

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HUYEN BICH NGUYEN aka GABRIELLE NGUYEN,

Petitioner.

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

A party may not encourage the trial court to commit an error at trial and then raise a claim based on that error on appeal. Moreover, under the controlling Washington statute and case law, physical control of a motor vehicle while under the influence is a necessarily-included offense of driving under the influence, because physical control is committed every time DUI is committed. In this case, Nguyen encouraged the trial court, sitting as the factfinder, to consider physical control as an included offense of DUI, and the trial court found her guilty of that included offense. Should this Court reject Nguyen's claim that physical control is not an included offense?

B. STATEMENT OF THE CASE

The defendant, Huyen Bich Nguyen aka Gabrielle Nguyen, was charged with possession of cocaine and driving under the influence (DUI). CP 1-6. Trial began in March 2006 before the Honorable Richard Eadie. Nguyen waived her right to a jury trial,

and accordingly, Judge Eadie presided as both judge and factfinder.¹ CP 39.

The trial testimony established that Washington State Patrol Trooper Christopher Magallon saw Nguyen's car stopped in the gore point near the Howell Street onramp to southbound I-5. 1RP 27-28.² The engine was running, and the car was partially in the lane of travel. 1RP 28-29, 114. Nguyen, who was in the driver's seat and the sole occupant of the car, was using her cellular telephone; Trooper Magallon waited for Nguyen to finish her call, at which point Nguyen indicated that she intended to drive away. 1RP 29-30.

Magallon smelled an odor of alcoholic beverages and observed that Nguyen was acting strangely. 1RP 31. Nguyen stated that she had been drinking wine at Rocksalt, a Seattle nightclub. 1RP 33. Magallon asked Nguyen to move her car to the nearby shoulder to perform some field sobriety tests, and Nguyen agreed to do so. 1RP 34-35, 39. Instead, however, Nguyen drove

¹ Nguyen's attorney stated that they were raising an entrapment defense to DUI and an unwitting possession defense to possession of cocaine, and that these defenses were more appropriate for a bench trial. 1RP 6, 10-11.

² The verbatim report of proceedings comprises four volumes, which are referenced as follows: "1RP" is March 23, 2006; "2RP" is March 27, 2006; "3RP" is March 28, May 18, June 15, and July 27, 2006; and "4RP" is July 19, 2006.

to the next exit, left the freeway, turned a corner, and eventually parked near the Washington Convention Center. 1RP 40. Nguyen performed poorly on the field sobriety tests. 1RP 45-60. In addition, Nguyen's behavior was erratic; she asked Magallon repeatedly if he had a girlfriend, and at one point she tried to hug him. 1RP 62-63. Magallon suspected that Nguyen was under the influence of stimulants as well as alcohol. 1RP 64-65. He placed her under arrest. 1RP 65-66.

Trooper Magallon searched Nguyen's car incident to arrest and found a baggie of cocaine and a small straw in the center console. 1RP 67; CP 26-30. Magallon took Nguyen to Harborview for a blood draw, the analysis of which revealed that Nguyen had both alcohol and cocaine in her system. 1RP 75-76, 97; CP 26-30.

In her defense, Nguyen offered telephonic testimony from a witness who claimed that he had put the cocaine in Nguyen's car without her knowledge when he and Nguyen were kissing in the car earlier in the evening. 2RP 164, 169-70. Nguyen also testified, and asserted that she had almost no memory of the incident. 2RP 186.

After hearing the evidence, the trial court suppressed Nguyen's post-arrest statements pursuant to Nguyen's motion to

suppress. 2RP 200-01, 205-07, 215-17; 3RP 279-80; CP 169-73.

These statements included Nguyen's admission that she drove from Rocksalt to the gore point on I-5. 1RP 86-90. In anticipation of the trial court's ruling, the State argued in its closing that the trial court should consider the charge of physical control of a vehicle while under the influence as a "lesser included offense" of DUI. 2RP 234-36, 242. Nguyen did not object, nor did she argue that the trial court should not consider physical control as an included offense. Rather, in addition to arguing entrapment as a defense to DUI, Nguyen's counsel argued that she was "safely off the roadway" at the point where Trooper Magallon contacted her. 2RP 251, 256-59. Being "safely off the roadway" is a complete defense to physical control under RCW 46.61.504(2), but it is not a defense to DUI.

The trial court found that Nguyen's defense witness was not credible, and so the court found her guilty of possession of cocaine. In addition, the trial court found that there was insufficient admissible evidence to prove that Nguyen had driven the car from Rocksalt to the gore point, and the court would not consider Nguyen's driving after Magallon asked her to move her car. But the court also found that Nguyen was not safely off the roadway when

she was stopped in the gore point. Accordingly, the trial court found that Nguyen was guilty of the included offense of physical control. 3RP 275-81; CP 157-61. During the court's ruling, Nguyen's counsel confirmed that the court had found her guilty "on the lesser included" of physical control. 3RP 280. The court imposed a standard range sentence for possession of cocaine and the mandatory minimum sentence for physical control, to be served concurrently. CP 183-89, 190-93.

