

No. 47558-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

Docie Burch,
Appellant.

Mason County Superior Court
Cause No. 14-1-00554-7
The Honorable Judge Amber Finlay

Appellant's SECOND Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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SUPPLEMENTAL ISSUE

The court has asked the parties “to file additional briefing on the applicability and importance of the factors outlined in *State v. Bash*, 130 Wn.2d 594, 605, 925 P. 2d 978 (1996), bearing on the question of legislative intent to make vehicular homicide and/or vehicle assault strict liability offenses.”

ARGUMENT

THE *BASH* FACTORS ESTABLISH THAT THE LEGISLATURE DID NOT INTEND TO MAKE VEHICULAR HOMICIDE AND VEHICULAR ASSAULT STRICT LIABILITY CRIMES.

Strict liability offenses are generally disfavored. *Bash*, 130 Wn.2d at 606. A statute’s silence on a mental element is not dispositive. *Id.*, at 605. Where a statute does not specify a mental element, legislative intent is determined by resorting to the eight factors (the “*Bash*” factors). *Id.*, at 605-606.

These include

(1)... the background rules of the common law, and [the crime’s] conventional mens rea element; (2) whether the crime can be characterized as a “public welfare offense” ...; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) and the harshness of the penalty[;]... (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, “even at the cost of convicting innocent-minded and blameless people”; and (8) the number of prosecutions to be expected.

Id. These eight factors are to be analyzed “in light of the principle that offenses with no mental element are generally disfavored.” *State v. Anderson*, 141 Wn.2d 357, 363, 5 P.3d 1247, 1251 (2000) (citing *Bash*, 130 Wn.2d at 606).

Seven of the eight factors establish that the legislature did not intend to dispense with a *mens rea* element in vehicular homicide and vehicular assault cases committed by means of intoxication. Accordingly, ordinary negligence remains an element of each offense, and the trial court here should have instructed jurors on the state’s burden to prove ordinary negligence.

Each *Bash* factor is addressed in turn below.

Common law antecedents. Examination of the common law suggests that vehicular assault and vehicular homicide are not strict liability crimes. *Bash*, 130 Wn.2d at 605-606. There is no direct common-law analogue for either offense. The closest common-law antecedents are assault and manslaughter, neither of which are founded upon strict liability. *See State v. Sample*, 52 Wn.App. 52, 55, 757 P.2d 539 (1988) (noting that negligent conduct would not constitute assault at common law); *State v. Norman*, 61 Wn.App. 16, 22-23, 808 P.2d 1159, 1162 (1991) (noting that common law manslaughter required more than

ordinary negligence). This suggests that the legislature did not intend to impose strict liability.

Public welfare offenses. Neither crime is a “public welfare offense,” and thus neither statute imposes strict liability. *Anderson*, 141 Wn.2d at 363. Public welfare crimes are generally those which are regulatory in nature, with no direct or immediate injury to person or property. *Id.* Vehicular assault and vehicular homicide cannot be categorized as public welfare offenses; by definition, the crimes require harm to persons. It is thus very unlikely the legislature would have imposed strict liability. *Id.*

Punishment of innocent conduct. Imposing strict liability “would encompass seemingly entirely innocent conduct.” *Bash*, 130 Wn.2d at 606. A person who drives perfectly after having consumed alcohol will be liable for vehicular homicide or vehicular assault, if involved in an accident that stems from another person’s negligence or reckless conduct. This suggests that the legislature did not intend to impose strict liability, but rather that legislators intended to require proof of ordinary negligence. *See, e.g., State v. Williams*, 158 Wn.2d 904, 911-914, 148 P.3d 993 (2006).

Harshness of the penalty. The high penalty that attends conviction for vehicular homicide and vehicular assault suggests the

legislature did not intend strict liability. *Anderson*, 141 Wn.2d at 364-365. Crimes resulting in harsh penalties are more likely to require proof of a culpable mental state. *Id.* Vehicular homicide is a Class A felony; vehicular assault is a class B felony. RCW 46.61.520; RCW 46.61.522. The legislature is unlikely to have imposed strict liability for an offense that carries a maximum of ten years in prison (vehicular assault), much less one that could result in a life sentence (vehicular homicide). *See Anderson*, 141 Wn.2d at 365 (“[T]he fact that the offense carries with it a maximum term of five years’ imprisonment... is clearly a factor that weighs in favor of a holding that this offense is not one of strict liability”); *Williams*, 158 Wn.2d at 914 (noting that possibility of five-year penalty “weighs against strict liability.”).

