Case No. 46149-8-II

IN THE COURT OF APPEALS, DIVISION TWO OF THE STATE OF WASHINGTON

STATE OF WASHINGTON
Plaintiff/Respondent,

vs.

APRIL HANCOCK,
Defendant/Appellant.

Appeal from the Superior Court of Mason County

Superior Court Case No. 12-1-00520-6
District Court Case No. 2Z327384

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

The statement of the case has been previously provided in Appellant's brief. However, Appellant wishes to clarify a misconception that is created by the State's rendition of the facts. The State claims that Deputy Gaynor "saw the defendant, April Hancock, standing next to her car on Highway 3 in Mason County." Brief of Respondent at 3-4. This is later followed by the statement that "[w]hen he returned, he saw that Hancock's car was ***then*** in the gas station lot of the Deer Creek Store." *Id.* at 4 (emphasis added). The implication that the State is attempting to make, in this and other pleadings, is that Ms. Hancock was out on the highway and then moved the car into the parking lot after the deputy passed, giving the impression that she was driving on the highway. There is no such evidence. Rather, the car was in the parking lot when the deputy passed and was still there when he returned. Record at 10. The car was never operated by Ms. Hancock on the highway, nor was it ever parked on the highway at any time.[1]

ARGUMENTS

The State's argument that RCW 46.20.005 is not a lesser included offense within RCW 46.20.342(1) fails to properly apply statutory construction, fails to recognize legislative authority and intent, does not properly apply the test for a lesser included

[1] It is physically impossible to stop on the highway near Deer Creek Store owing to deep irrigation ditches on both sides of the road, which is probably why the issue never came up at trial.

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offense, and fails to provide any valid justification for its postion.

1. Test for lesser included offense.

A lesser included offense is an offense where all of the elements of the lesser offense are also necessary elements of the greater offense. *State v. Allen*, 116 Wn.App. 454, 463, 66 P.3d 653 (Wash.App. Div. 3 2003); *State v. Aumick*, 126 Wn.2d 422, 426, 894 P.2d 1325 (Wash. 1995); *State v. Berlin,* 133 Wash.2d 541, 545 - 546, 548, 550, 947 P.2d 700 (Wash. 1997); *State v. Walden*, 67 Wn.App. 891, 893, 841 P.2d 81 (Wash.App. Div. 1 1992); *State v. Workman,* 90 Wn.2d 443, 447 - 448, 584 P.2d 382 (Wash. 1978). The greater offense cannot be committed without also committing the lesser offense.

2. State has provided no valid arguments to support its position that RCW 46.20.005 is not a lesser included offense within RCW 46.20.342(1).

The State provides no valid reason for finding that RCW 46.20.005 is not a lesser included offense within RCW 46.20.342(1). Many of the State's arguments are meaningless. For example, the State finds some special significance in the fact "that RCW 46.20.005 provides the only example of any current statute where the Washington Legislature has declared by statutory language that one offense is a lesser included offense to another offense." Brief of Respondent at 7. Although the State does not

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say why this is important, it can easily be argued that the legislature simply saw it as an important issue that RCW 46.20.005 is understood as a lesser included offense to RCW 46.20.342(1). The fact that "traditionally, lesser included offenses are determined by judicial rule" and goes back to 1859 (Brief of Respondent at 7), only means that the legislature is likely to be well acquainted with the term and can use it as it pleases. In any case, courts will assume the legislature knows what it is doing when it uses such terms. *Jametsky v Rodney A.*, at 1008, citing *Thurston County v. Gorton,* 85 Wash.2d 133, 138, 530 P.2d 309 (1975).

3. State's historical argument

The State first claims that RCW 46.20.005 first appeared in 1998. Brief of Respondent at 5. However, the State later admits that the language of RCW 46.20.005 could be found in earlier statutes. Brief of Respondent at 8. Despite the State's effort to portray the later statute as being unrealted to the earlier statute, this was simply a renumbering of the statute, which is not uncommon. From 1998 until the present, RCW 46.20.005 has contained language making it a lesser included offense within RCW 46.20.342(1). From 1985 until 1998 that same language was included in RCW 46.20.021. *See*, 1985 Wash. Laws ch. 302 §§ 2 and 3. Prior to 1985 the language was actually included in RCW 46.20.342(1) until it was

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moved to RCW 46.20.021. 1979 Wash. Laws ch 136 § 62. Since 1979, the fact that DWOL was a lesser included offense has been codified in Washington law. The timeline looks like this:

1979 - RCW 46.20.021 DWOL is made a lesser included offense withing the text of RCW 46.20.342(1).
1985 - the language making RCW 46.20.021 a "lesser included offense" within DWLS is moved from RCW 46.20.342(1) to RCW 46.20.021.
1990 - the "highway" wording is removed from RCW 46.20.342(1), but no changes are made to RCW 46.20.021.[2]
1997 - RCW 46.20.021 is renumbered as RCW 46.20.005.

