

19 of 20 DOCUMENTS



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As of: Jul 02, 2008

**STATE OF OHIO, PLAINTIFF-APPELLEE v. JAMES E. BARNETT, DEFENDANT-APPELLANT**

**CASE NO. 13-92-1**

**COURT OF APPEALS OF OHIO, THIRD APPELLATE DISTRICT, SENECA COUNTY**

*1993 Ohio App. LEXIS 2313*

**April 29, 1993, Entered**

**PRIOR HISTORY:** [\*1] CHARACTER OF PROCEEDINGS: Criminal Appeal from Common Pleas Court.

**DISPOSITION:** JUDGMENT: Judgment reversed and cause remanded.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed his conviction by the Common Pleas Court, Seneca County (Ohio) for involuntary manslaughter in violation of *Ohio Rev. Code Ann. § 2903.04(B)*. After passing across the double yellow line and while headed north in the southbound lane of travel of the no-passing zone, defendant's truck collided with a southbound automobile, killing its two occupants. Defendant asserted that his conviction in the circumstances was error.

**OVERVIEW:** At trial, the State offered evidence tending to prove that defendant was driving left of center, a violation of *Ohio Rev. Code Ann. § 4511.29*, driving on the left side of the roadway in violation of *Ohio Rev. Code Ann. § 4511.30*, and passing while in a hazardous zone in violation of *Ohio Rev. Code Ann. § 4511.31*. *Ohio Rev. Code Ann. § 4511.99(D)* provided that such violations were misdemeanors on first offense, which defendant's violations were. Defendant's motion under *Ohio R. Crim. P. 29(A)* to acquit was overruled and was not renewed thereafter, and no objection was made to the trial court's instructions given the jury at the close of all the evidence. However, the court reversed, finding that

defendant's commission of minor misdemeanor traffic offenses was insufficient to sustain the conviction for involuntary manslaughter. An acquittal should have been granted because the evidence tended to prove that defendant proximately caused the deaths of two persons while committing or attempting to commit minor misdemeanor offenses only. There was no evidence from which it could be inferred that defendant caused the deaths while committing or attempting to commit misdemeanor offenses.

**OUTCOME:** The court reversed and remanded the cause to the trial court for further proceedings. The court also certified the record of the action to the Supreme Court of Ohio for its review and final determination.

**LexisNexis(R) Headnotes**

*Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview*

[HN1] *Ohio Rev. Code Ann. § 2903.04(B)* provides: No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor.

*Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution*

*Criminal Law & Procedure > Trials > Motions for Acquittal*

***Criminal Law & Procedure > Appeals > Standards of Review > Substantial Evidence***

[HN2] When reviewing a judgment overruling a motion for acquittal made pursuant to *Ohio R. Crim. P. 29(A)*, the question is whether, viewing the evidence most favorable to the State, a reasonable mind might find each element of the offense beyond a reasonable doubt.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview  
Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN3] Whoever violates *Ohio Rev. Code Ann. §§ 4511.01 to 4511.76* is guilty of a minor misdemeanor on a first offense.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > First-Degree Murder > General Overview***

***Criminal Law & Procedure > Scienter > Negligence Torts > Transportation Torts > General Overview***

[HN4] *Ohio Rev. Code Ann. § 2903.07*, vehicular homicide, provides in part: (A) No person, while operating or participating in the operation of a motor vehicle, shall negligently cause the death of another. (B) Whoever violates § 2903.07 is guilty of vehicular homicide, a misdemeanor of the first degree. The conduct which must be proven to underlie the negligent causation of the death of another sufficient for a conviction of vehicular homicide is any operation or participation in the operation of a motor vehicle, regardless of the classification of the criminal offense found to be proven by that conduct. , vehicular homicide, provides in part: (A) No person, while operating or participating in the operation of a motor vehicle shall negligently cause the death of another. (B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. The conduct which must be proven to underlie the negligent causation of the death of another sufficient for a conviction of vehicular homicide is any operation or participation in the operation of a motor vehicle, regardless of the classification of the criminal offense found to be proven by that conduct.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview***

***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN5] The plain language of *Ohio Rev. Code Ann. § 2903.04(B)* requires proof beyond a reasonable doubt that a defendant caused the death of another as a prox-

imate result of committing, or attempting to commit, a misdemeanor.

