Supreme Ct. No. 90647-5
COA No. 31702-1-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

CHARLES L. TOTUS, JR., Petitioner.

ANSWER TO PETITION FOR REVIEW

JAMES P. HAGARTY
Prosecuting Attorney

TAMARA A. HANLON
Senior Deputy Prosecuting Attorney
WSBA #28345
Attorney for Respondent
128 N. Second Street, Room 329
Yakima, WA 98901
(509) 574-1210

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

A. IDENTITY OF RESPONDENT 1

B. COURT OF APPEALS DECISION 1

C. ISSUES PRESENTED FOR REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT WHY REVIEW SHOULD BE DENIED 4

F. CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON CASES

City of Auburn v. Brooke, 119 Wn.2d 623,
836 P.2d 212 (1992) 8,9,12

City of Seattle v. Hein, 115 Wn.2d 555,
799 P.2d 734 (1990) 12

In re Pers. Restraint of Music, 104 Wn.2d 189,
704 P.2d 144 (1985) 11

State v. Branch, 129 Wn.2d 635,
919 P.2d 1228 (1996) 4

State v. Chervenell, 99 Wn.2d 309,
662 P.2d 836 (1983) 4, 13

State v. Dallas, 126 Wn.2d 324,
892 P.2d 1082 (1995) 8

State v. Drum, 143 Wn. App. 608,
181 P.3d 18 (2008) 8

State v. Holsworth, 93 Wn.2d 158,
607 P.2d 845 (1980) 4,5

State v. Keene, 95 Wn.2d 203,
622 P.2d 360 (1980) 4,5

State v. Kjorsvik, 117 Wn.2d 93,
812 P.2d 86 (1991) 10,11

State v. Leach, 113 Wn.2d 679,
782 P.2d 552 (1989) 5,6

State v. Summers, 120 Wn.2d 801,
846 P.2d 490 (1993) 4,13

State v. Vangerpen, 125 Wn.2d 782,
888 P.2d 1177 (1995) 5,7,8,9

FEDERAL CASES

Henderson v. Morgan, 426 U.S. 637,
96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976) 4

STATUTES

RCW 46.61.504 1

COURT RULES

CrRLJ 2 6

A. IDENTITY OF RESPONDENT

The Respondent is the State of Washington.

B. COURT OF APPEALS DECISIONS

At issue are 1) the commissioner's ruling filed May 5, 2014, and 2) the order denying motion to modify filed July 14, 2014 that were filed in Division Three of the Court of Appeals.

C. ISSUE PRESENTED FOR REVIEW

1. Is the commissioner's ruling, which affirmed the trial court's decision to admit two predicate convictions for Physical Control, contrary to a decision of the Washington State Supreme Court?

D. STATEMENT OF THE CASE

The Defendant, Charles Leland Totus, Jr., was charged with Felony DUI based on four prior offenses within ten years. Prior to trial, he challenged the four prior offenses. Two of those priors involved crimes of physical control of a vehicle while under the influence in violation of RCW 46.61.504. One prior was in 2005, and the other one was in 2008.

Totus challenged the predicate convictions from 2005 and 2008 and moved to suppress evidence of the convictions at trial. A hearing was held on his motion. He argued that the citations for the predicate offenses did not state all the elements. (CP 6-15).

At the hearing, the State presented evidence of each citation, as well as the Statement of Defendant on Plea of Guilty (hereinafter Plea Statement) for the 2005 and 2008 convictions. The 2005 citation lists the offense as RCW 46.61.504, "physical control." (CP 65). In Totus' Plea Statement for that charge it states:

> "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical control of motor vehicle while ability to drive was affected by alcohol he had drank." (CP 66).

The 2008 citation lists the offense as RCW 46.61.504, "physical control." (CP 48). That Plea Statement reads as follows:

> "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical control of motor vehicle while affected by alcohol." (CP 49).