This is not an unintentional accident, nor the actions of an incompetent legislature; rather it shows a specific and deliberate intent on the part of the legislature to maintain DWOL aa lesser included offense within RCW 46.20.342(1).

It should be noted that RCW 46.20.021 previously defined itself as a lesser included offense within RCW 46.20.342(1), RCW 46.20.416, RCW 46.20.420, and RCW 46.65.090. However, RCW 46.20.416 and 46.95.090 have been deleted from the list of offenses for which driving without a license was considered a lesser included offense. The two statutes that remain are RCW 46.20.342(1) Driving while license

[2] There is no explanation in the legislative record for the removal of "highway" from RCW 46.20.342(1), however, judges who testified at public hearings considered DWOL as an included offense within DWLS and did not believe that elements of RCW 46.20.342(1) had been changed. *See*, Senate Committee on Law & Justice, SSB 6608, Synopsis as Enacted, June 7, 1990; Transcript of Public Hearing SB 6608, January 23, 1990 (See, Appendix A). See, Appellant's Brief at 13 - 19 for more detailed discussion of the legislative history.

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invalidated, and RCW 46.20.345 Operation under other license or permit while license suspended or revoked. Both of these statutes appropriately deal with driving after a license has been taken away, essentially driving without a license (RCW 46.20.005), with the added element of having had the license taken away/suspended/revoked. It is possible to violate RCW 46.20.005 without violating RCW 46.20.342(1) and RCW 46.20.345, but it is not possible to violate RCW 46.20.342(1) and RCW 46.20.345 without violating RCW 46.20.005. This indicates that RCW 46.20.005 is a lesser included offense within RCW 46.20.342(1), just as the legislature stated.

4. The Workman test and statutory construction

The State acknowledges that the *Workman* test for lesser included offenses is a valid test for determining a lesser included offense. Brief of Respondent at 7, citing *State v. Sublett,* 176 Wn.2d 58, 292 P.3d 715 (2012). *Workman* gives a two-prong test; however, because it is meant to determine whether a jury instruction should be given, only the first prong is relevant to the current discussion. *State v. Workman,* 90 Wn.2d 447 - 448. In applying the *Workman* test, the State argues that RCW 46.20.342(1) no longer contains the "highway" language; therefore, it is not an element and fails the *Workman* test because RCW 46.20.342(1) no

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longer contains the "highway" language. Brief of Respondent at 7-8. The State claims that this is the plain language of RCW 46.20.342(1). Brief of Respondent at 6. The State, however, simply ignores the plain language of RCW 46.20.005. The State must examine the entire issue in a complete vacuum and ignore numerous rules of statutory construction to reach this conclusion.

The State asks the court to ignore all the various methods and tools it has traditionally used in statutory construction. The State even goes so far as asking the Court to rule that the legislature does not know what it is doing, and that it cannot understand a "judicial term of art, 'lesser included offense." Brief of Respondent, at 10. It asks the Court to find that the legislature could not possibly comprehend the term "lesser included offense" even though it has been in use for over hundreds of years; and rule that the legislature did not mean what it said, even though the term has been maintained in the RCW for at least 35 years. However, "when our Legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions." *State v. Bobic,* 140 Wash.2d 250, 264, 996 P.2d 610 (2000).

The State claims that the two statutes cannot be reconciled. Brief

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of Respondent, at 11. The State applies the *Workman* test without applying any statutory analysis to support it. One problem with the State's application of the test to RCW 46.20.342(1) is that the State appears to think that the plain language of the statute is the end of the analysis, but the same argument can be made for RCW 46.20.005. Little is gained by such analysis when there are two potentially conflicting statutes because each is equally entitled to the application of the plain meaning of its language. Further, it ignores all other statutory construction rules that can help determine legislative intent and reconcile the statutes. When RCW 46.20.342(1) and RCW 46.20.005 are analyzed as greater and lesser included offenses, it become obvious that it is much easier to apply and satisfy the goals of statutory construction by applying the plain meaning of RCW 46.20.005, than it is to use the State's proposed analysis, which fails on almost every count.

