IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	
	)	
	)	
VS.	)	Williamson County Criminal
	)	CCA No. 01C-01-9608-C-00378
	)	
PATRICK KELLY LEWIS, II,	)	
	)	
Appellant.	)	

RULE 11 APPLICATION FOR PERMISSION TO APPEAL
FROM THE COURT OF CRIMINAL APPEALS OF TENNESSEE

APPLICATION OF APPELLANT, KELLY LEWIS

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INTRODUCTION

Pursuant to Rule 11, Tennessee Rules of Appellate Procedure, Patrick Kelly Lewis, II (hereinafter Kelly Lewis) submits this Application for Permission to Appeal from the judgment of the Court of Criminal Appeals of Tennessee rendered on October 30, 1997 affirming his convictions for felony reckless endangerment and simple possession of marijuana. A copy of the Opinion is attached to this Application. No petition to rehear was filed by either party.

This case presents an issue of first impression in this Court as to whether sentences which are otherwise ordered to run concurrently would permit the imposition of "consecutive fines." In *State v. Bryant*, 805 S.W.2d 762 (Tenn. 1991) this Court held that fines are part of the "sentence." Thus, they are not "money judgments" which can be imposed in a consecutive fashion when the other components of the sentence are ordered to run concurrently. This case squarely raises this issue and this Court should accept this Appeal to resolve the question. This case also concerns the sufficiency of the evidence of the proof to convict Mr. Lewis of felony reckless endangerment of what was, after all, an automobile accident. Lastly, Mr. Lewis asserts that this Court should review the question of the failure of the trial court to give a lesser included offense instruction on the misdemeanor version of reckless endangerment.

QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE IMPOSITION OF CONSECUTIVE MONEY FINES MUST CONSIDER THE STATUTORY REQUIREMENTS OF T.C.A. §40-35-115 REGARDING MULTIPLE CONVICTIONS AND CONSECUTIVE/CONCURRENT SENTENCES.

2. WHETHER CONSECUTIVE FINES MAY BE IMPOSED IN INSTANCES WHERE THE SENTENCES ARE OTHERWISE ORDERED TO RUN CONCURRENTLY.

3. WHETHER THE GOVERNMENT FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT ALL OF THE NECESSARY ELEMENTS OF RECKLESS ENDANGERMENT IN THAT THE CONDUCT OF KELLY LEWIS WAS ONLY NEGLIGENT AND NOT RECKLESS AND, IN ANY EVENT, THE DRIVER OF THE OTHER CAR WAS NOT IN ANY SUBSTANTIAL RISK OF IMMINENT DANGER OF DEATH OR SERIOUS BODILY INJURY.

4. WHETHER THE TRIAL JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY AS TO THE LESSER INCLUDED OFFENSE OF MISDEMEANOR RECKLESS ENDANGERMENT SINCE THE ISSUE OF WHETHER THE VEHICLE WAS A DEADLY WEAPON WAS A DISPUTED ISSUE TO BE DECIDED BY THE JURY UNDER THE FACTS OF THIS CASE.

STATEMENT OF THE FACTS

Pursuant to Rule 11(b) T.R.A.P., the facts relevant to the questions presented are correctly stated in the opinion of the Court of Criminal Appeals and thus are not restated in detail in this Application. In summary, Mr. Lewis was driving his vehicle at night on a two-lane highway. As he rounded a "blind" curve, he observed another vehicle in his own lane of traffic which was in the process of turning to its own left. Mr. Lewis could not stop his vehicle in time and so, instead of slamming into the back of the other vehicle, Mr. Lewis turned to his left, just as the vehicle in front of him turned to its left as well. Mr. Lewis's vehicle glanced off the other vehicle and Mr. Lewis's vehicle then went into a ditch. The driver of the other vehicle did not sustain any serious injury and neither did his vehicle. The police found a tiny amount of marijuana in Mr. Lewis's car.

Mr. Lewis was convicted of felony reckless endangerment. He was also convicted of simple possession of marijuana.

