

FILED

JUN 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B.

28296-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MATTHEW A. LOGES, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

APPELLANT'S BRIEF

Julia A. Dooris
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
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Spokane, WA 99203
(509) 838-8585

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by finding the search of the truck was necessary for the purposes of community caretaking under *State v. Smith*, 137 Wn. App. 262, 153 P.2d 199 (2007).
2. The trial court erred by refusing to grant Mr. Loges's CrR 3.6 motion, requesting that the court suppress the evidence discovered in the unlawful search of the truck.
3. The trial court erred in its finding No. 8: "The defendant said he had no idea how the truck came to be where it was." (CP 27)
4. The trial court erred in its finding No. 34: "The testimony of Mr. Seroka and Ms. Whitney is not reliable as it makes no sense, based on the location of the truck on SR 240 not being in the way to Prosser from Kennewick, the time frame, or why Ms. Whitney drove to Kennewick. (CP 28)
5. The trial court erred in its finding No. 35: "If Mr. Seroka's testimony was believed, the defendant drove the truck at least some distance, as it was found completely in the lane of travel when the officers arrived, while Mr. Seroka stated that he moved the truck off the roadway." (CP 28)

6. Insufficient evidence exists to support conclusion of law No. 4: “The defendant was in actual physical control of the truck at the time he was contacted by Officer Griffiths. (CP 29)
7. Insufficient evidence exists to support conclusion of law No. 6: “The defendant is guilty of Felony Physical Control of a Motor Vehicle and Driving While License Suspended in the Second Degree.” (CP 29)
8. The trial court erred by convicting Mr. Loges of both Felony Physical Control of a Motor Vehicle and Driving While License Suspended in the Second Degree.

B. ISSUES

1. When a vehicle is obstructing a lane of traffic on a rural highway at approximately midnight, does the trial court err by finding a warrantless search of the vehicle in the hopes of locating an ignition key lawful under the “community caretaking exception” when no evidence exists that a tow truck could not be called to impound the vehicle to remove it from the roadway?

2. Has the State proven beyond a reasonable doubt that a defendant has “actual physical control” of a vehicle when he is asleep, adamantly and repeatedly asserts someone else was driving, the driver and a witness both corroborate that someone else was driving, no evidence exists that the defendant knew the key was in the vehicle, but the police find an ignition key underneath the driver’s seat, wedged next to the transmission hump?

3. Does insufficient evidence exist to support a conviction of driving with a suspended license when the State fails to introduce any evidence that the defendant drove the vehicle?

C. STATEMENT OF THE CASE

Matthew Loges and his neighbor and co-worker David Seroka had an arrangement: Mr. Seroka drove Matthew Loges to and from work in Mr. Loges’s truck because Mr. Loges’s license was suspended. (RP 107)

On May 5, 2008, at the end of the workday, Mr. Seroka drove Mr. Loges to a co-worker’s house to discuss a side job. (RP 109) Mr. Loges drank alcohol. (RP 111) At some point, Mr. Seroka wanted to go home,

so he called his wife¹ and asked her to come pick him up. (RP 112) Ms. Whitney agreed and drove to the designated pick-up place, but by the time she arrived, Mr. Loges decided he was ready to go home. (RP 113)

Mr. Seroka was unfamiliar with the area where the co-worker lived. He described it as “way out in --- at the end of civilization of the Tri-Cities as I know it.” (RP 109) Mr. Seroka has only a basic understanding of about half of the thoroughfares in the Tri-Cities area, and the three major highways, but other than that, he needs a map to get around. (RP 109)

Mr. Seroka told his wife to follow him, while he drove the truck, home. (RP 113-14) At some point, Mr. Loges’s truck overheated and the engine stalled. (RP 115) Mr. Seroka attempted to steer the truck to the shoulder of the freeway. (RP 115)

Mr. Seroka planned to drive with his wife to Mr. Loges’s house, hook up the car dolly and return for the truck. (RP 117-18) Mr. Loges wanted to stay with the truck, so Mr. Seroka took the keys and left with his wife. (RP 116-17) Mr. Loges was in the passenger seat when Mr. Seroka left. (RP 117)

¹ Mr. Seroka and Ms. Brenda Whitney were not legally married, but they have a “common law” marriage. (RP 114)

Mr. Seroka did not know the name of the location where he left Mr. Loges and the truck. (RP 114)

