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THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH SANDHOLM,

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

SECOND SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ARGUMENT

In *State v. Peterson* the Court noted “There simply is no bright-line rule by which the courts can determine whether the legislature intended to provide alternate means of committing a particular crime.” 168 Wn.2d 763, 769, 230 P.3d 588 (2010); *accord*, *State v. Owens*, 180 Wn.2d 90, 96, 323 P.3d 1030 (2014). But as the Court articulated in *State v. Arndt* the fundamental question is whether the “statute . . . clearly answers this question upon its face” 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976). Determining what the legislature intended is the function of the rules of statutory construction. *Jametsky v. Olsen*, 179 Wn.2d 756, 762, 317 P.3d 1003 (2014). In other words, determining whether the Legislature intended to create alternative means is simply a task of statutory construction.

In *State v. Franco*, this Court held RCW 46.61.502 defined three alternative means of committing the offense of driving under the influence. 96 Wn.2d 816, 821, 639 P.2d 1320 (1982). The Court said:

We see no reason to construe the present statute in a manner inconsistent with our views on prior statutes or with the clear, concise, unambiguous language of the statute itself. We, therefore, conclude that under the statute there are three alternate ways of committing the crime entitled DWI.

Id.

This Court does not “lightly set aside precedent.” *State v. Kier*, 164 Wn.2d 798, 804, 194 P.3d 212 (2008). The doctrine of *stare decisis* “requires a clear showing that an established rule is incorrect and harmful before it is abandoned.” *In re Rights to Water of Stranger Creek & Tributaries in Stevens County*, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). *Franco*’s reliance on the plain language of the statute and on the structure of other statutes other is entirely consistent with basic tenants of statutory construction. The Court’s conclusion in *Franco* is both correct and is certainly not harmful.

1. This Court’s interpretation in *Franco* of the plain language of RCW 46.61.502 is correct.

This Court

[d]etermine[s] legislative intent from the statute’s plain language, “considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.

State v. Conover, __ Wn.2d __, 355 P.3d 1093, 1096 (2015) (quoting *Association of Washington Spirits & Wine Distributors. v. Washington State Liquor Control Board*, 182 Wn.2d 342, 350, 340 P.3d 849 (2015)).

On its face, former RCW 46.61.502 indicates the Legislature created alternative means of committing the offense of driving under

the influence. This intent is made clear by the plain language and structure of the statute. It is further illustrated by specific and separate affirmative defenses which apply to some but not all of the alternatives. Further, the Legislature created specific mandatory penalties which do not apply equally to the acts set forth in the separate subsections of the statute. Finally, the intent of former RCW 46.61.502 is clarified by the current version of the statute.

a. The structure and plain language of the statute reveal the Legislature's intent to create separate alternative means.

Former RCW 46.61.502 provided in relevant part:

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

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or

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

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

As is clear, the former statute first described a per se violation where the person's blood-alcohol level was .08 or higher within two hours of driving. Importantly, the first subsection, unlike the remaining two, does not on its face require the State prove the blood-alcohol level

at the time of driving, but only with two hours of driving. Believing the Legislature did not intend to divorce proof of driving from proof of intoxication, and wishing to avoid impermissibly shifting the burden of proof, the court recognized subsection (a) includes an implied element that the person's blood-alcohol level was above the legal limit when driving. *State v. Crediford*, 130 Wn.2d 747, 759-60, 927 P.2d 1129 (1996). Because it negates this implied element, if the defense set forth in former RCW 46.61.502(3) is raised "the State must assume its burden of proving that the defendant did not drink after driving or that their BAC was not influenced by what he or she drank after driving." *State v. Robbins*, 138 Wn.2d 486, 496, 980 P.2d 725 (1999).

Because they specifically require proof of driving while affected by alcohol or drugs, subsections (b) and (c) do not include the two-hour rule or the corresponding implied element. Moreover, by its own language, the affirmative defense does not apply to either subsection (b) or (c). Former RCW 46.61.502(3) "[I]ndividual subsections are not addressed in isolation from the other sections of the statute." *In re Adams*, 178 Wn.2d 417, 424, 309 P.3d 451 (2013). Instead, when interpreting the meaning of subsections within a statute courts look to the preceding and subsequent subsections as well as the remainder of

the statute. *Id.*; *In re Welfare of A.T.*, 109 Wn. App. 709, 716, 34 P.3d 1246 (2001). The Legislature's intent may be derived from the statutory structure or scheme it uses. *See e.g., State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010) (concluding Legislature intended subsection RCW 9.94A.525 to be applied in the order in which they are listed.)

Each statutory provision is intended to "effect some material purpose." *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). The Legislature's creation of the two-hour rule, the implied element, and affirmative defense which applies to only one of the three subsections reveals the Legislature intended that subsection to describe an alternative means of committing the offense. That recognition leads inescapably to the conclusion that the two remaining subsections also separately define separate alternative means. Any other conclusion would require one to read the statute as saying a person commits the offense if she does "(a)" or if she does "(b) and/or (c)." That ignores the structure of the statute and fails to give effect to the legislative intent.

