

69202-0

69202-0

No. 69202-0-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOHN HARRIS, Jr.,

Appellant.

FILED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The State did not prove every element of the crime of hit and run driving beyond a reasonable doubt.

2. The State did not prove every element of attempting to elude a pursuing police vehicle beyond a reasonable doubt.

3. The trial court erred by ordering Harris to pay \$1,545.50 as the mandatory minimum fine for the crime of driving while under the influence of alcohol.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. John Harris Jr. was convicted of hit and run of an attended vehicle, but the State did not prove that he was driving at the time of the accident. Viewing the evidence in the light most favorable to the State, must Harris's conviction for hit and run be dismissed?

2. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Harris was convicted of attempting to elude a pursuing police vehicle, which requires the

State to prove he was driving in a reckless manner. After being signaled to stop by a patrol car's lights, Harris drove for only a few blocks, occasionally at a high speed, but he stopped for traffic lights, signaled for turns, stayed in his lane of traffic, did not endanger others, and returned to the area where the officers first saw his vehicle.

Viewing the evidence in the light most favorable to the State, must Harris's conviction for attempting to elude a pursuing police vehicle be dismissed?

3. A defendant may not be convicted of a crime unless the State proves every element of that crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art. I, §§ 3, 22. Harris was convicted of driving while under the influence, which requires the State to prove he was under the influence of or affected by alcohol, drugs, or a combination of the two at the time he was driving a motor vehicle. The officers who arrested Harris and the woman who he allegedly talked to after the accident did not testify that he showed any of the well-known physical symptoms of being under the influence of alcohol. When a police officer spoke to Harris over an hour after the accident, Harris vomited, smelled slightly of alcohol, and had trouble with his balance, but he had also complained of a back injury. Viewing the evidence in

the light most favorable to the State, must Harris's conviction for driving while under the influence be dismissed?

4. Harris was convicted of driving while under the influence of alcohol. Because he refused to take a breath test and had a prior DUI within the past seven years, he was subject to a fine of between \$750 and \$5,000. RCW 46.61.5055(2)(b)(ii). The sentencing court imposed the mandatory minimum fine, but the Judgment and Sentence requires Harris to pay \$1,545.50. Where this amount conflicts with the court's ruling, must Harris's case be remanded to correct the Judgment and Sentence?

C. STATEMENT OF THE CASE

Two Seattle patrol officers responded to a report of a disturbance at Vince's restaurant near the corner of Renton Avenue South and South Henderson Street; when they drew near they learned a 911 caller had reported a man in the bar with a gun.¹ 2RP 129, 192-93.² As their patrol car approached the restaurant, the officers saw a red Nissan Titan pickup truck without its lights on leave the area and

¹ Although the officers referred to Vince's as a bar, it was an Italian restaurant. 2RP 191, 205; see CP 3.

² The verbatim report of proceedings is contained in three volumes:
1RP - jury trial June 11, 2012, and earlier omnibus hearings
2RP - jury trial, June 12, 2012
3RP - jury trial June 13 and 14, 2012, sentencing June 25, 2012, and motions to continue the sentencing hearing

turn onto South Henderson Street. 2RP 193. Some teenagers on the sidewalk pointed at the truck as it left.³ 2RP 131, 156, 192.

The officers saw the pickup make a “wide-sweeping turn” onto South Henderson without stopping for the red light. 2RP 193, 213. They followed the truck on Henderson to the first intersection where it was stopped in the left-hand turn lane for a red light. 2RP 131, 194. The police officers were in uniform in a police car equipped with emergency lights and siren. 2RP 130, 190, 194. They turned on the patrol car’s emergency lights after they stopped behind the red pickup.⁴ 2RP 131, 194.

As the light turned green, the pickup signaled for a right turn and cut across two lanes of traffic to turn right onto Martin Luther King Jr. Way South. 2RP 131, 194. The truck accelerated quickly, causing the tires to squeal, and a brief chase ensued. 2RP 131, 196. The officer who was driving the patrol car estimated he traveled at up to 55 miles per hour to catch up to the truck. 2RP 195.

³ A diagram of the police officer’s pursuit of the pickup truck was admitted as Exhibit 2. A copy of the video and audio from the officer’s patrol car camera was admitted as Exhibit 1.

⁴ Contrary to policy, the officer who was driving the patrol car did not turn on the siren because the noise in the car made it difficult to hear the radio. 2RP 198, 234. He did “chirp” the siren at some point. 2RP 225-26.

