

No. 71615-8-I

---

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

---

STATE OF WASHINGTON,

Appellant,

v.

TRAVIS J. BIRD,

Respondent.

---

BRIEF OF RESPONDENT

---

ADRIAN M. MADRONE  
WSBA No. 39226  
Attorney for Respondent

Lustick, Kaiman & Madrone PLLC  
222 Grand Ave, Suite A  
Bellingham WA 98225  
(360) 685-4221

2019 JUN 19 11:11:28  
 COURT OF APPEALS  
 STATE OF WASHINGTON  
 [Signature]

**TABLE OF CONTENTS**

INTRODUCTION ..... 1

RESPONSE TO STATE’S ASSIGNMENTS OF ERROR..... 2

STATEMENT OF THE CASE..... 2

LEGAL ARGUMENT..... 5

    1. Standard of Review..... 5

    2. The trial court correctly found that the Skagit County record was unclear, and therefore could not find proof of the predicate offense. .... 6

    3. The three types of Vehicular Assault are separate and distinct offenses, and each carry different direct and collateral penalties. .... 6

    4. The State’s argument is not supported by authority. .... 7

    5. The State’s argument asks the Court to make an impermissible inference. .... 10

    6. When a record is unclear, the rule of lenity dictates that ambiguity be resolved in favor of the defendant. .... 13

ATTORNEY FEES AND COSTS..... 13

CONCLUSION..... 14

**TABLE OF AUTHORITIES**

**Cases**

*In re Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008) ..... 9

*State v. Autrey*, 136 Wn.App. 460, 150 P.3d 580 (2006)..... 11

*State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990)..... 8

*State v. Chambers*, 157 Wn.App. 465, 477, 237 P.3d 352 (2010)..... 5

*State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)..... 13

*State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989) ..... 10, 12

*State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991)..... 13

**Statutes**

RCW 46.61.522 ..... 3

RCW 46.61.522(1)(a) ..... 6

RCW 46.61.522(1)(b) ..... 2, 6

RCW 46.61.522(1)(c) ..... 6

RCW 9.94A.505(8)..... 11

**Rules**

RAP 18.1 ..... 13

## INTRODUCTION

The issue in this case is whether the trial court correctly ruled that there was insufficient proof of a specific prior conviction necessary to elevate a DUI charge to a felony.

In 2008, Travis Bird was convicted of Vehicular Assault in Skagit County Superior Court. In 2013, Mr. Bird was charged with Driving Under the Influence (DUI) in Whatcom County Superior Court. The DUI was charged as a felony due to the prior Vehicular Assault conviction.

There are three different types of Vehicular Assault. Only a conviction of Vehicular Assault while Under the Influence elevates a future DUI charge to a felony; convictions of either of the other two types would leave subsequent DUI charges as misdemeanors.

In this case, the defense moved to dismiss the felony charge based on insufficient proof of the predicate offense. The defense argued (and continues to argue) that the record from Skagit County is unclear as to which type of Vehicular Assault Mr. Bird was convicted of, and without proof of this predicate offense the felony charge must be dismissed.

Judge Charles Snyder reviewed briefing and heard argument from both sides on this issue. Judge Snyder agreed with the defense that the Skagit County record was not clear as to which form of Vehicular Assault Mr. Bird was convicted of, and that the rule of lenity required this

ambiguity be resolved in favor of the defendant. Judge Snyder ruled that as a matter of law the State could not prove the conviction for the predicate offense of Vehicular Assault while Under the Influence, and therefore granted the motion to dismiss. Rather than refile the DUI as a misdemeanor (as the ruling would have allowed for), the State elected to pursue this appeal.

### **RESPONSE TO STATE’S ASSIGNMENTS OF ERROR**

The trial court correctly ruled that on the ambiguous record from Skagit County, it could not find the necessary proof of a conviction for Vehicular Assault while Under the Influence and therefore was required to dismiss the felony. Neither the court’s granting of the motion to dismiss nor its denial of the State’s motion to reconsider was improper.