Nguyen appealed, and claimed *inter alia* that physical control is not an included offense of DUI because the potential penalties for the two crimes are the same, both being gross misdemeanors. The Court of Appeals rejected all of Nguyen's claims, and affirmed her convictions in an unpublished opinion. State v. Nguyen, 140 Wn. App. 1020, 2007 WL 2411680.

C. ARGUMENT

1. THE DEFENDANT AGREED AT TRIAL AND THE CONTROLLING STATUTE ESTABLISHES THAT PHYSICAL CONTROL IS AN INCLUDED OFFENSE OF DUI.

Nguyen urges this Court to hold that physical control of a motor vehicle while under the influence is not a "lesser included" offense of DUI because both offenses are gross misdemeanors

with the same potential penalties. This argument should be rejected. First of all, Nguyen agreed at trial that the trial court *should* consider physical control as an included offense of DUI; therefore, this claim is barred under the invited error doctrine and RAP 2.5. Moreover, the plain language of the controlling statute, and the cases applying that statute, establish that physical control *is* an included offense of DUI. All of the elements of physical control are necessary elements of DUI, and physical control is necessarily committed every time DUI is committed. This Court should reject Nguyen's claim, and affirm.

a. The Invited Error Doctrine Bars This Claim.

The invited error doctrine dictates that a party may not set up a potential error at trial and then claim that error on appeal. In re Dependency of K.R., 128 Wn.2d 129, 147, 904 P.2d 1132 (1995); State v. Henderson, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). Under this doctrine, a claim cannot be raised on appeal "if the party asserting such error materially contributed thereto." In re K.R., at 147. The invited error doctrine applies when included offenses have been erroneously submitted to the factfinder, no matter whether the defendant actually proposed the included offense or

merely acquiesced to it. See State v. Bailey, 114 Wn.2d 340, 787 P.2d 1378 (1990); State v. Lewis, 15 Wn. App. 172, 548 P.2d 587, rev. denied, 87 Wn.2d 1005 (1976).

Furthermore, the question of whether an included offense should be considered by the factfinder is a statutory issue, not a constitutional one. See State v. Tamalini, 134 Wn.2d 725, 728, 953 P.2d 450 (1998); State v. Scott, 110 Wn.2d 682, 688 n.5, 757 P.2d 492 (1988). Accordingly, an alleged error regarding an included offense should not be considered for the first time on appeal, because such a claim does not concern a manifest error of constitutional magnitude. RAP 2.5(a).

In this case, Nguyen did more than merely acquiesce to the State's request for the trial court to consider physical control as an included offense of DUI. In fact, Nguyen's counsel took the opportunity presented by the State's request and devoted a substantial portion of his closing argument to asking the court to find that Nguyen was "safely off the roadway," which is a complete statutory defense to physical control, but not DUI, under RCW 46.61.504(2). RP (3/27/06) 256-59. Nguyen's counsel also submitted case law to the trial court regarding this defense in

support of the argument that Nguyen was safely off the roadway.

RP (3/27/06) 256, 271.

At no point did Nguyen argue that physical control was *not* an included offense of DUI, nor did Nguyen argue that the included charge was inappropriate based on the facts of the case. Rather, Nguyen encouraged the trial court to consider physical control as an included offense. Based on this record, Nguyen cannot claim that the trial court should not have considered physical control as an included offense because any possible error was invited, and because RAP 2.5(a) precludes raising this claim for the first time on appeal.

This Court's analysis need go no further. But if this Court considers Nguyen's claim on the merits, it fails nonetheless.

b. The Statute And Case Law Defeat This Claim.

As a general rule, a criminal defendant cannot be convicted of a crime with which she has not been charged. But Washington's legislature has codified the exception to this general rule for crimes necessarily included in the commission of the charged crime:

In all other cases, the defendant may be found guilty of an offense the commission of which is

necessarily included within that with which he is charged in the indictment or information.

RCW 10.61.006.

In applying this statute, Washington courts employ a well-established, two-part test for determining whether an offense is legally included within the charged offense, and whether the factfinder should be allowed to consider that offense during its deliberations based on the facts of the case. First, each necessary element of the included offense also must be a necessary element of the crime charged (the legal prong). Second, the trial evidence must support an inference that the included offense was committed instead of the crime charged (the factual prong). State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); State v. Berlin, 133 Wn.2d 541, 545-46, 550, 947 P.2d 700 (1997). If both prongs of this test are satisfied, then the statute entitles either party to ask for the included offense to be submitted to the factfinder for consideration. Tamalini, 134 Wn.2d at 728. Notably, the legal prong of this well-established test does not include any consideration of what the respective penalties may be, but focuses solely on the elements of the crimes in question.