After driving a few blocks on Martin Luther King, the truck made a full stop at a traffic light, and turned right onto South Cloverdale Street when the light turned green. 1RP 167, 169-70, 197. The patrol car followed as the truck drove one block on Cloverdale, stopped at a light and turned right onto Renton Avenue South. 2RP 172-73. Although the officer described the pickup as traveling aggressively on Renton Avenue South, it stayed within its lane and returned to park in front of Vince's. 2RP 171, 174, 199-200.

After the truck parked, Harris emerged, dropped his car keys, and stood with his arms out to his sides in the middle of the street. 2RP 200, 201. One officer pointed a gun at Harris and the other a taser, ordering him to the ground. 2RP 141, 201-02. Harris was yelling and did not immediately respond. 2RP 144, 201. Harris eventually got on the ground and was placed under arrest. 2RP 204.

The officers did not find a weapon on Harris or in the red truck. 2RP 186-87, 205. The truck had damage in front of the driver's door, which did not open fully. 2RP 148, 219.

Harris was treated by medics at the arrest scene due to back pain. 2RP 145-46, 275. At the police precinct, Harris was ill and vomited. 3RP 333-34. He declined to take a BAC test. 3RP 339-40.

His balance was unsteady, but he was able to follow the DUI officer's commands.⁵ 3RP 334, 343-44, 348, 352-53. Harris was never asked to perform field sobriety tests. 2RP 179; 3RP 353.

Naomi Yonemura was involved in a traffic accident on Renton Avenue South that evening when she hit the side of a red pickup truck that pulled in front of her. 2RP 257, 262, 286, 301. Her Corolla sustained some damage to the front-end. 2RP 148, 205, 257-58. Yonemura did not move her car from the lane of traffic after the accident, but the pickup parked nearby and the driver came to talk to her. 2RP 287. Yonemura accused the man of peeling out in front of her, but he denied it. 2RP 258. The man said he would give her a business card for the auto body shop where he worked so she could get her car fixed there. 2RP 258. When Yonemura asked for the driver's "information," however, he yelled at her and went back to his truck. 2RP 258-59. He never provided her with his name, contact information, driver's license or insurance information. 2RP 264-65.

Yonemura called 911 with a cell phone loaned by a young man across the street and reported the location of the accident, described the red pickup, and provided its vehicle's license number. 2RP 259, 269.

⁵ The video from the police precinct was admitted as Exhibit 10.

Later, after Harris's arrest, she saw someone being treated by medics but did not see that man's face. 2RP 275-76.

The detective assigned to the case prepared a photo montage the contained a photograph of Harris and five men who looked like him. 2RP 240-41, 250; Ex. 5. He showed the montage to Yonemura, and she identified someone other than Harris as the driver. 2RP 241-43; 280.

The King County Prosecutor charged Harris by amended information with attempting to elude a pursuing police vehicle, driving while under the influence of alcohol, and hit and run of an attended motor vehicle. CP 10-11. A jury convicted him as charged, and he was sentenced to twelve months in jail for each offense. CP 59, 64, 111-13; 3RP 449. The Judgment and Sentence for the misdemeanor convictions includes a requirement Harris pay \$1,545.50 for the crime of driving while under the influence of alcohol. CP 65.

D. ARGUMENT

1. **The State did not prove beyond a reasonable doubt that Harris committed the crime of hit and run of an attended vehicle.**

a. The State was required to prove beyond a reasonable doubt every element of the crime of hit and run. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. On appellate review, the court determines whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Harris was convicted of hit and run of an attended motor vehicle. RCW 46.52.020(2), (3); CP 11, 50. The purpose of the statute is to ensure that drivers stop at the scene of accidents and give information and any necessary aid. State v. Perebeynos, 121 Wn. App. 189, 195, 87 P.3d 1216 (2004). The applicable portions of the statute read:

(2)(a) The driver of any vehicle involved in an accident resulting only in damage to a vehicle which is driven or attended by any person or damage to other property must move the vehicle as soon as possible off the roadway or freeway main lanes, shoulders, medians, and adjacent areas to a location on an exit ramp shoulder, the frontage road, the nearest suitable cross-street, or other suitable location. The driver shall remain at the suitable location until he or she has fulfilled the requirements of subsection (3) of this section. Moving the vehicle in no way affects fault for the accident.

...