### **STATEMENT OF THE CASE**

The defense concurs with the State’s summary of the procedural posture of the case and the basic outline of facts.

The defense points out several relevant things about the record presented here. Nowhere in the record does it state that Mr. Bird pled to or was convicted of the specific “under the influence” subsection of the Vehicular Assault statute—RCW 46.61.522(1)(b). Rather, all of the Skagit

County documents—the charging document, the guilty plea statement, the Findings of Fact & Conclusions of Law on the *Alford* plea, and the Judgment & Sentence (J&S)—show a charge, plea, and conviction for the broad offense of “Vehicular Assault – All Alternatives.”

In the language of the charging document, the three sub-types of Vehicular Assault are listed as “and/or” alternatives to each other. CP 15; *see also* Appellant’s Br. at 3. In Mr. Bird’s guilty plea statement, the language indicates, “I plead guilty to: count one Vehicular Assault in the Original Information.” CP 28. Because Mr. Bird entered his guilty plea by way of an *Alford* plea, the court entered a separate Findings of Fact & Conclusions of Law. The *Alford* plea document states, “The Court finds that Travis Bird is guilty of the crime(s) of Vehicular Assault.” CP 32. The J&S then indicates, “The defendant was found guilty on by plea of [*sic*] Vehicular Assault – All Alternatives ... RCW 46.61.522, Count I; DOV: 07/04/2008 – GUILTY PLEA.” CP 33.

The State points out that on the J&S there is a hand-written notation above the phrase “All Alternatives” that reads “(DUI).” CP 33; Appellant’s Br. at 6. There is nothing in the record as to who wrote the notation, when it was written, or what exactly it was intended to mean. At oral argument, Judge Snyder specifically pointed out the lack of information about that note, and the State conceded, “that is, of course, for

the court to determine what does it mean.” RP (Vol 1, 1/30/14) at 18. In his oral ruling, Judge Snyder pointed out, “There’s a handwritten notation ‘DUI’ above all alternatives. It’s not initialed. It’s there. You can draw inferences from it, I suppose, that it was the intent that that was the prong. That would be drawing an inference from something without any other basis to do so.” RP Vol 1 at 20.

Judge Snyder went on in his oral ruling to describe the ambiguity he was faced with:

There are facts that would indicate that he was under [the] influence. There is no conclusion by the trial court judge in Skagit County that took the plea that that, in fact, was the element that he was finding him guilty on. I have to speculate whether he was finding him guilty on one element, two elements, three elements, all elements, because when you charge all alternatives, that’s how it was charged in the information which says if it’s done that way, it says to the defendant any of these, we might prove any of these. So you have to be prepared to defend against any of these.

All that happened when the judgment and sentence was created, they took the same language and put it in the judgment and sentence which is not an indication that there was a finding that all of those elements have been found. I think it could be, I think there’s evidence to support them, but I don’t know which one that the judge did, and I don’t know that the judge did all of them. He didn’t say I’m finding him guilty under every prong. [...]

He just said I’m finding him guilty because of the facts that are here, and the facts provide evidence of guilt. Which facts are that? That he was driving recklessly, or that he was driving under the influence? I don’t know, and the rule of lenity says under these sort of circumstances, if there’s ambiguity, I think you have to resolve it in favor of the defendant, and so for this Court to find as a matter of law that he has been convicted under this particular prong isn’t clear enough, I don’t think, from the Skagit County record for this Court to be able to make that finding.

[...] I have to look at what I think the court of appeals has said in their previous rulings, and I know also how the court of appeals generally tends to apply these sorts of rules, and my belief is that they have been given instruction in a number of cases, not just in this case but in many other ways that there has to be some specificity before there can be a consequence that raises behavior from a misdemeanor level to a felony level, and I don't think that I can make a finding on this Skagit County record that is conclusive to that effect.

So because I have to make a determination as a matter of law, I don't think I can make a determination as a matter of law that he was convicted under that particular prong of the vehicular assault statute in Skagit County. He might have been. He might not have been. He might have been under that and many others, but there is no clarity here, and that's the problem that I think I have.

