

No. 47558-8-II

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

STATE OF WASHINGTON, RESPONDENT

V.

DOCIE E. BURCH, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni. A. Sheldon, Judge

No. 14-1-00554-7

BRIEF OF RESPONDENT

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A. STATE'S COUNTER-STATEMENT OF ISSUE PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

Burch's sole argument on appeal is that the crimes of vehicular homicide and vehicular assault committed by means of intoxicated driving include an element of ordinary negligence and that the trial court, therefore, erred by not including ordinary negligence as an element in the corresponding "to convict" jury instructions. In response, the State contends that after legislative amendments to relevant the statues and after our Supreme Court's decision in *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), negligence is not an element of vehicular homicide or vehicular assault committed by means of driving under the influence.

B. FACTS AND STATEMENT OF THE CASE

On December 29, 2014, Emily Hillis drove her Jeep Cherokee across a bridge in Mason County, hit a patch of ice, and slid off the road about 20 feet and then landed in a ditch, where the Jeep came to rest turned over onto its side. RP 40, 55, 63-64, 73. A deputy sheriff, Deputy Liles, responded to the scene of the accident and began an accident report. While investigating at the accident scene, a sand truck came along and sanded the road. RP 63.

Ms. Hillis lived nearby, about two miles down the road. Her insurance information was at her home, so Deputy Liles allowed Ms. Hillis to accept a ride from a friend and return home. RP 64. The deputy

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then drove to Ms. Hillis's home, about two to four minutes away, to obtain the insurance information. RP 64, 72

After Deputy Liles left the accident scene to go to Ms. Hillis's home, two men, Neil Erickson and Dennis Haase, stopped to check on the overturned Jeep. RP 33-36. While the men were at the accident scene, a small Nissan truck driven by the defendant, Docie Burch, then came across the bridge, slid on the ice (or sand), and crashed into the two men. RP 68, 105, 106-07, 110. Neil Erickson suffered severe injuries, which included a broken leg, broken vertebrae, three broken ribs, three broken bones in his shoulder, a broken jaw, a broken eye socket, and a nearly severed ear. RP 35, 66. The other man, Dennis Haase, was died as a result of the accident. RP 31, 33, 66, 220-25.

While Deputy Liles was at Ms. Hillis's house, he received a call from his dispatcher reporting a second accident, this one with serious injuries, at the scene of the first accident. RP 63-65, 67, 72. Deputy Liles responded back to the scene with lights and siren and, despite the earlier report of ice, had no trouble maintaining his lane and had no problem with traction or sliding. RP 67.

While investigating the second accident, officers learned that Burch smelled strongly of alcohol. RP 145, 190, 232. Her behavior was

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strange, and initially they thought it was because of the trauma of the accident, but eventually it became apparent that she was probably under the influence. RP 232. A deputy obtained a search warrant for a sample of Burch's blood to test for intoxicants. RP 194. Despite the search warrant, Burch refused to provide a blood sample. RP 194, 206. Instead, she tried to run away. RP 206. She fought back against deputies and medical personnel who tried to obtain a blood sample from her. RP 195-96, 206-07. Eventually, they were able to restrain her and obtain a blood sample. RP 195-96, 206-07. Subsequent testing of the blood revealed that her blood alcohol content was between .11 and .14 within two hours of driving and that she also had a small amount of methamphetamine in her blood. RP 247, 248, 255.

At trial, the jury received evidence that alcohol impairs a person's motor control, balance and coordination, and that it slows down thought processes, slows the function of the central nervous system, and slows reaction time. RP 251-52, 335. A toxicologist testified that alcohol also impairs divided attention skills, such as the ability to divide attention as needed for safe driving. RP 252. When a driver hits ice and first starts to slide, if the driver reacts correctly the driver can steer out of the slide if the driver has good reaction time. RP 170-71.

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Before the trial began and again at the end of trial, the court went over jury instructions with the parties. RP 26, 346-402. Burch's attorney informed the trial court as follows: "Your Honor, I've reviewed the jury instructions and I don't think I'll be proposing any because the State proposed the necessary ones." RP 26. Before reading instructions to the jury, the court and the parties went over each instruction one at a time, and the defense had no objection or exception to any instruction given, including having no objection to the vehicular homicide or vehicular assault instructions as given. RP 346-47, 349-51, 383-93, 395-98, 400-02.