(3) Unless otherwise provided in subsection (7) of this section the driver of any vehicle involved in an accident . . . resulting in damage to any vehicle which is driven or attended by any person or damage to other property shall give his or her name, address, insurance company, insurance policy number, and vehicle license number and shall exhibit his or her vehicle driver's license to any person struck or injured or the driver or any occupant of, or any person attending, any such vehicle collided with and shall render to any person injured in such accident reasonable assistance. . . . Under no circumstances shall the rendering of assistance or other compliance with the provision of this subsection be evidence of the liability of any driver for such accident.

RCW 46.52.020 (emphasis added).

The State is also required to prove that the defendant knew he was involved in a traffic accident. State v. Vela, 100 Wn.2d 636, 639, 673 P.2d 185 (1983). Thus, the State was required to prove that Harris was the driver of a vehicle he knew was involved in an accident and that he failed to provide the other driver with his name and address,

driver's license, vehicle license number and auto insurance information or failed to provide reasonable assistance needed by occupants of the other vehicle. Vela, 100 Wn.2d at 638-39; State v. Teuber, 19 Wn. App. 651, 657, 577 P.2d 147, rev. denied, 91 Wn.2d 1006 (1978); CP 43-44.

b. The State did not prove beyond a reasonable doubt that Harris was the driver of the car that was involved in the traffic accident. An essential element of the crime of hit and run of an attended vehicle is that the defendant was the driver of a car involved in an accident. RCW 46.52.020(3); CP 43. Harris's conviction must be reversed because the State did not prove beyond a reasonable doubt that he was driving the truck when the accident occurred.

Yonemura testified that she was in an accident and hit the side of a red truck. 2RP 257, 262, 286. The truck's driver parked on the side of the street and came to her car to talk to her, but he left before providing her with his driver's license number, insurance information or vehicle license number. 2RP 258-59, 260, 264-65, 287. Yonemura saw the man return to the truck, but she did not see him get in it. 2RP 265, 271-72. She could not see inside the truck and thus did not know if there were any other occupants. 2RP 262.

Yonemura was shown a photo montage that contained Harris's photograph. 2RP 240, 280; Ex. 5. She identified a photograph in the montage as the man who was driving the truck. 2RP 280, 298.

Yonemura later doubted her choice and decided another photograph was that of the driver. 2RP 282. Neither photograph was of Harris. 2RP 241-42, 282, 298-99.

The description Yonemura gave the police of the driver also did not provide the necessary proof. Yonemura described the driver as an African-American or African male without an accent, in his mid-30's, of lean to medium build, wearing dark pants, a dark top, and a "do-rag." 2RP 266-67. Harris, however, was 52 years old at the time of the incident. 3RP 345-46. He was wearing a jacket and jeans. 2RP 204. He thus did not fit Yonemura's description.

Finally, while Harris was seen driving the red pickup after the accident, there was at least one other person in the vehicle. 2RP 202. The State did not prove that Harris owned the pickup truck.

c. Harris's conviction must be reversed. The State is free to rely upon circumstantial evidence in a prosecution, but the defendant may not be convicted unless that evidence supports every element of the crime beyond a reasonable doubt. State v. Thompson, 153 Wn.

App. 325, 335, 223 P.3d 1165 (2009). While the State proved that Harris drove the red truck during the police pursuit, the State did not prove beyond a reasonable doubt that Harris was driving when Yonemura hit the truck, an essential element of the crime. Harris's conviction for hit and run of an attended motor vehicle must be dismissed. See, Teuber, 19 Wn. App. at 657-58.

2. The State did not prove beyond a reasonable doubt that Harris committed the crime of attempting to elude a pursuing police vehicle.

Harris was also convicted of attempting to elude a pursuing police vehicle, RCW 46.61.024. CP 10, 48. The statute reads:

Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal give by the police officer may be by hand, voice, emergency light, or siren. The officer giving the signal shall be in uniform and his vehicle shall be equipped with lights and sirens.

RCW 46.61.024(1). An essential element of the crime is that the defendant drive in a "reckless manner." Id; CP 34 (Instruction 9). The term "in a reckless manner" is not defined in RCW 46.61.024 or elsewhere in the Motor Vehicle Code. RCW 46.61.024; State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The court

instructed Harris' jury that operating a motor vehicle in a reckless manner "means to drive in a rash or heedless manner, indifferent to the consequences." CP 35 (Instruction 10); accord Roggenkamp, 153 Wn.2d at 622 (addressing vehicular assault and vehicular homicide statutes); State v. Ridgley, 141 Wn. App. 771, 780-81, 174 P.3d 105 (2007).

