

People v. Sava (1987) 190 Cal.App.3d 935, 235 Cal.Rptr. 694
[No. D005040. Court of Appeals of California, Fourth Appellate District, Division One. March 27, 1987.]

THE PEOPLE, Plaintiff and Respondent, v. MEGAN ROSE SAVA, Defendant and Appellant.

(Opinion by Todd, J., with Butler, Acting P. J., and Lewis, J., concurring.)

COUNSEL

Matthew Lees for Defendant and Appellant.

John W. Witt, City Attorney, Ronald L. Johnson, Senior Chief Deputy City Attorney, Eugene P. Gordon, Chief Deputy City Attorney, and Allisyn L. Thomas, Deputy City Attorney, for Plaintiff and Respondent.

OPINION

TODD, J.

The sole question raised in this appeal is whether, pursuant to [*People v. Geiger* \(1984\) 35 Cal.3d 510](#) [199 Cal.Rptr 45, 674 P.2d 1303, 50 A.L.R. 4th 1055], a defendant in a **misdemeanor drunk driving** prosecution is entitled upon request to jury instructions on vehicle code infractions based upon a claim the infractions are lesser related offenses. This appeal is on certification from the Appellate Department of the Superior Court of San Diego County, which affirmed defendant Megan Rose Sava's municipal court conviction of driving under the influence (Veh. Code, § 23152, subd. (a)).

Background

On February 8, 1985, a complaint was filed in municipal court charging defendant Megan Rose Sava (Sava) with driving under the influence of [190 Cal.App.3d 937] alcohol (Veh. Code, § 23152, subd. (a)) and with driving a vehicle while having a blood alcohol level of 0.10 percent or more (Veh. Code, § 23152, subd. (b)). The complaint also charged Sava with a prior misdemeanor reckless driving conviction (Veh. Code, § 23103) in connection with each of the drunk driving charges. These charges were tried before a jury.

The court refused Sava's requested jury instructions on speeding (Veh. Code, § 22348) and following too closely (Veh. Code, § 21703) and also refused her instruction directing the jury: "If [it] is not satisfied beyond a reasonable doubt that the defendant is guilty of the offenses charged and it unanimously so finds, it may convict her of any lesser offense if the jury is convinced beyond a reasonable doubt that she is guilty of such lesser offense. [¶] The offense of 'following too closely' in violation of California Vehicle Code Section 21703 is a lesser offense to the

offenses charged in Counts I and II. [¶] The offense of 'speeding' in violation of California Vehicle Code Section 22348 is a lesser offense to the offenses charged in Counts I and II." The jury found Sava not guilty of driving with a blood alcohol level of 0.10 percent or more as charged in count II of the complaint. Sava was found guilty as charged in count I of the complaint of driving under the influence of alcohol. Sava appeals, contending the court erroneously refused her instructions on speeding and following too closely, claiming the infractions are lesser related offenses to drunk driving.

Discussion

In *People v. Geiger*, supra, 35 Cal.3d 510, the Supreme Court held due process requires a criminal defendant be allowed to request a jury instruction on a lesser offense that is closely related to the charged offense even though the related offense is not necessarily included in the charged offense. (Id at pp. 526-532.) In *Geiger*, the defendant's second degree burglary conviction was reversed upon the defendant's claim that in accordance with his theory of the case he could have been convicted of vandalism (Pen. Code, § 594), a related offense not necessarily included in burglary. The Supreme Court reversed, advising at the outset: "[W]e find no reason in law, justice, or common sense why a jury that is not persuaded of the defendant's guilt of the charged offense should not have the opportunity to find him guilty of a lesser related offense where, as here, the lesser offense is closely related to that charged, there is evidence of its commission, and defendant's theory of defense is consistent with such a finding.... [W]ell-established principles of constitutional dimension...support the giving of instructions upon request in such a situation...." (*People v. Geiger*, supra, 35 Cal.3d at p. 514.) [1a] The touchstone principle of the *Geiger* decision is a defendant has a constitutional right to have the jury determine every material issue presented by the evidence. From this the court noted the state does not have an interest [190 Cal.App.3d 938] in a defendant "obtaining an acquittal where he is innocent of the primary offense charged but guilty of a necessarily included offense. Nor has the state any legitimate interest in obtaining a conviction of the offense charged where the jury entertains a reasonable doubt of guilt of the charged offense but returns a verdict of guilty of that offense solely because the jury is unwilling to acquit where it is satisfied that the defendant has been guilty of wrongful conduct constituting a necessarily included offense.' ..." (Id at p. 519, quoting *People v. Martin* (1970) 1 Cal.3d 524, 533 [83 Cal.Rptr. 166, 463 P.2d 390].) These same considerations requiring instructions on lesser included offenses were deemed applicable to instructions on lesser related offenses because "it would be fundamentally unfair to deny the defendant the right to have the court or jury consider the 'third option' of convicting the defendant of the related offense." (*People v. Geiger*, supra, 35 Cal.3d at p. 520.) The "reliability of the factfinding process demands affording the jury the 'third option' when the evidence supports a conviction of a related, but not necessarily included, offense." (Id at p. 525.)