5. Statutory construction rules as applied to RCW 46.20.005 and RCW 46.20.342(1)

In addition to looking at the language of a statute, the Court should attempt to harmonize potentially conflicting statutes so as to give effect to both. *Gorman v. Garlock, Inc.*, 118 P.3d 311, 155 Wn.2d 198, 210 (Wash. 2005). The Court should assume that the legislature knew what it was doing (*See, Jametsky v. Rodney A.*, at 1008, citing *Thurston County v.*

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Gorton, 85 Wash.2d 133, 138, 530 P.2d 309 (1975)), and intended for RCW 46.20.005 to be a lesser included offence (*See, State v. Evans*, 298 P.3d 724 (Wash. 2013)), the Court can then give deference to and apply the plain meaning of RCW46.20.005 (*See, State v. J.P.*, 69 P.3d 318, 149 Wn.2d 444, 450 (Wash. 2003)), as well as deference to RCW 46.20.005's more specific language over that of RCW 46.20.342(1). *See, Gorman v. Garlock, Inc.*, at 210; *Probst v. Department of Labor and Industries*, 230 P.3d 271, 155 Wn.App. 908, 917, 918-919 (Wash.App. Div. 2 2010); See also, *Herrett Trucking Co. v. Washington Public Service Commission*, 364 P.2d 505, 58 Wn.2d 542, 543-545 (Wash. 1961). This allows the Court to imply the "highway" requirement to RCW 46.20.342(1), as intended and specifically stated by the legislature.

By applying the requirements for a lesser included offense to RCW 46.20.005, as set out in *Workman*, each of the elements of the lesser offense are now necessary elements of the greater offenses. *State v. Workman,* 90 Wn.2d 443, 447 - 448, 584 P.2d 382 (Wash. 1978). It is possible to commit the lesser offense of DWOL without committing the greater DWLS offense, but it is impossible to commit the greater offense without committing the lesser offense. RCW 46.20.005 satisfies the test for a lesser included offense. Additionally, this method allows for other benefits. Both statutes have been completely harmonized, giving full

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effect to both without having to delete an entire section of RCW 46.20.005 that has been in existence for over 35 years. *See, Elford v. City of Battle Ground*, 941 P.2d 678, 87 Wn.App. 229, 234 (Wash.App. Div. 2 1997), citing *King v. Department of Social and Health Servs.*, 110 Wash.2d 793, 799, 756 P.2d 1303 (1988). This would not be possible if the State's view were correct. Further, such a ruling would have the added benefit of being consistent with all prior appellate court rulings that were made prior to the 1990 change to RCW 46.20.342(1), deleting the "highway" requirement. Additionally, the courts will avoid absurd results such as criminalizing mowing your lawn with a riding mower, but exempting golf carts. See, RCW 46.04.320 (defining a motor vehicle); *See, State v. J.P.*, at 450. With the exception of being able to interpret RCW 46.20.342(1) by itself without any need to do any analysis, the Court is able to comply with all the rules and goals of statutory construction that Washington appellate courts have adopted. This cannot be done by using the State's proposal. If the State's position were adopted, the Court would have to ignore all the existing rules of statutory construction and create a new rule to allow it to ignore legislative intent, -- delete a significant portion of RCW 46.20.005, etc. However, if RCW 46.20.005 really is a lesser included offense within RCW 46.20.005 then both statutes can be easily reconciled and will function as intended.

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It should also be asked what the State's interest is in preventing the operation of a motor vehicle on private property. The answer is, "none." The suspension of a license is a punishment for another crime. Often this is for DUI, which is outlawed everywhere in the State because it is specifically exempted from the highway requirement. RCW 46.61.005(2). This makes the prohibition of DUI applicable to private property. It should also be noted that the legislature felt it necessary to exempt RCW 46.20.502 from the highway limitation despite saying that DUI was prohibited "within this state" in RCW 46.61.502. There is a clear interest in the case of DUI because the act of DUI is dangerous on private property just as it is on a public highway. But even with DUI, the Washington Supreme Court has held that DUI may not be enforced when it is too far removed from the public roads to pose a threat. *State v. Day*, 638 P.2d 546, 96 Wn.2d 646, 649 (Wash. 1981). However, DWLS does not pose the same threat as DUI. Nor does the State have a valid interest in the operation of a motor vehicle on private property. Driving on public highways is a privilege. *Spokane v. Port*, 43 Wash.App. 273, 275-76, 716 P.2d 945 (driving is a privilege, not a right), review denied, 106 Wash.2d 1010 (1986). That privilege can be revoked when one fails to follow the rules, as is the case with DUI. However, the State's interest in managing the driving privilege on public roads does not extend to private property,

