Supreme Ct No. 90647-5

COA No. 317021

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

CHARLES L. TOTUS, JR, Petitioner

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Charles Totus asks this court to accept review of the decision of Division Three of the Court of Appeals terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

The commissioner's ruling filed on May 5, 2014, and the order denying the motion to modify the commissioner's ruling, filed on July 14, 2014. Copies of the decisions are in the Appendix at pages A-1 through A-10 and B-1.

C. ISSUE PRESENTED FOR REVIEW

Is a citation that merely charges "physical control" constitutionally defective under *City of Auburn v. Brooke*, 119 Wn.2d 623, 836 P.2d 212 (1992) and *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.3d 86 (1991) because it fails to state the essential statutory and court-imposed elements of the offense?

D. STATEMENT OF THE CASE

Mr. Totus appeals from his felony DUI conviction. (CP 220-228) 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. RCW 46.61.502(1)(c). The trial court permitted the State to prove two of these predicate offenses with convictions based on citations that merely charged "physical control." (CP 48, 65) Mr. Totus contended that the citations, which were never amended, failed to state the elements of the charged offense, were constitutionally invalid and were therefore inadmissible to prove the required predicate offenses for felony DUI. (CP 6-15)

The trial 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 WHY REVIEW SHOULD BE ACCEPTED

Review should be granted when a decision of the Court of Appeals conflicts with a decision of the Supreme Court or involves a significant question of constitutional law. RAP 13.4(b). The Court of Appeals decisions in this case conflict with this court's construction of the requirements of U.S. Const. amend. VI and Const. art. I, § 22 (amendment 10) set forth in *State v. Vangerpen,* 125 Wn.2d 782, 787-88, 888 P.2d 1177 (1995), *City of Auburn v. Brooke,* 119 Wn.2d 623, 636, 836 P.2d 212 (1992),

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991) and *City of Seattle v. Hein*, 115 Wn.2d 555, 556, 799 P.2d 734 (1990).

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.2d 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). 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 of the crime. *State v. Vangerpen,* 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

Where the charging language is challenged for the first time following entry of the judgment, the language should be liberally construed. *Brooke*, 119 Wn.2d at 636, 836 P.2d 212 (*citing State v. Kjorsvik*, 117 Wn.2d 93, 106, 812, 812 P.2d 86 (1991)). If, but only if, the necessary facts appear in any form or can be found by a fair construction of the charging

language, then the defendant has the burden of showing that he was actually prejudiced as a result of the inartful language. *Brooke*, 119 Wn.2d at 636.

The use of the term "physical control" to signify the offense of being in actual physical control of a vehicle while intoxicated fails to meet the essential elements requirement. *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). In *City of Auburn*, 119 Wn.2d at 629-31, the Court discussed *City of Seattle v. Hein*, 115 Wn.2d 555, 556, 799 P.2d 734 (1990). In *Hein*, the Court affirmed a Superior Court decision reversing a conviction for "being in actual physical control of a vehicle while intoxicated" because the citation merely described the offense as "physical control."

In both *Brooke* and *Hein*, the court declined to reach the question of whether the defendant was prejudiced by the inartful language because "the citations make no attempt to state the elements or the facts supporting the elements; they merely state the numerical code sections defining the offenses and the titles of the offenses alleged." *Brooke*, 119 Wn.2d at 635.

In the present case, relying on *State v. Leach*, 113 Wn.2d 679, 695, 782 P.2d 552 (1989), the commissioner reasoned that the phrase "physical control" satisfied the essential elements requirement:

> The State is not required to use the exact words of the statute. *Leach,* 113 Wn.2d at 686; *see* RCW 10.37.056(5). Moreover, the charging document need not "*list* every element of the

> crime. Rather, [it] must allege sufficient *facts* to support every element of the crime charged."
>
> . . .
>
> Here, as in *Leach,* Mr. Totus was charged with misdemeanor, which are processed in courts of limited jurisdiction. Also, his citations included a shorthand way of referring to "physical control of a motor vehicle while under the influence." The phrase "physical control" has a common usage just like the acronym DWI used in *Leach.*

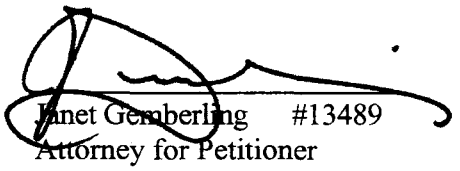
(Commissioner's Ruling at 4-6)

The commissioner's ruling, and court's denial of appellant's motion to modify the ruling, suggest that the lower court fails to follow the combined reasoning of *Hein* and *Brooke*, resulting in misplaced reliance on the narrow exception for the term "DWI" in *Leach*. This Court should grant review and clarify the holdings in the two later cases.