***Governments > Legislation > Interpretation***

[HN6] A court must first look to the language of a statute to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal, and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. Where the language itself clearly expresses the legislative intent, the courts need look no further. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the general assembly. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of a statute to meet a situation not provided for. Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.

***Governments > Legislation > Interpretation***

[HN7] Courts are limited in their analysis to the construction and interpretation of statutes as written. The courts, in the construction of a statute, must be guided by it as it exists, in other words, as the legislature enacted it. A court has the duty to adhere to a statute as it is written and enforce its literal terms. In interpreting a legislative enactment, the courts may not simply rewrite it on the basis that they are thereby improving the law, or write what they consider better acts, or read into a statute that which is not found there.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Murder > Aggravated Murder > Penalties  
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview  
Criminal Law & Procedure > Sentencing > Fines***

[HN8] *Ohio Rev. Code Ann. § 2901.02*, which establishes classification of offenses, in part provides: Offenses include aggravated murder, murder, aggravated felonies of the first, second, and third degree, felonies of the first, second, third, and fourth degree, misdemeanors of the first, second, third, and fourth degree, minor misdemeanors, and offenses not specifically classified. Regardless of the penalty which may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a mis-

demeanor. Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty. Any offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty. Any offense not specifically classified is a minor misdemeanor if the only penalty which may be imposed is a fine not exceeding \$ 100.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN9] *Ohio Rev. Code Ann. § 2901.02* classifies offenses into two degrees of murder, four degrees each of felony and misdemeanor, minor misdemeanors, and offenses not specifically classified. The purpose of the classification is to permit a high level of flexibility in characterizing offenses and assessing penalties for their violation according to their comparative seriousness. Also, § 2901.02 is intended to preserve a distinction between felonies and misdemeanors. In enacting § 2901.02, it is clear that the legislature's intent was to create separate and distinct classifications of criminal offenses.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > Elements***  
***Criminal Law & Procedure > Trials > Burdens of Proof > Prosecution***

[HN10] The plain language of *Ohio Rev. Code Ann. § 2903.04(B)* specifies that the criminal offense of involuntary manslaughter has been committed if a person proximately causes the death of another while committing, or attempting to commit, an offense classified as a misdemeanor, not an offense classified as a minor misdemeanor.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Transportation Law > Private Motor Vehicles > Traffic Regulation***

[HN11] Indicative of the legislature's intent to distinguish between misdemeanors and minor misdemeanors as separate and distinct classes of offenses is the fact that a second occurrence of certain traffic violations if committed within one year of the first offense, which is a minor misdemeanor, are elevated in classification to misdemeanors of various degrees. *Ohio Rev. Code Ann. § 4511.99(D)*.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Criminal Law & Procedure > Sentencing > Fines***

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN12] In *Ohio Rev. Code Ann. § 2929.21* the legislature specified separately the penalties to be imposed for conviction of misdemeanor and minor misdemeanor offenses. *Ohio Rev. Code Ann. § 2929.21(B)(1) through (4)* specify the terms of imprisonment, and § 2929.21(C)(1) through (4) specify the amounts of fines to be imposed for conviction of each of the four degrees of misdemeanor offenses. Minor misdemeanor offenses are treated separately in § 2929.21(D), again indicating apparent legislative intent to classify misdemeanors of whatever degree differently from minor misdemeanors. Nothing in the plain language of the relevant sections of the Ohio Revised Code discloses an intent to classify minor misdemeanors generally as a fifth degree misdemeanor.

***Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > General Overview***

***Criminal Law & Procedure > Scienter > Knowledge***

[HN13] *Ohio Rev. Code Ann. § 2923.02(A)* defines the crime of attempt to commit an offense as: No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

***Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

[HN14] According to *Ohio Rev. Code Ann. § 2923.02(E)*, an attempt to commit a minor misdemeanor is not an offense under § 2923.02(E), and an attempt to commit an offense classified as a fourth degree misdemeanor presumably may be a minor misdemeanor.

***Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Attempt > Penalties***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

[HN15] According to *Ohio Rev. Code Ann. § 2923.02(E)*, an attempt to commit an unclassified felony is deemed to be a fourth class felony, the lowest degree of felony, while an attempt to commit an unclassified misdemeanor is statutorily deemed to be a fourth degree misdemeanor, not a minor misdemeanor. From this statutory sequence it may be inferred that the least degree of misdemeanor is the fourth degree, and that a minor mis-

demeanor is another classification of offense which not only may not be attempted, but may not itself be deemed an attempt to commit a higher unclassified offense.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Criminal Law & Procedure > Guilty Pleas > General Overview***

***Criminal Law & Procedure > Sentencing > Imposition > Factors***

[HN16] *Ohio R. Crim. P. 4.1* provides for an optional procedure in the prosecution and disposition of minor misdemeanor offenses not covered by the Uniform Traffic Rules, and in *Rule 4.1(B)* defines a minor misdemeanor, with respect to offenses committed on or after January 1, 1974, as an offense for which the potential penalty does not exceed a fine of \$ 100. Essentially, the optional procedure permits a court to establish a procedure by which a law enforcement officer may issue, in lieu of arrest, a citation for a minor misdemeanor offense requiring the offender to appear in court at a specific date and time to answer to a charge unless the offender at a time before that required for appearance elects to enter a written plea of guilty and pay the fine and costs stated on the citation according to a schedule of fines and costs adopted by the court for such offense.

***Criminal Law & Procedure > Criminal Offenses > Controlled Substances > Delivery, Distribution & Sale > Elements***

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Education Law > Students > Discipline Methods > General Overview***

[HN17] *Ohio Traffic R. 3* requires courts with jurisdiction of traffic offenses to establish a violations bureau to accept appearance, waiver of trial, plea of guilty and payment of fine and costs for offenses within its authority. All traffic offenses fall within that authority except (1) indictable offenses, (2) operating a motor vehicle while under the influence of alcohol or any drug of abuse, (3) leaving the scene of an accident, (4) driving while under suspension or revocation of driver's license, (5) driving without a license, (6) a second moving traffic offense within a twelve month period, (7) failure to stop and remain standing for a school bus stopped on the highway to receive or discharge a school child, (8) willfully eluding or fleeing a police officer, and (9) drag racing. All the nine enumerated excepted offenses are punishable upon finding of guilt, by fines and/or periods of incarceration classifying them as greater than minor misdemeanors.

***Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview***

***Governments > Legislation > Interpretation***

[HN18] *Ohio Rev. Code Ann. § 2901.04* establishes the rule of statutory construction as follows: Sections of the Ohio Revised Code defining offenses or penalties shall be strictly construed against the State and liberally construed in favor of the accused.

***Criminal Law & Procedure > Criminal Offenses > Homicide > Involuntary Manslaughter > General Overview***

***Criminal Law & Procedure > Criminal Offenses > Vehicular Crimes > Vehicular Homicide > Elements***

[HN19] While an offense classified as a misdemeanor of whatever degree, such as driving while under the influence of alcohol, might well underlie and support conviction of a charge of violating *Ohio Rev. Code Ann. § 2903.04(B)*, involuntary manslaughter, as well as charges of violating *Ohio Rev. Code Ann. § 2903.06*, aggravated vehicular homicide, or *Ohio Rev. Code Ann. § 2903.07*, vehicular homicide, proof of a traffic offense classified as a minor misdemeanor will not serve as the predicate or underlying offense necessary for a conviction of *Ohio Rev. Code Ann. § 2903.04(B)*, while fulfilling proof of the predicate element required by *Ohio Rev. Code Ann. §§ 2903.06, 2903.07*.

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**JUDGES:** BRYANT, HADLEY, SHAW

**OPINION BY:** BRYANT

**OPINION**

OPINION

BRYANT, J., This is an appeal by defendant-appellant, James E. Barnett, from a judgment of the Court of Common Pleas of Seneca County entered August 5, 1991, on a jury's verdict finding him to be guilty of two counts of violating *R.C. 2903.04(B)*, involuntary manslaughter.

On October 9, 1990, Barnett was driving a semi-tractor-trailer truck northbound on State Route 23 in Seneca County, Ohio. As he approached another north-

bound tractor-trailer rig in his lane of travel, he attempted to pass it by driving into the southbound lane of the two-lane highway in a no-passing zone signified by a double yellow line painted in the center of the roadway.

After passing across the double yellow line and while headed north [\*2] in the southbound lane of travel of the no-passing zone, Barnett's truck collided with a southbound automobile, killing its two occupants.

The Seneca County Grand Jury indicted Barnett for two counts of violating *R.C. 2903.04(B)*, involuntary manslaughter.