Meanwhile, at about 11:19 p.m., a motorist called 911 and relayed that a truck was in the lane of travel at I-82 and Van Giesen, and a man appeared to be slumped over the steering wheel. (RP 65; 154)

Two officers responded to the call: Richland Police Officer Brad Griffiths and Washington State Patrol Trooper Jodi Metz. (RP 63-68; 151-53)

Officer Griffiths arrived first and roused the sleeping Mr. Loges. (RP 71) Mr. Loges was in the driver's seat of the truck. (RP 69) The keys were not in the ignition. (RP 80) When Mr. Loges started speaking, the officer smelled alcohol. (RP 72) Mr. Loges insisted that he had not driven the truck, but he would not tell the officers who the driver was. (RP 87)

The officer ran Mr. Loges's name through dispatch, and learned Mr. Loges had an outstanding arrest warrant and that his license was suspended. (RP 73) Officer Griffiths immediately moved Mr. Loges out of the car, handcuffed him and put him in the patrol car. (RP 79)

Next, the officers searched the truck. (RP 80) Trooper Metz found a key to the ignition underneath the driver's seat, near the transmission hump. (RP 157; 166) Officer Griffiths searched the car incident to arrest.

(RP 80) Trooper Metz searched the car because they needed to get the car off the road. (RP 173-74) At the station, Mr. Loges's BAC tests yielded a .166 and .167. (RP 191)

Sometime in the early morning hours², Mr. Loges called the Seroka house. He told Ms. Whitney that he had a ride. (RP 129-30)

Mr. Loges was arrested and charged with felony physical control of a motor vehicle while under the influence, and driving while license suspended or revoked in the second degree. (CP 1)

Mr. Loges waived his right to a jury, and the court heard both the CrR 3.6 motion and the trial at the same time. (*See* RP 37-39; 50-52)

Regarding the positioning of the truck on the roadway, Mr. Seroka testified:

The lights came on and got it over to the side of the road. Rolled it as far as I could to get it over to the side of the road. I didn't push or anything.

(RP 115)

I cannot be a hundred percent certain, but I mean, I thought it was far enough out of the oncoming – oncoming traffic to where, you know, it should have been okay.

(RP 116)

I can't – I don't honestly remember. This was a year ago, okay? Once that truck died and it got over to the side of the road, the last thing I did was look down and see where the

² Mr. Seroka thought the call came around 2:30-3:00 a.m. (RP 128). Ms. Whitney thought it was around 1:00 a.m. (RP 149)

hell the tires were – excuse me. Look down and see where the heck the tires were at.

(RP 126)

I got it over to the right as far as I possibly could.

(RP 126-27)

Ms. Whitney corroborated the same facts that Mr. Seroka provided. (RP 136-37) She said she met the truck at 82 and 395. (RP 139) She testified that when Mr. Seroka pulled the truck over, she pulled in behind it. (RP 141) Ms. Whitney also said that when Mr. Loges called to say he had a ride, it was “early, early morning.” (RP 149)

The court’s findings and conclusions from the CrR 3.6 hearing indicated that the search was impermissible under *Arizona v. Gant*³, and that the inevitable discovery rule did not apply. (CP 25) But the court concluded in part:

8. The officers subjectively believed that assistance was necessary in this case to protect the safety of the community from an imminent threat.

9. A reasonable person in the same situation would have the same concern that the truck in the lane of travel late at night on a dark road with a speed limit of 55 mph was a threat to community safety

10. There is a reasonable basis associating the cab of the truck with the circumstances due to the location of the truck in the lane of travel and the belief that the key needed to move the truck would likely be found in the truck.

³ *Arizona v. Gant*, -- U.S. --, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

11. The search of the truck was necessary for the purposes of community caretaking, see e.g. State v. Smith, 137 Wn. App. 262 (2007)

(CP 25) The court denied the motion to suppress the key. (CP 25)

The court found Mr. Loges guilty on both counts. (CP 29) In its findings related to the trial, the court found in part:

30. Mr. Seroka did not know precisely where he left the truck or where in the roadway the truck was located.

34. The testimony of Mr. Seroka and Ms. Whitney is not reliable as it makes no sense, based on the location of the truck on SR 240 not being in the way to Prosser from Kennewick, the time frame, or why Ms. Whitney drove to Kennewick.

35. If Mr. Seroka's testimony was believed, the defendant drove the truck at least some distance, as it was found completely in the lane of travel when the officers arrived, while Mr. Seroka stated that he moved the truck off the roadway.

