

66622-3

66622-3

NO. 66622-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

---

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER DAILEY,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH

---

**BRIEF OF RESPONDENT**

---

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

ANN SUMMERS  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent

King County Prosecuting Attorney  
W554 King County Courthouse  
516 3rd Avenue  
Seattle, Washington 98104  
(206) 296-9650

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 15 PM 4:22

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u> .....	1
B. <u>STATEMENT OF THE CASE</u> .....	1
1. PROCEDURAL FACTS .....	1
2. FACTS OF THE CRIME .....	2
C. <u>ARGUMENT</u> .....	4
1. KNOWLEDGE OF THE HARMFUL SIDE EFFECTS OF A PRESCRIBED DRUG IS NOT AN ELEMENT OF DRIVING UNDER THE INFLUENCE OR VEHICULAR ASSAULT .....	4
2. DAILEY INVITED ANY ERROR IN THE JURY INSTRUCTIONS.....	12
3. THE CHARGING DOCUMENT WAS NOT DEFICIENT.....	13
D. <u>CONCLUSION</u> .....	17

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Mackey v. Montrym, 443 U.S. 1,  
99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979)..... 11

Washington State:

City of Seattle v. Patu, 147 Wn.2d 717,  
58 P.3d 273 (2003)..... 12

Kaiser v. Suburban Transportation System,  
65 Wn.2d 461, 398 P.2d 14 (1965) ..... 6, 7, 8

State v. Bash, 130 Wn.2d 594,  
925 P.2d 978 (1996)..... 9, 10

State v. Carter, 127 Wn. App. 713,  
112 P.3d 561 (2005)..... 13

State v. Goodman, 150 Wn.2d 774,  
83 P.3d 410 (2004)..... 14

State v. Johnson, 119 Wn.2d 143,  
829 P.3d 1078 (1992)..... 14

State v. Kjorsvik, 117 Wn.2d 93,  
812 P.2d 86 (1991)..... 14, 15

State v. Leach, 113 Wn.2d 679,  
782 P.2d 552 (1989)..... 14

State v. Mertens, 148 Wn.2d 820,  
64 P.3d 633 (2003)..... 9

State v. Rivas, 126 Wn.2d 443,  
896 P.2d 57 (1995)..... 8

<u>State v. Vangerpen</u> , 125 Wn.2d 782, 888 P.2d 1177 (1995).....	16
<u>State v. Williams</u> , 162 Wn.2d 177, 170 P.3d 30 (2007).....	14

**Statutes**

Washington State:

1909 Wash. Laws., Ch. 249, § 275 .....	10
Laws of 1965, Ex. Sess., ch. 155, § 91 .....	7
Laws of 1979, Ex. Sess., ch. 176, § 1 .....	8
Laws of 1983, ch. 164, § 2 .....	8
Laws of 1986, ch. 153, § 2 .....	8
Laws of 1987, ch. 373, § 2 .....	8
Laws of 1993, ch. 328, § 1 .....	8
Laws of 1994, ch. 275, § 2 .....	8
Laws of 1996, ch. 199, § 8 .....	8
Laws of 1998, ch. 213, § 3 .....	8
Laws of 2001, ch. 300, § 1 .....	8
Laws of 2006, ch. 73, § 1 .....	8
Laws of 2008, ch. 282, § 20 .....	8
Laws of 2011, ch. 293, § 2 .....	8
RCW 9.94A.515 .....	11
RCW 46.56.010.....	7
RCW 46.61.502.....	5, 6, 8, 15

RCW 46.61.522.....	5, 8, 11
RCW 46.61.602.....	8

Rules and Regulations

Washington State:

CrR 3.5.....	16
--------------	----

Other Authorities

<a href="http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682155.html">http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682155.html</a> .....	16
<a href="http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html">http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html</a> .....	16

A. ISSUES PRESENTED.

1. Whether driving under the influence of a prescribed drug is a strict liability crime where the language of the statute contains no mens rea and additional considerations strongly weigh in favor of concluding that the legislature intended that driving under the influence be a strict liability crime.

2. Assuming that driving while under the influence of a prescribed drug is not a strict liability crime, whether the defendant invited any instructional error where he proposed a "to convict" instruction for driving under the influence that contained the same alleged error as the court's instructions.