While fairness to a defendant mandates instructions on lesser related offenses under appropriate circumstances, the court also observed the benefits of such a rule adhere not just to the defendant in criminal trials, but to the People as well. "Just as the lesser included offense doctrine serves the interests of the People by permitting conviction of a lesser offense rather than

acquittal of a clearly guilty defendant when the prosecution fails to prove the charged offense, instructions on related offenses will ensure that some guilty defendants who would otherwise go free will be punished for a crime which they committed even though it was overlooked by a prosecutor or was not charged because the prosecutor overestimated the strength of the People's evidence." (*People v. Geiger*, supra, 35 Cal.3d 510, 530.)

Geiger thus holds to justify instructions on lesser related offenses, the defendant must show (1) that there is "some basis, other than an unexplainable rejection of prosecution evidence," to justify a jury finding on the related charge; (2) that the evidence supporting the related charge is "relevant to and admitted for the purpose of establishing whether the defendant is guilty of the charged offense"; and (3) that the defense theory is consistent with a conviction for the related offense. (*People v. Geiger*, supra, 35 Cal.3d 510, 531.) Based on the constitutional principle of due process and fundamental fairness to the defendant, the Geiger rule under appropriate circumstances thus expands the issues a jury may properly be permitted to determine.

However, neither the rule nor the spirit of the rule announced in Geiger can be extended to cases in which a defendant in a misdemeanor drunk driving prosecution seeks jury instructions on infractions as lesser related offenses to the charge of driving under the influence. [2] An accused [190 Cal.App.3d 939] charged with an infraction is not entitled to a jury trial nor is she entitled to counsel at public expense. **Penal Code section 19c provides:** "An infraction is not punishable by imprisonment. A person charged with an infraction shall not be entitled to a trial by jury. A person charged with an infraction shall not be entitled to have the public defender or other counsel appointed at public expense to represent him unless he is arrested and not released on his written promise to appear, his own recognizance, or a deposit of bail." Further, **infractions are not crimes** and the rule forbidding successive prosecutions of a defendant is not applicable when an infraction is one of the offenses involved. (*People v. Battle* (1975) 50 Cal.App.3d Supp. 1 [123 Cal.Rptr. 636].) fn. 1 [1b] Proceedings on infractions are not attended by the same constitutional safeguards as those attending felony or misdemeanor prosecutions. The limitation on an accused's right to jury trial of infractions has withstood constitutional attack **upon the rationale the Legislature did not intend to classify infractions as crimes.** (See *People v. Oppenheimer* (1974) 42 Cal.App.3d Supp. 4 [116 Cal.Rptr. 795] and *People v. Battle*, supra, 50 Cal.App.3d Supp. 1.) **The only occasion when an accused might be afforded a jury trial on an infraction is when the accused is charged with both a misdemeanor and an infraction and jury trial of the misdemeanor charge is not waived.** (Pen. Code, § 1042.5.) fn. 2 As Presiding Judge Holmes observed in his concurrence in Battle, the underlying purpose of Penal Code section 1042.5 is promotion of expeditious disposal of infractions cases "which is the chief reason for classifying them as such." (*People v. Battle*, supra, 50 Cal.App.3d Supp. 1, Supp. 7.)

