31702-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES L. TOTUS, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

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INDEX

A. ASSIGNMENTS OF ERROR 1

B. ISSUES 1

C. STATEMENT OF THE CASE 2

D. SUMMARY 4

E. ARGUMENT 5

1. PRIOR CONVICTIONS FOR "PHYSICAL CONTROL" WERE CONSTITUTIONALLY DEFECTIVE; ADMITTING EVIDENCE OF THOSE CONVICTIONS WAS ERROR 5

2. THE JURY INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF TWO OF THE PREDICATE OFFENSES, PRIOR CONVICTION OF ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE INTOXICATED 11

F. CONCLUSION 13

TABLE OF AUTHORITIES

WASHINGTON CASES

CITY OF AUBURN V. BROOKE, 119 Wn.2d 623,
836 P.2d 212 (1992) 7

CITY OF SEATTLE V. HEIN, 115 Wn.2d 555,
799 P.2d 734 (1990) 7

CITY OF YAKIMA V. GODOY, 175 Wn. App. 233,
305 P.3d 1100 (2013) 9

STATE V. AMMONS, 105 Wn.2d 175,
713 P.2d 719 (1986), *amended by*,
105 Wn.2d 175, 718 P.2d 796 (1986) 6

STATE V. CARMEN, 118 Wn. App. 655,
77 P.3d 368 (2003) 6

STATE V. HOLT, 104 Wn.2d 315,
704 P.2d 1189 (1985) 8

STATE V. KIRWIN, 166 Wn. App. 659,
271 P.3d 310 (2012) 11

STATE V. KJORSVIK, 117 Wn.2d 93,
812 P.3d 86 (1991) 7, 9, 10

STATE V. SMITH, 155 Wn.2d 496,
120 P.3d 559 (2005) 11

STATE V. SUMMERS, 120 Wn.2d 801,
846 P.2d 490 (1993) 6

STATE V. THOMPSON, 143 Wn. App. 861,
181 P.3d 858 (2008) 6

STATE V. VANGERPEN, 125 Wn.2d 782,
888 P.2d 1177 (1995) 7, 8, 10

STATE V. WILLIAMS, 133 Wn. App. 714,
136 P.3d 792 (2006) 11

CONSTITUTIONAL PROVISIONS

ARTICLE I, § 22 (amendment 10) 7

U.S. CONST. Amend. VI 7

STATUTES

RCW 46.61.502 ..... 2, 6

RCW 46.61.502(1)(c) 5, 9

RCW 46.61.502(6)(a) 5, 12

RCW 46.61.504 ..... 6, 12

RCW 46.61.5055 ..... 5, 12

RCW 46.61.5055(a)(i) 6

RCW 46.61.5055(a)(ii) 6

RCW 61.46.504 1

A. ASSIGNMENTS OF ERROR

1. The court erred in admitting evidence of constitutionally invalid predicate convictions.

2. The court erred in entering judgment on an erroneous jury special verdict.

B. ISSUES

1. Two predicate convictions for the current offense of felony DUI were based on citations for "physical control." Where the citations were never amended, were the resulting convictions constitutionally invalid and inadmissible to prove the predicate offenses?

2. The State presents evidence of prior convictions under RCW 61.46.504, which prohibits being in actual physical control of a motor vehicle while intoxicated, as predicate offenses for a felony DUI charge. The jury is asked by special verdict to determine whether the accused has prior convictions for "physical control." Absent any instruction elaborating on the meaning of "physical control" is the jury's affirmative response a sufficient basis to support the felony DUI conviction?

C. STATEMENT OF THE CASE

The State charged Mr. Totus with felony driving while intoxicated, RCW 46.61.502. (CP 1) The essential elements of the felony offense include four prior alcohol-related convictions. (CP 1)

Before trial, Mr. Totus moved to exclude evidence of several such convictions, alleging that they were constitutionally invalid because the charging documents had failed to state the elements of the charged offenses. The challenged convictions included two charges of "physical control" alleged to have been committed on August 14, 2005 and November 8, 2008. (CP 48, 65)

The State responded that, in failing to raise this challenge before pleading guilty to the prior charged offenses, Mr. Totus had waived any claim of constitutional insufficiency. (CP 77)

> Defense claims that citations issued by arresting officers failed to advise Mr. Totus of all essential elements of physical control are correct. This is not Constitutional error, because the defendant waived any claims of defects in the citations by pleading guilty. Even if Mr. Totus had challenged the sufficiency of these citations during their pendency, his remedy would have been refilling and retrial. Furthermore, the statements of defendant on plea of guilty advised Mr. Totus of the essential elements, curing any defects in the citations. Even if this is Constitutional error,

> the State has proved beyond a reasonable doubt that these convictions remain constitutionally valid.