3. Assuming that driving under the influence of a prescribed drug is not a strict liability crime, whether the charging document was sufficient where the language used reasonably apprised the defendant of a knowledge element.

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Christopher Dailey was charged by information with the crime of vehicular assault. CP 15. A jury found him guilty as

charged. CP 93, 119. He was sentenced to 84 months of confinement. CP 102.

## 2. FACTS OF THE CRIME.

On October 1, 2009, Mary Ann Bastrom was driving on Airport Way in Seattle when she felt a strong jolt as her vehicle was hit from behind. RP 12/22/10 24. She pulled to the side of the road and saw that the vehicle that had struck her, which was driven by Christopher Dailey, continued across the road and struck a telephone pole. RP 12/22/10 28, 76. Another motorist also saw Dailey drive into the telephone pole, and stopped to assist Bastrom. RP 12/22/10 54-57.

Officer Brian Shaw of the Seattle Police Department arrived at the scene of the collision and found Dailey walking around. RP 12/22/10 76. Dailey stated that he was "fine." RP 12/22/10 77-78, 87. Officer Shaw noted that Dailey's speech was slurred. RP 12/22/10 88. Dailey told Officer Shaw that he was driving his mother's car and that he "blacked out." RP 12/22/10 94. Dailey had trouble following Officer Shaw's directions. RP 12/22/10 97. Dailey reported that he had not been drinking alcohol but that he had taken prescription medications. RP 12/22/10 98-101. Based

on his observations, Officer Shaw requested that an officer who was a Drug Recognition Expert ("DRE") respond to the scene to evaluate Dailey. RP 12/22/10 104.

Trooper Lisa Mosely of the Washington State Patrol, a DRE, was sent to the scene and contacted Dailey. RP 12/27/10 6-9. She found Dailey sluggish, disoriented and unable to maintain his balance. RP 12/27/10 11, 23. His eyes were watery and bloodshot. RP 12/27/10 20. Trooper Mosely performed a Horizontal Gaze Nystagmus test on Dailey, which indicated that Dailey was impaired. RP 12/27/10 21. Dailey told Trooper Mosely that he was taking three prescribed medications because he was recovering from significant burn injuries. RP 12/27/10 24. He also told her he had taken "meth" a couple of days before. RP 12/27/10 25. Trooper Mosely placed Dailey under arrest. RP 12/27/10 23. He refused to allow his blood to be drawn. RP 12/27/10 26.

At the scene, Dailey produced three prescription bottles, which Trooper Mosely examined, confirming that the medications were prescribed to Dailey. RP 12/27/10 23, 25. The medications were Risperdal, Gabapentin, and Benztropine. RP 12/27/10 25. At trial, a physician testified that Benztropine, a psychiatric medication, and Gabapentin, a pain medication, both cause sleepiness.

CP 41.<sup>1</sup> The physician also testified that prescription bottles containing these medications usually contain warnings that the medications cause sleepiness, although there was no testimony as to any warning labels on the bottles that were in Dailey's possession. CP 49. Trooper Mosely returned the bottles to Dailey at the time of arrest. RP 12/27/10 54.

Mary Ann Bastrom was not injured in the collision, but her adult daughter, who was in the passenger seat, suffered a fracture to one of the vertebrae in her spine. RP 12/22/10 23, 26, 32-33; CP 34. Her spinal injury required pain medication and physical therapy, but no surgery. RP 12/22/10 34; CP 37.

C. ARGUMENT.

1. KNOWLEDGE OF THE HARMFUL SIDE EFFECTS OF A PRESCRIBED DRUG IS NOT AN ELEMENT OF DRIVING UNDER THE INFLUENCE OR VEHICULAR ASSAULT.

Dailey argues for the first time on appeal that the crime of driving under the influence of a prescribed drug contains a common law element created by the state supreme court in 1965: that the

---

<sup>1</sup> Dr. Beda's videotaped deposition for the purposes of perpetuating her testimony was played for the jury, and the transcript of her testimony is found at CP 24-60.

defendant had knowledge of the prescription drug's harmful side effects. This claim should be rejected. The case relied on by Dailey was interpreting a previous formulation of the crime of driving under the influence. It does not apply to the current formulation.

