No. 46149-8-II

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**COURT OF APPEALS, DIVISION II**
**STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

V.

APRIL HANCOCK, APPELLANT

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Appeal from the Superior Court of Mason County
State of Washington
The Honorable Judge Amber L. Finlay

No. 12-1-00520-6

On review of Mason County District Court No. 2Z327384
The Honorable Judge Victoria Meadows

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# BRIEF OF RESPONDENT

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A. INTRODUCTION

The Appellant, April Hancock, was convicted by a Mason County District Court jury for the offense of driving with a revoked license in the first degree in violation of RCW 46.20.342(1). Hancock was cited with the offense after an officer saw her driving on the lot of a convenience store gas station. The officer did not see Hancock drive anywhere other than on the convenience store gas station lot. There is no dispute as to whether Hancock's license was revoked at the time of driving.

In the district court, Hancock contended that because RCW 46.20.005 describes itself as a lesser included offense to RCW 46.20.342, to obtain a conviction for violation of RCW 46.20.342(1), the State was required to prove the elements of RCW 46.20.005 in addition to the elements of RCW 46.20.342(1). RCW 46.20.005 requires proof that the driving occur on a public highway, but RCW 46.20.342(1) does not have this requirement. The district court disagreed and ruled that proof of a violation of RCW 46.20.342 did not proof a violation of RCW 46.20.005; therefore, the jury instructions did not include an element that the driving occurred on a public highway, and there was no direct evidence that



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Hancock drove on a public highway. The only direct evidence was that she drove on the gas station convenience store lot.

The jury convicted, and Hancock appealed to the Mason County Superior Court. The superior court affirmed the district court. Hancock sought discretionary review to this Court. This Court accepted discretionary review.

In the superior court RALJ appeal, Hancock specified a number of issues for review. The State contends that each of these issues will be resolved by resolution of the one central issue: *Does RCW 46.20.005 require that the element of driving on a public highway be included as an additional element of driving with a revoked license as defined by RCW 46.20.342(1)?* Accordingly, rather than attempt to follow the format of Hancock's brief on appeal, the State will respond to Hancock's brief by addressing this one, central issue, which incorporates each of the issues expressed by Hancock.

## B. STATE'S RESTATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

*Does RCW 46.20.005 require that the element of driving on a public highway be included as an additional element of driving with a revoked license as defined by RCW 46.20.342(1)?*

C. STANDARD OF REVIEW

Review of the district court's decision on appeal, in this Court and in the superior court, is governed by the standards contained in RALJ 9 .1. *State v. Ford,* 110 Wn.2d 827, 829, 755 P.2d 806 (1988). On review of a RALJ appeal from a superior court, this Court reviews the record before the district court, reviewing factual issues for substantial evidence and legal issues de novo. *City of Bellevue v. Jacke,* 96 Wn. App. 209, 211, 978 P.2d 1116 (1999).

A court acting in an appellate capacity may properly affirm a trial court judgment on any basis established by the pleadings and supported by the record, whether or not the trial court relied on that basis in reaching its decision. *In re Marriage of Rideout,* 150 Wn.2d 337, 358, 77 P.3d 1174 (2003) (quoting *Truck Ins. Exch. v. Vanport Homes, Inc.,* 147 Wn.2d 751, 766, 58 P.3d 276 (2002)); *Backlund v. Univ. of Wash.,* 137 Wn.2d 651, 670, 975 P.2d 950 (1999); *Amy v. Kmart of Wash. LLC,* 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

D. FACTS

On April 3, 2012, Deputy Gaynor of the Mason County Sheriff's Office saw the defendant, April Hancock, standing next to her car on

Highway 3 in Mason County. RP 11. Deputy Gaynor recognized her and remembered that she was a suspended driver; so, as he drove on he checked her driver's license status with his dispatcher and confirmed that Hancock's license was in fact suspended. *Id.*

Because the driver's check confirmed that Hancock's license was suspended, Deputy Gaynor turned around and attempted to locate Hancock. RP 11-12. When he returned, he saw that Hancock's car was then in the gas station lot of the Deer Creek Store. RP 12. As Deputy Gaynor watched, Hancock's car backed up to the gas pumps. RP 12. Deputy Gaynor pulled up to the back of Hancock's car and activated his overhead lights. RP 12. He then contacted the driver and identified her as April Hancock. RP 13.

Hancock's license was revoked in the first degree at the time of driving. RP 26. The State charged her with driving while revoked in the first degree. CP 84.