I am going to have to grant the motion, I think. I'm not sure that, you know, I necessarily agree with that as being the proper outcome, but it is something that I think I'm constrained to do by the law as it's been presented. RP Vol 1 at 21-23.

## **LEGAL ARGUMENT**

### **1. Standard of Review**

The defense agrees with the State that this matter is before the court for review *de novo*. Appellant's Br. at 8. The defense also agrees that it was the duty of the trial court to determine as matter of law whether the prior conviction qualified as a predicate offense. Appellant's Br. At 8 citing *State v. Chambers*, 157 Wn.App. 465, 477, 237 P.3d 352 (2010)<sup>1</sup>.

---

<sup>1</sup> In its motion to dismiss at the trial court, the defense argued that the burden was on the State to prove the predicate offense to the court beyond a reasonable doubt. Upon further review of *Chambers*, the defense concedes that the trial court makes the determination of the predicate offense as a matter of law using a preponderance standard.

**2. The trial court correctly found that the Skagit County record was unclear, and therefore could not find proof of the predicate offense.**

The trial court's rationale behind its ruling (quoted above) was correct and appropriate given the Skagit County record that the State presented. The trial court looked for specific information indicating that Mr. Bird was actually convicted of the "under the influence" subsection, and could not find it. The court did not accept the State's argument that the conviction could be inferred, and instead found that an ambiguous record is construed in favor of the defendant. This ruling was correct, and should stand on appeal.

**3. The three types of Vehicular Assault are separate and distinct offenses, and each carry different direct and collateral penalties.**

As pointed out in the trial court, the three different types of Vehicular Assault all have different ramifications and impacts upon conviction. Two types of Vehicular Assault are designated Most Serious Offenses (strike offenses)<sup>2</sup>, while the third type is not<sup>3</sup>. It is illogical to suggest that a person can be convicted of both a strike offense and a non-strike offense when pleading to one single count.

---

<sup>2</sup> RCW 46.61.522(1)(a) – Driving in a Reckless Manner; RCW 46.61.522(1)(b) – Under the Influence.

<sup>3</sup> RCW 46.61.522(1)(c) — Disregard for the Safety of Others.

Along the same line, as is quite clear in this case, a conviction of the “under the influence” type results in future DUI charges elevating to felonies, while the other two types do not result in automatic elevation. It is similarly illogical to suggest that a person can be convicted of both elevating and non-elevating offenses simultaneously when pleading to one single count.

Because the future ramifications can be so different for each of the separate subtypes of Vehicular Assault, it is the duty of the convicting court to make clear precisely what offense it is convicting a person for. If the court fails to make a clear record, the ambiguity gets resolved in favor of the defendant. That is what the trial court did in this case, and that outcome was correct.

**4. The State’s argument is not supported by authority.**

The State’s argument is that when a person is convicted of one broad offense (*e.g.*, Vehicular Assault), they are necessarily and automatically convicted of all subtypes of that offense. Specifically, the State argues, “Where a defendant is charged with multiple alternative means, a plea to the charge includes a plea to each and every alternative mean.” Appellant’s Br. at 8. Yet, the State’s cited authority does not support such a wide assertion.

The State cites *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990) as authority for its position. *Bowerman*, however, deals with a different issue than the one here. In *Bowerman*, a defendant was charged with aggravated murder in the first degree. On the first day of trial, the State added a count of first degree felony murder. The prosecutor described the added count as a lesser included offense, which could be argued to the jury as an alternative option for conviction. At the close of trial, the jury convicted the defendant of the more serious aggravated murder charge. On appeal, the defendant argued she should have been given the opportunity to plead guilty to the lesser offense, thereby avoiding the more serious penalties of the aggravated murder charge. The *Bowerman* court held that a defendant does not have the right to plead guilty to a lesser included offense in order to avoid conviction of a more serious charge. That is simply a different situation than the one before the Court here.