(CP 77)[1]

The trial court ruled that because Mr. Totus acknowledged the essential elements of the offenses at the time of his prior guilty pleas, evidence of those convictions was admissible to establish the existence of predicate offenses:

> Mr. Totus' statement on plea of guilty adequately advised him of the essential elements of physical control of vehicle under the influence under RCW 46.61.504 pursuant to *State v. Leach,* 113 Wn.2d 679, 782 P.2d 552 (1989), *Seattle v. Hein,* 115 Wn.2d 555, 799 P.2d 734 (1990), and *State v. Kjorsvik,* 117 Wn.2d 93, 812 P.2d 86 (1991), and corrected any defect in the citation issued by the arresting officer.

(CP 233) The court concluded that evidence of the convictions was admissible. (CP 235)

The State introduced copies of the Judgment and Sentence in four prior cases, two of which showed that Mr. Totus had been convicted of "Physical Control . . . 46.61.504." (CP 53, 69; RP 208-210, 255)

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[1] In his guilty plea statement Mr. Totus acknowledged that he was charged with being "in physical control of a motor vehicle while ability to drive was affected by alcohol he had drank." (CP 66)

In a bifurcated trial, following the jury's guilty verdict on the current offense of driving while intoxicated, the court instructed the jury on its consideration of the evidence of the prior convictions:

> Evidence has been introduced in this case on the subject of the defendant's prior criminal history for the limited purpose of determining whether the defendant has four or more convictions for Driving While Under the Influence of Intoxicating Liquor or Physical Control within the last ten years. You must not consider this evidence for any other purpose. Any discussion of the evidence during your deliberations must be consistent with this limitation.

(CP 199 – Instruction 3)

The jury was given a special verdict form: "On or before September 26, 2012, did the defendant have four or more prior offenses within ten years for Driving under the Influence of Intoxicating Liquor and/or Physical Control?" to which the jury answered "yes." (CP 202) The court entered judgment on the verdicts and Mr. Totus appealed. (CP 220-228)

D. SUMMARY

Mr. Totus was convicted of felony DUI. One of the essential elements of that offense is the existence of four prior convictions for offenses such as DUI or being in physical control of a vehicle while intoxicated. The Court permitted the State to prove two of these predicate

offenses with convictions based on citations that merely charged "physical control." The citations, which were never amended, failed to state the elements of the charged offense and were constitutionally invalid. They were therefore inadmissible to prove the required predicate offenses for felony DUI.

Even if the evidence of prior convictions for physical control had been admissible, the unknown offense of "physical control" is not a predicate offense that can support a conviction for felony DUI. Yet the court adjudged the defendant guilty of felony DUI based on the jury's finding of "four or more prior offenses within ten years for Driving under the Influence of Intoxicating Liquor and/or Physical Control."

E. ARGUMENT

1. PRIOR CONVICTIONS FOR "PHYSICAL CONTROL" WERE CONSTITUTIONALLY DEFECTIVE; ADMITTING EVIDENCE OF THOSE CONVICTIONS WAS ERROR.

A person is guilty of driving while under the influence of intoxicating liquor (DUI) if he or she drives a vehicle while under the influence of, or affected by, intoxicating liquor. RCW 46.61.502(1)(c). DUI is a felony if the accused has four or more prior convictions of the offenses identified in RCW 46.61.5055. RCW 46.61.502(6)(a). Predicate

offenses for felony DUI include DUI and being in physical control of vehicle while intoxicated. RCW 46.61.5055(a)(i) and (ii); RCW 46.61.502 and 504.

If a defendant's prior criminal conviction serves as an essential element of a current charge, the defendant may challenge the constitutionality of the predicate conviction. *State v. Summers*, 120 Wn.2d 801, 810, 846 P.2d 490 (1993). Where, as here, the court must determine the admissibility of challenged evidence, it is the trial court, not the jury, that decides the constitutional validity of the predicate conviction. *State v. Carmen*, 118 Wn. App. 655, 665, 77 P.3d 368 (2003).