After trial, on August 5, 1991, the trial court entered judgment on the jury's verdict, convicting Barnett of both counts as charged. On December 12, 1991, Barnett was sentenced to serve a term of two to ten years incarceration on each count, sentences to run concurrently, and his driver's license was revoked for life. Barnett now appeals, asserting as his single assignment of error his conviction and sentence in the circumstances.

At the close of the state's evidence, Barnett moved pursuant to *Crim.R. 29(A)* for acquittal on grounds that the state's evidence was insufficient to prove the offenses charged in the indictment. The motion to acquit was overruled, was not renewed thereafter, and no objection was made to the court's instructions given the jury at the close of all the evidence. Nevertheless, we address the issue presented as being properly before us pursuant to *Crim.R. 52(B)* and *Crim.R. 12(B)(2)*.

Barnett was convicted [\*3] of and sentenced for violation of *R.C. 2903.04(B)* which provides:

[HN1] (B) No person shall cause the death of another as a proximate result of the offender's committing or attempting to commit a misdemeanor. (Emphasis added).

[HN2] When reviewing a judgment overruling a motion for acquittal made pursuant to *Crim.R. 29(A)*, the question is whether, viewing the evidence most favorable to the state, a reasonable mind might find each element of the offense beyond a reasonable doubt. *State v. Bridgeman (1978), 55 Ohio St.2d 261, 263, 9 O.O.3d 401, 402, 381 N.E.2d 184, 185.*

At trial, the state offered evidence against Barnett tending to prove that he was driving left of center, a violation of *R.C. 4511.29*, driving on the left side of the roadway in violation of *R.C. 4511.30*, and passing while in a hazardous zone in violation of *R.C. 4511.31*. *R.C. 4511.99(D)* provides in part:

[HN3] *Whoever violates sections 4511.01 to 4511.76 \* \* \* of the Revised Code \* \* \* is guilty of a minor misdemeanor on a first offense \* \* \**. (Emphasis added).

For purposes of this appeal it is undisputed that all of Barnett's violations shown at triad are first offenses. Thus, because no other [\*4] penalty is provided for the traffic violations noted, considering the evidence of predicate offenses most favorable for the state, that evidence may be deemed to prove Barnett's guilt of minor misdemeanors, only.

We must decide whether or not proof by the state of Barnett's commission of a minor misdemeanor traffic offense is sufficient to sustain his conviction for violation of *R.C. 2903.04(B)*, involuntary manslaughter.

Appellant contends that the statutory scheme of punishment for the causing of the death of another person creates an offense separate from involuntary manslaughter to apply to an involuntary homicide caused by a minor misdemeanor traffic violation, pointing out that in the language of the statute enacted for such instance the classification of the underlying offense is not relevant.

*R.C. 2903.07*, vehicular homicide, provides in part:

[HN4] (A) No person, while operating or participating in the operation of a motor vehicle \* \* \* shall negligently cause the death of another.

(B) Whoever violates this section is guilty of vehicular homicide, a misdemeanor of the first degree. \* \* \*

The conduct which must be proven to underlie the negligent causation [\*5] of the death of another sufficient for conviction of the defendant of vehicular homicide is any operation or participation in the operation of a motor vehicle, regardless of the classification of the criminal offense found to be proven by that conduct.

Thus appellant draws the conclusion that since a separate statute is provided for the different eventualities based upon the decreasing seriousness of the several predicate offenses, it contravenes legislated policy to elevate to felony status the consequences of a minor misdemeanor traffic violation resulting in the unintentional or accidental death of another.

The appellee argues that a misdemeanor, though characterized as minor, is nonetheless a misdemeanor for purposes of *R.C. 2903.04(B)* and urges that we interpret

the statute to permit and thus affirm Barnett's convictions for involuntary manslaughter on proof of deaths proximately resulting from traffic offenses classified as minor misdemeanors.

Appellee urges us to adopt the interpretation of *R.C. 2903.04(B)* and the rationale of the courts of appeals for the Second Appellate District in *State v. Centers* (May 19, 1986), Montgomery App. No. 9380, unreported, 1986 WL 6113 [\*6] (Ohio App.) and for the Ninth Appellate District found in *State v. Montecalvo* (Sept. 5, 1990), Lorain App. No. 89CA004653, unreported, 7 AOA 366, Cacioppo J. dissenting, in *State v. Knoefel* (Nov. 28, 1990), Lorain App. No. 90CA004828, unreported, 1990 WL 190401 (Ohio App.) Cirigliano, J. concurring separately, Reece, P.J. concurring in concurrence, and in *State v. Westfall* (July 31, 1991), Summit App. No. 14930, unreported, 1991 WL 149573 (Ohio App.), Reece, J. concurring in part, and Cacioppo, J. dissenting.