In view of the fundamental procedural differences between the treatment of infractions and more serious offenses, a holding which would permit a [190 Cal.App.3d 940] jury to consider whether a defendant in a misdemeanor drunk driving prosecution committed an infraction would be an illogical result. Since the Geiger rule is built upon the precept a defendant has a constitutional right to have the jury determine every issue material to the

charged crime as presented by the evidence, this very precept bars application of the rule to permit jury consideration of infractions as lesser related offenses to the crime charged. With the one very limited exception noted above, **it has never been within the province of the jury to determine whether an infraction has been committed since an accused has neither a statutory nor constitutional right to jury trial of charged infractions.** Consequently, the Supreme Court's perceived "third option" benefit of the Geiger rule (conviction of a lesser related offense in addition to the conviction or acquittal of the charged offense options) **is inapplicable to infractions.** The Geiger rule should not be permitted to be used as a guise for expanding the issues a jury may otherwise be properly permitted to consider in misdemeanor drunk driving prosecutions. Neither reason nor fairness requires the possible disposition of misdemeanor or felony charges through conviction on minor traffic infractions.

Disposition

Judgment is affirmed.

Butler, Acting P. J., and Lewis, J., concurred.

–FN 1. In [Kellett v. Superior Court \(1966\) 63 Cal.2d 822](#) [48 Cal.Rptr. 366, 409 P.2d 206], the defendant was charged with exhibiting a firearm, a misdemeanor (Pen. Code, § 417). A month later, the defendant was charged with felony possession of a concealable weapon by one who has been convicted of a felony (Pen. Code, § 12021). The defendant pleaded guilty to violating Penal Code section 417 and then moved to dismiss the information charging the Penal Code section 12021 violation on the ground it was barred by Penal Code section 654. The motion was denied. The defendant sought a writ of prohibition to prevent his trial. The court issued the writ, holding: "[I]f an act or course of criminal conduct can be punished only once under [Penal Code] section 654, either an acquittal or conviction and sentence under one penal statute will preclude subsequent prosecution in a separate proceeding under any other penal statute." (*Kellett v. Superior Court*, supra, 63 Cal.2d at p. 828.) As the court in *Battle* observed, Kellett was concerned only with felonies and misdemeanors, not misdemeanors and infractions. "[T]he Kellett court was concerned with successive prosecutions for crimes." *People v. Battle*, supra, 50 Cal.App.3d Supp. 1 at p. Supp. 5.) **Battle soundly reasoned infractions are not crimes;** hence, the Kellett rule was held inapplicable to prosecutions involving infractions.

–FN 2. **Penal Code section 1042.5 provides:** "Trial of an infraction shall be by the court, but when a defendant has been charged with an **infraction and** with a **public offense** for which there is a right to jury trial and a jury trial is not waived, the court may order that the offenses be tried together by jury or that they be tried separately with the infraction being tried by the court either in the same proceeding or a separate proceeding as may be appropriate."

People v. Battle, 50 Cal.App. 3, Supp 1, 123 Cal. Rptr. 636, 639.

People v. Battle , 50 Cal.App.3d Supp. 1

[Crim. A. No. 13180. Appellate Department, Superior Court, Los Angeles. **June 27, 1975.**]

THE PEOPLE, Plaintiff and Appellant, v. HENRY BUSTER BATTLE, Defendant and Respondent

(Opinion by Marshall, J. Separate concurring opinions by Holmes, P.J., and Alarcon, J.)

COUNSEL

Joseph P. Busch, District Attorney, Harry B. Sondheim and Barry R. Levy, Deputy District Attorneys, for Plaintiff and Appellant.

Henry William Sands for Defendant and Respondent. [**50 Cal.App.3d Supp. 3**]

OPINION

MARSHALL, J.

