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CRIMINAL LAW—The Child Abuse Statute Now Requires Criminal Negligence: *Santillanes v. State*

I. INTRODUCTION

In *Santillanes v. State*,¹ the New Mexico Supreme Court held that the mens rea element of negligence in the New Mexico child abuse statute² requires a showing of criminal negligence instead of ordinary civil negligence.³ That is, to satisfy the statute's element of negligence, the prosecution must prove that "the defendant knew or should have known of the danger involved and [that the defendant] acted with a reckless disregard for the safety or health of the child."⁴ The court in *Santillanes* specifically overruled every case that had applied a civil negligence standard to the child abuse statute⁵ and mandated the prospective application of a criminal negligence standard.⁶ This Note provides a description of the case, a brief history of the interpretation of the child abuse statute, an analysis of the court's rationale and an examination of the implications of the decision.

II. STATEMENT OF THE CASE

Vincent Santillanes was convicted of child abuse involving no death or great bodily injury under section 30-6-1(C).⁷ The conviction arose out of an incident in which Santillanes cut his 7-year-old nephew's neck with a knife.⁸ Santillanes claimed that the child injured himself by jumping into a fishing line strung between two trees. However, the jury found that Santillanes cut his nephew's throat with a knife during an altercation.⁹

On appeal to the court of appeals, Santillanes claimed that the trial court erred in refusing his requested instruction that stated a criminal negligence standard. The instruction offered by Santillanes set forth a criminal negligence standard to define the negligence element of section

1. 115 N.M. 215, 849 P.2d 358 (1993).

2. N.M. STAT. ANN. § 30-6-1(c) (Cum. Supp. 1992).

3. 115 N.M. at 222, 849 P.2d at 365. Justice Frost wrote the 5-0 opinion for the court.

4. *Id.*

5. *Id.* at 225 n.7, 849 P.2d at 368 n.7.

6. *Id.* at 225, 849 P.2d at 368.

7. The child abuse statute reads as follows:

Abuse of a child consists of a person knowingly, intentionally or *negligently*, and without justifiable cause, causing or permitting a child to be:

(1) placed in a situation that may endanger the child's life or health;

(2) tortured, cruelly confined or cruelly punished; or

(3) exposed to the inclemency of the weather.

N.M. STAT. ANN. § 30-6-1(C) (Cum. Supp. 1992) (emphasis added).

8. 115 N.M. at 216, 849 P.2d at 359.

9. *Id.* at 223, 849 P.2d at 366.

30-6-1(C).¹⁰ The instruction was based upon the definition of criminal negligence found in the Model Penal Code.¹¹ The trial court refused Santillanes' requested instruction and instructed the jury on a civil negligence standard.¹² On appeal, Santillanes claimed that the offered instruction was in error because the term "negligently" as used in the statute was unconstitutionally vague or overbroad in violation of due process of law.¹³ The court of appeals, however, held that because Santillanes' requested instruction incorrectly defined criminal negligence and thus was confusing to the jury, he failed to preserve the issue for appeal and as a result lacked standing to complain of any violation of due process.¹⁴

On appeal to the supreme court, Santillanes argued that section 30-6-1 was unconstitutional because it wrongly criminalized ordinary civil negligence. He further argued that felony punishment should attach only to criminal behavior and that according felony status to acts of civil negligence violates substantive due process.¹⁵ Finally, Santillanes argued that interpreting the term "negligently" to require only a civil negligence standard overreaches the statute's aim by incorporating conduct that is

10. Santillanes' requested instruction stated:

An act, to be "negligence" or to be done "negligently," must be one which a reasonably prudent person would foresee as creating a substantial and unjustifiable risk of injury to Paul Santillanes. The risk created must be of such a nature and degree that the reasonably prudent person's failure to perceive it involves a gross deviation from the standard of care that a reasonably prudent person would observe in the same situation.

115 N.M. at 217, 849 P.2d at 360.

11. The Code states:

(d) Negligently

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

MODEL PENAL CODE § 2.02(d) (1985).

12. The civil negligence instruction offered by the trial court states as follows:

The term "negligence" may relate either to an act or a failure to act.

An act, to be "negligence," must be one which a reasonably prudent person would foresee as involving an unreasonable risk of injury to himself or to another and which such a person, in the exercise of ordinary care, would not do.

A failure to act, to be "negligence," must be a failure to do an act which one is under a duty to do and which a reasonably prudent person, in the exercise of ordinary care, would do in order to prevent injury to himself or to another.

115 N.M. at 217, 849 P.2d at 360.

13. 115 N.M. at 217, 849 P.2d at 360.