Dailey was convicted of the crime of vehicular assault based on driving while under the influence of a drug. CP 119. That crime is defined as follows by RCW 46.61.522:

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle;

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and cause substantial bodily harm to another.

RCW 46.61.522(1)(b). RCW 46.61.502 defines driving under the influence of a drug as follows:

(1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle in this state:

(b) While the person is under the influence of or affected by intoxicating liquor or any drug.

RCW 46.61.502(1)(b). RCW 46.61.502 contains a section that provides that it is not a defense that a person was lawfully using the drug at the time of the crime. That provision reads:

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

RCW 46.61.502(2).

As reflected above, the crime of vehicular assault based on driving under the influence of a drug contains three statutory elements: (1) the person operates or drives a vehicle; (2) while under the influence of a drug; and (3) causes substantial bodily injury to another. These three elements were clearly set forth in both the charging document and the jury instructions in this case.

CP 15, 81.

Dailey argues, however, that there is a fourth element to the offense not set forth in the statute: that the defendant had knowledge of the harmful side effects of a prescribed drug. Dailey relies solely on Kaiser v. Suburban Transportation System, 65 Wn.2d 461, 398 P.2d 14 (1965). In that case, a bus passenger sued a bus driver and the bus company for injuries she sustained when the driver lost consciousness and the bus hit a telephone pole. Id. at 463. The driver had taken a prescription medication for a nasal condition that caused him to lose consciousness. Id. In addressing the question of whether the driver's conduct was

negligence *per se* because he violated former RCW 46.56.010,<sup>2</sup> the court stated, "We do not think that one who innocently takes a pill, which is prescribed by a doctor, can be convicted of a crime under this statute and thus be negligent *per se* unless he has knowledge of the pill's harmful qualities." Id. at 466. The court found that the driver had no knowledge of those side effects and thus, "This involuntariness negated the mens rea and established the driver's innocence." Id. at 468.

The holding of Kaiser is inapposite because it has been superseded by subsequent changes to the definition of the crime. It is significant that in reaching this holding the Kaiser court found that the prior statute, RCW 46.56.010, contained a "mens rea." In the intervening 46 years since that decision, the crime of driving

---

<sup>2</sup> Former RCW 46.56.010 provided, in pertinent part, that "It is unlawful for any person who is . . . under the influence of any . . . drug which renders him incapable of safely driving a vehicle to drive a vehicle upon the public highways." RCW 46.56.010 was repealed in 1965. Laws of 1965, Ex. Sess. ch. 155, § 91.

under the influence has been recodified and repeatedly redefined.<sup>3</sup>

The statute in effect prior to 1965 contained a different and more stringent formulation of the elements of the crime. A careful analysis of the current statute, RCW 46.61.502, leads to the conclusion that the crime is now a strict liability offense.

When interpreting a statute, the primary objective is to carry out the intent of the legislature. State v. Rivas, 126 Wn.2d 443, 451, 896 P.2d 57 (1995). On its face, RCW 46.61.502 contains no mens rea element. In amending and recodifying this statute, the legislature did not add the Kaiser element of knowledge of the harmful side effects of a drug. Instead, RCW 46.61.502(2) explicitly states that it is not a defense that the defendant was lawfully taking the drug that affected his or her driving.

The legislature may create strict liability crimes that require no mens rea. Rivas, 126 Wn.2d at 452. In determining whether a particular statutory scheme created a strict liability offense, courts

---

<sup>3</sup> See Laws of 2011, ch. 293, § 2; Laws of 2008, ch. 282, § 20; Laws of 2006, ch. 73, § 1; Laws of 1998, ch. 213, § 3; Laws of 1994, ch. 275, § 2; Laws of 1993, ch. 328, § 1; Laws of 1987, ch. 373, § 2; Laws of 1986, ch. 153, § 2; Laws of 1979, Ex. Sess., ch. 176, § 1 (amending RCW 46.61.602). See also Laws of 2001, ch. 300, § 1; Laws of 1996, ch. 199, § 8; Laws of 1983, ch. 164, § 2 (amending RCW 46.61.522).

first look to the language and history of the statute in question.

State v. Mertens, 148 Wn.2d 820, 828, 64 P.3d 633 (2003).