The defendant was charged with **violation of section 26453 of the Vehicle Code in that he failed to maintain his brakes in good condition**. He was arraigned on May 15, 1974, and plead not guilty. On June 10, 1974, he changed his plea to nolo contendere and the court fined him \$50 plus \$15 penalty assessment. On August 15, 1974, a complaint was filed against the defendant, charging him with three misdemeanor violations of subdivision 3(b) of section 192 of the Penal Code -- three deaths had occurred. **He plead not guilty and once in jeopardy.**

The investigating officer, Tommy Thomas, informed the district attorney concerning his findings, which included evidence that six out of the defendant's ten brakes were out of the departmental tolerances.

An investigator for the district attorney, Robert Ewen, was assigned to the matter on June 14, 1974, and obtained various items for one Professor Hurt, of the University of Southern California, who utilized computers and drew on his experience and knowledge of physics and engineering. He also used equations, slide rule, microscopic slide rule, calculator, binoculars, and stereoscopic microscopes to analyze tire treads and various minute objects. Investigator Ewen declared that he would not have prosecuted the cause without the professor's analysis.

Professor Hurt declared that this was the first assignment he had from the district attorney. He reviewed materials supplied by the investigators on May 29, 1974. He later secured additional photographs to assist him in calculating deceleration characteristics. He made speed estimate calculations and speed and trajectory analyses. According to Professor Hurt, only a few persons were capable of doing this work.

The deputy district attorney who filed the infraction complaint had been considering a charge of

vehicular manslaughter against the defendant and had asked Thomas to investigate further. The officer furnished such investigation report **before the complaint was filed**. The deputy concluded that there was insufficient evidence for a successful manslaughter prosecution. He referred the matter to his main office for their review of the facts, probably on May 7, 1974. Before June 10, 1974 (when defendant plead nolo contendere), he was informed that the California Highway Patrol had referred the case to a Sergeant Meyers in its central office and that the sergeant was consulting Dr. Hurt. Before **[50 Cal.App.3d Supp. 4]** June 10, 1974, the deputy advised the defendant and his attorney that the matter was under further investigation by his main office and that his office might further prosecute the defendant for manslaughter.

The attorneys discussed ***Kellett v. Superior Court* (1966) 63 Cal.2d 822 [48 Cal.Rptr. 366, 409 P.2d 206]**, and the legal implications of a plea; defense counsel then informed the prosecutor that he wished to plead nolo contendere to the infraction charged. The deputy district attorney declared that, "I did have discussions with the judge. I requested of the court that because of the implications of the case that there were deaths involved, that my office was still under investigation -- still investigating the case, that the record should be properly preserved and requested of the court that the plea be taken with a full tall [sic, Tahl] waiver even though that is not the normal procedure in the court on an infraction case; this being so, that the court would be protecting the record for defense as well as the people in this matter." The discussion with the judge was not on the record as no reporter was present -- it was, the deputy district attorney stated, a "personal request I made to the judge when we advised him that he (Battle) would be entering a plea ..."

Inapplicability of Kellett to Instant Case

[1] Harassment, in the sense of *Kellett*, supra, is not present in the instant case; here the defendant (as well as the court) was aware of the prosecutor's intention to investigate the possibility of charging manslaughter. Here the prosecutor was not deliberately holding back such charge but was simply awaiting the sifting of the evidence by an expert, Professor Hurt. The prosecution was not "aware" in the sense employed by *Kellett* (supra, 63 Cal.2d, at p. 827) of the existence of a second offense until the expert had completed his investigation. **A suspicion as to the existence of the offense cannot constitute "awareness" as the prosecutor could not have charged the crime before such investigation was completed.**

These are not the *Kellett* facts. In *Kellett*, the defendant stood on a public sidewalk with a pistol in his hand; both offenses charged -- possession of a concealable weapon and exhibiting a firearm in a threatening manner -- were known (or should have been known) to the prosecution from the outset. **Here the prosecutor was only aware of a possibility of an offense in addition to the violation of section 26453 of the Vehicle Code.** It cannot be said that he should have been aware, when it took the ministrations of an expert trained in a highly technical field to produce **[50 Cal.App.3d Supp. 5]** proof which made it possible to conclude that the People should charge manslaughter.