36. If Mr. Seroka's testimony is not believed, the defendant drove the truck to the location where it was found.

(CP 28-29)

The court concluded, "The defendant was in actual physical control of the truck at the time he was contacted by Officer Griffiths." (CP 29) The court found him guilty. (CP 30)

The trial court attempted to explain its oral ruling at the presentment of the findings and conclusions:

THE COURT: All right, thank you. I'm a little bit fuzzy, but my recollection was that he was of the opinion that he was completely off the roadway. When asked could he be absolutely completely positive on that, I think he answered

no. But that's not the only thing I'm going on. His wife testified that when she stopped at the side of the roadway, she stopped behind his vehicle. Well, if he's not off the roadway, the problem would have been corrected at that time. So that's why I find that he was completely off the roadway – or that's why I find that that's the better interpretation of his testimony is that he was all the way off the roadway.

(6/11/09 RP 27)

The Court found Mr. Loges had an offender score of 7, and thus the standard range for count I was 51-60 months, with a maximum term of 5 years. Count II carried a standard range of up to 365 days. (CP 32)

The court sentenced Mr. Loges to 60 months on Count I, and 365 days on Count II. (CP 35) The court also imposed community custody or placement on Count I from 9 to 18 months not to exceed the statutory maximum of 60 months. (CP 35)

He appeals.

D. ARGUMENT

1. THE SEARCH OF THE TRUCK AFTER MR. LOGES'S ARREST WAS NOT JUSTIFIED UNDER THE COMMUNITY CARETAKING PROVISION EXCEPTION.

The Fourth Amendment to the United States Constitution guarantees the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

U.S. Const. amend. IV. The Fourth Amendment to the United States Constitution, applies to the states by the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

Generally, under the Fourth Amendment, a police officer's seizure of either evidence of a crime in a constitutionally protected area or seizure of a crime suspect must be supported by a judicial warrant based on probable cause. A warrantless seizure is presumed unreasonable under the Fourth Amendment. *See, e.g., Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). The presumption of unreasonableness may be rebutted by a showing by the State that a specific exception to the warrant requirement applies in the case under consideration. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). "The State bears the burden of showing a seizure without a warrant falls within one of these exceptions." *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

In Washington, the "'community caretaking function' exception to the warrant requirement encompasses the 'search and seizure' of automobiles, emergency aid, and routine checks on health and safety." *State v. Acrey*, 148 Wn.2d 738, 749-50, 64 P.3d 594 (2003).

Community caretaking is "based on a service notion that police serve to ensure the safety and welfare of the citizenry at large. For

example, this may involve approaching a seemingly stranded motorist or lost child to inquire whether he or she needs assistance, assisting persons involved in a natural disaster, or warning members of a community about a hazardous materials leak in the area.” John F. Decker, *Emergency Circumstances, Police Responses, and Fourth Amendment Restrictions*, 89 *J.Crim. L. & Criminology* 433, 445-46 (1999)

In the case of routine checks on health and safety, the proper determination is whether an officer’s encounter with a person is reasonable, a determination based on balancing the individual’s interest in freedom from police interference against the public’s interest in having the police officers perform a community caretaking function. *Acrey*, 148 *Wn.2d* at 750.

Community caretaking is “totally divorced from a criminal investigation.” *Kinzy*, 141 *Wn.2d* at 385. Whether a stop incident to “community caretaking” is “reasonable” requires balancing the competing interests involved in light of all the surrounding facts and circumstances, with a focus on the individual’s interest in freedom from police interference against the public’s interest in having the police perform a “community caretaking function.” *Acrey*, 148 *Wn.2d* at 750.

Courts must “cautiously apply the community caretaking function exception because of the potential for abuse.” *Kinzy*, 141 *Wn.2d* at 391.

Once the community caretaking function applies, police officers may conduct a non-criminal investigation so long as it is necessary and strictly relevant to the community caretaking task at hand. *Kinzy*, 141 Wn.2d at 388.

In this case, the trial court's conclusion that the search of Mr. Loges's truck was necessary under the community caretaking function is untenable. The court summarily concluded that because the truck was located in a lane of travel on a highway, it was a threat to community safety.

Yet evidence was introduced that the police cars were on scene, parked behind the car, with lights flashing. The lights from the police cruiser would certainly be seen and give adequate warning to passing motorists.