On the felony conviction for reckless endangerment the judge imposed a sentence of nine-tenths of a year incarceration, which was suspended, and two years probation. The judge also imposed a fine of $3,000.00. On the misdemeanor, simple possession charge, Mr. Lewis was sentenced to six months in jail which was suspended for 11 months and 29 days and a fine of $2,000.00. The Judge specifically ordered that all of the sentences would run "concurrently" but that the fines would be "consecutive."

The Court of Criminal Appeals affirmed the convictions for felony reckless endangerment and simple possession of marijuana but dismissed the companion charge

against Mr. Lewis and his parents for "evading arrest." The Court of Criminal Appeals remanded as to the propriety of the amount of the fine on the simple possession charge but upheld the concept that "consecutive" fines could be imposed for the reckless endangerment and simple possession convictions even though the sentences were otherwise ordered to run concurrently. It is this issue which has never been considered by this Court.

REASONS FOR GRANTING THIS APPLICATION FOR PERMISSION TO APPEAL

1. THE STATUTORY GUIDELINES FOR CONSECUTIVE SENTENCES PURSUANT TO T.C.A. §40-35-115 APPLY TO THE IMPOSITION OF FINES.

2. "CONSECUTIVE" FINES SHOULD NOT BE IMPOSED WHERE THE SENTENCES ARE OTHERWISE ORDERED TO RUN "CONCURRENTLY."

This Court should grant this Application for Permission to Appeal to consider the question of whether the consecutive/concurrent procedural considerations which govern the imposition of confinement in jail or the penitentiary apply to the imposition of money fines. Here, the trial court imposed a fine of $3,000.00 for the felony reckless endangerment conviction and a fine of $2,000.00 for the simple possession conviction. The trial judge ran the "confinement" portions of the sentences concurrently but ordered that the fines would be "consecutive": for a total fine of $5,000.00. Mr. Lewis asserts here that when the judge orders that the sentences are concurrent that this includes the fines as well. In the alternative, a trial judge may impose "consecutive" fines but only where the sentencing guidelines of T.C.A. § 40-35-115 would otherwise permit consecutive "sentences."

The Court of Criminal Appeals gave rather brief attention to this issue because it had previously considered the precise question in an earlier opinion. The earlier opinion was *State v. Woodcock*, 922 S.W.2d 904 (Tenn. Crim. App. 1995) which was authored by

Judge Peay who also wrote the opinion in the instant case. *Woodcock* dealt with this issue in great detail but no appeal was taken to this Court.[1]

In *Woodcock* the Court of Criminal Appeals considered, as an issue of first impression in Tennessee, whether sentences imposed in several counts, which are otherwise ordered to run concurrently, require that the fines are to "run" concurrently or whether they may "run" consecutively. *Woodcock* involved three separate fines in three separate counts. The judge in that case imposed concurrent sentences but, under the judgment, the fines were added together and effectively made to run consecutive in nature. The Court of Criminal Appeals found nothing wrong with this result.

The contention on appeal in *Woodcock* was that concurrent sentences meant concurrent sentences for all purposes which would include the fine. T.C.A. §40-35-115 deals with multiple sentences resulting from multiple convictions. Certain factors are contained in the statute which determine whether the "sentence" runs consecutively or concurrently. The statute is as follows:

> **40-35-115 Multiple Convictions.**
>
> (a) If a defendant is convicted of more than one (1) criminal offense, the court shall order sentences to run consecutively or concurrently as provided by the criteria in this section.

[1]A copy of *Woodcock* is attached to this Brief. In *Woodcock* the conviction was reversed on other grounds and thus there was no necessity of appealing. The undersigned counsel also represented Mr. Woodcock.

(b) The court may order sentences to run consecutively if the court finds by a preponderance of the evidence that:

(1) The defendant is a professional criminal who has knowingly devoted himself to criminal acts as a major source of livelihood;

(2) The defendant is an offender whose record of criminal activity is extensive;

(3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;

(4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

(5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the

relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;

(6) The defendant is sentenced for an offense committed while on probation; or

(7) The defendant is sentenced for criminal contempt.

(c) The finding concerning the imposition of consecutive or concurrent sentences is appealable by either party.

(d) Sentences shall be ordered to run concurrently, if the criteria noted previously in this section are not met, unless consecutive sentences are specifically required by statute or the Tennessee Rules of Criminal Procedure.

