

NO. 282961-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

MATTHEW ALLEN LOGES, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 08-1-00574-1

BRIEF OF RESPONDENT

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ISSUES

1. Was Trooper Metz's search prompted by a valid concern for community safety, falling under the community caretaking exception to the warrant requirement?
2. Did the trial court have sufficient evidence to find the defendant guilty of the crime of Felony Physical Control of a Motor Vehicle While Intoxicated?
3. Did the trial court have sufficient evidence to find the defendant guilty of the crime of Driving While License Suspended in the Second Degree?

STATEMENT OF THE CASE

On May 5th, 2008, at 11:18 p.m., 911 dispatchers received a call that a red Dodge Ram truck was parked in the middle of the outside-northbound lane of State Route 240. (RP 6/1/09, 65, 68). The car was in the area of SR 240 and Van Giesen. (RP 6/1/09, 65). That area of Richland is primarily residential, and SR 240 has a total of eight lanes of traffic. (RP 6/1/09, 65-66). Officer Griffiths of the Richland Police Department was the first to the scene. (RP 6/1/09, 64, 69). He noted that there was a man

sitting behind the steering wheel of the truck, reclined back, who appeared to be unconscious. (RP 6/1/09, 69). The truck was parked fully in the lane of travel with the lights and engine off, well away from any streetlights. (RP 6/1/09, 68).

Officer Griffiths approached the vehicle, concerned for the driver. (RP 6/1/09, 69-70). Officer Griffiths was able to rouse the man, later identified as the defendant, by shaking him and yelling. (RP 6/1/09, 72). Officer Griffiths detected the odor of intoxicants on the defendant's breath when he started talking. (RP 6/1/09, 72). Officer Griffiths ran a standard check on the defendant while waiting for a backup officer to arrive. (RP 6/1/09, 74). The information returned that the defendant's driver's license was suspended in the second degree, that he was required to have an interlock device, and that the Washington Department of Corrections had issued a warrant for his arrest.

(RP 6/1/09, 74). Trooper Jodi Metz of the Washington State Patrol arrived as a back-up officer while Officer Griffiths was running the check. (RP 6/1/09, 74).

The defendant was placed under arrest. (RP 6/1/09, 78). Officer Griffiths noted that the defendant was unsteady on his feet, had bloodshot-watery eyes, and was very uncoordinated. (RP 6/1/09, 78-79). Officer Griffiths elected not to ask the defendant to perform standardized field sobriety tests at that time because there was no protection from oncoming traffic, and it was not a safe location. (RP 6/1/09, 79). The defendant was placed in the backseat of the patrol car and advised of his rights. (RP 6/1/09, 79). Officer Griffiths and Trooper Metz then searched the vehicle. (RP 6/1/09, 80).

Trooper Metz noticed there was no key in the ignition, but located a key between the seat cushions near the transmission hump. (RP 6/1/09,

157). Using the key, Trooper Metz started the truck and moved it off to the side of the roadway. (RP 6/1/09, 158-159). Trooper Metz waited at the scene with the truck, supervised it being loaded onto the tow truck, and removed from the scene. (RP 6/1/09, 159, 163).

Officer Griffiths transported the defendant to the Benton County Jail, where he offered the defendant an opportunity to perform standardized field sobriety tests. (RP 6/1/09, 81, 83). The defendant completed the administrative breath alcohol testing process and provided two samples, .166 and .167. (RP 6/1/09, 93-95; 6/2/09, 191). The defendant claimed that he had not been driving, but he refused to identify the driver of the automobile. (RP 6/1/09, 87).

The defendant was subsequently charged with one count of Felony Physical Control of a Motor Vehicle, and one count of Driving While License Suspended in the Second Degree. (CP 1-2).

A trial was held on June 1-2, 2009. The defendant waived the presence of a jury, so the case was tried before Benton County Superior Court Judge Spanner. (RP, 6/1/09, 38-39). During the trial, the defendant called David Seroka. (RP 6/1/09, 105). Mr. Seroka testified that he had driven the defendant to work, then to a co-worker's home, where the defendant consumed alcohol. (RP 6/1/09, 108, 110-111). Mr. Seroka testified that he had been driving the truck home when the engine stopped, so he rolled the truck as far to the side of the road as possible. (RP 6/1/09, 115). Brenda Whitney was following Mr. Seroka back to Prosser when the truck's engine stopped. (RP 6/1/09, 116, 141). When Mr. Seroka left, the defendant was in the passenger seat, leaning up against the passenger door. (RP 6/1/09, 117). Mr. Seroka stated that the truck was not fully in the lane of travel when he left it. (RP 6/1/09, 122).

Judge Spanner found the defendant guilty of both charges. (CP 29; 30). He found that even if Mr. Seroka's testimony was to be accepted as true, it also gave rise to the possible inference that the automobile had been pulled fully over to the side of the road when Mr. Seroka left, meaning the truck must have been driven some distance to be fully in the lane of travel when Officer Griffiths arrived. (CP 28). The Judge noted specifically that Mr. Seroka did not state that he left the vehicle on SR 240. (RP, 6/2/09, 302).