Accordingly, the Court of Appeals has previously held that physical control is a necessarily-included offense of DUI. See McGuire v. City of Seattle, 31 Wn. App. 438, 442, 642 P.2d 765 (1982), rev. denied, 98 Wn.2d 1017 (1983) (holding that DUI "contains all of the elements of 'being in physical control' and has the additional element of vehicular motion"). And even in reversing a portion of McGuire regarding the "safely off the roadway" defense to physical control, this Court has also acknowledged that physical control is indeed a "lesser offense" of DUI. See State v. Votava, 149 Wn.2d 178, 186, 66 P.3d 1050 (2003) (observing that there was no evidence that the defendant drove, "which is why [the State] amended the charge [of DUI] to the lesser offense" of physical control). The only difference between these two offenses is that one requires proof of driving while the other does not. Physical control is thus an included offense of DUI, because physical control is necessarily committed every time DUI is committed.

Nonetheless, Nguyen argues that this Court should engraft a requirement onto RCW 10.61.006 that an included offense must carry lesser penalties than the charged crime in order to meet the legal requirements for a "lesser included" offense. This argument

must be rejected based on the plain language of the statute, which evidences a clear legislative intent contrary to Nguyen's position.

This Court's primary duty in interpreting any statute is to give effect to the legislature's intent. Moreover, the first principle of statutory construction is that when a statute's plain language is clear and unambiguous, the Court will go no further to ascertain legislative intent, and the Court must construe the statute as written. State v. Cromwell, 157 Wn.2d 529, 534, 140 P.3d 593 (2006). In this case, the plain language of the statute is clear and unambiguous.

As set forth above, the statute plainly states that an included offense is "an offense *the commission of which is necessarily included* within that with which [the defendant] is charged[.]" RCW 10.61.006 (emphasis supplied). Therefore, the statute unambiguously establishes that a crime is an included offense if all the essential elements necessary for its *commission* are contained within the crime charged. Berlin, 133 Wn.2d at 548. Put another way, an offense is included in another if the included offense is necessarily committed every time the charged crime is committed. Thus, the statute is focused solely upon the elements necessary for "the commission of" a crime, not the potential punishment that may

flow from a conviction for that crime. In fact, the statute is actually entitled "*Included offenses*," not "*Lesser offenses*." Although the case law typically uses the term "lesser included offenses" – likely because included offenses usually do carry lesser penalties – the term "lesser" is nowhere to be found in the statute itself.

If the legislature *had* intended to require that included offenses must carry lesser penalties than charged crimes, the legislature certainly could have written the statute that way, as at least one other state legislature has done. See Me. Rev. Stat. Ann. tit. 17-A, § 13-A(2) (2008) (expressly requiring that an included offense "is an offense *carrying a lesser penalty*" than the charged offense) (emphasis supplied). But Washington's legislature did not write the statute this way. Rather, as Washington courts have held repeatedly, the legal test for included offenses under RCW 10.61.006 is focused entirely upon the elements necessary to commit the crimes in question. See Workman, 90 Wn.2d at 447-48; Berlin, 133 Wn.2d at 545-46. Nguyen's argument is without merit, and this Court should affirm.

c. State v. Weber Does Not Support This Claim.

Despite the plain language of the statute, Nguyen argues that this Court's decision in State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), dictates that included offenses must have lesser penalties than the charged offense. More specifically, Nguyen states in her petition for review that Weber "stands for the rule that the magnitude of the penalty is critical to determining whether one offense is a lesser included offense of another." Petition for Review, at 11. This argument is without merit, because Weber and other cases addressing the issue of multiple punishments for double jeopardy purposes have no application here.

The issue in Weber was "[w]hether second degree attempted murder or first degree assault is the 'lesser' offense for double jeopardy purposes" in a case where the defendant was charged with both crimes and a jury had found the defendant guilty of both crimes. Weber, 159 Wn.2d at 258, 265. On its face, this is a fundamentally different question from the question presented in this case. Accordingly, Weber may be distinguished from this case on any number of grounds.

First, Weber addresses what should occur after the factfinder has already convicted a defendant of two charged

offenses that are the same in fact and law for double jeopardy purposes. See Weber, 159 Wn.2d at 265-66. This case, by contrast, concerns whether an included offense that has not been charged may even be considered by the factfinder in the first place. Moreover, neither of the two crimes at issue in Weber (attempted murder and assault) is an included offense of the other because each crime contains elements that the other does not. Weber, 159 Wn.2d at 266; see also State v. Valentine, 108 Wn. App. 24, 27, 29 P.3d 42 (2001). In this case, by contrast, all the elements of physical control are necessary elements of DUI. Furthermore, nowhere in Weber did this Court analyze or even mention RCW 10.61.006. Given that this statute controls what constitutes an included offense in Washington, it would be rather extraordinary if this Court in Weber had engrafted a new provision onto the statute without even mentioning it.