[HN5] The plain language of *R.C. 2903.04(B)* requires proof beyond a reasonable doubt that the defendant caused the death of another as a proximate result of committing, or attempting to commit, a *misdemeanor*.

Essentially, appellee urges us to hold as held in the appellate decisions cited to us that a minor misdemeanor is merely a fifth degree of misdemeanor.

Thus we are called upon to interpret and apply a statute defining and proscribing criminal conduct.

In *Provident Bank v. Wood* (1973), 36 *Ohio St.2d* 101, 105, 106, 65 *O.O.2d* 296, 298, 304 *N.E.2d* 378, 381 the Ohio Supreme Court stated:

It is a cardinal rule that [HN6] a court must first look to the language [\*7] of the statute itself to determine the legislative intent. See, e.g., *Katz v. Department of Liquor Control* (1957), 166 *Ohio St.* 229, 141 *N.E.2d* 294. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied accordingly. *Sears v. Weimer* (1944), 143 *Ohio St.* 312, 55 *N.E.2d* 413.

"Where the language itself clearly expresses the legislative intent, the courts need look no further." *Katz, supra*, at 231.

See, also, *Wingate v. Hordge* (1979), 60 *Ohio St.2d* 55, 14 *O.O.3d* 212, 396 *N.E.2d* 770.

The Ohio Revised Code Annotated, General Provisions, The Construction of Statutes, Legislative Intent, page X, provides:

Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the general assembly. The question is not what did the general assembly intend to enact, but what is the meaning of that which it did enact. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of [\*8] the statute to meet a situation not provided for.

Where the language of a statute is plain and unambiguous, and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted. (Footnotes omitted.)

Further, in 85 Ohio Jurisprudence 3d (1988) 166-167, Statutes, Section 176 it is stated:

[HN7] Courts are limited in their analysis to the construction and interpretation of statutes as written. \* \* \*.

The courts, in the construction of a statute, must be guided by it as it exists, in other words, as the legislature enacted it. A court has the duty to adhere to a statute as it is written and enforce its literal terms. In interpreting a legislative enactment, the courts may not simply rewrite it on the basis that they are thereby improving the law, or write what they consider better acts, or read into a statute that which is not found there.

\* \* \*.

*R.C. 2901.02* establishing classification of offenses, in parts pertinent to our review is:

[HN8] (A) Offenses include aggravated murder, murder, aggravated felonies of the first, second, and third degree, felonies [\*9] of the first, second, third, and fourth degree, *misdemeanors* of the first, second,

third, and fourth degree, *minor misdemeanors*, and offenses not specifically classified.

\* \* \*

(D) Regardless of the penalty which may be imposed, any offense specifically classified as a felony is a felony, and any offense specifically classified as a misdemeanor is a misdemeanor.

(E) Any offense not specifically classified is a felony if imprisonment for more than one year may be imposed as a penalty.

(F) Any offense not specifically classified is a misdemeanor if imprisonment for not more than one year may be imposed as a penalty.

(G) Any offense not specifically classified is a minor misdemeanor if the only penalty which may be imposed is a fine not exceeding one hundred dollars. (Emphasis added.)

The committee comment applicable to this section is:

[HN9] This section classifies offenses into two degrees of murder, four degrees each of felony and misdemeanor, minor misdemeanors, and offenses not specifically classified. The purpose of the classification is to permit a high level of flexibility in characterizing offenses and assessing penalties for their violation according to [\*10] their comparative seriousness.

Also, the section is intended to preserve a distinction between felonies and misdemeanors and in some measure to integrate into the new code existing offenses which will retain the former penalty scheme.

In enacting *R.C. 2901.02*, it is clear that the legislature's intent was to create separate and distinct classifications of criminal offenses.

[HN10] The plain language of *R.C. 2903.04(B)* specifies that the criminal offense of involuntary manslaughter has been committed if a person proximately causes the death of another while committing, or attempting to

commit, an offense classified as a *misdemeanor*, not an offense classified as a minor misdemeanor.