Sentencing Commission Comments. This statute is essentially a codification of two Tennessee Supreme Court cases dealing with concurrent and consecutive sentencing: *Gray v. State,* 538 S.W.2d 391 (Tenn. 1976) and *State v. Taylor,* 739 S.W.2d 227 (Tenn. 1987). In *Taylor*, the Court held that consecutive sentences should not routinely be imposed in

criminal cases and the aggregate maximum of consecutive terms must be reasonably related to the severity of the offenses involved. While this section permits consecutive sentencing, the trial judge has other available options, such as increasing the length of the sentence within the appropriate range depending on the presence of enhancing factors. However, where appropriate, consecutive sentences are authorized in the discretion of the court if the court finds one or more of the criteria as set forth in subsection (b). The first four criteria were taken directly from *Gray v. State*, *supra*, and the fifth was derived from *State v. Taylor*. The sixth and seventh criteria were added by the General Assembly in 1990. In addition, the court is permitted to order consecutive sentencing where the defendant is convicted of "failure to appear" pursuant to §39-16-609(f).

It should be noted that *Gray v. State, supra*, contained an additional category based on the numbers of prior felony convictions. This additional category has been built into the sentencing structure which enhances the sentence ranges depending on the types and severity of the prior felony convictions.

> Subsection (d) provides that while consecutive sentences are discretionary, in a few instances, consecutive sentences are mandated either by statute or by Tenn. R. Crim. P. 32. For example, see §39-16-605, which requires consecutive sentences for escape from a penal institution, and §40-20-111(b), which requires consecutive sentences for felonies committed while the defendant was released on bail.

In *Woodcock*, the Court of Criminal Appeals interpreted this statute as only applying to the "service of time" rather than dealing with a money fine. Accordingly, *Woodcock* concluded that even though the sentences were ordered to run concurrently, the fines on the otherwise concurrent counts must all be paid in a "consecutive" fashion.

Counsel submits this Court should visit the issue and determine whether *Woodcock* and, by extension, *Lewis* incorrectly interpreted T.C.A. §40-35-115. This statute, as noted, deals with the imposition of consecutive or concurrent "sentences." There is nothing in that statute which limits itself only to the confinement portion of the punishment.

In *State v. Bryant*, 805 S.W.2d 762 (Tenn. 1991) this Court found that a fine is as much of a "sentence" as confinement and therefore the normal standard of appellate review would apply. Thus, T.C.A. §40-35-401 which governs the standard of appellate review of fines, would similarly include whether the fines should run consecutively or concurrently. Of course this construction means that the word "sentences" in T.C.A. §40-35-115 includes the concept of a "fine" as much as "jail time."

In *Woodcock*, the Court of Criminal Appeals interpreted T.C.A. §40-35-115 as meaning that it only applied to the confinement portion of the "sentence." In reaching this conclusion that Court looked at the Sentencing Commission comments to the statute which advised that the statute was a codification of two cases, *Gray v. State*, 545 S.W.2d 391 (Tenn. 1976) and *State v. Taylor*, 739 S.W.2d 227 (Tenn. 1987). *Woodcock* quoted a passage from *Gray* as dealing with "confinement," but this certainly does not mean that T.C.A. §40-35-115 is limited only to confinement. The quoted passage from *Gray* is relevant only to the extent that *Gray* was considering the confinement aspects of the sentences which were at issue in that case. Indeed, when *Gray* was decided back in 1976, the judge had no sentencing authority with respect to fines whatsoever. The judge's authority with respect to fines did not become law until 1982 when the first judge sentencing act was passed. *Woodcock* also quoted a passage from *State v. Taylor*, *supra*, dealing with consecutive terms. Again, *Taylor* did not involve any fines which were not at issue in that case. Neither *Gray* nor *Taylor* lend support to the proposition that fines are not part of the "sentence" for consecutive sentence purposes.

At noted previously, this Court in *State v. Bryant*, interpreted the concept of a fine as being "part of the sentence." This should be clear form the language of T.C.A. §40-35-104(c) (copy attached) that a fine is a "sentencing alternative." A fine is not a civil penalty or civil judgment. It is a punishment just like time behind bars.