The defendant appeals these convictions. (CP 40-48).

ARGUMENT

1. Trooper Metz's search was prompted by a valid concern for community safety, falling under the community caretaking exception to the warrant requirement.

In reviewing a trial court's denial of a suppression motion, the court reviews the trial court's finding of facts for 'substantial

supporting evidence.' *State v. Lawson*, 135 Wn. App. 430, 434, 144 P.3d 377 (2006) (citing *State v. Mendez*, 137 Wn.2d 208, 214, 970 P.2d 722 (1999)). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Unchallenged findings of fact are viewed as verities on appeal. *Dickson v. Kates*, 132 Wn. App. 724, 730, 133 P.3d 498, 502 (2006). The trial court's conclusions of law are reviewed de novo. *State v. Levy*, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).

Officer Griffith and Trooper Metz responded to a call of a vehicle blocking a lane of traffic on a dark highway, which posed a hazard to the public. (RP 06/01/09, 65, 68, 74). The officers arrived, and agreeing with the assessment, searched the car for a key, in order to move the automobile to the side of the road, where it could safely await pick up by a tow truck, prior

to its impoundment. (RP 06/01/09, 68, 74, 156-159). The officers' concerns were thoroughly reasonable and justified.

The trial court made two findings of fact which, when taken as verities due to their status as unchallenged, show that the police were acting in their community caretaking function and that this concern was perfectly justified. Findings of Facts number 12 and 13 states:

12. Officer Griffiths and Trooper Metz both wanted to move the truck as quickly as possible, due to safety concerns of the truck being in the lane of travel.

13. The tow truck operator when arriving on the scene would ask for the keys ask [sic] it would speed up the process of removing the truck.

(CP 24).

When analyzing if a warrantless search falls within the community caretaking exception (sometimes known as the 'emergency' exception) Washington Courts have created a three part test:

(1) the officer subjectively believed that someone likely needed assistance for health and safety reasons; (2) a reasonable person in the same situation would similarly believe that there was

a need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place searched.

State v. Hos, 154 Wn. App. 238, 246-247, 225 P.3d 389 (2010) (quoting *State v. Kinzy*, 141 Wn.2d 373, 386-87, 5 P.3d 668 (2000)).

The community caretaking exception to the warrant requirement exists for a specific purpose. "This exception recognizes the community caretaking function of police officers and exists so police can aid citizens and protect property." *State v. Sadler*, 147 Wn. App. 97, 124, 193 P.3d 1108 (2008) (citing *State v. Menz*, 75 Wn. App. 351, 353, 880 P.2d 48 (1994)).

Officer Griffith and Trooper Metz were faced with what was very clearly a dangerous situation. A truck without the lights on was sitting fully in the lane of travel of an eight-lane highway, far from any streetlight. (RP 06/01/09, 65, 68). The location was such that Officer Griffiths believe it would be too dangerous to conduct the field sobriety tests in that location. (RP 06/01/09, 79). They proceeded to search the cab

of the truck, in an area where one is reasonably likely to find the keys to such a vehicle; the item sought to alleviate the danger.

The defendant mentions several factors which he believes alleviated the hazard. First, that the lights on the police cruiser would adequately warn oncoming traffic. (App. Brief, 12). However, the defendant neglects to mention the fact that the truck was parked in the lane of travel of a large highway, with a speed limit of 55 miles per hour, within the City of Richland. (RP 06/01/09, 65-66). The court specifically noted the convincing nature of Trooper Metz's testimony in regard to her fears on the subject of the dangerous situation. (RP, 6/2/09, 267).

Second, the defendant highlights the possibility that a tow truck could be summoned. However, awaiting the tow truck would have simply lengthened the time this danger to public safety existed. Furthermore, upon arrival of the tow truck, the operator would ask for the key.

Without it, a tow truck driver must engage in the far more time-consuming process of loading the automobile onto the dolly, and then onto the back of the tow truck. (RP, 6/1/09, 174). Again, this would only lengthen the time that the situation remained a danger to the public. The trial court was correct in finding that the search was justified under the community caretaking exception, and this ruling should be affirmed. (CP 25).

2. **Sufficient evidence was presented for the trial court to find the defendant guilty of both charges.**

The standard of review for whether sufficient evidence is presented to support a conviction is well defined:

In determining whether sufficient evidence supports a conviction, "[t]he standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d

216, 221, 616 P.2d 628 (1980)). Under this standard, we resolve all inferences in favor of the State. *State v. Smith*, 104 Wn.2d 497, 507, 707 P.2d 1306 (1985). 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). *State v. Maxey*, 63 Wn. App. 488, 491, 820 P.2d 515 (1991).

A. Felony Physical Control of a Motor Vehicle.

In order to prove the crime of Physical Control of a Motor Vehicle While Under the Influence, the State must prove that the person has actual physical control of a motor vehicle within the State of Washington while under the influence of intoxicating liquor or any drug, or while having an alcohol concentration of 0.08 or

higher within two hours of being in actual physical control, as shown by analysis of the person's breath or blood made pursuant to RCW 46.61.506. RCW 46.61.504(1). For this crime to be a felony, the State must also prove that the person was previously convicted of either vehicular homicide, or vehicular assault while under the influence of intoxicating liquor. RCW 46.61.504(6)(b).