14. *Id.* Despite its ruling, the court of appeals examined the trial court's record for fundamental error. The court concluded that because the evidence met the requirements of both criminal and civil negligence, no justiciable issue existed in this case regarding any distinction between civil and criminal negligence in the statute. *Id.*

15. *Id.* at 217, 849 P.2d at 360. While violation of the statute is now a third-degree felony, it was a fourth-degree felony at the time of Santillanes' conviction. See N.M. STAT. ANN. § 30-6-1(C) (Repl. Pam. 1984).

not criminal, but simply negligent, and thus is overbroad in violation of due process.¹⁶

The supreme court ruled that Santillanes did preserve his issue for appeal and that the court of appeals had erred in its interpretation of the relevant rule as to preservation of error.¹⁷ The supreme court held that Santillanes' requested instruction was sufficiently similar to the definition of criminal negligence of the Model Penal Code to preserve the issue for appeal.¹⁸

The court then held that the term "negligently" in section 30-6-1 requires a criminal negligence standard rather than an ordinary civil negligence standard.¹⁹ As a result, the supreme court held that the trial court had erred in giving the civil negligence instruction.²⁰ The court went on to specifically overrule those cases to the extent that they had applied a civil negligence standard to the child abuse statute.²¹ However, the court affirmed Santillanes' conviction, holding that no rational jury could have concluded that Santillanes' actions fell short of the standard of criminal negligence, and therefore the error in jury instructions was not reversible.²²

III. CASE HISTORY: THE PRE-SANTILLANES STANDARD

Prior to the decision in *Santillanes*, New Mexico courts had consistently applied a civil negligence standard under the child abuse statute to cases dating back to 1976. Moreover, New Mexico courts had regularly rejected constitutional challenges to the statute.²³ The relevant case history can be divided into two categories: (a) those cases which established section 30-6-1 as a "strict liability" statute; and (b) those cases that did not directly address section 30-6-1 but are analogous in that they refer to the impropriety of applying a civil negligence standard to criminal actions.

16. *Id.* at 217-18, 849 P.2d at 360-61.

17. *Id.* at 218, 849 P.2d at 361 (citing N.M. R. CRIM. P. 5-608(D)).

18. *Id.* The court noted that under Rule 5-608, counsel must offer a proper instruction to preserve error only if no instruction is given on the issue. In this case, there was an instruction given and it is the correctness of the instruction that is the subject of the appeal. The court further stated that because there is no uniform jury instruction on criminal negligence in New Mexico, Santillanes' reliance on the Model Penal Code was proper, and the instruction offered by Santillanes captured the essence of the Model Penal Code's definition of criminal negligence. *Id.*

19. *Id.* at 222, 849 P.2d at 365.

20. *Id.* at 223, 849 P.2d at 366.

21. *Id.* at 225 n.7 849 P.2d at 368 n.7 (overruling *State v. Crislip*, 110 N.M. 412, 796 P.2d 1108 (Ct. App.), *cert. denied*, 110 N.M. 260, 794 P.2d 734 (1990); *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App.), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983); *State v. Robinson*, 93 N.M. 340, 600 P.2d 286 (Ct. App.), *cert. denied*, 92 N.M. 532, 591 P.2d 286 (1979); *State v. Coe*, 92 N.M. 320, 587 P.2d 973 (Ct. App.), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1978); and *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct. App.), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976)).

22. 115 N.M. 215, 223, 849 P.2d 358, 366.

23. See, e.g., *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982); *Crislip*, 110 N.M. 412, 796 P.2d 1108; *Williams*, 110 N.M. 322, 670 P.2d 122; *State v. Fulton*, 99 N.M. 348, 657 P.2d 1197, (Ct. App. 1983); *Robinson*, 93 N.M. 340, 600 P.2d 286; *Coe*, 92 N.M. 320, 587 P.2d 973; *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), *cert. denied*, 87 N.M. 239, 531 P.2d 1212 (1975).