For each predicate offenses, the Plea Statement reads:

> "I plead guilty to the crime of physical control as charged in the complaint or citation and notice. I have received a copy of that complaint or citation and notice." (CP 51, 68).

Also, in both cases, the defendant made a statement in his own words about what he did that makes him guilty. *Id.* In the 2005 case, he wrote: "[o]n or about 8-14-05 in Yakima County I had physical control over a

motor vehicle while my ability to drive was affected by alcohol I had drank." (CP 68). In the 2008 case, he wrote: "[o]n or about 11-8-08 I was in physical control of a motor vehicle while ability to drive was affected by alcohol..." (CP 51). For each physical control case, the judge found that Totus' plea was knowingly, intelligently, and voluntarily made. (CP 51, 68). The judge also made a specific finding that Totus "understands the charges and the consequences of the plea." *Id.*

Based on this evidence that was presented in Totus' suppression hearing, the trial court found that Totus was sufficiently advised of the elements of physical control and that both predicate offenses were constitutionally valid and admissible in his Felony DUI trial. (CP 233-35). His motion to suppress was therefore denied.

Trial commenced and the jury found Totus guilty. (CP 191). Afterwards, a separate hearing was held on whether Totus had four prior offenses within the past ten years. (3 RP 215-53). For each prior, the State admitted the citation, Statement of Defendant on Plea of Guilty, and Judgment and Sentence. (RP 205). A special verdict was presented to the jury. (CP 202). The jury answered the special verdict in the affirmative. (CP 202). Totus appealed the trial court's ruling to suppress the predicate offenses. The commissioner affirmed the trial court after the State made a motion on the merits. Totus now seeks review of that ruling.

E. ARGUMENT WHY REVIEW SHOULD BE DENIED.

A defendant bears the initial burden of offering a "colorable, fact-specific argument" supporting the claim of error in the predicate conviction. *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993). Having called attention to the issue, the burden then shifts to the State to prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. *Id.* at 812; *State v. Holsworth*, 93 Wn.2d 158, 159, 607 P.2d 845 (1980). The State can use extrinsic evidence to meet its burden. *State v. Chervenell*, 99 Wn.2d 309, 313-14, 662 P.2d 836 (1983).

Here, the two predicate offenses both involved guilty pleas. A guilty plea is constitutionally valid if made knowingly, voluntarily, and intelligently. *State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996). Courts look at the totality of the circumstances to determine whether the guilty plea meets constitutional requirements. *Id.* A guilty plea cannot be voluntary unless the defendant is apprised of the nature of the charge. *State v. Keene*, 95 Wn.2d 203, 207, 622 P.2d 360 (1980) (citing *Henderson v. Morgan*, 426 U.S. 637, 645, 96 S. Ct. 2253, 2257, 49 L. Ed. 2d 108 (1976)). Apprising the defendant of the nature of the defense need not "always require a description of every element of the offense." *Holsworth*, 93 Wn.2d at 153 n.3 (quoting *Henderson*, 426 U.S. at 647 n.18).

Totus argues that his Physical Control guilty pleas were involuntary because the citations did not list all the essential elements of the crime. However, he cites no cases involving any challenges to *predicate* offenses. The cases cited merely stand for the proposition that if a citation is challenged pre-conviction, the remedy is a dismissal without prejudice and refilling of the information. *See e.g., State v. Vangerpen*, 125 Wn.2d 782, 888 P.2d 1177 (1995). None of his cited cases address the situation where the citation is challenged as a predicate offense of another charge, as is the case at hand.

In *State v. Keene*, the defendant argued that he did not plead guilty knowingly, intelligently, and voluntarily because the plea statement did not list the requisite specific intent. 95 Wn.2d at 208. The Washington Supreme Court rejected that argument and concluded that Keene knew the requisite intent because: (1) the information included the specific intent; (2) Keene pleaded guilty to the crime "as charged in the information" and acknowledged receiving a copy of the information; and (3) Keene assured the trial court judge that he had thoroughly read the plea statement. 95 Wn.2d at 208.