Inapplicability of Kellett to Infractions


From the following analysis it is concluded that Kellett is not applicable where an infraction is one of the offenses involved. In Kellett the court dealt with facts dissimilar to those of the instant case. Kellett was first charged with exhibiting a firearm, a misdemeanor (Pen. Code, §§ 417) and, a month later, with possession of a concealable weapon by one who has been convicted of a felony (Pen. Code, §§ 12021). He pleaded guilty to charges under section 417 and then moved to dismiss the section 12021 count. The court was concerned with the protection of defendant from successive prosecutions for "closely related crimes." (Italics added; Kellett, supra, [63 Cal.2d 822](#), 826.) **It was not concerned with infractions and misdemeanors but with felonies and misdemeanors.** (See Kellett, supra, 63 Cal.2d at pp. 827, 828.) The court declared that "if an act or course of criminal conduct can be punished only once under section 654 [of the Penal Code] either an acquittal or conviction and sentence under one penal statute will preclude subsequent prosecution in a separate proceeding under any other penal statute." (Italics added; Kellett, supra, [63 Cal.2d 822](#), 828.) Clearly, the Kellett court was concerned with successive prosecutions for crimes. **Here we have an infraction charged for violation of section 26453 of the Vehicle Code** and, subsequently, a charge of misdemeanor manslaughter.

The court in *In re Hayes* (1969) [70 Cal.2d 604](#), 605 [75 Cal.Rptr. 790, 451 P.2d 430] held that section 654 of the Penal Code applied to acts or omissions not only interdicted by the Penal Code but which also "embrace[s] penal provisions in other codes as well, including those found in the Vehicle Code" (Italics added). *fn. 1* This language causes us to doubt that the high court had infractions in mind when it dealt with the problem of successive prosecutions inasmuch as an infraction is neither a misdemeanor nor a felony under either the Vehicle Code or the Penal Code (Pen. Code, §§ 16; Veh. Code, §§ 40000.1). [50 Cal.App.3d Supp. 6]

In summation, **it is questionable whether the Legislature considers an infraction to be a "crime."** **The Legislature enacted section 19c of the Penal Code which deprives a person committing an infraction of the right to a jury trial and the right to counsel at public expense; however, both of these rights are guaranteed to one accused of a crime by sections 15 and 16 of article I of the California Constitution.** We must, if we can, construe a statute in such a fashion as to preserve it from unconstitutionality. (*In re Kay* (1970) [1 Cal.3d 930](#) [83 Cal.Rptr. 686, 464 P.2d 142].) By construing section 19c of the Penal Code to relate to noncriminal offenses we can avert a clash with the Constitution and achieve our goal, i.e., the continued viability of the statute.

Inconsistency of Sections 19c and 1042.5 vis-a-vis 689 of the Penal Code

[2] Section 16 of the Penal Code declares that "crimes and public offenses" include not only felonies and misdemeanors but also infractions. Sections 19c and 1042.5 of the Penal Code deprive a person accused of an infraction of the right to jury trial. Yet, **section 689 of the Penal Code declares that "[n]o person can be convicted of a public offense unless by verdict of a jury."** (Italics added.) (The 1968 amendment of section 16 of the Penal Code substituted the words "crimes and public offenses include:" for the words "crimes, how defined.



Crimes are divided into.")

If the Legislature intended to treat infractions as public offenses and if the charging of a public offense invokes the right to trial by jury, sections 19c and 1042.5, which deny a jury to one who commits an infraction, conflict with section 689. However, the same (1968) Legislature enacted section 19c, the pertinent amendment of section 16 and section 1042.5. Construing these sections in accordance with the precepts laid down in *In re Kay*, supra, we must conclude that it was not the intent of the Legislature to enact inconsistent statutes and, further, that when it added the term "public offense" to section 16 it was not so categorizing infractions because if it did so, it would have caused inconsistency between sections 19c and 689 of the Penal Code. Support for this interpretation is found in the language of section 1042.5 which states that a defendant "charged with an infraction and with a public offense for which there is a right to jury trial" (italics added) may be accorded a jury trial. Had the Legislature intended that an infraction be treated as a public offense, it would have worded the statute differently, for example, "an infraction and with some other public offense." [50 Cal.App.3d Supp. 7]