In some contexts, a challenge to a prior conviction constitutes a collateral attack, and the conviction must be shown to be "'constitutionally invalid on its face.'" *State v. Thompson*, 143 Wn. App. 861, 866, 181 P.3d 858 (2008), *quoting State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986), (*amended by*, 105 Wn.2d 175, 718 P.2d 796 (1986)). "But a challenge to the constitutional validity of a predicate conviction which serves as an essential element of a charge . . . is not a 'collateral attack' on the prior conviction." *See State v. Summers*, 120 Wn.2d at 810.

In *Summers*, the Supreme Court reaffirmed earlier holdings that a challenge to a predicate conviction that serves as an essential element of a charge for violation of the Uniform Firearms Act is not an attempt to

invalidate the previous judgment as in a direct appeal, but is an effort to foreclose the prior conviction's use to establish an essential element of felon in possession of a firearm. *Id.* The defendant bears the initial burden of "offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction." *Id.* at 812. If the defendant makes this initial showing, the State must prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. *Id.*

Under both the State and federal constitutions, it is fundamental that an accused be informed of the criminal charge he or she is to meet at trial and cannot be tried for an offense not charged. U.S. Const. amend. VI; Const. Art. I, § 22 (amendment 10). *State v. Vangerpen,* 125 Wn.2d 782, 787–88, 888 P.2d 1177 (1995). A charging document which fails to state all the essential elements of the offense, both statutory and court-imposed, is constitutionally defective. *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.3d 86 (1991).

The essential elements rule applies to all charging documents, including citations. *City of Auburn v. Brooke*, 119 Wn.2d 623, 636, 836 P.2d 212 (1992); *City of Seattle v. Hein*, 115 Wn.2d 555, 556, 799 P.2d 734 (1990). Merely citing to the proper statute and naming the offense is insufficient to charge a crime unless the name of the offense

apprises the defendant of all of the essential elements

State v. Vangerpen, 125 Wn.2d at 787.

The State argued, in effect, and the court agreed, that the omission of essential elements of the offense in the charging document may be waived or cured if the defendant fails to object until after judgment has been entered. No case cited below supports this analysis.

It is well settled that if the final charging document omits one or more elements of an offense, even in a case tried to a properly instructed jury, the defect in the information renders a conviction constitutionally invalid. *State v. Vangerpen*, 125 Wn.2d at 787-88. *Vangerpen* involved a challenge to the information in a case that was tried to a jury, and it was undisputed that "[t]he instructions in this case properly instructed the jury on all the elements of the crime . . . ." 125 Wn. 2d at 787. This did not, however, cure the defect in the charging document: "proper jury instructions cannot cure a defective information." *Id.* at 788 *citing State v. Holt,* 104 Wn.2d 315, 322, 704 P.2d 1189 (1985). "Jury instructions and charging documents serve different functions." *Id.*

A defendant's guilty plea statement is analogous to the jury instructions in a jury trial. Its function is to ensure that facts may be found to exist to support each element of the charging document. Where elements of the offense have been omitted from the charging document,

neither a guilty plea nor a jury verdict will suffice to validate the conviction.

Since Mr. Totus did not challenge the charging documents prior to his convictions for "physical control" this court may, arguably, apply a liberal construction to the challenged citations in order to determine their sufficiency. *See State v. Kjorsvik*, 117 Wn.2d at 98-99. Under this standard, "the defendant must show either that (a) the language of the charge, when liberally construed, fails to provide any notice of the omitted element; or (b) the defendant can establish actual prejudice resulting from inartful or vague language." *Id.* at 106.

The essential elements of the offense, referred to throughout the present case as "physical control," are (1) "Actual physical control" (2) "of a vehicle" (3) "while 'under the combined influence of or affected by intoxicating liquor'". *City of Yakima v. Godoy*, 175 Wn. App. 233, 236, 305 P.3d 1100 (2013) *quoting* RCW 46.61.504(1)(c). Neither of the citations charging this offense mentions or even implies the concept of a vehicle, nor is there any suggestion that intoxicating liquor must be involved, let alone the existence of any relationship between its influence and the act of physical control. The omissions fall far short of "inartful or vague language." *Id.*

Both the prosecution and the court apparently relied on the recitations contained in the guilty plea statements to cure any prejudice that might result from the glaring omissions in the citation. Here, because "the language of the charge, when liberally construed, fails to provide any notice of the omitted element," actual prejudice is irrelevant. *Kjorsvik,* 117 Wn.2d at 105-06. "If the necessary elements are not found or fairly implied, however, the reviewing court will presume prejudice and reverse without reaching the question of prejudice." *Id.*

"When a conviction is reversed due to an insufficient charging document, the result is a dismissal of charges without prejudice to the right of the State to recharge and retry the offense for which the defendant was convicted or for any lesser included offense." *State v. Vangerpen,* 125 Wn.2d at 791. Here, however, the issue is not whether the charging document in the present case is sufficient but rather whether the State's evidence of predicate convictions in prior cases was sufficient to support the judgment in the present case.