F. CONCLUSION

Review should be granted and the Court of Appeals decision should be reversed.

Respectfully submitted this 11th day of August, 2014.



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APPENDIX A

The Court of Appeals
of the
State of Washington
Division III

FILED
MAY -5 2014

STATE OF WASHINGTON, Respondent, v. CHARLES LELAND TOTUS, Jr., Appellant.	)	COMMISSIONER'S RULING NO. 31702-1-III

Charles Totus, Jr. appeals his Yakima County Superior Court conviction of felony driving while intoxicated (DUI). He contends that the court erred by (1) admitting evidence of allegedly constitutionally invalid predicate convictions, and (2) entering judgment on an erroneous jury special verdict. In his Statement of Additional Grounds for Review, Mr. Totus contends that his rights were violated when his blood sample was taken without a warrant, and that the trial judge made stereotyping statements to him at the end of his trial. The State of Washington's motion on the merits is affirmed.

Mr. Totus was charged with felony DUI based on four prior offenses within ten years. Before trial, Mr. Totus moved to exclude evidence of several of his past convictions on the ground they were constitutionally invalid because the charging documents 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. The State responded that, in failing to raise this challenge before pleading guilty to the prior charged offenses, Mr. Totus waived any claim of constitutional insufficiency. Mr. Totus asserted that the citations issued by the arresting officers failed to advise him of all essential elements of physical control. 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.

The State introduced copies of the Judgments and Sentences 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) In his guilty plea statements on the prior offenses, 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. The jury was given a special verdict form that read: "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?" The jury answered "yes" to this question. (CP 202).

The court entered judgment on the verdicts and Mr. Totus appeals.

First, Mr. Totus contends that his prior convictions for "physical control" were constitutionally defective and therefore admitting evidence of those convictions was error.

RCW 46.61.502(1)(c) provides that a person is guilty of driving while under the influence of intoxicating liquor if he or she drives a vehicle while under the influence of, or affected by, intoxicating liquor. RCW 46.61.502(6)(a) provides that a DUI is a felony if the accused has four or more prior convictions of the offenses identified in RCW 46.61.5055. Predicate offenses for felony DUI include DUI and being in physical control of a 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). The trial court, not the jury decides the constitutional validity of the predicate conviction. *State v. Carmen*, 118 Wn. App. 655, 665, 77 P.3d 368 (2003). Once the defendant has called attention to the issue, the burden shifts to the State to prove beyond a reasonable doubt that the predicate conviction is constitutionally sound. *Summers*, 120 Wn.2d at 812. The State may use extrinsic evidence to meet its burden. *State v. Chervenell*, 99 Wn.2d 309,

313-14, 662 P.2d 836 (1983). The Court cannot admit an invalid, vague, or otherwise inapplicable conviction. *State v. Miller*, 156 Wn.2d 23, 24, 123 P.3d 827 (2005).

A guilty plea is constitutionally valid if it is 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 if the guilty plea meets constitutional requirements. *Id.* A guilty plea cannot be voluntary unless the defendant is apprised of the nature of the charges against him. *State v. Keene*, 95 Wn.2d 203, 207, 622 P. 2d 360 (1980). Apprising the defendant of the nature of the defense does not always require a description of every element of the offense, *State v. Holsworth*, 93 Wn.2d 158, 153, n.3, 607 P.2d 845 (1980).

An information sufficiently charges a crime if it apprises the accused person with reasonable certainty of the nature of the accusation, so that they can prepare a proper defense and plead the judgment as a bar to any subsequent prosecution for the same offense. *State v. Leach,* 113 Wn.2d 679, 695, 782 P.2d 552 (1989); *State v. Grant,* 89 Wn.2d 678, 686, 575 P.2d 210 (1978); *State v. Royse,* 66 Wn.2d 552, 557, 403 P.2d 838 (1965). Washington courts have consistently held that a charging document that fails to apprise the defendant of all of the *statutory* elements of the crime is constitutionally defective. *State v. Davis*, 60 Wn. App. 813, 816-17, 808 P.2d 167 (1991); *Leach,* 113 Wn.2d at 686–89; *State v. Holt,* 104 Wn.2d 315, 320, 704 P.2d 1189 (1985); *State v. Unosawa,* 29 Wn.2d 578, 585–89, 188 P.2d 104 (1948); *State v. Hopper,* 58 Wn.App. 210, 792 P.2d 171 (1990). The State is not required to use the

exact words of the statute. *Leach,* 113 Wn.2d at 686; *see* RCW 10.37.056(5). Moreover, the charging document need not "*list* every element of the crime. Rather, [it] must allege sufficient *facts* to support every element of the crime charged." *Leach,* at 688.