As explained in *State v. Leach*, 113 Wn.2d 679, 696, 782 P.2d 552 (1989), "technical defects not affecting the substance of the charged offense do not prejudice the defendant..." In *Leach*, the citation used the

acronym "DWI." Id. at 695. The court noted the letters "DWI" have come into common usage as referring to "driving while intoxicated." Id. Similarly, the citation here included a shorthand way of referring to "physical control of a motor vehicle while under the influence." The phrase "physical control" has come into common usage just as the acronym DWI has become part of everyday vernacular.

As in *Leach*, the citation here complied with CrRLJ 2.1(b)(3)(iii), which requires a citation to contain, among other things, a "description of the offense charged." 113 Wn.2d at 699. Any criminal charging document must sufficiently and completely state an offense. *Id.* at 697. This requirement is satisfied by a more simplified procedure in courts of limited jurisdiction. *Id.*

So, while Totus's citation may not have included the full name of the offense in the citation, it did correctly indicate the RCW number and abbreviated name of the crime. In addition, it complied with CrRLJ 2.1. Furthermore, the Statement of Defendant on Plea of Guilty in both cases accurately listed out all the elements. (CP 49, 66). And further, Totus gave a factual summary of what happened in his own words that provided a factual basis for all the elements of the crimes. (CP 51, 68). From this, there is overwhelming evidence that Totus knew the elements he was charged with and, therefore, knowingly, intelligently, and voluntarily pled

guilty to the two predicate offenses in question. As such, the trial court did not err in finding his prior convictions constitutionally valid and admissible.

1. The commissioner's ruling does not conflict with *State v. Vangerpen.*

State v. Vangerpen involved a murder case where after both sides had rested the prosecuting attorney agreed that premeditation should have been alleged in the charging document and moved to amend the information to include that element. 125 Wn.2d 782, 785, 888 P.2d 1177 (1995). Over the defendant's objection, the trial court allowed the amendment. *Id.* at 785-6. The Court of appeals reversed and dismissed the charge without prejudice. *Id.* at 786.

The issue in *Vangerpen*, as framed by the Washington State Supreme Court, was as follows: "When an appellate court's reversal of a conviction is based upon an improper amendment of a charging document, should the charge be dismissed without prejudice to the State's right to refile charges or should this court convict the defendant of a lesser crime than was returned in the jury verdict?" *Id.* Our State Supreme Court held that the remedy was a dismissal with the right to refile charges, stating "Dismissal without prejudice has been the consistent remedy imposed for reversible error based on an improper charging document." *Id.* at 793.

The *Vangerpen* case was not a case involving a challenge to a *predicate* offense or a challenge to a guilty plea. In *Vangerpen*, he was challenging the murder conviction itself. The issue on appeal was the proper remedy. *See State v. Dallas,* 126 Wn.2d 324, 330, 892 P.2d 1082 (1995) ("the issue in *Vangerpen* was the proper remedy for a charging document which was defective as to the highest charge but adequate to support lesser included charges"); *State v. Drum*, 143 Wn. App. 608, 615, 181 P.3d 18 (2008).

Vangerpen is not on point because here, Totus pled guilty to the two Physical Control predicates. He never raised any issues pre-conviction, as *Vangerpen* did. *Vangerpen* raised the issue mid-trial and after trial and the State agreed that an element was missing. Here, Totus never raised the issue until years later when he decided to challenge his predicate offenses. The ruling in his present case is not contrary to *Vangerpen. Vangerpen* involved an entirely different factual scenario and the remedy for an improper amendment of a charging document.