In addition to statutory language, Washington courts utilize the following considerations to determine whether the legislature intended to impose strict liability. Mertens, 148 Wn.2d at 828-29 (citing State v. Bash, 130 Wn.2d 594, 605-06, 925 P.2d 978 (1996)). These are: (1) the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a “public welfare offense” that was created by the legislature (because public welfare offenses are often strict liability); (3) the extent to which a strict liability reading of the statute would encompass innocent conduct; (4) the harshness of the penalty (because the greater the punishment the more likely fault is required); (5) the seriousness of the harm to the public (which weighs in favor of a strict liability offense); (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the legislature thinks it important to stamp out harmful conduct at all costs, “even at the cost of convicting innocent-minded and blameless people”; and (8) the number of prosecutions to be expected. Id.

These considerations lead to the conclusion that driving under the influence of a prescribed drug was intended to be a strict liability offense. First, there was no such crime at common law, and thus no common law tradition of having a mental element for that crime.<sup>4</sup> Second, the crime is unquestionably a public welfare offense. In State v. Bash, 130 Wn.2d at 607, the court explained that public welfare offenses are "not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where the law requires a duty." The Bash court specifically cited highway safety laws as an example of public welfare offenses. Id. at 607. Third, one who drives while affected by a prescription drug and harms another is not engaging in entirely innocent conduct. The average citizen knows that prescription drugs can affect the senses. A person should be confident that a prescription drug does not affect his ability to drive before getting behind the wheel of a vehicle. By driving without taking such precautions, an offender puts everyone on the roadways in danger. Fourth, driving under the influence is a misdemeanor in most

---

<sup>4</sup> The crime of driving while intoxicated was first enacted in Washington in 1909. 1909 Wash. Laws, Ch. 249, § 275.

cases, which makes it less likely that the legislature intended to require fault. RCW 46.61.522(2).<sup>5</sup> Fifth, the societal harm of driving under the influence is well-documented and weighs in favor of a strict liability offense. The United States Supreme Court has recognized that the State has a "paramount interest" in preserving the safety of public highways, particularly in regard to impaired drivers. Mackey v. Montrym, 443 U.S. 1, 17, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979). Sixth, it would not be difficult for a defendant to take steps to ensure that a prescription medication does not affect his or her driving ability before getting behind the wheel of a vehicle. Seventh, the State will ordinarily be able to prove that a defendant had knowledge of the side effects of a prescription drug with a doctor's testimony regarding warnings or evidence of warning labels placed on the bottle. Finally, there are very few reported cases involving driving under the influence of a prescription drug. These considerations lead to the conclusion that the legislature intended driving under the influence of a prescription drug, like driving under the influence of liquor or an illegal drug, to be a strict liability offense. As such, the State need not prove that

---

<sup>5</sup> Vehicular assault while under the influence is a class B felony with a seriousness level of IV. RCW 46.61.522(2); 9.94A.515.

the defendant had knowledge of the harmful side effects of the prescribed drug.

2. DAILEY INVITED ANY ERROR IN THE JURY INSTRUCTIONS.

Assuming arguendo that knowledge of the harmful side effects of a drug is an element of driving under the influence of a prescribed drug (and vehicular assault based on driving under the influence of a prescribed drug), the invited error doctrine should preclude Dailey's claim that the jury was improperly instructed in this case. Dailey proposed instructions that are identical to the court's instructions, in that they contain no such knowledge element. Dailey should not be allowed to raise an error that was contained in the instructions that he himself proposed to the court.

The invited error doctrine prevents a party from setting up an error at trial and then complaining of it on appeal. City of Seattle v. Patu, 147 Wn.2d 717, 720, 58 P.3d 273 (2003). The invited error doctrine applies to "to convict" instructions that omit an essential element of the crime. Id. The invited error doctrine applies when defense counsel proposes an instruction identical to the one given

by the trial court. State v. Carter, 127 Wn. App. 713, 716, 112 P.3d 561 (2005).

In the present case, Dailey proposed a "to convict" instruction for driving under the influence. The elements of that crime, as proposed by defense counsel, did not include knowledge of the harmful side effects of a drug. CP 68. As such, the defense-proposed instruction is essentially identical to the instruction given by the trial court as to the lesser included offense of driving under the influence. CP 88. Because the elements of vehicular assault as charged in this case include the elements of driving under the influence, and because the defendant proposed an instruction as to the elements of driving under the influence that failed to include any knowledge element, this Court should hold that Dailey invited any error by proposing that the court instruct the jury in a way that he now claims is constitutionally deficient.

