silent with regard to *mens rea* and there was no indication that the legislature intended to impose strict liability).

While the majority rejects the application of the default culpability provision and instead concludes that section 2506 prescribes a *mens rea* of malice based solely on the fact that it classifies the offense of drug delivery resulting in death as a third-degree murder crime, I cannot agree. Significantly, third-degree murder is a class of crimes that can include any number of different offenses. See 18 Pa. C.S. § 2505(c) (specifying that third-degree murder includes "[a]ll other kinds of murder" that are not first-degree murder or second-degree murder); 18 Pa. C.S. § 106(a)(1) (defining third-degree murder as class of crimes). Although this Court has held that the offense of third-degree murder requires a *mens rea* of malice, that holding does not necessarily mean that any other offense that the General Assembly classifies as a type of third-degree murder must also contain a *mens rea* of malice. Rather, in enacting an offense to be classified as a third-degree murder crime, the General Assembly is free to require a *mens rea* of malice or it may require some other

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303 of the Crimes Code clarifies the element of causation for section 2506. See 18 Pa. C.S. § 303.

element of culpability.<sup>3</sup> Accordingly, unlike the majority, I do not believe that this Court may presume that the General Assembly intended section 2506 to include a *mens rea* of malice merely because it classified the offense of drug delivery resulting in death as a type of third-degree murder crime. Rather, I would apply section 302(c)'s *mens rea* of recklessness to section 2506.

According to the Crimes Code, "[a] person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." 18 Pa. C.S. § 302(b)(3). Moreover, "[t]he risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation." *Id.* Applying this definition of recklessness to the instant case, I would find that the Commonwealth presented sufficient evidence to establish a *prima facie* case of guilt against Ludwig with respect to the offense of drug delivery resulting in death.

Ludwig was undoubtedly aware that Ecstasy is an illegal drug, unregulated by the government for any use, and that serious, sometimes fatal, reactions can result from the consumption of such a drug.<sup>4</sup> Nevertheless, despite the illegal and dangerous nature of the

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<sup>3</sup> Indeed, I note that if the elements of the offense of third-degree murder were automatically bootstrapped into any separate offense classified as a type of third-degree murder, there would be no need to separately create such an offense because the conduct qualifying as third-degree murder under the separate offense would also constitute third-degree murder under the general offense of third-degree murder. Thus, the separate third-degree murder offense would simply be superfluous.

<sup>4</sup> Dr. Frederick W. Fochtman, the director and chief toxicologist in the Forensic Laboratory Division of the Allegheny County Coroner's Office, explained during the Open (continued...)

drug, Ludwig supplied Brandy, a minor, with an Ecstasy pill containing twice the normal dosage. In addition, Ludwig gave Brandy the pill without knowing the purity or adulterated nature of the drug, how Brandy would react to the drug, or Brandy's tolerance to the drug.<sup>5</sup> In my view, this evidence, particularly when considered in a light most favorable to the Commonwealth, is more than sufficient to show that Ludwig disregarded a substantial and unjustifiable risk that the direct result of his behavior would be that Brandy could die from an adverse reaction to the Ecstasy pill.<sup>6</sup> See Commonwealth v. Huggins, 836 A.2d 862, 869-71 (Pa. 2003) (Commonwealth sufficiently proved a *prima facie* case of involuntary manslaughter against appellee where evidence showed that appellee acted recklessly by allowing himself to fall asleep when he was driving a van filled over-capacity with children

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Inquest that Ecstasy pills are illicitly manufactured, meaning "that they are not being manufactured under any standards of good laboratory practice or good manufacturing practice." R.R. at 72a; see also id. at 292a (testimony from Andrew Petyak, special agent of Drug Enforcement Administration, that Ecstasy is produced under very unsanitized conditions). Dr. Fochtman further testified that because these drugs are produced in such a manner, some pills might contain double or triple the quantity of Ecstasy that another pill might contain and some pills may also include other drugs besides Ecstasy. See id. at 72a, 80a. In explaining the effects of Ecstasy, Dr. Fochtman stated that "when the drug increases in concentration, then it will produce anxiety, agitation, it could provide -- it could produce convulsions or seizures, it can cause a dystonia, where the person's muscles become very firm and very rigid, and it also could cause a CNS depressant effect, which would depress the respirations, and in addition to that, it can have an arrhythmic effect, or cause the heart to beat irregularly." Id. at 81a. According to Dr. Fochtman, there are multiple ways that death can result from these effects of the drug. See id. at 82a.

<sup>5</sup> Any assertion by Ludwig that he was unaware that someone other than Michelle would ultimately consume the drug loses any potential viability when viewed in light of the Commonwealth's evidence that Michelle informed Ludwig that she was purchasing two pills for her friends, and that those friends were present when Ludwig sold the pills to Michelle.

unsecured by seat belts); Commonwealth v. Comer, 716 A.2d 593, 597 (Pa. 1998) (evidence showed that appellee acted with degree of recklessness contemplated by involuntary manslaughter statute when he drank four or five beers, took muscle relaxer pills, and then drove at an excessive rate of speed). Thus, as I would find that section 2506 incorporates a *mens rea* of recklessness, and that the evidence was sufficient to show that Appellant committed the offense of drug delivery resulting in death with a *mens rea* of recklessness, I would reverse the trial court's order granting Ludwig's Petition for Writ of Habeas Corpus with respect to the offense of drug delivery resulting in death.

Messrs. Justice Saylor and Eakin join.

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<sup>6</sup> Clearly, this risk was one that a reasonable person would have avoided if placed in Ludwig's situation.