[HN11] Indicative of the legislature's intent to distinguish between misdemeanors and minor misdemeanors as separate and distinct classes of offenses is the fact that a second occurrence of Barnett's traffic violations if committed within one year of the first offense, are elevated in classification to misdemeanors of various degrees. See *R.C. 4511.99(D)*.

[HN12] In *R.C. 2929.21* the legislature specified separately the penalties to be imposed for conviction of misdemeanor and minor misdemeanor offenses. *R.C. [\*11] 2929.21* section (B), subsections (1) through (4) specify the terms of imprisonment, and section (C), subsections (1) through (4) specify the amounts of fines, to be imposed for conviction of each of the *four* degrees of misdemeanor offenses. Minor misdemeanor offenses are treated in separate section (D), again indicating apparent legislative intent to classify misdemeanors of whatever degree differently from minor misdemeanors. Nothing in the plain language of the relevant sections of the Revised Code discloses an intent to classify minor misdemeanors generally as a fifth degree misdemeanor.

Appellee urges that we interpret the opinion of the Supreme Court of Ohio in *State v. Chippendale (1990)*, *52 Ohio St.3d 118*, *556 N.E.2d 1134* to confirm that the vehicular homicide statutes do not preclude conviction on a charge of involuntary manslaughter where a death results from a traffic accident, regardless of the classification of the predicate offense as a misdemeanor or as a minor misdemeanor. However, should we do so, the authority does not resolve the very different issue presented here. Assistance is more evident from manifestations of intent in other circumstances in which [\*12] both the Ohio Legislature and the Ohio Supreme Court have placed emphasis on the disparate classification of misdemeanor and minor misdemeanor offenses both for punitive and for procedural purposes.

For example, *R.C. 2923.02(A)* defines the crime of attempt to commit an offense as:

[HN13] (A) No person, purposely or knowingly, and when purpose or knowledge is sufficient culpability for the commission of an offense, shall engage in conduct which, if successful, would constitute or result in the offense.

[HN14] According to *R.C. 2923.02(E)*, an attempt to commit a minor misdemeanor is not an offense under that statute, and while we have found no authoritative decision of this state concluding that an attempt to com-

mit a fourth degree misdemeanor is a minor misdemeanor, according to section (E) an attempt to commit an offense classified as a fourth degree misdemeanor presumably may be a minor misdemeanor.

[HN15] According to *R.C. 2923.02(E)* an attempt to commit an unclassified felony is deemed to be a fourth class felony, the lowest degree of felony, while an attempt to commit an unclassified misdemeanor is statutorily deemed to be a fourth degree misdemeanor, not a minor misdemeanor. From [\*13] this statutory sequence it might be inferred that the least degree of misdemeanor is the fourth degree, and that a minor misdemeanor is another classification of offense which not only may not be attempted, but may not itself be deemed an attempt to commit a higher unclassified offense.

The exclusiveness of classification is not inconsistent with the attempt concept, however, for if an attempt to commit an offense classified as a fourth degree felony may be punished as a first degree misdemeanor, an offense of a lesser classification than felony, it is logically consistent to treat an attempt to commit a fourth degree misdemeanor as if it were an offense of a lesser classification of offense, *i.e.*, a minor misdemeanor, notwithstanding the status of most minor misdemeanor offenses as *malum prohibitum* without requirement of a culpable mental state.

*Crim.R. 4.1*, promulgated by the Supreme Court, [HN16] provides for an optional procedure in the prosecution and disposition of minor misdemeanor offenses not covered by the Uniform Traffic Rules, and in section (B) defines a minor misdemeanor, with respect to offenses committed on or after January 1, 1974, as "an offense for which the [\*14] potential penalty does not exceed a fine of one hundred dollars."

Essentially, the optional procedure permits a court to establish a procedure by which a law enforcement officer may issue, in lieu of arrest, a citation for a minor misdemeanor offense requiring the offender to appear in court at a specific date and time to answer to a charge unless the offender at a time before that required for appearance elects to enter a written plea of guilty and pay the fine and costs stated on the citation according to a schedule of fines and costs adopted by the court for such offense.