*Bowerman* would be relevant if Mr. Bird were presently facing the Vehicular Assault charge and was attempting to plead guilty to the “Disregard for Safety of Others” type over the State’s objection. *Bowerman* would say that Mr. Bird would not have the right to do this. He could not plead to a lesser form of Vehicular Assault in order to avoid the penalties of the more serious types. That, however, is not the issue here.

The issue here is one of proof of the type of conviction in Skagit County. *Bowerman* does not shed light on this question.

The State also cites *In re Richey*, 162 Wn.2d 865, 175 P.3d 585 (2008) as further support for its position. *Richey* is similarly distinguishable. The question before the court in *Richey* was “whether the crime of ‘attempted first degree felony murder’ exists in Washington.” *Id.* at 868. The court’s answer: no. The next question was if that offense does not exist, was the defendant’s judgment and sentence “facially invalid in light of the fact that he was charged, alternatively, with attempted first degree felony murder and attempted first degree intentional murder.” *Id.* at 870. The court’s answer: no, the J&S was not facially invalid, and therefore the defendant’s petition was time-barred. The *Richey* court cited *Bowerman* to support its holding that when a defendant is charged with two alternative forms of a single crime, the fact that one is later ruled non-existent does not invalidate the conviction.

As with *Bowerman*, the *Richey* case does not shed any particular light on the issue at hand. Again, the issue here is one of proof of the type of conviction in Skagit County. *Richey* does not assist in resolving this question.

**5. The State's argument asks the Court to make an impermissible inference.**

The State submits that if the Court does not find that Mr. Bird was convicted of the "Under the Influence" type by virtue of his pleading to the general "Vehicular Assault" offense, then the Court should look to certain facts and make the inference that he was convicted of the "Under the Influence" type.

"A presumption is only permissible when no more than one conclusion can be drawn from any set of circumstances. An inference should not arise where there exist other reasonable conclusions that would follow from the circumstances." *State v. Jackson*, 112 Wn.2d 867, 876, 774 P.2d 1211 (1989).

The issue here, identified by Judge Snyder, is that there a number of inferences that could be drawn from the Skagit County record. They include the possibility that Mr. Bird was convicted of the "Under the Influence" type, but do not preclude other possibilities. As Judge Snyder pointed out, "There are facts that would indicate that he was under [the] influence. There is no conclusion by the trial court judge in Skagit County that took the plea that that, in fact, was the element that he was finding him guilty on. I have to speculate whether he was finding him guilty on

one element, two elements, three elements, all elements...” RP Vol 1 at 21. This Court is faced with the same dilemma.

The State submits that the hand written notation of “(DUI)” above the words “Vehicular Assault – All Alternatives” on the J&S is gives “clear indication that Judge Needy was treating the vehicular assault as one committed under the DUI prong.” Appellant’s Br. at 13. However, there is nothing in the record showing that Judge Needy is actually the one who wrote the note. As Judge Snyder commented, such an interpretation of the note “would be drawing an inference from something without any other basis to do so.” RP Vol 1 at 20.

The State also suggests that the attachment of “Appendix B – DUI” to the J&S proves that the conviction was for the “Under the Influence” type. The State argues that the sentencing judge would have been operating unlawfully in imposing these conditions if Mr. Bird were not convicted of the “Under the Influence” type. The State is incorrect in this assertion.

Even a review of the State’s cited authority<sup>4</sup> makes clear that sentencing courts are given discretion to set appropriate terms of community custody, so long as the requirements are “directly related to the crime.” In Mr. Bird’s case, the facts of the incident leading to the Vehicular Assault charge could relate to either the “Under the Influence”

---

<sup>4</sup> RCW 9.94A.505(8) and *State v. Autrey*, 136 Wn.App. 460, 150 P.3d 580 (2006).

or the “Reckless Manner” type. Therefore, the sentencing judge could have reasonably imposed restrictions related to alcohol use and requirements of attending a “victim DUI panel” even if sentencing Mr. Bird under the “Reckless” prong. It would not have been unlawful for the judge to do this.