A. State v. Grubbs and the Development of Section 30-6-1 Standards

*State v. Grubbs*²⁴ laid the foundation for applying a civil negligence standard to section 30-6-1. In *Grubbs*, the defendant was convicted of involuntary manslaughter by negligent use of a weapon.²⁵ The defendant appealed his conviction on the grounds that the felony offense required a standard of negligence which was different or greater than ordinary negligence.²⁶ The New Mexico Supreme Court affirmed the conviction, holding that the trial court properly gave an instruction based on ordinary civil negligence.²⁷ The court noted that the term "negligent" was not defined in the statute and there was no evidence that the legislature intended to give the term anything but its ordinary meaning.²⁸

Although *Grubbs* did not involve section 30-6-1, New Mexico courts have consistently relied upon its holding in applying a civil negligence standard to section 30-6-1.²⁹ Moreover, the courts resisted challenges to the statute based upon the inappropriateness of the civil standard. For example, in *State v. Lucero*,³⁰ the trial court dismissed an indictment under the statute on the ground that the statute made no distinction among intentional, knowing or negligent acts nor did it provide for lesser offenses according to the degree of culpability of the defendant.³¹ As a result, the statute unconstitutionally denied defendants equal protection under the laws.³² The court of appeals vacated the order on the grounds that it was well within the authority of the legislature to make a negligent act a crime.³³ The court characterized section 30-6-1 as a strict liability statute which found its basis in the compelling public interest in protecting children.³⁴

In *State v. Dorothy Lucero*,³⁵ the supreme court repeated *Lucero's* strict liability interpretation. In *Dorothy Lucero*, the court reasoned that section 30-6-1 was a "strict liability statute" and that the state of mind of the defendant was immaterial.³⁶ The court reiterated the state's interest in protecting abused children and noted that it was well within the rights of the legislature to make the commission of an act criminal without regard to the intent of the wrongdoer.³⁷

24. 85 N.M. 365, 512 P.2d 693 (1973), cited in *Santillanes*, 115 N.M. at 219-20, 849 P.2d at 362-63.

25. *Id.* at 366, 512 P.2d at 694. The conviction was based on what is now N.M. STAT. ANN. § 30-7-4(A)(3) (1993 Cum. Supp.). See *Grubbs*, 85 N.M. at 366, 512 P.2d at 694.

26. *Id.*

27. *Id.* at 368, 512 P.2d at 696.

28. *Id.*

29. See, e.g., *State v. Robinson*, 93 N.M. 340, 345, 600 P.2d 286, 291 (Ct. App.), cert. denied, 92 N.M. 532, 591 P.2d 286 (1976).

30. 87 N.M. 242, 531 P.2d 1215 (1975), cited in *Santillanes*, 115 N.M. 215, 218, 849 P.2d 358, 361.

31. *Id.* at 243-44, 531 P.2d at 1216-17.

32. *Id.*

33. *Id.* at 245, 531 P.2d at 1218.

34. *Id.* at 244, 531 P.2d at 1217.

35. 98 N.M. 204, 647 P.2d 406 (1982), cited in *Santillanes*, 115 N.M. 215, 219 n.3, 849 P.2d 358, 362 n.3.

36. *Id.* at 206, 647 P.2d at 408.

37. *Id.*

State v. Coe,³⁸ a court of appeals decision, stands in contrast to the cases discussed above. In *Coe*, the court rejected the defendant's argument that the child abuse statute was unconstitutionally vague because the court found that the civil negligence standard covers any and all harm that might befall a child.³⁹ The court stated that the statute did not apply to ordinary situations where a child was injured, but only to those where the parent performs some abusive act.⁴⁰ *Coe* seemed to indicate that something more than ordinary negligence is required by section 30-6-1. However, the *Coe* court did not expressly overrule *Lucero* or *Dorothy Lucero*, and it did not hold that the statute required a criminal negligence standard.

B. *Raton v. Rice* and the Criminal Negligence Standard

Case law regarding reckless driving seems to contradict the decisions interpreting section 30-6-1 in that the cases do not allow civil negligence to be the basis for a criminal conviction. In *Raton v. Rice*,⁴¹ the supreme court held that in the area of reckless driving, mere negligence was insufficient to form the basis of a criminal charge.⁴² The court noted that while ordinary negligence may be enough to compel a driver to pay damages, it is not sufficient under the possibility of a penitentiary sentence.⁴³ *Raton* demonstrated that, at least in the area of reckless driving, the supreme court was unwilling to apply a civil negligence standard if incarceration might have resulted.

Because reckless driving, like child abuse, involves a compelling public safety interest, the result of *Raton* seems inconsistent with the rationale of the pre-*Santillanes* child abuse cases. Unlike those cases, *Raton* indicates that even when a safety interest is at issue, the court is reluctant to apply a civil negligence standard to cases in which incarceration may result.