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with the exception of DUI, which has a specific statutory exception. RCW 46.61.005(2); but see, *State v. Day*, 638 P.2d 546, 96 Wn.2d 646 (Wash. 1981). Although DUI is in and of itself a dangerous activity, DWLS is not. Unless it is coupled with intoxication, DWLS is no different than driving without a license on private property; something that the children of farming families do every day while operating farm equipment. There is no difference between the actual operation of vehicle without a license and operating a vehicle with a license suspended, or driving with a valid driver's license for that matter. The difference is that with DWLS and DWOL the person is not authorized to drive on a public road. With DWLS, a person's license has been taken away as a punishment; and with DWOL the person never had one to begin with. But this has nothing to do with how the vehicle was being operated, only with where and when the person had the privilege to drive. In such a situation, it makes no sense to say that the State's interest should extend to private property over which it has no control and where traffic laws do not apply. See, *State v. Day*, 638 P.2d 546, 96 Wn.2d 646 (Wash. 1981) (DUI statute that prohibited DUI with this state, would not be applied to person driving unlicensed vehicle on private property, because "reasonably necessary in the interest of the health, safety, morals, or welfare of the people," as the driver was never observed driving on a public road). Further, applying a restriction to

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driving on private property for DWLS would lead to absurd results, which are avoided by courts. *State v. J.P.*, at 450; *State v. Day*, 638 P.2d 546, 96 Wn.2d 646, 648 (Wash. 1981). For example, according to the State's "plain language" rule, RCW 46.20.342(1) prohibits the operation of "a ***motor vehicle*** in this state while that person is in a suspended or revoked status." However, the "plain language" of "motor vehicle" is very broad, but luckily we have a statute that defines the term. RCW 46.04.320 defines motor vehicle as:

> "Motor vehicle" means ***every vehicle that is self-propelled*** and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. "Motor vehicle" includes a neighborhood electric vehicle as defined in RCW 46.04.357. "Motor vehicle" includes a medium-speed electric vehicle as defined in RCW 46.04.295. An electric personal assistive mobility device is not considered a motor vehicle. A power wheelchair is not considered a motor vehicle. ***A golf cart is not considered a motor vehicle***, except for the purposes of chapter 46.61 RCW.

Under the State's interpretation, someone who has a suspended license could not mow his/her lawn on a riding lawn mower, a farmer could not plow a field or harvest a crop on his/her own land, a person could not back his/her car out of the garage to wash it in his/her own driveway; but they could drive a "golf cart" anywhere they want. Clearly, this would not be the result that the legislature intended, nor does the State have an interest in preventing someone from mowing the lawn on private property. But

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this would the result of applying only the plain meaning of RCW 46.20.005 as the State suggests. It would be worse if the Court did not look at other statutes to determine intent, as the State suggests. Fortunately, the courts have developed other rules of statutory construction to interpret the meaning and intent of a statute; "plain meaning" being only the first step in the process. When the other rules of statutory construction are applied, RCW 46.20.342(1) and RCW 46.20.005 can be easily harmonized to function together properly, as they have for 35 years, without having to delete a significant portion of RCW 46.20.005, without finding that the legislature did not understand what they were doing, without assuming the role of the legislature to rewrite existing laws, without rendering older cases moot, and without causing any of the absurd results that would arise from a ruling that RCW 46.20.005 is not a lesser included offense within RCW 46.20.342(1).

CONCLUSION

Taking language of RCW 46.20.005 and applying it at face value by finding that it is indeed a lesser included offense is the best course of action. The benefits that are derived from applying RCW 46.20.005 as written demonstrate that the legislature understood the legal meaning of "lesser included offense" and intended the statute to be applied as written. Giving effect to the legislative intent that has been in place for over 35

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years and reconciling the statutes by limiting RCW 46.20.342(1) to public highways, is the best way to handle this issue.

The Court should find that RCW 46.20.005 is a lesser included offense within DWLS, and that because RCW 46.20.342(1) is the greater offence, it includes the element of public highways. Therefore, because Ms. Hancock did not operated a motor vehicle on a public highway, the Court should vacate the guilty verdict and order the entry of a not guilty verdict.

DATED this 10th day of February, 2015.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that a true and correct copy of the foregoing was sent via

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DATED this 10th day of February, 2015.

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