After receiving the evidence, the jury returned guilty verdicts for one count of vehicular assault and one count of vehicular homicide. For each guilty verdict the jury answered a special interrogatory finding that both counts were committed while Burch was under the influence. RP 452-53; CP 20-23. The jury answered the special interrogatories no as to driving in a reckless manner, and the jury was unable to answer whether Burch drove with disregard for the safety of others. RP 452-53; CP 20-21.

C. ARGUMENT

Burch's sole argument on appeal is that the crimes of vehicular homicide and vehicular assault committed by means of intoxicated driving include an element of ordinary negligence and that the trial court, therefore, erred by not including

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ordinary negligence as an element in the corresponding “to convict” jury instructions. In response, the State contends that after legislative amendments to relevant the statues and after our Supreme Court’s decision in *State v. Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), negligence is not an element of vehicular homicide or vehicular assault committed by means of driving under the influence.

Burch cites two cases, *State v. Lovelace*, 77 Wn. App. 916, 895 P.2d 10 (1995) and *State v. McAllister*, 60 Wn. App. 654, 806 P.2d 772 (1991), to support her contention that ordinary negligence is an element of vehicular homicide and vehicular assault when committed by means of driving under the influence. Br. of Appellant at 3.

The *McAllister* opinion was published on March 12, 1991, and involved an offense that occurred on September 16, 1986. *McAllister* at 655. In this context, the *McAllister* Court wrote that to sustain a conviction for vehicular homicide committed by driving under the influence, the State had to prove “a combination of ordinary negligence and intoxication while driving.” *Id.* at 658-59 (citation and footnote omitted).

A latter case, when considering an offense of vehicular assault that occurred on March 2, 1991, rejected the defendant-appellant’s claim that the to-convict jury instruction was defective because it did not include ordinary negligence as an element of vehicular assault committed by

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means of driving under the influence. *State v. Hursh*, 77 Wn. App. 242, 243, 245, 890 P.2d 1066 (1995) (abrogated on other grounds by *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005)). The *Hursh* Court held as follows: “We hold that RCW 46.61.522 cannot be construed to require a showing of negligent conduct as an element of vehicular assault. To attempt such a construction would be to read into the statute an element which is not there.” *Hursh* at 246-47.

Effective July 1, 1991, the Legislature amended the vehicular homicide statute, RCW 46.61.520. By doing so, the Legislature did state... as clearly as possible, that the only causal connection which the State is required to prove is the connection between the act of driving and the accident.” *State v Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995). The vehicular assault statute, RCW 46.61.522, was similarly amended in 2001, and reference to proximate cause connected to the means of driving under the influence was removed from the statutory language.

Subsequent to the July 1, 1991, amendment to the vehicular homicide statute, but prior to the 2001 amendment to the vehicular assault statute and prior to the Supreme Court case of *State v Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995), the Court of Appeals decided the case of

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State v. Lovelace, 77 Wn. App. 916, 895 P.2d 10 (1995), the second of two supporting cases cited by Burch.

Lovelace involved a charge of vehicular assault stemming from driving under the influence that occurred on May 25, 1992. *Id.* at 917, 919. Writing prior to the 2001 amendments to RCW 46.61.522 and prior to the Supreme Court's decision in *State v. Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995), the *Lovelace* Court wrote that "[t]o prove proximate cause in a vehicular assault case, the State must prove ordinary negligence and intoxication while driving." *Lovelace* at 919, citing *State v. McAllister*, 60 Wn. App. 654, 806 P.2d 772 (1991). The *Lovelace* Court declared: "Vehicular assault is not a strict liability crime." *Lovelace* at 919, citing *State v. MacMaster*, 113 Wn.2d 226, 231, 778 P.2d 1037 (1989) and *State v. McAllister*, 60 Wn. App. 654, 658-60, 806 P.2d 772 (1991).