IV. RATIONALE AND IMPLICATIONS OF *SANTILLANES*

A. *The Court's Rationale*

The decision in *Santillanes* explicitly abandons the civil negligence standard previously employed by the courts in favor of a criminal standard.⁴⁴ The court ruled that the legislature's failure to define the term "negligently," coupled with its attachment of felony punishment to the statute, created a reasonable doubt as to the intended scope of proscribed

38. 92 N.M. 320, 587 P.2d 973 (Ct. App.), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1978), *cited in Santillanes*, 115 N.M. 215, 219, 849 P.2d 358, 362.

39. *Id.* at 321, 587 P.2d at 974.

40. *Id.*

41. 52 N.M. 363, 199 P.2d 986 (1948).

42. *Id.* at 365, 199 P.2d at 987.

43. *Id.*

44. 115 N.M. at 222, 849 P.2d at 365.

conduct.⁴⁵ As a result, applying a civil negligence standard to the statute improperly goes beyond the statute's intended scope by criminalizing conduct that is not morally contemptible.⁴⁶

By focusing on the statute's intended scope, the court framed the issue in *Santillanes* as one of statutory construction: "the question is when the legislature has included but not defined the mens rea element in a criminal statute, here the term "negligently," what degree of negligence is required."⁴⁷

In answering this question, the court looked at the type of criminal conduct the statute was intended to address. The court stated that criminal statutes generally fall into one of two categories: "regulatory measures" and "serious nonregulatory crimes."⁴⁸ The court notes that:

[g]enerally, a regulatory measure arising from the exercise of the legislature's police power is aimed at the achievement of some societal good rather than at the punishment of a crime that is *malum in se*, or in other words, exhibiting an "evil mind" Serious nonregulatory crimes, on the other hand, generally proscribe conduct manifesting moral culpability.⁴⁹

To determine the category into which the legislature intended to place the child abuse statute, the court focused on the felony punishment attached to violation of the statute. The court noted that penalties for regulatory crimes have traditionally been slight, while penalties for crimes requiring mens rea generally have been higher.⁵⁰ As the court stated, "when moral condemnation and social opprobrium attach to the conviction of a crime, the crime should typically reflect a mental state warranting such contempt."⁵¹

The court stated that the attachment of felony punishment to the statute, combined with the legislature's failure to define the term "negligently," created a reasonable doubt as to the statute's intended scope.⁵² The court further noted that a statute defining criminal conduct must

45. *Id.*

46. *Id.*

47. *Id.* at 218-19, 849 P.2d at 361-62. Note that the court specifically refused to find the statute unconstitutional either on the basis of vagueness or on the basis of overbreadth. First, the court stated that the statute was clearly not so vague as to violate due process, as "[p]ersons of common intelligence certainly could apply either the civil negligence standard or the criminal negligence standard without having to guess as to what conduct was proscribed under each standard." *Id.* at 221, 849 P.2d at 364. Second, the court stated that the statute was overbroad in that the term "negligently" encompasses conduct that the statute cannot be interpreted to proscribe. However, the constitutional doctrine of overbreadth "serves to invalidate a statute only when it sweeps so broadly to impinge unnecessarily on conduct protected by the First and Fourteenth Amendments . . . [n]o such constitutionally protected conduct is involved here." *Id.* (citing *State v. Silva*, 86 N.M. 543, 547, 525 P.2d 903, 907 (Ct. App.), cert. denied, 86 N.M. 528, 525 P.2d 888 (1974)).

48. 115 N.M. 215, 221-22, 849 P.2d 358, 364-65.

49. *Id.* (citations omitted).

50. *Id.* at 222, 849 P.2d at 365.

51. *Id.*

52. *Id.*

be strictly construed,⁵³ and that any doubts about the construction of penal statutes must be resolved in favor of lenity.⁵⁴ As a result, applying a civil negligence standard to the statute improperly goes beyond the statute's intended scope.⁵⁵ The court interpreted the legislature's attachment of felony punishment to the statute without clearly indicating that ordinary civil negligence is a "sufficient predicate for a felony"⁵⁶ to mean that the intended scope of the statute was to punish conduct that is morally culpable, not merely inadvertent.⁵⁷ Thus, the mens rea element of negligence in the statute requires a showing of criminal negligence rather than ordinary civil negligence.⁵⁸

B. Implications for the Future

The effect of the *Santillanes* ruling was to bring interpretation of the term "negligently" in the child abuse statute in line with the court's decisions regarding negligence in the area of reckless driving. In other words, courts should not apply a civil negligence standard to a criminal matter without a clear indication from the legislature that a civil negligence standard is intended.⁵⁹ In making this decision, the court placed great weight on the felony punishment attached to the crime: "[W]e find this concept firmly rooted in our jurisprudence: When a crime is punishable as a felony, civil negligence ordinarily is an inappropriate predicate by which to define such criminal conduct."⁶⁰ In requiring a showing of criminal negligence, the court invoked the reasoning of a 1948 case rather than two decades of decisions specifically interpreting section 30-6-1 to require only a civil negligence standard.⁶¹