Prior to trial, Hancock filed a motion in the district court, asking that the court dismiss the case because there was no evidence that she drove a motor vehicle on a highway as opposed to a private lot. CP 187-90. The district court denied Hancock's motion, and entered written



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findings of fact and conclusions of law. CP 176-77. The findings of fact were undisputed. *Id.*

After receiving the evidence, a district court jury returned a verdict of guilty as charged for the offense of driving with a revoked license in the first degree. CP 116.

## E. ARGUMENT

*Does RCW 46.20.005 require that the element of driving on a public highway be included as an additional element of driving with a revoked license as defined by RCW 46.20.342(1)?*

RCW 46.20.005 was enacted in 1997 and first appeared in the Revised Code of Washington in 1998. The text of the statute has not changed since its enactment. The statute states as follows:

> Except as expressly exempted by this chapter, it is a misdemeanor for a person to drive any motor vehicle upon a highway in this state without a valid driver's license issued to Washington residents under this chapter. This section does not apply if at the time of the stop the person is not in violation of RCW 46.20.342(1) or *46.20.420 and has in his or her possession an expired driver's license or other valid identifying documentation under RCW 46.20.035. *A violation of this section is a lesser included offense within the offenses described in RCW 46.20.342(1)* or *46.20.420.



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RCW 46.20.005 (emphasis added). Because the statute includes the words "upon a highway in this state," it appears that one does not violate this provision unless he or she drives on a highway.

The current version of RCW 46.20.342(1) states, in relevant part, as follows:

> It is unlawful for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status or when his or her privilege to drive is suspended or revoked in this or any other state.

RCW 46.20.342(1). Thus, distinct from RCW 46.20.005, this statute does not require that driving occur on a highway; instead, by its plain language, RCW 46.20.342(1) applies to driving that occurs anywhere in the state, regardless whether the driving is on a highway or whether it is on any other place that is not a highway.

But Hancock contends that, because RCW 46.20.005 states by its terms that it is a lesser included offense to RCW 46.20.342(1), the requirement of RCW 46.20.005 that the driving must occur on a highway must by extension apply to RCW 46.20.342(1), even though .342(1) by its plain language applies to any driving that occurs anywhere in the state.



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A diligent search of the Revised Code of Washington reveals that RCW 46.20.005 provides the only example of any current statute where the Washington Legislature has declared by statutory language that one offense is a lesser included offense to another offense. Traditionally, lesser included offenses are determined by judicial rule. For a historical reference to the judicial rule regarding lesser included offenses, see *Clarke v. Washington Territory*, 1 Wash. Terr. 68, 70 (1859). For a more recent discussion of the judicial rule regarding lesser included offenses, see *State v. Sublett*, 176 Wn.2d 58, 83, 292 P.3d 715 (2012).

The Court in the more recent case, Sublett, described the test to determine whether an offense is a lesser included offense, as follows:

> We apply the Workman test to determine whether a defendant is entitled to an instruction on a lesser included offense. *State v. Nguyen*, 165 Wn.2d 428, 434-35, 197 P.3d 673 (2008) (citing *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978)). Under that test, two conditions must be met: first, each element of the lesser offense must be a necessary element of the offense charged. Second, the evidence must support an inference that the lesser crime was committed.

*State v. Sublett*, 176 Wn.2d 58, 83, 292 P.3d 715 (2012).

Applying the Workman test to the facts of the instant case, it is clear that RCW 46.20.005 is not a lesser included offense to RCW



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46.20.342(1), at least not as far as the judicial rule is concerned, because the first prong of the test is not satisfied. A necessary element of the lesser offense, RCW 46.20.005, is that the driving occur on a highway. But this is not a necessary element of the greater offense, RCW 46.20.342(1), which does not require proof that the driving occurred on a highway. Thus, the first prong of the *Workman* test is not met on these facts.

Historically, however, RCW 46.20.342 did include as an element proof that the driving occurred on a highway, as follows: "Any person who drives a motor vehicle *on any public highway* of this state while that person is in a suspended or revoked status...." RCW 46.20.342(1) (1989) (emphasis added). When this former version of RCW 46.20.342 was current in 1989, the then-current version of RCW 46.20.021 read (in relevant part) as follows:

> No person, except as expressly exempted by the this chapter, may drive any motor vehicle upon a highway in this state unless the person has a valid driver's license issued under the provisions of this chapter. A violation of this subsection is a misdemeanor and is a lesser included offense within the offenses described in RCW 46.20.342(1), 46.20.416, 46.20.420, and 46.65.090.

