

State v. Olson, 79 Or.App. 302 (1986)

719 P.2d 55, 64 A.L.R.4th 293

79 Or.App. 302
Court of Appeals of Oregon.

STATE of Oregon, Respondent,
v.
Eric Leroy OLSON, Appellant.

M486112; CA A37579.

|
Argued and Submitted Feb. 10, 1986.

|
Decided May 14, 1986.

Nothing in choice of evils defense to driving while under influence of intoxicants prevents its use when defendant has acted to protect property rather than life. [ORS 161.200\(1\)\(a\)](#).

[2 Cases that cite this headnote](#)

[3] **Criminal Law**
🔑 Defenses in General

When defendant's evidence is sufficient to support application of choice of evils defense to charge of driving while under influence of intoxicants, prosecution must rebut it beyond a reasonable doubt. [ORS 161.055\(1\)](#), [161.190](#).

[4 Cases that cite this headnote](#)

Synopsis

Defendant was convicted in the District Court, Multnomah County, Kimberly Frankel, J., of driving while under influence of intoxicants. The Court of Appeals, Young, J., held that defendant's evidence was sufficient to support application of choice of evils defense.

Conviction vacated and remanded.

West Headnotes (4)

[1] **Criminal Law**
🔑 Compulsion or Necessity; Justification in General

Showing that defendant's driving of car was necessary to avoid injury or threat of injury to human or animal life was not an element of choice of evils defense to charge of driving while under influence of intoxicants, which is available if conduct is necessary as an emergency measure to avoid imminent public or private injury. [ORS 161.200\(1\)\(a\)](#).

[3 Cases that cite this headnote](#)

[2] **Criminal Law**
🔑 Compulsion or Necessity; Justification in General

[4] **Criminal Law**
🔑 Defenses in General

Defendant's testimony that he chose lesser evil of moving car out of intersection, although he was intoxicated, rather than leaving it in lane of traffic, sufficiently supported application of choice of evils defense and required prosecution to rebut evidence in order to obtain conviction.

[1 Cases that cite this headnote](#)

Attorneys and Law Firms

****56 *302** Garrett A. Richardson, Portland, argued the cause and filed brief for appellant.

***303** Kendall Barnes, Asst. Atty. Gen., Salem, argued the cause for respondent. With him on brief were Dave Frohnmayr, Atty. Gen., and James E. Mountain, Jr., Salem.

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Before JOSEPH, C.J., and VAN HOOMISSEN and YOUNG, JJ.

Opinion

*304 YOUNG, Judge.

Defendant was tried by the court and convicted of driving while under the influence of intoxicants (DUII). He appeals and claims that the trial court applied an incorrect legal standard in evaluating his choice of evils defense. We vacate the conviction and remand.

Officer Brunt saw defendant on the evening of November 23, 1984, in an argument with a woman in a restaurant parking lot. Brunt intervened and determined that defendant was intoxicated but that the woman was not. At Brunt's suggestion, defendant and the woman left in defendant's car, with her driving. A few minutes later Brunt saw the car stop in an intersection. The woman got out from the driver's side and walked away. After a moment, defendant moved to the driver's side and drove the car a short distance. Brunt then arrested him for DUII.

Defendant admitted that he was intoxicated and that he drove. His defense was that he chose the lesser evil of moving the car out of the intersection rather than leaving it in a lane of traffic. The defense is statutory. [ORS 161.200](#). The trial court found defendant guilty, explaining that the facts did not indicate that the defendant's driving the car was necessary to avoid "injury or threat of injury to human or animal life."

[1] The trial court erred in reasoning that a defendant seeking to rely on the choice of evils defense must show that his actions were necessary to avoid injury or threat of injury to human or animal life. The relevant statute indicates that the defense is available if the defendant's

conduct "is necessary as an emergency measure to avoid an imminent *305 public or private injury." [ORS 161.200\(1\)\(a\)](#). The threatened injury must be

"of such gravity that, according to ordinary standards of intelligence and morality, the desirability and urgency of avoiding the injury clearly outweigh the desirability of avoiding **57 the injury sought to be prevented by the statute defining the offense in issue." [ORS 161.200\(1\)\(b\)](#).

[2] Based on that wording, this court has held that there is nothing inherent in the choice of evils defense which prevents its use when the defendant has acted to protect property rather than life. See *State v. Haley*, 64 Or.App. 209, 215, 667 P.2d 560 (1983).

[3] Once a defendant presents facts indicating that the choice of evils defense justified his actions, the prosecution must offer evidence to rebut the defense beyond a reasonable doubt. See [ORS 161.055\(1\)](#); [ORS 161.190](#). Whether the prosecution did so in this case is for the trial court's determination as the fact-finder. The evidence has been presented, and the trial court need only evaluate that evidence under the correct standard. Accordingly, we vacate the conviction and remand to the trial court to review the existing record in light of the principles set forth in this opinion. On remand, if the court finds that the state has disproved the choice of evils defense beyond a reasonable doubt, it shall enter a new judgment of conviction; otherwise, defendant is entitled to an acquittal.

Conviction vacated; remanded for further proceedings not inconsistent with this opinion.