To construe T.C.A. §40-35-115 as <u>excluding</u> fines means that there is absolutely no guidance as to how fines are to be imposed with regard to whether they should

run cumulatively or not. This would be a strange result because the Sentencing Reform Act of 1989 authorized fines for almost *all* felonies and misdemeanors. T.C.A. §40-35-111. Given that fines are now as much a part of the punishment as is confinement, it is difficult to conclude that fines should be ignored for the consecutive or concurrent sentence determination pursuant to T.C.A. §40-35-115.[2]

There is no suggestion in this record that any of the factors justifying consecutive sentences exist here. Indeed, the trial judge ran all of the other components of the sentence in a concurrent fashion. Admittedly, in *Woodcock* the Court found that a trial judge might run the fines "concurrently" but that opinion did not articulate any standard for the trial judge to utilize in making this determination nor did *Woodcock* articulate any standard of appellate review. Resolution of this issue is simple. A trial court should utilize the consecutive/concurrent sentence factors pursuant to T.C.A. §40-35-115 to determine whether fines run concurrently or not. Appellate review would then utilize the same appellate review standard as this Court adopted in *State v. Bryant*, *supra*, dealing with the review of the amount of the fine itself.

The defense also asserts that it is inconsistent to impose concurrent terms of imprisonment or probation but consecutive fines! In *State v. Connors*, 924 S.W.2d 362 (Tenn. Crim. App. 1996) the trial judge ran several sentences concurrently but ordered that the terms of probation would run consecutively. The Court of Criminal Appeals found that

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[2]That fines are now so common is yet another reason why this Court should grant review. This issue will continue to be raised in trial courts around Tennessee since most cases involve multiple convictions and multiple sentences. Review at this time will resolve important questions of law and reduce further litigation.

all aspects of a sentence should run the same, since the "Sentencing Act makes no provision for ordering different portions of the same sentence to run in different manners." 924 S.W.2d, at 364.

The defense suggests that the reasoning in *Connors* should apply equally to the "running" of the fines. In other words, if the number of days or years runs concurrently, then so does the fine. To hold otherwise would mean that different portions of the same sentence would run in different manners contrary to the holding in *Connors*.

A fine is not like a money judgment. It is a sentence. It is a punishment. This Court should grant review here and make clear that the provisions of T.C.A. §40-35-115 regarding consecutive or concurrent sentences apply equally to the imposition of a fine. While a trial court certainly has the authority to impose "consecutive fines," this should only occur where the statutory sentencing factors authorize such a result. Similarly, it is inconsistent with the 1989 Sentencing Act to have a concurrent term of imprisonment or term of probation but a consecutive fine imposed in a cumulative fashion. Thus, this Court should grant review and reverse the Court of Criminal Appeals and direct that whatever fines are imposed here must be ordered to run concurrently.

3. THE GOVERNMENT FAILED TO ESTABLISH BEYOND A REASONABLE DOUBT ALL OF THE NECESSARY ELEMENTS OF RECKLESS ENDANGERMENT IN THAT THE CONDUCT OF KELLY LEWIS WAS ONLY NEGLIGENT AND NOT RECKLESS AND, IN ANY EVENT, THE DRIVER OF THE OTHER CAR WAS NOT IN SUBSTANTIAL RISK OF IMMINENT DANGER OF DEATH OR SERIOUS BODILY INJURY.

The defendant, Kelly Lewis, asserts that this Court should grant review and dismiss his conviction for Felony Reckless Endangerment because the evidence was insufficient to support a finding of guilt of this offense beyond a reasonable doubt. While conflicts in the testimony are to be resolved in favor of the state, an objective analysis of the facts of this accident demonstrates, beyond question, that reckless endangerment was simply not established by the government in this trial.

A.

T.C.A. §39-13-103 provides that "a person commits an offense who recklessly engages in conduct which places or may place another person in imminent danger of death or serious bodily injury." The *mens rea* requirement is one of reckless conduct.

T.C.A. §39-11-302(c) provides that the mental state of recklessness is established only when the Government proves that the defendant "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." This provision also requires that the "risk must be of such a nature and degree that its disregard constitutes gross deviation from the standard of care that an ordinary person would exercise under all of the circumstances as viewed from the accused person's standpoint."