Nor was any evidence introduced that no tow trucks were available to impound and tow the truck to a secure location. In fact, Officer Griffiths testified that calling a tow truck was a viable option: "The only thing that I could do if it's blocking the lane of travel, and that's call for a tow truck and have the vehicle impounded." (RP 81)

Given the circumstances, including the late hour, the rural area and what was likely very light traffic, the officer's decision to search the car based upon "community caretaking" was unreasonable. Mr. Loges was

already in custody. The “caretaking” investigation was complete. The only reason to search the car was to find a key in order to find evidence of additional possible charges for Mr. Loges. But community caretaking must be “totally divorced from criminal investigation.” *Kinzy*, 141 Wn.2d at 385.

In short, the officers’ search of the truck was not necessary, nor a legitimate caretaking function. Because the court must apply this exception to the warrant requirement narrowly, the court should find that the search was not authorized under the “community caretaking” exception, and reverse the trial court’s finding related to the discovery of the key.

2. MR. LOGES WAS NOT IN ACTUAL POSSESSION OF THE TRUCK, SINCE NO EVIDENCE EXISTS HE KNEW THE KEY WAS LOCATED IN THE TRUCK.

An appellate court reviews the evidence in a light most favorable to the State to determine “whether ... any rational trier of fact could have found guilt beyond a reasonable doubt” where a criminal defendant challenges the sufficiency of the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Salinas*, 119 Wn.2d at 201. “A

claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.*

An inference is a logical deduction or conclusion that the law allows, but does not require, following the establishment of the basic facts. *State v. Jackson*, 112 Wn.2d 867, 874, 774 P.2d 1211 (1989) (quoting 5 K. Tegland, Wash. Prac., Evidence § 65, at 127- 28 (2 ed. 1982)). When no direct evidence is presented regarding a material element of the crime, a reviewing court looks to whether there is adequate circumstantial evidence from which a jury could reasonably determine that the element is proven. *State v. Bailey*, 52 Wn. App. 42, 51, 757 P.2d 541 (1988), *affirmed*, 114 Wn.2d 340, 787 P.2d 1378 (1990).

Inferences and presumptions may be used to assist the prosecution in proving the elements of the crime charged but they cannot lessen or shift the prosecution's burden of proof on any element. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). Due process requires that when an inference is used as proof of an element of a crime, the connection between the foundational fact and the elemental fact must be rational. *Ulster*, 442 U.S. at 171, 99 S. Ct. at 2232 (Powell, J., dissenting). When an inference is the sole and sufficient proof of an element of a crime, the rational connection between the foundational fact and the elemental fact must be sufficient to support the inference beyond a

reasonable doubt. *Ulster*, 442 U.S. at 166-67, 99 S. Ct. at 2229-30. In cases where the inference is only some proof of an element of a crime, the rational connection must only support the inference as being more likely than not. *County Court of Ulster County, N.Y. v. Allen*, 442 U.S. 140, 165, 167, 99 S. Ct. 2213, 60 L. Ed. 2d 777 (1979).

In order to convict Mr. Loges of actual felony physical control of a motor vehicle while under the influence, the State had to prove that Mr. Loges had (1) “actual physical control of a vehicle” and (2) within two hours after being in actual physical control of the vehicle, an alcohol concentration of 0.08 or higher. RCW 46.61.504(1)-(2).

“Actual physical control” is not defined in the statute. *See* RCW 46.61.504. Physical control is deemed to exist when a person has authority or control over a vehicle that is reasonably capable of being made operable. *State v. Smelter*, 36 Wn. App. 439, 442, 674 P.2d 690 (1984). The suspect must have the keys or other actual means of controlling the vehicle. *State v. Maxey*, 63 Wn. App. 488, 493, 820 P.2d 515 (1991).

Washington cases addressing the issue have generally only found physical control if the driver was in the vehicle and in possession of the keys. *See City of Mount Vernon v. Quezada-Avila*, 77 Wn. App. 663, 893 P.2d 659 (1995) (actual physical control found

when Quezada-Avila was asleep behind the wheel with keys in the ignition of a vehicle with two flat tires); *Smelter*, 36 Wn. App. 439, 674 P.2d 690 (1984) (physical control found where Smelter was seated behind the wheel of a vehicle that had run out of gas).