In *Leach*, 113 Wn.2d at 696, the Court held that a misdemeanor citation issued to the motorist describing the offense charged as a "DWI" and listing the code section violated was constitutionally sufficient to give the motorist notice of the charge against her, and though the citation was somewhat incomplete, there was no evidence that the motorist was prejudiced by the technical defect, and further, the defendant/motorist requested neither clarification of the charge. The *Leach* Court noted that the letters "DWI" had common usage and stood for "driving while intoxicated," *Id,* and that while any criminal charging document must sufficiently and completely state the offense, the requirement is satisfied by a more simplified procedure in courts of limited jurisdiction. *Id.* at 697.

Also, in *State v. Keene*, *supra*, the defendant contended that his guilty plea was not knowing, intelligent, and voluntary because the plea statement did not list the requisite specific intent. *Keene*, 95 Wn.2d at 208. The Court rejected Mr. Keene's argument, concluding that Mr. Keene knew the requisite intent because the information included the specific intent and Mr. Keene had acknowledged he had received a copy of the information, and he assured the trial court judge that he had thoroughly read the plea statement. *Keene*, 95 Wn.2d at 208.

Here, as in *Leach*, Mr. Totus was charged with misdemeanor, which are processed in courts of limited jurisdiction. Also, his citations included a shorthand way of referring to "physical control of a motor vehicle while under the influence." The phrase "physical control" has a common usage just like the acronym DWI used in *Leach*. Further, the citation correctly noted the RCW number applicable and complied with CrRLJ 2.1. Additionally, just as in *Keene*, Mr. Totus' Statements of Defendant on Plea of Guilty for the two predicate crimes accurately list all the elements and he gives a factual summary of what occurred in his own words, which in turn provided a factual basis for all of the elements of the crimes charged. Thus, the court did not err in finding that Mr. Totus' prior convictions were constitutionally valid and admissible.

Second, Mr. Totus contends that his conviction should be reversed because "the jury instructions omitted an essential element of two of the predicate offenses, prior conviction of actual physical control of a vehicle while intoxicated." (Appellant's brief, page 11). The State responds that Mr. Totus failed to object to the jury instructions and does not show manifest constitutional error and actual prejudice warranting review by this Court. The State is correct.

Failure to object to a jury instruction usually precludes a challenge on appeal. *State v. Bailey*, 114 Wn.2d 340, 345, 787 P.2d 1378 (1990). It is well-established that any defects in an instruction must be brought to the trial court's attention, and if not, such defect cannot be raised for the first time on appeal. *State v. Theroff*, 95 Wn.2d 385, 391, 622 P.2d 1240 (1980. Pursuant to CrR 6.15(c), timely objections along with

the reason for the objection must be made so that the trial court has the opportunity to correct any error. *City of Seattle v. Rainwater*, 86 Wn.2d 567, 571, 546 P.2d 450 (1976).

One exception allowing an assignment of error to an objection for the first time on appeal is if the error is a manifest constitutional error and the defendant can show actual prejudice resulted therefrom. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); RAP 2.5(a). Three steps are involved in analyzing whether an issue raised for the first time on appeal can benefit from RAP 2.5(a)'s manifest constitutional error exception. The defendant has the initial burden of showing that the error was (1) "truly of constitutional dimension" and (2) "manifest." *State v. O'Hara,* 167 Wn.2d 91, 98, 217 P.3d 756 (2009). A defendant cannot simply assert that an error occurred at trial and label the error "constitutional"; instead, he must identify an error of constitutional magnitude and show how the alleged error actually affected his rights at trial. *Gordon,* 172 Wn.2d 671, 676, 260 P.3d 884 (2011). If he successfully shows that a claim raises a manifest constitutional error, then the burden shifts to the State to prove that the error was harmless beyond a reasonable doubt. *State v. Grimes*, 165 Wn. App. 172, 185-86, 267 P.3d 454 (2011). To establish actual prejudice, the defendant must make a plausible showing that the asserted error had practical and identifiable consequences in the trial of the case. *State v. O'Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

As previously stated, RCW 46.61.5055(4) provides: "A person who is convicted of a violation RCW 46.61.502 or 46.61.504 shall be punished under chapter 9.94A RCW if: (a) the person has four or more prior offenses with ten years." RCW 46.61.5055

provides that a 'prior offense" includes a "conviction for a violation of RCW 46.61.504..." RCW 46.61.504 addresses the violation of physical control of a vehicle while under the influence. Even though the existence of a prior conviction is an essential element that must be proved to the jury, it is a question of law as to whether the prior conviction qualifies as a predicate offense and thus can be used to elevate the current offense to a felony. *State v. Chambers*, 157 Wn. App. 465, 478-79, 237 P.3d 352 (2010). Further, whether a prior conviction meets the statutory definition is not an element of the crime charged. *Chambers*, 157 Wn. App. at 479.