Furthermore, this court has previously held in *People v. Oppenheimer* (1974) 42 Cal.App.3d Supp. 4, 7, fn. 2 [116 Cal.Rptr. 795], that inasmuch as section 689 of the Penal Code was originally enacted in 1872 and last amended in 1951, and sections 19c and 1042.5 of the Penal Code were enacted in 1968, we must read all the sections together and, in case of conflict, give effect to the latest enacted sections -- sections 19c and 1042.5. We therefore have declared in *People v. Oppenheimer*, supra, that sections 19c and 1042.5 qualify section 689 insofar as infractions are concerned. Hence, even though we were to treat an infraction as a public offense under section 16, we must nevertheless excise infractions from section 689 in order to effect the objective of the Legislature. (Pen. Code, §§ 4.)

The court in *People v. Oppenheimer* (1974) 42 Cal.App.3d Supp. 4 [116 Cal.Rptr. 795], declares that an infraction is a petty offense. A defendant was not historically accorded the right to a jury in trials of petty offenses. Whether an infraction is characterized as a petty offense or a noncriminal offense, an appellate court in the circumstances of the present case should not bar prosecution for manslaughter by reason of an earlier plea of nolo contendere to an infraction. To do otherwise would fly in the face of the legislative adjuration to construe statutory provisions "according to the fair import of their terms, with a view to effect its objects and to promote justice." (Pen. Code, §§ 4.)

The judgment of dismissal is reversed.

HOLMES, P. J.

I concur because I do not believe the doctrine of *Kellett v. Superior Court*, supra, 63 Cal.2d 822, was meant to apply to the kind of offenses presently classified as infractions. (See *In re Johnson* (1965) 62 Cal.2d 325, 336 [42 Cal.Rptr. 228, 398 P.2d 420]; *Mills v. Municipal Court* (1973) 10 Cal.3d 288, 303-308 [110 Cal.Rptr. 329, 515 P.2d 273].) In the overwhelming majority of infraction cases the primary interest of the accused will be served by expedition in disposal.

Caught up in the crush of traffic court business, the prosecutor is in no position to make the final decision regarding other possible offenses that is required by Kellett. If he later determines to file a new charge the defendant will have to appear again; but this will happen so seldom, relative to the volume of business, that the harassment sought by Kellett to be prevented will not be a significant factor. **A contrary rule would impede that swift disposal of infraction cases which is the chief reason for classifying them as such.** This view finds support in section 1042.5 of the Penal Code where trial of an infraction and a related misdemeanor in separate proceedings is authorized. **[50 Cal.App.3d Supp. 8]**

ALARCON, J.

I concur in that portion of the opinion which holds that the Kellett rule is inapplicable under these facts. The results of the scientific research, and the testimony of the expert, interpreting his findings, which was necessary to prove manslaughter, were unavailable and therefore unknown to the prosecution at the time the defendant entered his plea to the infraction.

Prior to the entry of his plea the defendant was fully informed that the investigation concerning the proximate cause of the death of the three victims had not been completed. Rather than request a delay to effect a consolidation should new charges be filed and to avoid the possibility of multiple prosecution, the defendant elected to enter his plea to the infraction. If the defendant is now to be inconvenienced by a second prosecution, it was a predictable if not inevitable consequence of his acquiescence.

-FN 1. **The gravamen of the Hayes decision**, supra, 70 Cal.2d 604 (dealing with divisibility of conduct), is that we "must not confuse simultaneity with identity: in both of the above situations -- driving as in this case and possession of contraband in the cited cases -- **the defendant committed two simultaneous criminal acts, which coincidentally had in common an identical noncriminal act.**" (Italics by Mosk, J.; Hayes, supra, 70 Cal.2d 604, 607.)