

**Appeal Nos. 2011AP1044-CR
2011AP1105-CR**

**Cir. Ct. Nos. 2008CF324
2008CF323**

**WISCONSIN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DALE R. NEUMANN,

DEFENDANT-APPELLANT.

FILED

May 1, 2012

Diane M. Fremgen
Clerk of Supreme Court

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

LEILANI E. NEUMANN,

DEFENDANT-APPELLANT.

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Hoover, P.J., Peterson and Mangerson, JJ.

We certify these appeals to the Wisconsin Supreme Court to decide issues of statutory construction, constitutional rights and appropriate jury instructions for individuals charged with reckless homicide based on their choice to rely on prayer instead of medical treatment, resulting in their child's death.

BACKGROUND

Dale and Leilani Neumann believed and taught that illness is a spiritual affliction. They believed in the causal relationship between sickness and sin, the power of God to heal the sick, and the use of prayer to heal rather than conventional medical treatment. For the Neumanns, seeking medical attention rather than turning to God would constitute disobedience to God.

Two weeks before her death, their eleven-year-old daughter, Madeline, began experiencing symptoms of fatigue, thirst and frequent urination. However, three days before her death, she would have appeared generally healthy to a casual observer. On Friday, March 21, 2008, Leilani noticed that her daughter was very tired, but nobody believed she was suffering from a serious illness. The next morning, Madeline reported that she was feeling tired and Leilani told her to stay home and rest rather than working at the family coffee shop. When Leilani returned from work, she noticed that Madeline's legs were skinny and blue. Leilani massaged Madeline's legs, and the Neumanns prayed over her. Leilani stated that she was shocked by the sudden decline in Madeline's health and believed she was under "spiritual attack" and that prayer was the only answer.

Believing that Madeline may have had the flu or a fever, the family enlisted others to pray for Madeline, and Dale broadcasted an e-mail seeking emergency prayer and assistance from a church elder. Leilani's father suggested using Pedialyte because Madeline seemed dehydrated, but Leilani said, "That could be taking the glory from God." Later that night, the family believed Madeline's health had improved because her breathing became easier and more regular and her hands were much warmer.

The next morning, Leilani described Madeline’s condition as “comatose” and “hanging between life and death.” At 1:30 p.m., her parents expressed optimism about Madeline’s prognosis. Approximately one hour later, Madeline stopped breathing.

The Neumanns were charged with second-degree reckless homicide, contrary to WIS. STAT. § 940.06(1) (2009-10).¹ They claim a statutory right under WIS. STAT. § 948.03(6) and a constitutional right to substitute prayer for medical treatment.

ISSUES ON APPEAL

The Neumanns both argue that inconsistencies between WIS. STAT. § 940.06 and WIS. STAT. § 948.03 violate their due process right to fair notice that their conduct was unlawful. They also argue that the jury was improperly instructed regarding a parent’s duty to provide medical care for a child.²

Statutory Construction

The Neumanns argue that their use of the prayer treatment option specifically authorized by WIS. STAT. § 948.03(6) was later prosecuted under WIS. STAT. § 940.06. Section 948.03(3) prohibits recklessly causing “great bodily harm to a child.” Great bodily harm includes “bodily injury which creates a substantial risk of death.” WIS. STAT. § 939.22(14). Under § 948.03(6), parents engaged in

¹ All references to the Wisconsin Statutes are to the 2009-10 version.

² Dale’s and Leilani’s briefs also request a new trial in the interest of justice, arguing that their respective trial counsels were ineffective. Dale also argues that the court improperly informed his jury of Leilani’s conviction.

faith healing cannot be prosecuted for child abuse solely because they provided their child with “treatment by spiritual means through prayer alone for healing” However, the reckless homicide statute, § 940.06, punishes a faith-healing parent who recklessly causes the death of another human being. “Criminal recklessness” means “the actor creates an unreasonable and substantial risk of death or great bodily harm.” WIS. STAT. § 939.24. Therefore, they argue, until Madeline died, her parents’ treatment through prayer was specifically authorized by § 948.03(6), and it became a criminal act only upon Madeline’s death.

The State notes that the reckless homicide statute penalizes the reckless infliction of *death* on another person—not “great bodily harm.” If the terms overlap as the Neumanns suggest, use of the term “death” in WIS. STAT. § 940.06 would be superfluous. The State notes the difference in the actor’s mental state between the two standards:

The standards of criminal recklessness in the two statutes are explicitly different. [R]eckless child abuse required [that] defendant’s actions *demonstrate* a conscious disregard for the safety of a child, not that the defendant was subjectively aware of that risk. Wis. Stat. § 948.03(1). In contrast, “criminal recklessness” is defined as when “the actor creates an unreasonable and substantial risk of death or great bodily harm to another human being and the actor is aware of that risk.” Wis. Stat. § 948.24(1). Thus, “recklessly” causing harm to a child under § 948.03(b) [sic] is distinguished from “criminal recklessness,” because only the latter includes a subjective component. We therefore conclude that recklessly causing harm to a child, unlike criminal recklessness, does not contain a subjective component.

State v. Williams, 2006 WI App 212, ¶26, 296 Wis. 2d 834, 723 N.W.2d 719 (parenthetical omitted). Because the recklessness standard in the child abuse statute is much lower than the standard in the homicide statute, the State argues that the legislature properly applied the prayer privilege only to the child abuse

statute. The State contends that when the parent becomes aware of the grave risk, the prayer treatment privilege is unavailable. The prayer treatment privilege prohibits prosecution for child abuse “solely” because the parent provides treatment by spiritual means. When the child’s life is endangered, the prosecution is not “solely” based on the decision to utilize prayer. The statutory scheme reflects a willingness to accommodate the parent’s religious practice only when the child does not face serious physical harm.

