

Judgment rendered August 15, 2012.

No. 47,062-KW

ON REHEARING

COURT OF APPEAL  
SECOND CIRCUIT  
STATE OF LOUISIANA

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STATE OF LOUISIANA

Plaintiff-Respondent

versus

DANIEL LEE GIBBS

Defendant-Applicant

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Originally Appealed from the  
First Judicial District Court for the  
Parish of Caddo, Louisiana  
Trial Court No. 279896

Honorable John D. Mosely, Jr., Judge

\* \* \* \* \*

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Defendant-Applicant

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Before BROWN, GASKINS, DREW, MOORE and LOLLEY, JJ.

LOLLEY, J., dissenting with reasons.

DREW, J., dissents for the reasons assigned by Judge Lolley.

GASKINS, J.,

Mr. Gibbs was convicted of violating La. R.S. 30:2531 for intentional littering, for leaving a mobile home, that he had been transporting, on the side of the road after it began falling apart and starting grass fires. He left the mobile home in the possession of its owner.

While Mr. Gibbs was initially ticketed with a violation of La. R.S. 30:2531.3, which provides for civil penalties for commercial littering, he was charged by a bill of information for the violation of intentional littering under La. R.S. 30:2531, which provides for criminal penalties.

In our original opinion, the majority concluded that Mr. Gibbs should have refused to transport the mobile home based on its condition; however, the evidence does not support the theory that Mr. Gibbs should have known it was likely to deteriorate upon moving it. Jerry Moore, who helped Mr. Gibbs move the trailer, testified as follows, in response to the question, “[Y]ou require that, it be in suitable shape to be road worthy?”:

A. Oh, yes, sir. They had wanted it to be that way, or you wouldn't be moving it.

While testifying, Mr. Gibbs answered questions regarding the condition of the trailer:

Q. Okay, Did you look it over before you hooked your truck up to it, to drive away?

A. I can't tell if the metal is bad on it or not, but I looked at it, yes.

Q. Did it appear to be in poor condition to you; were you concerned that it might break?

A. No.

Q. Did you have a conversation with Mr. Harris about the condition of the trailer at anytime?

A. No.

Q. So you didn't ask him, is this trailer in good shape, it is going to break on me while I'm driving down the road?

A. If I wouldn't know, he wouldn't know, either, but I didn't ask him.

The record does not support a finding that Mr. Gibbs should have known the trailer was not roadworthy.

La. R.S. 30:2531 contains an inference that the driver of the conveyance disposed of the litter. Yet, testimony showed that Mr. Harris, the mobile home owner, had possession of it when it was left on the side of the road. Jerry Moore explained:

Q. And Mr. Harris was present.

A. Yep.

Q. Did Mr. Harris indicate to you what he expected you all to do?

A. Mr. Gibbs told him to get it fixed, and then we'll come back and pull it. We got it off the road and everything.

Q. Did Mr. Harris agree to that?

A. Uh-huh.

.....

Q. It was your understanding that Mr. Harris owned the trailer?

A. Yes.

Q. Okay, and that he was going to have to take some actions before Mr. Gibbs could tow it any further?

A. Uh-huh. Yeah. And Mr. Gibbs told him that when you get it fixed, give us a call, and we'll come back and move it.

Q. Did Mr. Harris agree to that?

A. Uh-hum.

Mr. Gibbs' testimony about Mr. Harris taking possession of the mobile home was as follows:

Q. Mr. Gibbs, just to be clear, Mr. Harris returned once the damage to the trailer made it impossible for you to continue what you had been hired to do, right?

A. Correct.

Q. And you made Mr. Harris aware of this, right?

A. Well, yes. It was obvious. I mean, it was on the ground, yes.

Q. And you removed your truck from the trailer while Mr. Harris was present?

A. Yes.

Q. And he knew that he was going to have to take further action or repair to have that trailer moved by you.

A. I told him that, yes, sir.

Q. And he agreed to that?

A. Yes.

Q. As your witness stated, that was your understanding as well?

A. Right.

Q. And he was to call you when he made those necessary repairs or accommodations?

A. Right.

Q. Did he ever call you back?

A. No.

This testimony overcame any inference that Mr. Gibbs was in possession of the mobile home when it was “littered” on the side of the roadway. Had Mr. Harris, or any other witness, testified to a contrary conversation or sequence of events, the trial court could have made a credibility call as to whether Mr. Gibbs was in possession of the mobile home when it was left by the roadside. Mr. Harris did not testify; consequently, the only evidence before the court was that Mr. Harris was the one possessing the mobile home when it was left on the highway. The testimony of Mr. Moore and Mr. Gibbs shows that they were not able to transport the mobile home. Should we find that Mr. Gibbs had a responsibility to spend \$3,000 and tear up the mobile home without the owner’s approval? Not under the evidence presented.

We reverse the judgment of conviction against Mr. Gibbs.

REVERSED.

**LOLLEY, J., dissenting**

The central issue in this case, as the majority recognized, comes down to who had possession of the trailer when the act of littering was committed. While the majority opinion states that Daniel Lee Gibbs could not have known whether the mobile home was roadworthy, this issue is a red herring. Commercial littering is a strict liability crime only requiring an act in violation of the statute. Whether or not Gibbs properly inspected the trailer prior to moving it is largely irrelevant.

The majority relies solely upon the testimony of defendant Gibbs and his employee Jason Moore to establish that possession of the trailer had passed to its owner, Terry Harris. The majority's reversal of the trial court's finding that possession remained with Gibbs is wrong for the following reasons.

First, as discussed in the original opinion, the element of intent, fundamental to a finding that Harris took possession, is not supported by the record. The record clearly shows that while the mobile home was attached to Gibbs' truck, he refused to move it further until repairs were made. Whether or not Harris voiced consent, as Gibbs and Moore testified, or resisted Gibbs' decision is irrelevant. One cannot accept where no offer has been made. The majority here has mistaken Harris's submission for a voluntary act of acceptance. Assuming, *arguendo*, that Gibbs voluntarily transferred possession to Harris, the record still does not support a credible transfer of possession because Gibbs concealed the fact that the mobile home could not be repaired. Thus, the record only shows that Harris was

present when Gibbs removed the mobile home from his truck. The record does not support that Harris had the intent to take possession of the mobile home.

Secondly, a reviewing court must accord great deference to a trier of fact's decision to accept or reject the testimony of a witness in whole or in part and the reviewing court may impinge on that discretion only to the extent necessary to guarantee the fundamental due process of law. Here, the trial court heard the testimony of Deputy James Hendricks, Daniel Lee Gibbs and Jason Moore, judged their credibility, and determined that Gibbs had possession of the motor home when he abandoned it. The majority has erroneously substituted its appreciation of the evidence based on a cold review of the transcript for that of the trial court's judgment based on firsthand observation. Deputy Hendricks' testimony concerning the abandonment of the mobile home, which the majority has ignored in its review, is as follows:

Q. Just to be clear, so did you ask [Gibbs] if he had been paid by Terry Harris to move that trailer?

A. Yes, sir.

Q. What did he say to this?

A. He said that he did get paid to move it, and then I think he ended up giving the money back to Terry Harris.

Q. And he also admitted to you that he was driving it?

A. Correct.

Q. Or moving it?

A. Moving. His company.

Q. And at that time, he was the one that left it on the side of the road; is that correct?

A. Yes, sir.

Because the trial court was in a better position to judge the testimony of all the witnesses, its decision to credit the testimony of Dep. Hendricks who investigated the crime over the self-serving testimony of the defendants should not be impinged upon absent circumstances threatening the fundamental due process of law.

For these reasons, I respectfully dissent.