[HN17] *Traf.R. 3* requires courts with jurisdiction of traffic offenses to establish a violations bureau to "accept appearance, waiver of trial, plea of guilty and payment of fine and costs for offenses within its authority." All traffic offenses fall within that authority except (1) indictable offenses, (2) operating a motor vehicle while under the influence of alcohol or any drug of abuse, (3) leaving the scene of an accident, (4) driving while under suspension or revocation of driver's license, (5) driving without a license, (6) a second moving traffic offense within a

twelve month period, (7) failure to stop and [\*15] remain standing for a school bus stopped on the highway to receive or discharge a school child, (8) wilfully eluding or fleeing a police officer, and (9) drag racing. All the nine enumerated excepted offenses are punishable upon finding of guilt, by fines and/or periods of incarceration classifying them as greater than minor misdemeanors.

In the final analysis, when we are called upon to interpret and apply a statute defining and proscribing criminal conduct, the touchstone is *R.C. 2901.04* which establishes the rule of construction as follows:

[HN18] (A) Sections of Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

\* \* \*

Considering all the foregoing, we conclude and therefore we hold that [HN19] while an offense classified as a misdemeanor of whatever degree, such as driving while under the influence of alcohol, might well underlie and support conviction of a charge of violating *R.C. 2903.04(B)*, involuntary manslaughter, as well as charges of violating *R.C. 2903.06*, aggravated vehicular homicide, or *R.C. 2903.07*, vehicular homicide, see *State v. Chippendale (1990)*, 52 Ohio St.3d 118, [\*16] 556 N.E.2d 1134, proof of a traffic offense classified as a minor misdemeanor will not serve as the predicate or underlying offense necessary for a conviction of the former statute, while fulfilling proof of the predicate element required by the two latter statutes.

Because the state adduced evidence at trial tending to prove that Barnett proximately caused the death of two persons while committing, or attempting to commit, minor misdemeanor offenses only, and no evidence was presented from which it may be inferred that Barnett proximately caused these deaths while committing, or attempting to commit, misdemeanor offenses, the trial court erred by overruling defense counsel's motion for Barnett's acquittal at the close of the state's evidence.

Appellant's single assignment of error is well taken. However, because our judgment is in conflict with the judgments pronounced upon the same question by the Court of Appeals of Montgomery County in *Centers, supra*, the Court of Appeals of Lorain County in *Montecalvo and Knoefel, supra*, and the Court of Appeals of Summit County in *Westfall, supra*, we certify the record of this case to the Supreme Court of Ohio for its review [\*17] and final determination.



Having found error in the judgment entered by the Court of Common Pleas of Seneca County, we reverse that judgment and remand the cause to that court for further proceedings not inconsistent with this decision.

Judgment reversed and cause remanded.

HADLEY, P.J., concurs.

**CONCUR BY: SHAW**

**CONCUR**

SHAW, J., concurring separately:

I have a number of concerns with the "statutory construction" approach to this issue. At the outset, I am particularly troubled that under this approach, offenses such as reckless operation of a motor vehicle would appear to fall outside the scope of the involuntary manslaughter statute.

Moreover, I am not persuaded by the rationale advanced by some that those minor traffic offenses involving mere negligent culpability should be inherently ineligible to constitute predicate offenses for involuntary manslaughter, on the apparent theory that to do otherwise somehow creates an unfair or disproportionate consequence. On the contrary, it seems to me that the entire

involuntary manslaughter statute is, in fact, based upon the well established concept that an otherwise relatively minor act naturally becomes more serious when a death results, [\*18] notwithstanding the intent behind the act.

Finally, I am not entirely convinced that the Supreme Court of Ohio has not already addressed this issue, albeit indirectly, in the *Chippendale* decision, *supra*, wherein the court concludes that "\* \* \* the legislature clearly intended to permit a charge of manslaughter against persons involved in *vehicular fatalities*, despite the more specific provisions for aggravated vehicular and vehicular homicide." (Emphasis added.) *Id. at 122*, quoting with approval *State v. Davis, supra*. (Emphasis added.)

Nevertheless, I believe the "statutory construction" analysis set forth herein does raise a significant question about this issue, particularly in contrast to the total lack of any rationale contained in those cases which have decided to the contrary. Moreover, the issue is clearly an important one which should be clarified by the Ohio Supreme Court.

Accordingly, I concur in the judgment reached today and endorse our certification of this case to the Ohio Supreme Court so that we may obtain a prompt and decisive resolution of this issue.