Despite these rulings, however, the *Lovelace* Court upheld Lovelace's conviction, reasoning that his level of intoxication strongly inferred "that his negligence caused him to leave his lane." *Lovelace* at 920. Affirming the conviction, the *Lovelace* Court concluded "that Lovelace's intoxication was the proximate cause of the accident." *Id.* at 920. Thus, with the conviction affirmed, and with the *Lovelace* Court

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writing prior to the Supreme Court's decision in *State v Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995) and prior to the 2001 amendments to RCW 46.61.522, the State had no incentive to appeal.

On June 1, 1995, the Supreme Court published *State v Rivas*, 126 Wn.2d 443, 451, 896 P.2d 57 (1995), which considered whether the vehicular homicide by intoxication statute, RCW 46.61.520, requires a causal connection between intoxication and death. The offense at issue in *Rivas* occurred on August 28, 1992. *Id.* at 444. The Supreme Court held in *Rivas* that "causation between intoxication and death is not an element of vehicular homicide." *Id.* at 444.

The *Rivas* Court's decision is instructive, because it traces the evolution of vehicular homicide cases and the evolving elements from enactment of the Washington Motor Vehicle Act in 1937 to the 1991 amendment to RCW 46.61.520. *Id.* at 446-53. It was when speaking of the 1991 amendments that the *Rivas* Court declared that: "The Legislature did state, however, as clearly as possible, that the only causal connection which the State is required to prove is the connection between the act of driving and the accident." *Rivas* at 451.

Addressing the seemingly contrary authority of *State v. MacMaster*, 113 Wn.2d 226, 231, 778 P.2d 1037 (1989) (which

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incidentally was cited by the Court of Appeals in its earlier decision in *State v. Lovelace*, 77 Wn. App. 916, 895 P.2d 10 (1995), which is relied on by Burch), the Supreme Court in *Rivas* declared that “[t]he language of the amendment indicates that the Legislature did not intend that a causal connection such as that described in *MacMaster* be incorporated into the 1991 amendment.” *Rivas* at 451. *Rivas* explained that “[t]he *MacMaster* causal element was added by the court because of its concern with the strict liability results of a literal reading of that statute.” *Rivas* at 452. On this point, *Rivas* then concluded that “even if RCW 46.61.520, as amended in 1991, sets forth a strict liability crime, no authority has been cited indicating that strict liability is impermissible.” *Rivas* at 453.

Rivas reached a result that differs substantially from the pre-1991 amendment case of *State v. McAllister*, 60 Wn. App. 654, 806 P.2d 772 (1991), but *Rivas* does not overrule *McAllister*. *Rivas* at 453. Instead, *Rivas* cites *McAllister* as authority for the proposition that “[b]efore criminal liability is imposed, the conduct of the defendant must be both (1) the actual cause, and (2) the ‘legal’ or ‘proximate’ cause of the result.” *Rivas* at 453. The *Rivas* Court explained that under the statute, “an intoxicated defendant may still avoid responsibility for a death which

results from his or her driving if the death is caused by a superseding, intervening event.” *Id.*

An act or event is an intervening cause only if it occurs later in time. *State v. Souther*, 100 Wn. App. 701, 998 P.2d 350 (2000). In the instant case, there is evidence that there was ice on the road before Burch approached the icy spot and crashed her car into two victims, killing one and severely injuring the other, but because the icy road condition is at most a concurrent cause of the accident and resulting death and injury, it is irrelevant for purposes of vehicular assault and vehicular homicide. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005); *State v. Hursh*, 77 Wn. App. 242, 890 P.2d 1066 (1995).

In conclusion, the State contends that the 2001 amendments to RCW 46.61.522 result in language that, for purposes of whether ordinary negligence is an element of the offenses described, is substantively equal to RCW 46.61.520. The State contends, therefore, that *State v Rivas*, 126 Wn.2d 443, 896 P.2d 57 (1995), controls the result in the instant case and that ordinary negligence is not an element of either vehicular homicide or vehicular assault when either is committed by the means of driving under the influence.

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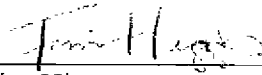
Therefore, no error occurred in the instant case when the trial court omitted the element of ordinary negligence from the to-convict jury instructions for the offenses of vehicular assault and vehicular homicide.

D. CONCLUSION

The State asks that this Court deny Burch's appeal and sustain her convictions.

DATED: November 23, 2015.

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