RCW 46.20.021(1) (1989). Notably, the historical version of RCW 46.20.021 was substantially identical in substance to the current version of

RCW 46.20.005. Also notable is that, because the former version of RCW 46.20.005. Also notable is that, because the former version of RCW 46.20.342 required proof that the driving occurred on a public highway, there was no conflict between the 1989 version of RCW 46.20.342 and the language contained in the 1989 version of RCW 46.20.021 (now found at RCW 46.20.005).

In 1990, however, RCW 46.20.342 was amended to delete the words "on any public highway of" and to insert in place of those words the word "in". Laws 1990, ch. 210, § 5(1). The amended version appeared in the 1991 version of the Revised Code as follows: "Any person who drives a motor vehicle *in this state* while that person is in a suspended or revoked status... is guilty of a gross misdemeanor...." RCW 46.20.342(1) (1991) (emphasis added).[1] Thus, by this amendment the legislature indicated its intent to criminalize driving with a suspended or revoked license anywhere and everywhere in the state, no matter where it occurs, and irrespective of whether the driving occurred on a highway or whether it occurred on private property.

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[1] Subsequent amendments to RCW 46.20.342(1) have altered the wording somewhat, but the substantive effect of the statute (relevant to the instant case) has not changed. The current version reads as follows: "It is unlawful for any person to drive a motor vehicle in



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Meanwhile, there was no amendment to RCW 46.20.021 that altered or affected the language "upon a highway" until the statute was amended in 1997 to delete subsection (1) of the statute in its entirety. Laws 1997, ch. 66, § 3. At the same time that the legislature deleted subsection (1) of the then current version of RCW 46.20.021, however, it transferred the deleted language to a new statute, which was subsequently codified as RCW 46.20.005 (1998). Laws 1997, ch. 66, § 1. The original version of RCW 46.20.005 currently exists without amendment.

Despite the legislature's use of a judicial term of art, "lesser included offense," in regard to suspended driving, it is clear that according to the judicial test for lesser included offenses, RCW 46.20.005 is not a lesser included offense to RCW 46.20.342(1). *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978). It follows that the definition of the term "lesser included offense" means something different to the legislature than what it means to the judiciary. The judiciary has more than one hundred years of case law that defines the meaning of the term of art "lesser included offense." The legislature's meaning in the current context is undefined.

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this state while that person is in a suspended or revoked status...." RCW 46.20.342(1) (2013).



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The rules of statutory construction lead to a conclusion that, notwithstanding the language of RCW 46.20.005, the legislature clearly intended to criminalize the act of driving with a revoked license everywhere in the state, irrespective of whether the driving occurred on a public highway, or on private property, or elsewhere. *Herrett Trucking Co. v. Washington Public Service Commission*, 58 Wn.2d 542, 364 P.2d 505 (1961) (earlier special statute must yield to latter general statute when there is manifest legislative intent that the latter statute should have effect or where the two statutes cannot otherwise be reconciled and given effect).

## F. CONCLUSION

RCW 46.20.005 has an element that requires proof of driving on a public highway. RCW 46.20.342(1) does not require proof of driving on a public highway. Yet, RCW 46.20.005 states in statutory language that it is a lesser included offense to RCW 46.20.342(1). Hancock, therefore, contends that in order to prove a violation of RCW 46.20.342(1), the State is also required to prove each of the elements of RCW 46.20.005, to include the element that the driving occur on a public highway.



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Each of Hancock's assignments of error may be decided by resolving the one, core issue of whether RCW 46.20.005 creates a requirement as a matter of law that proof of a violation of RCW 46.20.342(1) must also include proof of each of the elements contained in RCW 46.20.005. If so, then error occurred in the instant case, because the jury was not instructed that driving on a public highway must be proved beyond a reasonable doubt in order to return a guilty verdict for the offense of driving on a revoked license in the first degree in violation of RCW 46.20.342(1). If not, however, then no error occurred here, and the evidence is sufficient to sustain the jury's verdict.

For the reasons argued above, the State contends that proof of the elements of RCW 46.20.005 is not required in order to prove a violation of RCW 46.20.342(1) and that, therefore, no error occurred here, and the district court ruling and the jury's verdict should be sustained.

DATED: January 12, 2015.

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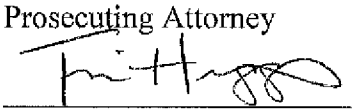

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## January 12, 2015 - 4:24 PM

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