There are several concepts which are important to the "reckless" mental state, each of which will be addressed here. First, the risk must constitute a "gross deviation from the standard of care that an ordinary person would exercise under all of the circumstances." Next, recklessness requires that the defendant be "aware of but consciously disregards" the risk. Lastly, the risk must be "substantial and unjustifiable" which, in the context of this endangerment prosecution, means that an accused must create a "substantial and unjustifiable risk" of "imminent danger or death of serious bodily injury."

B.

The required standard of care for reckless conduct must be compared to the standard of civil or simple negligence for a proper analysis of this case. A recent discussion of the familiar standard of care in simple negligence cases may be found in *McCall v. Wilder,* 913 S.W. 2d 150, 153 (Tenn. 1995). Here, this Court stated that in a negligence action the standard of conduct is always the same: "It is a standard of reasonable care in light of the apparent risk . . . there is a duty to exercise reasonable care under the circumstances."

Under the proof, was Kelly Lewis negligent in his conduct? The facts suggest that he may have been. The proof establishes that he was traveling about 60 miles per hour as he went around the curve.[3] As the proof also demonstrates, one cannot see the intersection until one gets around the curve. Perhaps Mr. Lewis was negligent in driving a little too fast for the road conditions and was unable to stop his vehicle when he saw the other vehicle

[3]This was the speculation of Mr. Raushenberger who saw Kelly Lewis's car from the "corner of his eye."

sitting in the road in the process of making a left-hand turn. This was the opinion of Officer Medina who never testified as to what the speed limit was on Highway 96.

The failure of the state to prove the speed limit on Highway 96 is fatal to the state's case. If Kelly Lewis was doing 60 miles per hour in a 15 mile per hour school zone, his conduct might be reckless. Going 60 in a 55 mile per hour zone --if that is what the limit was-- is only negligent. Compare with *State v. Ramsey*, 903 S.W. 2d 709, 712 (Tenn. Crim. App. 1995)(80 in a 35).

The point is that Mr. Kelly Lewis ought to have been aware of the possibility that someone might have been sitting in the road making a turn and that a collision might result. He failed to use due care but his conduct was not a "gross deviation" of the standard of care which is required for recklessness. His inability to safely stop his car was certainly negligent but it did not constitute reckless behavior.[4]

C.

Reckless conduct, under T.C.A. §39-11-302(c), also requires actual awareness of the risk as viewed from the defendant's standpoint. The distinction between reckless conduct and negligence is that reckless conduct requires that the defendant "is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur." Recklessness does not only require that Kelly Lewis must have seen the vehicle, the government had to prove that he was aware that his continued conduct would cause the possibility of a great risk of harm and that he disregarded that risk.

[4]Would this Court sanction punitive damages here if this were a civil case. Certainly not.

In other words, the defendant must be aware that the result will occur but then consciously disregards the risk that this will happen. There is simply no proof here that Kelly Lewis saw the vehicle until he got around the corner of the road. When he did, Mr. Lewis did not slam into the back of the other vehicle. Instead, Mr. Lewis attempted to get around the vehicle so as to avoid a rear-end collision. It was at this point that the other vehicle began the turn and both vehicles connected and then Mr. Lewis's vehicle went off into a ditch.

Kelly Lewis "should have known" of the possibility of a collision, but he did not have actual awareness. Thus, the government did not establish sufficient proof to meet the high standard required of reckless conduct.

D.

The reckless endangerment statute also requires that the reckless conduct "places or may place another person in imminent danger of death or serious bodily injury." The State failed to prove this element when the driver of the other vehicle only pulled a muscle in his neck.

The defense is not unmindful of *State v. Ramsey*, 903 S.W. 2d 709, 712 (Tenn. Crim. App. 1995) finding that lack of any actual serious injury is not the test. In *Ramsey*, the victim was lucky to be alive -- the other passenger was killed: there was a **substantial risk** of imminent death to the surviving victim.