**3. THE CHARGING DOCUMENT WAS NOT DEFICIENT.**

Assuming arguendo that knowledge of the harmful side effects of a drug is an element of driving under the influence of a prescribed drug (and vehicular assault based on driving under the

influence of a prescribed drug), the charging document in this case, when liberally construed, sufficiently apprised Dailey of this element.

The federal and state constitutions require that the State give notice to the defendant of the charged offense so that he may prepare a defense. State v. Goodman, 150 Wn.2d 774, 784, 83 P.3d 410 (2004). The charging document must allege facts that identify the crime charged and support the elements of the charged offense. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). It must include all statutory and nonstatutory elements of the charged offense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). This requirement has been termed the "essential elements" requirement. State v. Williams, 162 Wn.2d 177, 183, 170 P.3d 30 (2007). An "essential element is one whose specification is necessary to establish the very illegality of the behavior" charged. State v. Johnson, 119 Wn.2d 143, 147, 829 P.3d 1078 (1992).

If a defendant challenges the information before verdict, the charging language must be strictly construed and the defendant need not show prejudice. Johnson, 119 Wn.2d at 143. If the challenge is raised for the first time on appeal, the court applies a

liberal test to determine whether the required elements appear in any form in the charging document. Kjorsvik, 117 Wn.2d at 105-06. The test is as follows: (1) do the necessary facts appear in any form by fair construction in the charging document; and if so, (2) can the defendant show that he or she was actually prejudiced by inartful language that caused an actual lack of notice? Id. The exact words of a common law element need not be used in the information. Id. at 109. The information is sufficient if the words used, construed according to common sense, reasonably apprise the accused of the elements of the crime.

Here, Dailey was charged with three alternative means of committing vehicular assault, including driving in a "reckless manner" and with "disregard for the safety of others." The charging document reads:

That the defendant CHRISTOPHER MICHAEL DAILEY in King County, Washington, on or about October 1, 2009, did drive or operate a vehicle in a reckless manner with disregard for the safety of others and while under the influence of intoxicating liquor or any drugs, as defined by RCW 46.61.502, caused substantial bodily harm to Renee Bastrom;

CP 15. If knowledge of the harmful side effects of a prescribed drug is an element of the crime, such knowledge would be included in driving "with disregard for the safety of others." Thus, construed

according to common sense, the language "with disregard for the safety of others" reasonably apprised Dailey of such an element.

Dailey has made no attempt to show that he was actually prejudiced by the language used in the information. The evidence adduced at trial indicates that the prescriptions were not new to Dailey<sup>6</sup>, and that the prescription bottles containing the medications would usually contain warnings that they cause sleepiness.<sup>7</sup> There is no indication that Dailey could claim that he had no knowledge of these side effects.

Finally, even if the information was constitutionally defective, the remedy is dismissal without prejudice. State v. Vangerpen, 125 Wn.2d 782, 791, 888 P.2d 1177 (1995). The State is free to refile and retry the offense for which the defendant was convicted, or any lesser included offenses. Id.

---

<sup>6</sup> At the CrR 3.5 hearing, Dailey testified that his burn injuries occurred in May of 2009, four months before the vehicle accident. RP 12/21/10 34.

<sup>7</sup> Information readily available on the Internet from the National Institutes of Health confirms that patients are advised that Gabapentin and Benzotropine are medications that may make them drowsy, and are advised "Do not drive a car or operate a motor vehicle until you know how this medication affects you."  
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a694007.html>;  
<http://www.nlm.nih.gov/medlineplus/druginfo/meds/a682155.html>.

D. CONCLUSION.

Dailey's conviction should be affirmed.

DATED this 15<sup>th</sup> day of September, 2011.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
ANN SUMMERS, WSBA #21509  
Senior Deputy Prosecuting Attorney  
Attorneys for Respondent  
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Dobson and Dana Lind, the attorneys for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAILEY, Cause No. 66622-3-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

9/15/11

Date

FILED  
COURT OF APPEALS DIV I  
STATE OF WASHINGTON  
2011 SEP 15 PM 4:22