Seriousness of harm to the public. The only factor arguably weighing in favor of strict liability is the fifth *Bash* factor. Both vehicular homicide and vehicular assault cause serious harm to the public. But, as in *Bash*, “[w]hether a strict liability standard would accomplish the goal of deterrence is doubtful.” *Bash*, 130 Wn.2d at 610. Punishing perfect drivers as harshly as those whose culpability is mere ordinary negligence will have, at best, an incremental deterrent effect.

Ascertaining “the true facts.” The ease with which a person can “ascertain the true facts” suggests that the legislature did not intend strict

liability. *Id.* Any person who drinks and drives knows that negligent driving may result. This weighs against strict liability. *Id.*; *Cf. Williams*, 158 Wn.2d at 915 (“The sixth factor, the ease or difficulty of defendant ascertaining the true facts, is not particularly useful in our analysis.”)

Burden on the state of requiring proof of ordinary negligence.

Proof of fault will not be “difficult and time-consuming”¹ for the state, given the “hundreds of minor oversights and inadvertences” that can comprise ordinary negligence. *State v. Ferguson*, 76 Wn.App. 560, 569, 886 P.2d 1164 (1995) (internal quotation marks and citation omitted). This, too, weighs against strict liability. *Anderson*, 141 Wn.2d at 363.

Number of prosecutions. In general, “the fewer expected prosecutions, the more likely intent is required.” *Id.*, at 365. The number of prosecutions for vehicular assault and vehicular homicide is low. For FY 2015, there were only 44 vehicular assaults committed by means of intoxication or reckless driving; the total for vehicular homicides committed under the influence was 28. *See Caseload Forecast Council, Statistical Summary of Adult Felony Sentencing*, p. 12 (2015).² The state saw far fewer convictions for these offenses than, for example, second-degree assault (373), second-degree burglary (454), or possession of a

¹ *Bash*, 130 Wn.2d at 605-606.

stolen vehicle (398).³ Caseload Forecast Council, pp. 4, 9. This makes it more likely that the legislature intended conviction to require proof of a culpable mental state. *Id.*, at 365.

Seven of the eight *Bash* factors suggest that the legislature intended to retain a mental element for both vehicular homicide and vehicular assault. Analysis of the *Bash* factors suggest it is unlikely that the legislature “intended to jettison the normal requirement that mens rea be proved.” *Anderson*, 141 Wn.2d at 367.

Under *Bash*, the statute should be interpreted to require proof of ordinary negligence. *Id.* The omission of that element from the “to convict” instructions requires reversal of Ms. Burch’s convictions. *Id.*, at 367.

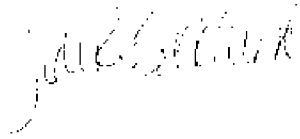
CONCLUSION

Vehicular homicide and vehicular assault are not strict liability crimes. Both require proof of ordinary negligence. The jury’s verdicts in this case do not reflect a finding of ordinary negligence, because the trial court failed to instruct jurors on that element. Ms. Burch’s convictions must be reversed and the case remanded for a new trial.

² Available at http://www.cfc.wa.gov/PublicationSentencing/StatisticalSummary/Adult_Stat_Sum_FY2015.pdf (accessed May 15, 2016).

Respectfully submitted on May 19, 2016.

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

³ Each of these three offenses requires proof of a culpable mental state.

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Docie Burch, DOC #382543
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332

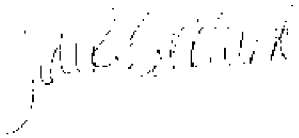
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Mason County Prosecuting Attorney
timw@co.mason.wa.us

I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 19, 2016.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

May 19, 2016 - 8:35 AM

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