Where the defendant appeared intoxicated and was seated in the driver's seat of a parked car that had its engine running, probable cause existed to arrest for being in physical control of a vehicle while intoxicated. *Spokane v. Badeaux*, 20 Wn. App. 731, 734, 581 P.2d 1088 (1978). Also, a person in the driver's seat of a vehicle with a running engine can be found in control even when that person is asleep. *Edmonds v. Ostby*, 48 Wn. App. 867, 870, 740 P.2d 916 (1987); *Badeaux*, 20 Wn. App. at 733 (driver was intoxicated stupor and "dozed off" while being questioned by officer); *State v. Reid*, 98 Wn. App. 152, 988 P.2d 1038 (1999).

Actual physical control statutes have been characterized as "preventive measure[s]," which "deter individuals who have been drinking intoxicating liquor from getting into their vehicles, except as passengers[.]" *Smelter*, 36 Wn. App. at 444 (quoting *State v. Schuler*, 243 N.W.2d 367, 369-70 (N.D.1976))

Physical control also "means the defendant is in a position to physically regulate and determine movement or lack of movement of the

vehicle." *State v. Beck*, 42 Wn. App. 12, 15, 707 P.2d 1380 (1985). "[A]ctual physical control" meant "the authority to manage." *State v. Smelter*, 36 Wn. App. at 442. In *Smelter*, the court upheld a conviction where the trooper observed the defendant seated behind the wheel of a vehicle stopped, with its engine off, partly on the left shoulder of an interstate freeway. *Smelter*, 36 Wn. App. at 440.

When the vehicle was where it was by means of a person's choice, that person was in actual physical control, whether or not they, or someone else, moved the vehicle safely off the roadway; thus a person may be in actual physical control even if someone else had been driving. *State v. Votava*, 149 Wn.2d 178, 66 P.3d 1050 (2003). In *Votava*, the defendant was reclined in the driver's seat, asleep, with the lights on and the engine running.

The significant difference in this case is that Mr. Loges did not have the key in the ignition. Nor is it apparent that he was aware that the key was located anywhere within the truck. He maintained that he was not driving. Two additional witnesses testified that he did not drive. The officer's ability to unearth a key underneath a seat near the transmission hump does not arise to proof that Mr. Loges had "actual physical control" of the truck. The record does not support the court's finding to the contrary. The conviction should be reversed.

3. INSUFFICIENT EVIDENCE EXISTS TO SUPPORT THE CONVICTION OF DRIVING WITH A SUSPENDED LICENSE.

Under RCW 46.20.342(1), “it is unlawful for any person to drive a motor vehicle in this State while that person is in a suspended or revoked status ...” In a criminal prosecution, due process requires the State to prove every element of the charged crime beyond a reasonable doubt. *State v. Teal*, 152 Wn.2d 333, 337, 96 P.3d 974 (2004); *In re Winship*, 397 U.S. 358, 361-64, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

In this case, in order to convict Mr. Loges, the State had to prove that he drove the truck. But the State simply did not and could not establish this. No witnesses saw Mr. Loges drive the truck. The key was not in the ignition. From the fact that the key was not in plain sight, and was not easily and readily accessible, the court cannot reasonably infer that Mr. Loges was the driver of the truck.

Moreover, Mr. Loges provided two witnesses who testified, unrebutted, that someone else drove the truck. The court’s inference must be based upon established facts. The fact that the truck was stopped in a lane of traffic does not lead to an inference that Mr. Loges drove it there. The court’s conclusion to the contrary is insupportable by the evidence.

Indeed, if the State was capable of proving that Mr. Loges drove the truck, certainly the State would have charged Mr. Loges in count one with driving under the influence, not actual control of the car. *See* RCW 46.61.502.

Because the State failed to introduce any evidence that Mr. Loges drove the truck, the evidence is insufficient to support the conviction for driving with a suspended license. This conviction should be reversed.

E. CONCLUSION

The trial court erred by finding that the search of the truck was permissible under the community caretaking exception to the warrant requirement. The search was completed *after* the officers ascertained whether Mr. Loges needed assistance, and indeed, after his arrest. Other reasonable options existed for moving the vehicle off the roadway. The court's broad interpretation of a narrow exception to the warrant requirement should be reversed.

Moreover, insufficient evidence exists to support the conviction for actual physical control of the vehicle. The State failed to introduce any evidence that Mr. Loges was in any sort of control of the truck, or that he was even aware that an ignition key was present inside the vehicle.

Finally, the State failed to prove that Mr. Loges ever drove the truck. No reasonable inference exists that he drove. In the absence of any evidence or reasonable inference, the evidence is insufficient to support the conviction of driving with a license suspended. Mr. Loges's convictions should both be reversed.

Dated this 17th day of June, 2010.

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