The State’s strongest argument appears to be the one related to the sentencing range. The State submits that the conviction could not have been for the “Disregard for the Safety of Others” (DSO) prong because the J&S lists a seriousness level of IV, when the seriousness level of a DSO offense would have been III. The defense concedes that this may offer some support for the State’s position. However, even if the Court accepts the State’s argument, it only lessens the likelihood of the DSO prong, while leaving the “Reckless” prong as an equal possibility for conviction.

As cited above, *State v. Jackson* sets out that “An inference should not arise where there exist other reasonable conclusions that would follow from the circumstances.” 112 Wn.2d at 876. Here, conviction under the “Reckless” prong and the “Under the Influence” prong are both reasonable possibilities, and nothing the State has submitted proves otherwise. Therefore, the Court should decline the State’s invitation to draw the impermissible inference that the conviction was specifically for the “Under the Influence” type of Vehicular Assault.

**6. When a record is unclear, the rule of lenity dictates that ambiguity be resolved in favor of the defendant.**

The rule of lenity requires the court to adopt an interpretation most favorable to the criminal defendant. *State v. Roberts*, 117 Wn.2d 576, 586, 817 P.2d 855 (1991)(citing *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)). Given the lack of clarity in the Skagit County record, Judge Snyder properly applied the rule of lenity to find in favor of Mr. Bird. The Court here should affirm Judge Snyder's application of this rule.

**ATTORNEY FEES AND COSTS**

**Mr. Bird is entitled to an award of Attorney Fees and Costs pursuant to RAP 18.1.**

In the event that this Court affirms the trial court's dismissal and denies the State's appeal, Mr. Bird would be entitled to an award of reasonable attorney's fees and costs incurred as a result of this appeal.

Mr. Bird is a young man in his mid-20s. He works a decent job, but has little disposable income. He has funded the costs of his legal representation entirely out of his own pocket, and this has caused significant financial stress for him. Though it costs the State virtually nothing to file an appeal such as this, Mr. Bird has incurred significant additional legal fees to further defend against the State's appeal.

Mr. Bird requests that if the Court finds in his favor here, it also award him an appropriate amount to cover his additional legal expenses.

**CONCLUSION**

Whatcom County Superior Court Judge Snyder correctly and appropriately ruled that based on the ambiguous record of Mr. Bird's Vehicular Assault conviction in Skagit County, he could not find as a matter of law that Mr. Bird had been convicted under the specific subsection for Vehicular Assault while Under the Influence. Without the necessary proof of this predicate offense, the trial court was required to dismiss the felony filing.

The same record is presented to this Court, and Mr. Bird respectfully requests this Court come to the same conclusion as the trial court. He respectfully asks this Court deny the State's appeal and affirm the trial court's dismissal.

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of August, 2014.

Lustick, Kaiman & Madrone PLLC

  
\_\_\_\_\_  
Adrian M. Madrone, WSBA No. 39226  
Attorney for Respondent

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

2014 AUG 19 11:11:28  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE  
BELLINGHAM  
*[Handwritten Signature]*

IN THE COUR OF APPEALS, DIVISION ONE  
OF THE STATE OF WASHINGTON

No. 71615-8-1

STATE OF WASHINGTON

DECLARATION OF SERVICE

Appellant,

vs.

TRAVIS J. BIRD

Respondent

I, Ella Peri, legal assistant to Adrian M. Madrone, attorney for the Respondent in this matter, do hereby certify that on August 18, 2014, in order to serve the Appellant for the Respondent, I caused to be sent via 4<sup>th</sup> Corner Legal Messenger a true copy of the Brief of Respondent to:

Mr. Nathan Deen  
Whatcom County Prosecutor's Office  
311 Grand Ave, Suite 201  
Bellingham, WA 98225

This is sworn under penalty of perjury under the law of the State of Washington at Bellingham, Washington on this 18<sup>th</sup> day of August, 2014.

LUSTICK, KAIMAN & MADRONE PLLC,

*Ella Peri*

Ella Peri  
Senior Legal Assistant  
Lustick, Kaiman & Madrone, PLLC