The decision in *Santillanes* makes it more difficult for prosecutors to obtain convictions under section 30-6-1. To meet the *Santillanes* interpretation of the term "negligently" in the statute, the prosecution must prove that the defendant "knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child."⁶² That the court was willing to make convictions more difficult

53. *Id.* at 221, 849 P.2d at 364 (citing *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 93 N.M. 546, 549, 603 P.2d 285, 288 (1979)).

54. *Id.* at 221, 849 P.2d at 364 (citing *State v. Leiding*, 112 N.M. 143, 145, 812 P.2d 797, 799 (Ct. App.), *cert. denied*, 112 N.M. 77, 811 P.2d 575 (1991)).

55. *Santillanes*, 115 N.M. at 222, 849 P.2d at 365.

56. *Id.*

57. *Id.*

58. *Id.* The court held that its decision would be applied prospectively, rather than retroactively. *Id.* at 224, 849 P.2d at 367 (citing *Linkletter v. Walker*, 381 U.S. 618 (1965)). The court stated that prospective application was proper because law enforcement officials have relied on the civil negligence standard for at least 15 years. In addition, because the morally culpable behavior that the criminal negligence standard is intended to deter was proscribed under the previous standard, applying the rule retroactively would not further its purpose. Finally, the court noted that retroactive effect would unduly burden the judicial system and "reopen old wounds and create new scars for child abuse victims and their families." *Id.*

59. *Id.* at 222, 849 P.2d at 365.

60. *Id.*

61. *Id.* (citing *Raton v. Rice*, 52 N.M. 363, 199 P.2d 986 (1948)).

62. *Id.*

to obtain despite the sensitive nature of the subject matter indicates the court's determination to construe criminal statutes narrowly, even when an issue of public safety is at stake. The court acknowledged the state's argument that the statute "reflects a compelling public interest in protecting defenseless children,"⁶³ but nevertheless limited the application of the statute in order to insure that it was not employed beyond the scope intended by the legislature.⁶⁴

In addition, by classifying section 30-6-1 as a statute addressing a "serious nonregulatory crime," the court's decision contradicts years of earlier cases which characterize section 30-6-1 as a "strict liability" statute.⁶⁵ By construing the intended scope of the statute to punish conduct that is "morally culpable, not merely inadvertent,"⁶⁶ the court implied that the term "strict liability" as traditionally used no longer applies to the child abuse standard. In light of the court's requirement that proof that the defendant "knew or should have known of the danger involved and acted with a reckless disregard for the safety or health of the child"⁶⁷ was a necessary element of negligence, any characterization of section 30-6-1 as a strict liability statute would be inaccurate.

V. CONCLUSION

In *Santillanes*, the New Mexico Supreme Court held that the term "negligently" in the child abuse statute requires application of a criminal negligence standard rather than a civil negligence standard. In order to meet the element of negligence, the state must prove that the defendant "knew or should have known of the danger involved and acted with a reckless disregard for the safety of the child."⁶⁸ The court specifically overruled those cases which had applied a civil negligence standard to the child abuse statute. In doing so, the court made it more difficult to obtain child abuse convictions under section 30-6-1, and demonstrated its willingness to construe criminal statutes narrowly even when a matter of compelling public interest was at issue.

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63. *Id.* at 219, 849 P.2d at 362.

64. The court took pains to note that it was not "defining the crime of negligent child abuse, thus usurping the police power of the legislature," but merely "interpreting the statute in light of traditional concerns regarding the intended scope of criminal statutes." *Id.* at 224, 849 P.2d at 367. Moreover, the court stated that it was within the rights of the legislature in the future to indicate that "the public interest in the matter is so compelling or that the potential for harm is so great that the interests of the public must override the interests of the individual" so as to justify civil negligence as a predicate for a felony." *Id.* at 223, 849 P.2d at 366 (citing *State v. Barber*, 91 N.M. 764, 581 P.2d 27 (Ct. App. 1978)).

65. See, e.g., *State v. Lucero*, 87 N.M. 242, 531 P.2d 1215 (Ct. App.), cert. denied, 87 N.M. 239, 531 P.2d 1212 (1975); *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982).

66. 115 N.M. at 222, 849 P.2d at 365.

67. *Id.*

68. *Id.*