The court erred in admitting evidence of two prior convictions for the offense of "physical control" to satisfy the statutory requirement of four prior convictions to elevate a misdemeanor conviction for driving while intoxicated to a felony conviction. Without those prior convictions,

the evidence is insufficient to support the judgment finding Mr. Totus guilty of felony driving

2. THE JURY INSTRUCTIONS OMITTED AN ESSENTIAL ELEMENT OF TWO OF THE PREDICATE OFFENSES, PRIOR CONVICTION OF ACTUAL PHYSICAL CONTROL OF A VEHICLE WHILE INTOXICATED.

"Jury instructions that omit essential elements of the crime violate due process because they relieve the State of its burden to prove every essential element beyond a reasonable doubt." *State v. Williams*, 133 Wn. App. 714, 721, 136 P.3d 792 (2006).

> 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 Wash.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).[5] Implicit in this principle is the requirement that jury instructions list all of the elements of the crime, since failure to list all elements would permit the jury to convict without proof of the omitted element. *See State v. Linehan,* 147 Wash.2d 638, 653–54, 56 P.3d 542 (2002).

State v. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005).

"[W]here a to-convict instruction omits an essential element of a charged crime, it is constitutionally defective and the remedy is a new trial unless the State can demonstrate that the omission was harmless beyond a reasonable doubt." *State v. Kirwin*, 166 Wn. App. 659, 669, 271 P.3d 310 (2012).

Having four or more prior offenses within 10 years as defined in RCW 46.61.5055 is an essential element of felony DUI. RCW 46.61.502(6)(a). Under RCW 46.61.5055, "prior offense" includes "[a] conviction for a violation of RCW 46.61.504 or an equivalent local ordinance". Violation of RCW 46.61.504 essentially consists of "being in actual physical control of a motor vehicle while under the influence of intoxicating liquor."

Under these statutes, in order to prove that Mr. Totus committed felony DUI based in part on two prior convictions for being in actual physical control of a vehicle while under the influence of intoxicants, RCW 46.61.504, the State should have been required to prove the essential elements of the offense, including control of a motor vehicle and the state of being contemporaneously intoxicated.

The jury instructions in this case merely asked the jury to decide whether Mr. Totus had "four or more prior offenses within ten years for Driving under the Influence of Intoxicating Liquor and/or Physical Control." The jury was not asked to determine whether Mr. Totus had been convicted of "being in actual physical control of a motor vehicle while under the influence of intoxicating liquor." The jury was merely asked to decide whether he had prior convictions for "physical control." Physical control, without more, is insolubly ambiguous, and does not

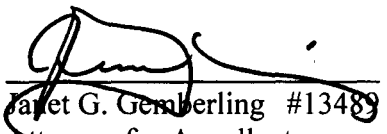
implicate actual physical control of a vehicle while intoxicated. Mr. Totus was convicted on the basis of jury instructions that permitted the jury to find the essential element of four predicate convictions based in part on documents that showed two convictions for "physical control."

F. CONCLUSION

Mr. Totus was convicted of a felony based on evidence of constitutionally invalid predicate convictions. Moreover, the jury instructions merely required the jury to find prior convictions of "physical control," which is not a known predicate offense for felony DUI conviction. The resulting conviction should be reversed and the charge dismissed without prejudice.

Dated this 28th day of October, 2013.

JANET GEMBERLING, P.S.



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31702-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
CHARLES L. TOTUS, JR.,	)	
	)	
Appellant.	)	

I certify under penalty of perjury under the laws of the State of Washington that on October 28, 2013, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

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I certify under penalty of perjury under the laws of the State of Washington that on October 28, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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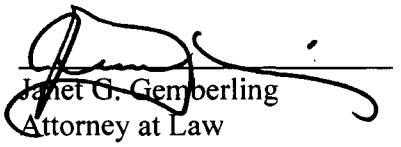
Signed at Spokane, Washington on October 28, 2013.



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