2. The commissioner's ruling does not conflict with *City of Auburn v. Brooke.*

Likewise, in *City of Auburn v. Brooke*, two cases with defective charging documents were dismissed without prejudice and charges were allowed to be re-filed. 119 Wn.2d 623, 836 P.2d 212 (1992). In one case,

defendant Brooke challenged a plea to disorderly conduct by arguing that the citation was constitutionally defective. Id. at 626. In another case, the defendant was found guilty of hit and run driving by jury conviction. *Id.* He appealed to the Superior Court and that court affirmed the conviction. *Id.* He then appealed to the Court of Appeals. Like *Vangerpen*, the *Brooke* case is not on point. Totus challenges a predicate offense. Neither case in *Brooke* involved a challenge to a predicate offense.

The *Brooke* court specifically noted that: "...as a practical matter, **this ruling will usually apply only to cases in which convictions are not yet final.**" (emphasis added). 119 Wn.2d at 639. Totus's Physical Control convictions are final convictions. The court also stated that: "Errors in final charging documents do not constitute *per se* prejudicial error on collateral review." *Id.* Defendants raising the issue on collateral attack "must establish that their rights were actually and substantially prejudiced." *Id.* Here, Totus did not appeal the prior convictions and did not collaterally attack them. His convictions for physical control are final convictions. He raises the issue for the first time now, in a challenge to them being used as *predicate* offenses. As such, the *Brooke* case is inapplicable to the case at hand and the commissioner's ruling is not inconsistent with it.

3. The commissioner's ruling does not conflict with *State v. Kjorsvik*.

In *State v. Kjorsvik*, a defendant was found guilty of robbery in the first degree. 117 Wn.2d 93, 95, 812 P.2d 86 (1991). He appealed on the basis that the information was insufficient because it eliminated the common law "intent to steal" element of robbery. *Id.* at 96. The issue was raised for the first time on appeal. *Id.* at 95. The court held that "Charging documents which are not challenged until after the verdict will be subject to a stricter standard of review and more liberally construed in favor of validity than those challenged before or during trial." *Id.* at 102. This stricter standard discourages "sandbagging," whereby an objection isn't made at trial because it would only result in an amendment or dismissal followed by refilling the charge. *See id.* at 103. Under this post-verdict standard, even if there is an apparently missing element, it may be able to be implied from the language within the charging document. *Id.* at 104.

This post-verdict standard involves the defendant showing that: 1) the necessary elements of the offense are not in the information in any form, and 2) the defendant was prejudiced by the inartful or vague language. *Id.* at 104-6. The first part involves looking at the face of the charging document and then "**beyond the face of the charging document**

to determine if the accused actually received notice of the charges he or she must have been prepared to defend against." *Id.* at 106 (emphasis added). Prejudice is not presumed where essential elements are missing. "It is possible that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges." *Id.* Those circumstances include "the jury instructions given, the arguments of counsel, weight of evidence of guilt, and other relevant factors in evaluating whether a particular instruction caused actual prejudice." *In re Pers. Restraint of Music*, 104 Wn.2d 189, 191, 704 P.2d 144 (1985).

Unlike Kjorsvik, Totus is not collaterally attacking his Physical Control convictions after a trial on those charges. He is challenging their use as *predicates* many years after pleading guilty to them. The standard is different when dealing with a plea and a charge being used as a predicate. And here, the record is overwhelming of other circumstances indicating that the defendant was informed of the charges. By looking at the Statements of Plea of Guilty, it is clear that Totus understood the charges and all of their elements. Therefore, the commissioner's ruling does not conflict with *Kjorsvik* in any way.

4. The commissioner's ruling does not conflict with *City of Seattle v. Hein*.

The *City of Seattle v. Hein* case has been summarized as follows:

> In *Hein*, the defendant was convicted of violating Seattle Municipal Code (S.M.C.) 11.56.020(B) (being in actual physical control of a vehicle while intoxicated). The Superior Court reversed the conviction on the ground that the citation, also used as the final charging document, described the offense only by municipal code section number and the words "physical control". The City sought review in the Court of Appeals which deferred consideration of the motion pending our opinion in Leach, and thereafter denied review. The City thereupon petitioned this court for discretionary review.
>
> This court's commissioner denied review, declaring that *Leach* nowhere suggests that a different constitutional standard applies to citations and that reference in the citation to a code section will not remedy the omission of an element of the crime. We denied the motion to modify the commissioner's ruling by a per curiam opinion, holding: The City of Seattle's motion to modify the ruling of the Commissioner of this court in the above entitled case is denied. The essential elements rule, discussed in *State v. Leach*, 113 Wn.2d 679, 782 P.2d 552 (1989), applies to citations. *Hein*, 115 Wn.2d at 556.