Here, the language of the special verdict form did not prevent Mr. Totus from arguing against any of his prior convictions. In fact, he did, but his focus was on alleged discrepancies in the case numbers and inferring that the fingerprint evidence was limited in value because it came from arrests and not convictions. His attorney never argued about the language of "physical control" in the special verdict form.

Furthermore, Mr. Totus fails to show any actual prejudice resulting from the giving of the instruction he is now challenging. *State v. Bland*, 128 Wn. App. 511, 515, 116 P.3d 428 (2005). Therefore, this Court will not review this issue because he did not object to it so as to preserve it for appeal.

But even assuming the trial court erred, such error was harmless as the prosecutor correctly presented the law in closing argument, stating that "The evidence has proved beyond a reasonable doubt that, in fact, the defendant, Mr. Totus, on or before September 26, 2012, did have 4 or more prior offenses within 10 years for

driving under the influence of intoxicating liquor and/or convictions for physical control of a vehicle while under the influence of intoxicating liquor." RP 270.

Also, neither the court nor the jury instructions prohibited Mr. Totus from arguing that he did not have four prior convictions or that any of the priors were defective for failure of the informations to contain all of the elements of the crimes charged.

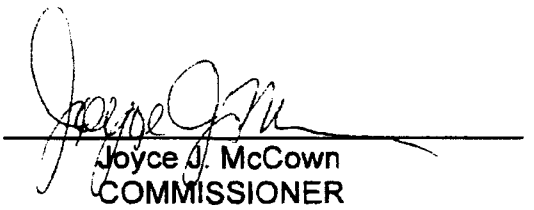
Mr. Totus' four prior offenses meet the definition set forth in RCW 46.61.5055, and based on the evidence the jury's response to the special verdict would have been the same even if Mr. Totus' proposed language was included.

In his Statement of Additional Grounds for Review, Mr. Totus contends that his rights were violated because his blood was taken without a warrant. However, the record shows that prior to trial the court heard a motion in limine regarding the results of the blood test and the State agreed that the results would not be admitted at trial and the court ruled that there could be no mention during trial of the blood test. (RP 72-74) While Mr. Totus may be unhappy that a blood draw was made, such had no impact on his trial and this Court can afford him no remedy.

Also, in his Statement of Additional Grounds for Review, Mr. Totus contends that the trial judge made "stereotyping statements" to him. Mr. Totus does not identify or elude to what the statements were and having reviewed the entire record the undersigned did not discover any statements by the trial judge that were untoward.

In light of the above, the trial court's decision is affirmed and the State's motion on the merits is granted.

May 5, 2014.



Joyce J. McCown
COMMISSIONER

APPENDIX B

FILED
JULY 14, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. CHARLES LELAND TOTUS, JR., Appellant.	)	No. 31702-1-III ORDER DENYING MOTION TO MODIFY

THE COURT has considered appellant's motion to modify the Commissioner's Ruling of May 5, 2014, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion to modify is hereby denied.

DATED: July 14, 2014.

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey.

FOR THE COURT:

Laurel H Siddoway, CJ

LAUREL H. SIDDOWAY, Chief Judge

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. _____
Respondent,	)	
	)	COA No. 317021
vs.	)	
	)	
CHARLES L. TOTUS, JR,	)	CERTIFICATE
	)	OF MAILING
Petitioner.	)	

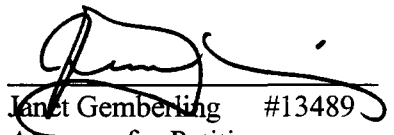
I certify under penalty of perjury under the laws of the State of Washington that on August 11, 2014, I served a copy of the Petition for Review in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon
tamara.hanlon@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on August 11, 2014, I sent a copy of the Petition for Review in this matter by pre-paid first class mail addressed to:

Charles L. Totus, Jr.
#755224
Coyote Ridge Correction Center
PO Box 769
Connell, WA 99326

Signed at Spokane, Washington on August 11, 2014.



Janet Gemberling #13489
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JANET GEMBERLING, PS

August 11, 2014 - 4:25 PM

Transmittal Letter

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Comments:

No Comments were entered.

Proof of service is attached and an email service by agreement has been made to tamara.hanlon@co.yakima.wa.us.

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