Actual physical control is not defined in the statute, and as such, has been left to the courts to resolve. The definition adopted by the courts is well summarized in *State v. Votava*:

An officer may charge actual physical control of a vehicle when a person is in the position to control the movement or lack of movement of the vehicle. See *State v. Beck*, 42 Wn.App. 12, 15, 707 P.2d 1380 (1985). When the evidence gives rise to a reasonable inference that the vehicle was where it was by a person's choice, that person is in actual physical control of the vehicle. *State v. Smelter*, 36 Wn.App. 439, 445, 674 P.2d 690 (1984). A person may be in actual physical control even if someone else is driving. See, e.g., *In re Arambul*, 37 Wash.App. 805, 808, 683 P.2d 1123 (1984) (affirming negligent

homicide conviction of passenger who was in actual physical control when she grabbed the steering wheel).

State v. Votava, 149 Wn.2d 178, 184, 66 P.3d 1050 (2003).

In this case, the State proved that the defendant was found in the driver's seat of his own truck, fully in the lane of travel on State Route 240. (CP 23; RP 06/01/09, 68). The defendant does not dispute that he provided breath samples over 0.08 within two hours after being contacted. The State also proved that the defendant's prior conviction for Vehicular Homicide results in this case being a felony. (CP 32; RP 6/2/09, 232). The defendant refused to name the driver of the vehicle, though he claimed that someone else was driving. (RP 06/01/09, 87).

The defendant attempted to call Mr. Seroka and Ms. Whitney in support of his claim. However, the court reviewed the credibility of their testimony, and found it lacking. (CP 28). The court entered a finding of fact to this fact, to which the defense assigns error. (App. Brief,

1 - Assignment of Error No 4). However, issues of credibility are for the trial court to determine, and the Court of Appeals will not disturb them. *State v. Wright*, 155 Wn. App. 537, 556, 230 P.3d 1063 (2010) (citing *State v. Camarillo*, 115 Wash.2d 60, 71, 794 P.2d 850 (1990)).

The trial court had a sound basis for its determination of the guilt of the defendant. If Mr. Seroka's testimony was to be believed, then the defendant exercised control over the truck for some distance, as Mr. Seroka left the truck off the traveled portion of the highway. If Mr. Seroka's testimony was not credible, then the defendant drove the truck the entire distance from Kennewick onto SR 240. Here, the trial court did not find the testimony credible based on the illogical sequence of events and the location where the truck was located. (RP 6/2/09, 301-303).

Here, the State has clearly established that a "rational trier of fact could have found the

essential elements of the charged crime beyond a reasonable doubt." *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). The conviction should be affirmed.

**B. Driving While License
Suspended in the Second
Degree.**

In order to prove the crime of Driving While License Suspended in the Second Degree, the State must prove that the defendant's privilege to drive was suspended due to a reason listed in the statute and not eligible to be reinstated, and that the defendant was driving a motor vehicle in the State of Washington. RCW 46.20.342(1)(b).

In this case, the defendant agreed that his license was suspended in the second degree. The sole issue raised was whether or not he was actually driving the vehicle. However, based on the testimony of the defendant's own witness, David Seroka, the truck was off the side of the

road and the defendant was in the passenger seat when Mr. Seroka left the vehicle. (RP 06/01/09, 116-117). When the police arrived, the truck was fully in the lane of travel, and the defendant was in the driver's seat. Mr. Seroka also never testified that he left the vehicle on SR 240. It was not logical for the truck to be on SR 240, as it is not on the route from Kennewick to Prosser. Given this evidence and the inferences which must be drawn, the trial court's conclusion that the defendant was driving is clearly reasonable. Sufficient evidence was presented to prove the defendant guilty of the crime of Driving While License Suspended in the Second Degree.

CONCLUSION

The trial court was correct in denying the defendant's motion to suppress the key located in his vehicle. The trial court correctly found that the officer's search was a community caretaking function. The State presented sufficient evidence

that the defendant was in actual physical control of a motor vehicle, that this conviction was a felony based on the defendant's criminal history, and that the defendant was Driving While License Suspended in the Second Degree. The rulings of the trial court should be affirmed, and the case remanded for resentencing.

RESPECTFULLY SUBMITTED this 18th day of August 2010.

ANDY MILLER

Prosecutor



MEGAN A. BREDEWEG, Deputy

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ORIGINAL

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

NO. 282961

Respondent,

vs.

DECLARATION OF SERVICE

MATTHEW ALLEN LOGES,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on August 18, 2010.

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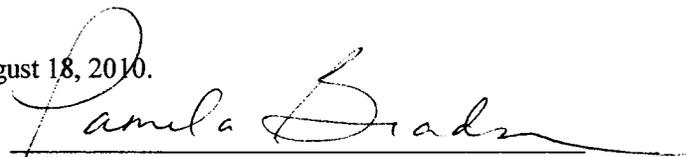
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

EXECUTED at Kennewick, Washington, on August 18, 2010.



 PAMELA BRADSHAW