That the Legislature's use of separate subsections indicates separate alternative means is consistent with the interpretation given other statutes employing similar structures. For example, the three

subsections in RCW 9A.32.020(1), the first degree murder statute, describe separate alternative means of committing murder. *State v. Fortune*, 128 Wn.2d 464, 467, 909 P.2d 930 (1996). The same is true of second degree murder. RCW 9A.32.050(1); *State v. Ramos*, 163 Wn.2d 654, 661, 184 P.3d 1256 (2008). Similarly, the subsections in RCW 9A.36.021 define alternative means of committing second degree assault. *State v. Smith*, 159 Wn.2d 778, 790, 154 P.3d 873 (2007). Having employed that same structure in former RCW 46.61.502, and because subsection (a) separately defines an alternative means, the Legislature must have intend subsections (b) and (c) to define separate alternative means.

A superficial reading on *Peterson* might lead one to argue that where a statute describes a single result which can be achieved in various ways it describes a single act or crime. That analysis is contrary to the above case. For example a murder results in the death of another person, regardless of whether the murder is intentional or committed in the course of a felony. Yet this Court has long recognized felony murder and intentional murder are alternative means of committing that offense. Such a superficial analysis would result in the undoing of a substantial amount of this Court precedent.

In *Owens* this Court noted its conclusion that the trafficking stolen property statute only defined two alternative means was supported by how closely related the described acts were. 180 Wn.2d at 99. The Court noted “it would be hard to imagine” a scenario where a person organized a theft but did not plan it or directed the theft but did not manage it. *Id.* Here, by contrast, it is easy to imagine a scenario where a person’s blood alcohol level is above .08 within two hours after driving, but they were not under the influence of marijuana. So too, one can readily envision a scenario where a driver has a THC level in excess of 5.00 but does not have a blood alcohol level of greater than .08 or even .00. It is as easy to imagine these scenarios as one where a person commits premeditated murder but does not commit a murder in the commission of a specified felony. Those logical distinctions are readily apparent in how the Legislature structured the relevant statutes. As with the murder statute, former RCW 46.61.502 defined alternative means of committing the offense of driving under the influence.

That intent is further illustrated by the Legislature’s use of different language in subsections (b) and (c). “The drafters of legislation . . . are presumed to have used no superfluous words and [courts] must accord meaning, if possible, to every word in a statute.”

State v. Roggenkamp, 153 Wn.2d 614, 624, 106 P.3d 196 (2005) (Internal citations and brackets omitted); *accord State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014). Subsection (b) concerns situations where a person is under the influence of “intoxicating liquor **or** any drug” while subsection (c) concerns situations where the driver is under the combined influence of “intoxicating liquor **and** any drug.” The Legislature’s use of the disjunctive in subsection (b) and conjunctive in subsection (c) must have some material effect.

To give independent meaning to the separate provisions, subsection (b) must require the State prove a person was under the influence of intoxicants but not drugs, **or** that he was under the influence of drugs but not intoxicants. Or, arguably, the State could prove that each independently affected the person’s ability to drive to an appreciable degree. But what the State cannot do is present evidence of the presence of both drugs and alcohol and simply argue that the person’s driving was affected to an appreciable degree without establishing which caused the impairment. To construe the statute in that fashion would improperly render subsection (c) superfluous. *K.L.B.*, 180 Wn.2d at 742.

b. *The portions of former RCW 46.61.502 regarding specific affirmative defenses and the evidentiary value of breath tests further illustrate the Legislature's creation of alternative means.*

The former statute provides further indication of the legislative intent to create separate alternatives in the provisions detailing specific defenses and the use of evidence. Former RCW 46.61.502 provided:

....

(3) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

....

First, the "in violation" language used in these subsections followed by reference to specific subsections strongly suggests the

former statute described three distinct alternatives each defined by a subsection in former RCW 46.61.502(1). Indeed, if the statute defined only a single offense it would be unnecessary to designate any subsection at all. Moreover, language describing a “violation” of a statutory provision is how the Legislature describes crimes. Thus, the “in violation” language followed by specific and separate references to the individual subsections strongly suggests (a), (b) and (c) define separate means.

In addition, language separately describing violations of only (a) or (b) or (c) - *i.e.*, “(1)(b) or (c)” - would be entirely unnecessary if the statute as a whole only described a single offense. If they jointly describe one offense the “or” would be an “and” as anytime there was a violation of (b) there would be a violation of (a) and (c) and vice versa. Further, the language “violation of subsection (1)(b) or (c)” demonstrates those subsections define separate alternatives.

c. The penalty provisions in RCW 46.61.5055 illustrate the Legislature created alternative means of committing the offense.