Due Process—Adequacy of Notice

The Neumanns argue as follows: Due process requires that people who wish to follow the law must be able to discern the boundary between what is legal and illegal. *Elections Bd. of State of Wis. v. Wisconsin Mfrs. & Commerce*, 227 Wis. 2d 650, 676-77, 597 N.W.2d 721 (1999). Conflicting legal provisions may violate due process by failing to provide fair notice of what conduct is legal. *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952). The Neumanns argue that the prayer treatment exception within the child abuse statute entirely overlaps with the definition of reckless homicide. The “substantial risk of death” that creates criminal liability under reckless homicide is the same “substantial risk of death” explicitly protected in the prayer treatment exception. The government may not officially inform an individual that certain conduct is permitted and then prosecute the individual for engaging in that same conduct. Activity that is protected by one statute may not be criminalized by another. *Cox v. Louisiana*, 379 U.S. 559, 571 (1965). Because Madeline’s condition never progressed beyond a “substantial risk of death” until she actually died, there was no boundary or a clear moment when the Neumanns would be placed on notice that their conduct had crossed the line between immunity under WIS. STAT. § 948.03(6) and liability under WIS. STAT. § 940.06. The legislature cannot protect good-faith reliance on prayer treatment

only to criminalize it when the treatment fails. No language in any statute informs the parent that there will be criminal liability if the legislatively protected choice of prayer treatment is unsuccessful and the child dies.

The Neumanns cite cases from Minnesota and Florida that found due process notice violations under similar circumstances.³ In those cases, children died after their parents treated their child's diabetic condition by prayer. Overturning their convictions, the courts concluded that the prayer treatment exceptions did not adequately identify a point at which a parent would be exposed to criminal liability for using that option.

The State responds that the reckless homicide statute provides adequate notice. A statute does not need to define with absolute clarity and precision what is and is not unlawful conduct. *State v. Nelson*, 2006 WI App 124, ¶36, 294 Wis. 2d 578, 718 N.W.2d 168. Due process requires only a "fair degree of definiteness." *State v. Courtney*, 74 Wis. 2d 705, 710, 247 N.W.2d 714 (1976). The State cites cases from California, Colorado, Oregon, Massachusetts, and Pennsylvania that upheld convictions of parents who relied on prayer alone.⁴ In those cases, the courts concluded that a parent's choice of prayer over medicine does not extend to circumstances that endanger the child's life. WISCONSIN STAT. § 948.03(6), like the statutes in those five jurisdictions, supports the State's argument, that "homicide is different."

³ *State v. McKown*, 475 N.W.2d 63 (Minn. 1991); *Hermanson v. State*, 604 So. 2d 775 (Fla. 1992).

⁴ *Walker v. Superior Court*, 763 P.2d 852 (Cal. 1988); *In re D.L.E.*, 645 P.2d 271, (Colo. 1982); *State v. Hays*, 964 P.2d 1042 (Or. Ct. App. 1998); *Commonwealth v. Twitchell*, 617 N.E.2d 609 (Mass. 1993); *Commonwealth v. Nixon*, 718 A.2d 311 (Pa. Super. Ct. 1998).

Jury Instructions

Because the prosecutions were based on an omission, the court instructed the jury that the Neumanns could be found guilty only if they violated a legal duty. In Leilani's case, the court then instructed the jury concerning that duty:

One such duty is the duty of a parent to protect their children, to care for them in sickness and in death [sic], and to do whatever is necessary for their preservation including medical attendance, if necessary.

In Dale's case, the court instructed:

Conduct can be either by an act or omission, when the defendant has a duty to act. One such duty is the duty of a parent to protect their child, to care for them in sickness and in health.

The Neumanns argue that these instructions negate the prayer treatment privilege granted by WIS. STAT. § 948.03(6). They also argue that the instructions violate their constitutional right to direct the medical care for their child. The due process clause "protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel v. Granville*, 530 U.S. 57, 66 (2000). That right, to some extent, includes the right to make decisions about the child's medical care. *P.J. ex rel. Jensen v. Wagner*, 603 F.3d 1182, 1197 (10th Cir. 2010). They also argue that the jury instructions were so broad and vague that they provided no discernible standard.

The State responds that the prayer exception is not applicable to the homicide statute and the general right of parents to make decisions concerning their children's care set out in *Troxel* does not prohibit the State from imposing a medical obligation on a parent necessary to preserve a child's life. Citing *Prince*

v. Massachusetts, 321 U.S. 158, 170 (1944), the State argues that there is no constitutional guarantee allowing a parent to knowingly impose a risk of death or great bodily harm to a child on the basis of religion, and parents are not free to “make martyrs of their children.” Therefore, it argues the trial court properly instructed the jury that parents have a duty to provide their children with medical care.

BASIS FOR THE CERTIFICATION

The statutory construction and constitutional issues raised in these appeals are appropriately decided by the supreme court rather than an error-correcting court. The issues raised are matters of first impression in Wisconsin, and the foreign authorities are split on these issues. The issues are likely to arise in future cases. We submit that it is appropriate for Wisconsin’s highest court to determine the scope of the prayer treatment exception and to inform trial courts regarding the appropriate jury instructions when that exception is raised in a reckless homicide case.