The degree of the risk of harm is, of course, an important component of the mental state of recklessness. Again, reckless conduct under T.C.A. §39-11-302(c) requires that the accused be aware of but consciously disregards a "*substantial* and unjustifiable *risk*

that the circumstances exist or the result will occur." In the context of the criminal statute Mr. Kelly Lewis was charged with violating, the Government had to prove that Mr. Lewis was aware of but disregarded a "substantial and unjustifiable risk" that the other driver might be placed in "imminent danger of death or serious bodily injury." It is not every risk of bodily harm which rises to the level of reckless conduct.

Turning again to the simple negligence standard as discussed in *McCall v. Wilder, supra,* we find that "where an act is one which a reasonable person would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." 913 S.W. 2d, at 153. Stated in another fashion, *McCall* finds that a "duty of reasonable care exists if the defendant's conduct poses an unreasonable and foreseeable risk of harm to persons or property." *Id.*

Obviously, Kelly Lewis may have created an unreasonable and foreseeable risk of harm to the driver of the other vehicle. Yet, this is only simple negligence. Reckless conduct demands that the risk be higher than merely "unreasonable and foreseeable" . . . the risk must in fact be "substantial and unjustifiable." This, of course, is a question of degree but the phrase "substantial risk" means that the victim must have been in a high degree of danger of imminent death or bodily injury.

Under the proof, Mr. Rauschenberger was <u>never</u> in "substantial risk" of serious harm. Kelly Lewis was the one who avoided harm by going around Mr. Rauschenberger. At the moment of impact, Mr. Rauschenberger was not in "substantial and

unjustifiable risk" of "imminent danger of death or serious bodily injury" from Lewis's conduct.

It is apparent that the State failed to prove all of the necessary elements to sustain a conviction against Kelly Lewis for this offense. Mr. Lewis may have acted negligently; he did not act recklessly. A careful analysis of the "elements" of recklessness shows that none of these factors are present here. While there was a lack of due care, there was not a *gross* deviation of the standard of care. While Kelly Lewis should have been aware of the possibility of harm, there was no evidence that he was *actually aware*. Lastly, the risk of harm to the victim was almost nonexistent; it was certainly not a *substantial* risk of serious bodily injury or death.

Affirmance of Mr. Lewis's conviction would set a horrible precedent. *Every automobile accident should not be transformed into a reckless endangerment prosecution.* This Court should grant review here and the conviction should be dismissed.[5]

[5]Compare Mr. Lewis's conduct with the act of firing multiple bullets into a dwelling which this Court has determined would constitute reckless endangerment. *State v. Wilson*, 924 S.W.2d 648, 652 (Tenn. 1996).

4. THE TRIAL JUDGE ERRONEOUSLY FAILED TO INSTRUCT THE JURY AS TO THE LESSER INCLUDED OFFENSE OF MISDEMEANOR RECKLESS ENDANGERMENT SINCE THE ISSUE OF WHETHER THE VEHICLE WAS A DEADLY WEAPON WAS A DISPUTED ISSUE TO BE DECIDED BY THE JURY UNDER THE FACTS OF THIS CASE.

T.C.A. §39-13-103(b) provides that "reckless endangerment is a Class A misdemeanor; however, reckless endangerment committed with a deadly weapon is a Class E felony." The trial judge's charge to the jury here only described the felony version of this offense and did not instruct the jury as to the lesser included offense where reckless endangerment is committed "without a weapon." Apparently the Court of Criminal Appeals found that the car here was a deadly weapon as a matter of law. This is simply incorrect. In *State v. Tate*, 912 S.W.2d 785 (Tenn. Crim. App. 1995) the Court held that a motor vehicle *may* constitute a deadly weapon. It is a question of fact which must be determined by the jury!

Weapons are generally placed in two categories - deadly *per se* such as firearms, and deadly by reason of the manner in which objects are used. *Morgan v. State*, 220 Tenn. 247, 415 S.W. 2d 879 (1967). In short, some objects are deadly weapons as a matter of law and other objects can be deadly weapons only by the manner of their use. T.C.A. §39-11-106(5). In the latter instance, it is always a fact question for the jury as to whether the object is a deadly weapon.

It is obvious that reckless endangerment without a weapon is legally a lesser included offense of reckless endangerment with a weapon. This is similar to the analysis that simple robbery is a lesser included offense of armed robbery.

