

IN THE DISTRICT COURT OF HOLT COUNTY, NEBRASKA

THE STATE OF NEBRASKA,
Plaintiff,

vs.

BOYD T. WILLIAMS,
Defendant.

Case No. CR99-2

**MEMORANDUM OPINION
AND JUDGMENT ON APPEAL**

DATE OF HEARING: May 20, 1999.

DATE OF DECISION: May 27, 1999.

APPEARANCES:

For plaintiff: no appearance.
For defendant: Rodney W. Smith without defendant.

SUBJECT OF ORDER: appeal from county court.

FINDINGS: The Court finds that:

1. The defendant was convicted, pursuant to jury verdict, of driving under the influence of alcohol and was sentenced upon the conviction. The defendant appeals, stating as his sole assignment of error that the county court erred in failing to give a “choice of evils” instruction upon the defendant’s request.

2. The Supreme Court has often stated the applicable principle regarding a requested instruction. To establish reversible error from a court’s refusal to give a requested instruction, an appellant has the burden to show that (1) the tendered instruction is a correct statement of the law, (2) the tendered instruction is warranted by the evidence, and (3) the appellant was prejudiced by the court’s refusal to give the tendered instruction. *State v. Kinser*, 252 Neb. 600, 567 N.W.2d 287 (1997).

3. This court finds very few previous instances in which a higher appellate court has considered the “choice of evils” defense and none addressing the present situation. See *State v. Cozzens*, 241 Neb. 565, 490 N.W.2d 184 (1992). Although the Supreme Court has not expressly so stated, this court assumes that a trial court is required to give a choice of

evils instruction where there is any evidence in support of a legally cognizable theory of choice of evils. See *State v. Marshall*, 253 Neb. 676, ___ N.W.2d ___ (1998) (self defense).

4. For such a defense to apply, it must be shown that the defendant's conduct was necessitated by a threat which the accused was without blame in occasioning or developing, under circumstances which left him no reasonable, legal, and viable alternative. 22 C.J.S. *Criminal Law* § 50 (1989). The necessity defense is unavailable where the defendant fails to produce evidence to show that he did not recklessly or negligently place himself in a situation in which it was probable that he would be forced to engage in criminal conduct. *Id.*

5. Viewed in the light most favorable to the defendant, there is simply no evidence to support the giving of the choice of evils defense. The defendant focuses on the situation out on the highway, but conveniently ignores the evidence regarding consumption of alcohol and departing to drive home. There is no reasonable way of viewing the evidence in which the defendant can be said to have been without blame in occasioning or developing the situation. There is no reasonable way of viewing the evidence in which the defendant can be viewed to have placed himself in the situation other than recklessly or negligently.

6. As the tendered instruction was not warranted by the evidence, the county court did not err in refusing to give the instruction. Consequently, the conviction and sentence must be affirmed.

ORDER: IT IS THEREFORE ORDERED AND ADJUDGED
that:

1. The judgment is AFFIRMED.
2. Costs on appeal are taxed to the defendant-appellant.
3. Unless notice of appeal and deposit of docket fee is made on or before June 28, 1999, the clerk of this court shall issue the mandate to the county court on June 29,

1999 showing that the judgment was “AFFIRMED”. If such notice of appeal and docket fee are timely filed and deposited, the mandate shall not be issued until receipt of the mandate of the higher appellate court and in accordance therewith.

Entered: May 27, 1999.

If checked, the Court Clerk shall:

- : Mail a copy of this order to all counsel of record and to any pro se parties.
Done on _____, 19____ by _____.
- : Deliver a certified copy of this opinion and order to county court.
Done on _____, 19____ by _____.
- : When appropriate, issue mandate in accordance with paragraph 3 of order.
Done on _____, 19____ by _____.
- : Note the decision on the trial docket as: 5/27/99 Signed “Memorandum Opinion and Judgment on Appeal” entered affirming judgment of county court.
Done on _____, 19____ by _____.

Mailed to:

BY THE COURT:

William B. Cassel
District Judge