The mandatory penalties for driving under the influence set out in RCW 46.61.5055 are gradated based upon the number of prior offenses from zero to four. The mandatory minimum penalties at each

level are then differentiated based upon the blood-alcohol level or the refusal to provide a sample. As an example with three prior offenses a refusal to provide a sample or a blood-alcohol level in excess of .15 results requires a sentence of no less than 120 days. RCW

46.61.5055(3)(b). Based upon the same three prior offenses a blood-alcohol level of less than .15 or the lack of a result for some reason other than a refusal yields a sentence of only 90 days. RCW

46.61.5055(3)(a)

A fact which increases a mandatory minimum is an element of the offense which the State must prove to a jury beyond a reasonable doubt. *Alleyne v. United States*, __ U.S. __, 133 S. Ct. 2151, 2158, 186 L. Ed. 2d 314 (2013). However, these additional elements do not apply uniformly to the three alternatives. For example, the refusal element could never apply under subsection (a), the per se alternative, as that alternative will only apply with a valid test. The greater than .15 element, by contrast, would only apply under the per se alternative as that is the only alternative in which a test result exceeds .08. The existence of these additional elements which apply to some but not all of the subsections illustrates the three subsections define separate alternatives of the offense.

The creation of additional elements and mandatory penalties which do not apply equally to each subsection indicates the individual subsections define separate alternative means.

d. The current version of the statute further illustrates the Legislature's intent.

Since 2013, RCW 46.61.505(1) has contained a fourth subsection defining a per se violation for a level of THC in excess of 5.00. Thus, under the current structure, subsections (a) and (b) separately define per se alternatives for alcohol and marijuana respectively. It is reasonable to conclude the Legislature intended to differentiate between alcohol and marijuana in the non per se alternatives, as they did just that in the per se alternatives. It would ignore the statutory structure, and be illogical, to conclude the Legislature intended to set out separate alternative means in each of subsections (a) and (b) but then altered its intent such that subsections (c) and (d) describe a single third alternative.

Additionally, like the per se alcohol alternative, the per se THC alternative employs the two-hour rule and affirmative defense. RCW 46.50.502(3)(b). It must then include the same implied element recognized in *Crediford*. However, the affirmative defenses and implied elements remain inapplicable to the remaining two subsections.

Unlike the mandatory penalties for alcohol, there are no graduated minimum penalties based upon increasing levels of THC. Thus, while under the former statute the mandatory sentence for a blood-alcohol level in excess of .15 could only apply to two of three subsections; it can now only apply to three of four subsections. Further, while the mandatory penalties for a refusal could previously apply to two of three subsections, they can now apply only to two of four.

The current statute cements the conclusion that the statute has always and continues to set forth separate alternative means.

e. The Legislature intended to set out three alternative means in former RCW 46.61.502.

The doctrine of legislative acquiescence recognizes that if the Legislature does not alter a statute after it has been interpreted by this Court, at some point that inaction indicates the Legislature's agreement with the Court's construction. *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165, 181, 149 P.3d 616 (2006). That presumption grows where the Legislature amends the statute but does not alter the relevant portions. *Kier*, 164 Wn.2d at 805.

Franco interpreted RCW 46.61.502 as setting forth three alternative means of committing the crime. Even assuming that was not the Legislature's intent in 1982, in the 33 years since the Court's

opinion, the Legislature has amended RCW 46.61.502 numerous times. Laws 2011 ch. 293 § 2; Laws 2008 ch. 282 § 20; Laws 2006 ch. 73 § 1; Laws 1998 ch. 213 § 3; Laws 1994 ch. 275 § 2; Laws 1993 ch. 328 § 1; Laws 1987 ch. 373 § 2; Laws 1986 ch. 153 § 2. In all of these amendments the Legislature has never altered the relevant structure or language of the statute or in any way indicated its disapproval of the conclusion of *Franco* that the statute creates three alternative means. Had the Legislature disagreed it could have easily collapsed the three subsections into one. Alternatively, the Legislature could have combined subsections (b) and (c) to read

While the person is under the influence of or affected by intoxicating liquor or any drug or the combined influence of intoxicating liquor and any drug.

The Legislature has done neither. In fact, as the above analysis reveals, the Legislature continues to differentiate between the subsections in a way that indicates the Legislature intends them to be alternative means.

The conclusion of *Franco* is correct.

2. The conclusion in *Franco* that the Legislature intended to set forth alternative means of committing the offense is not harmful.

Even if the State could establish the unanimous conclusion of *Franco* that the Legislature intended to create alternative means was

incorrect, the State must still establish it is harmful. *Stranger Creek*, 77 Wn.2d at 653. For 33 year the State has successfully prosecuted hundreds of thousands of cases of driving under the influence. The conclusion of *Franco*, even if incorrect has in no way frustrated that end. That is so because recognizing a fact is an alternate means of committing the offense does not alter the State's burden.

The prosecution will be forced only to establish each necessary element of a criminal offense to a unanimous jury. But this is a burden to which it is accustomed; [*In re Winship*, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)] established this requirement some time ago

Franco, 96 Wn.2d at 837 (Utter, J. dissenting in part).

Even if incorrect, the conclusion of *Franco* cannot be shown to be harmful.

B. CONCLUSION

In *Franco* this Court unanimously concluded the Legislature intended to establish three alternative means in former RCW 46.61.502. The above analysis demonstrates that conclusion was correct in *Franco* and remains so 33 years later.

Respectfully submitted this 15th day of October, 2015.

/s/ Gregory C. Link
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
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)) NO. 90246-1
) v.)
))
) KENNETH SANDHOLM,)
))
) Respondent.)

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Second Supplemental Brief of Respondent

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