In sum, Weber and this case address completely different legal concepts that apply in completely different circumstances. Weber simply has no application here, and Nguyen's reliance is misplaced.

d. Other States Have Rejected This Claim.

Lastly, Nguyen cites case law from Ohio and California in her petition for review to support her claim that this Court should engraft a requirement onto RCW 10.61.006 that included offenses must carry lesser penalties than the charged offense. See Petition for Review, at 9. However, as Nguyen acknowledges, other states that have considered this claim have rejected it, as this Court should.

Many state courts have considered this claim and have rejected it on grounds that the essential elements of the crimes in question, and not their potential penalties, dictate whether one crime is included in another. See, e.g., Nicholson v. State, 656 P.2d 1209, 1212 (Alaska Ct. App. 1982) (the term "lesser" for purposes of a lesser included offense "refers to the relation between the elements of an offense not the relation between their penalties"); State v. Caudillo, 124 Ariz. 410, 412-13, 604 P.2d 1121 (1979) ("whether the penalty is less or the same, an offense is necessarily included if all the elements thereof are contained within the elements necessary to prove the offense charged"); Lee v. United States, 668 A.2d 822, 826-27 (D.C. Ct. App. 1995) (the "traditional approach" to included offenses focuses on elements,

not penalties); Sanders v. State, 944 So.2d 203, 206 (Fla. 2006) ("included offenses are those offenses in which the statutory elements . . . are always subsumed" within the charged crime); State v. Gilman, 105 Idaho 891, 895, 673 P.2d 1085 (Idaho Ct. App. 1983) ("the doctrine of the lesser included offense is not limited to an offense less serious than the crime charged"); Brown v. State, 261 Ind. 169, 171, 301 N.E.2d 189 (1973) (Indiana constitution prohibits *greater* penalties for an included offense, but it may have the *same* penalties as the crime charged); State v. Gallup, 500 N.W.2d 437 (Iowa 1993) (elements control this analysis and "it makes no difference that the lesser included offense here carries a higher penalty"); State v. Berberich, 248 Kan. 854, 860, 811 P.2d 1192 (1991) (Kansas statute does not require an included offense to carry a lesser penalty); Hardy v. State, 301 Md. 124, 132-34, 482 A.2d 474 (1984) (a "greater" offense may have a lighter penalty than a "lesser included" offense, although actual sentence may not exceed maximum for crime charged); People v. Torres, 222 Mich. App. 411, 419, 564 N.W.2d 149, rev. denied, 456 Mich. 876, 569 N.W.2d 166 (1997) (under Michigan statute, "an offense may be inferior to another even if the penalties for both offenses are identical"); State v. Gresham, ___ N.W.2d ___, 2008

WL 2787712 (Neb. 2008) ("penalties are not a factor in determining whether one offense is lesser included"); State v. Young, 305 N.C. 391, 393, 289 S.E.2d 374 (1982) (North Carolina statute does not require lesser penalties for an included offense); Johnson v. State, 828 S.W.2d 511, 515-16 (Tex. App. 1992) ("one offense may be a lesser-included offense of another even if it carries the same penalty"). These holdings are consistent with Washington's statute and case law.

On the other hand, state courts that have reached a contrary conclusion have done so largely on the basis of the word "lesser," which does not appear in RCW 10.61.006, or on the basis of that state's established jurisprudence. See, e.g., State v. Huber, 555 N.W.2d 791, 795 (N.D. 1996) (finding that physical control is a "lesser included" of DUI, and observing that "[t]he term lesser included offense has been used both in the sense of lesser penalties and in the sense of fewer elements"); Sanders v. State, 479 So.2d 1097, 1105 (Miss. 1985) (noting that "all of this Court's cases . . . have dealt with an inferior offense necessarily included within the more serious offense"). These holdings are inconsistent with Washington's statute and case law.

This Court should hold, consistently with many other states, that RCW 10.61.006 is focused on essential elements, not penalties. Accordingly, this Court should affirm.

D. CONCLUSION

For the foregoing reasons, and for the reasons stated in the opinion of the Court of Appeals, this Court should hold that physical control while under the influence is a necessarily-included offense of DUI under RCW 10.61.006.

DATED this 18th day of August, 2008.

Respectfully submitted,

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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 Huyen Bich Nguyen, the appellant, at 625 N. Jackson Avenue, Suite D-7, Tacoma, WA 98406, containing a copy of the Brief of Respondent, in STATE V. HUYEN BICH NGUYEN, Cause No. 80752-3, in the Supreme Court, 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.

Wynne Brame
Done in Seattle, Washington

August 18, 2008

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