Auburn v. Brooke, 119 Wn.2d 623, 630-631 (1992) (citing *City of Seattle v. Hein*, 115 Wn.2d 555, 799 P.2d 734 1990)). Nothing in the commissioner's ruling is inconsistent with the reasoning of *Hein.*

The standard for review for challenging a predicate offense is different from that of the cases relied upon by Totus. Here, the State has to prove beyond a reasonable doubt that a predicate conviction is constitutionally sound. *Summers*, 120 Wn.2d at 812. The State can rely on extrinsic evidence in doing so. *State v. Chervenell*, 99 Wn.2d 309, 318. For example, in addition to the information, the Court can look at the Plea Statements and the record to ascertain if the defendant was fully aware of the nature of the offense charged. *See State v. Chervenell*, 99 Wn.2d 309, 318.

Here, Totus signed a Plea Statement for the 2005 Physical Control charge, wherein he agreed:

> "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical control of motor vehicle while ability to drive was affected by alcohol he had drank." (CP 66).

For the 2008 charge, similar language was in his Plea Statement:

> "I have been informed and fully understand that....(b) I am charged with Physical Control. The elements are being in physical

> control of motor vehicle while affected by alcohol." (CP 49).

Assuming, *arguendo*, that there was any defect in the citation, any prejudice was cured when he pled guilty to the charges and indicated that he was informed and fully understood the charge and elements. His statement, made in his own words, as to what he did that makes him guilty also reinforces that he understood all of the elements and the nature of the offense that he was charged with.

F. CONCLUSION

Totus' prior physical control convictions were constitutionally valid. He was sufficiently apprised of all the elements to which he was pleading guilty to. As such, his prior convictions were properly admitted at trial. The commissioner's ruling does not conflict with the cases referenced by Totus.

The State respectfully requests that this court deny review.

DATED: September 5, 2014.

TAMARA A. HANLON
WSBA # 28345
Senior Deputy Prosecuting Attorney
Yakima County, Washington
Attorney for Respondent

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on September 5, 2014, by agreement of the parties, I emailed a copy of the State's Answer to Petition on Review to Ms. Janet G. Gemberling at: admin@gemberlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5th day of September, 2014 at Yakima, Washington.

TAMARA A. HANLON,
WSBA#28345
Deputy Prosecuting Attorney
Yakima County, Washington
128 N. Second Street, Room 329
Yakima, WA 98901
Telephone: (509) 574-1210
Fax: (509) 574-1211
tamara.hanlon@co.yakima.wa.us

OFFICE RECEPTIONIST, CLERK

To: Tamara Hanlon
Subject: RE: State of Washington v. Charles L. Totus, JR. 90647-5

Rec'd 9/5/14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Tamara Hanlon [mailto:Tamara.Hanlon@co.yakima.wa.us]
Sent: Friday, September 05, 2014 9:41 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: 'Robert Canwell'; 'Jan Gemberling'
Subject: State of Washington v. Charles L. Totus, JR. 90647-5

Attached for filing is State's Answer to Petition for Review

- case name: STATE OF WASHINGTON V. CHARLES L. TOTUS, JR.
- case number: 90647-5

Tamara A. Hanlon, WSBA 28345
Senior Deputy Prosecuting Attorney
Appellate Unit
Yakima County Prosecuting Attorney's Office
tamara.hanlon@co.yakima.wa.us
509-574-1254