In the judge's charge to the jury only the felony version of this offense was instructed. The jury was never given the option of finding Mr. Lewis guilty of reckless endangerment without the use of a deadly weapon which would have resulted only in a misdemeanor conviction.

Whether the vehicle was or was not a deadly weapon in this case was clearly a question of fact for the jury to decide since, as noted by the above case law, an automobile is not *per se* a deadly weapon. In short, the instruction, as given, put the defendant Kelly Lewis in an all or nothing proposition. The jury could have found that he was guilty of reckless endangerment but that the automobile was not a deadly weapon which would have resulted in only a misdemeanor conviction.

Where there are any facts that are susceptible of inferring guilt on any lesser included offense the judge must charge on the lesser offenses. *State v. Wright*, 618 S.W. 2d 310 (Tenn. Crim. App. 1981). Simply because a defendant denies his or her guilt as to the charged offense does not dispense with the lesser offense instruction. *Templeton v. State*, 240 S.W. 789 (Tenn. 1922). If "there is any evidence which reasonable minds might accept as to any such [lesser] offenses, the accused is entitled to appropriate instructions." *Johnson v. State*, 531 S.W. 2d 558 (Tenn. 1975). See also the excellent opinion of Judge Kurtz in

State v. Vance, 888 S.W. 2d 776 (Tenn. Crim. App. 1994). ("The fact finder is the jury, and they must be correctly instructed" as to lesser included offenses).

It is true that there was no special request on the lesser included offense. However, the defendant is not required to file a special request; rather, it is the judge's obligation to instruct on all lesser included offenses whether requested or not. *See,* T.C.A. §40-18-110(a). Even where there is no special request, the defendant's constitutional right to trial by jury demands that proper lesser included offense instructions be given. *See, Strader v. State*, 210 Tenn. 669, 362 S.W. 2d 224 (1962) and *State v. Staggs*, 554 S.W. 2d 620, 626 (Tenn. 1977).

The failure to instruct on a lesser included offense can never be harmless error. The omission of a lesser included offense from the charge to the jury **always** requires a new trial. *State v. Summerall*, 926 S.W. 2d 272, 279 (Tenn. Crim. App. 1995), citing *Poole v. State*, 61 Tenn. 288, 294 (1872):

> However plain it may be to the mind of the Court that one certain offense has been committed and none other, he must not confine himself in his charge to that offense. When he does so, he invades the province of the jury, whose peculiar duty it is to ascertain the grade of the offense. However clear it may be, the Court should never decide the facts, but must leave them unembarrassed to the jury.

Accordingly, this Court should grant review here and order a new trial as to the charge of reckless endangerment because the trial judge did not charge the jury on the lesser included offense of reckless endangerment without the use of a deadly weapon, which is only a misdemeanor. The Court of Criminal Appeals misapplied settled law and thus review by this Court is necessary so that Mr. Lewis's right to trial by jury on all disputed facts is preserved.

CONCLUSION

This Court should grant review to resolve the question of whether "consecutive fines" can be imposed where the sentences are otherwise ordered to run concurrently. A related question is whether the consecutive/concurrent sentence guidelines contained in T.C.A. §40-35-115 apply to the imposition of fines. This Court should also grant review because the evidence failed to establish that Mr. Lewis was guilty of felony reckless endangerment. In any event, he certainly had the right to have the issue of misdemeanor reckless endangerment decided by the jury which was denied him in this case.

For all these reasons, Mr. Lewis respectfully requests that this Court grant his Application for Permission to Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Document has been served, by U.S. mail, postage prepaid, upon Assistant Attorney General Lisa Naylor, Cordell Hull Building, Second Floor, 426 Fifth Avenue North, Nashville, Tennessee 37243, this the ____ day of December, 1997.

_____
David L. Raybin

APPENDIX

T.C.A. §39-13-103 Reckless Endangerment

T.C.A. §39-11-302 Definitions of Mental States

T.C.A. §40-35-104 Sentencing Alternatives

Opinion in Court of Criminal Appeals Case of ***State v. Woodcock,*** 922 S.W.2D 904 (Tenn. Crim. App. 1995).

Opinion of Court of Criminal Appeals below in ***State v. Lewis*** which is the subject of this Application to Appeal.