The State did not prove beyond a reasonable doubt that Harris's driving was rash, heedless, or indifferent to the consequences. Harris did drive at a high rate of speed during part of the brief incident. However, he stopped at stop signs, signaled his turns, did not weave around other traffic, and remained in his own lane for most of the incident. Moreover, Harris ended the chase by driving back to the location where the police first saw the red truck and parking.

Harris's conduct is distinguishable from that of drivers in a recent decision addressing two convictions for attempting to elude a police vehicle, State v. Chouap, 170 Wn. App. 114, 123, 285 P.3d 138 (2012) (finding no double jeopardy violation for two counts of eluding). Chouap first drove at 70 miles per hour in an area with posted speed limits of 30 and 35 miles per hour. Chouap, 170 Wn. App. at 119. When he hit a speed bump, his car went airborne and

sparked. Id. The pursuing officers were so concerned about safety to the public that they terminated the pursuit. Id.

Fifteen or twenty minutes later, the officers again saw Chouap's Cadillac driving so fast that it was "fish-tailing" and nearly out of control. Id. at 119-20. The officers began a second high speed pursuit, this time through a residential neighborhood, but lost sight of the speeding vehicle. Id. at 120. When another police officer spotted that car soon thereafter, Chouap immediately accelerated to 80 miles per hour in a 35 mile per hour zone, causing another car to pull to the side of the road to avoid being hit. Id. Chouap then entered a freeway, driving erratically at 70 to 80 miles per hour, and exited, running a stop sign. Id. When officers tried to stop Chouap with "stop sticks," he moved to the right of the road and accelerated towards one of the deputies, resulting in a separate assault conviction. Id. at 120, 121. Eventually, one of the officers used his patrol car to hit Chouap's vehicle, causing it to spin out and stop. Id. at 121.

In a less egregious case, a conviction for attempting to elude a pursuing police vehicle was upheld where the driver accelerated to at least 50 miles per hour in a 25-mile-per-hour zone; frightened a

pedestrian causing the dog he was walking to bolt, and ran a stop sign.
State v. Perez, 166 Wn. App. 55, 61, 269 P.3d 372 (2012).

Harris's driving did not display the reckless disregard of the consequences displayed in Chouap and Perez and required by RCW 46.61.024(1). In addition, Harris drove back to the spot where the officers first saw his truck and stopped there. Harris's eluding conviction must be reversed and dismissed.

3. The State did not prove beyond a reasonable doubt that Harris committed the crime of driving while under the influence of alcohol.

Harris was convicted of driving while under the influence of alcohol. CP 49. This required the State to prove beyond a reasonable doubt that Harris was under the influence of or affected by alcohol or any drug or the combination of both alcohol and drugs while driving a motor vehicle. Former RCW 46.61.502(2010); CP 37; State v. Shabel, 95 Wn. App. 469, 473, 976 P.2d 153, rev. denied, 139 Wn.2d 1006 (1999). The State failed to meet this burden of proof.

The two officers who pursued and arrested Harris did not testify that he showed physical signs of being under the influence of alcohol or drugs. While one officer opined that Harris appeared "altered," this was based only upon Harris's driving and actions after the stop. 2RP

148-49. Neither officer testified that Harris smelled like alcohol, for example, and neither performed field sobriety tests at the scene.

Assuming for the purposes of argument that Harris was the man who spoke to Yonemura after the accident, she also did not mention any of the typical signs of alcohol or drug use. Instead, Yonemura was worried about the man's mental health based upon his driving and their conversation. 2RP 260-61.

At the police precinct, Officer Michael Lewis observed Harris vomit in the holding cell and testified the vomit smelled like alcohol. 3RP 333-34. He added that Harris had a hard time moving and smelled of alcohol. 3RP 334. This occurred, however, over an hour after Harris was seen driving a motor vehicle. 2RP 191; 3RP 347-48. Moreover, Harris was suffering from back pain, as an officer placed a knee in his back during the arrest. 2RP 145-46, 178; Ex. 5. Officer Lewis did not ask Harris to perform any field sobriety tests, and Harris refused to take a breath test. 3RP 339-40, 353.

This Court concluded that there was sufficient evidence to support a conviction for driving while under the influence of alcohol when the defendant was stopped for driving the wrong way on a one-way street, his Breathalyzer test showed an alcohol level of 0.10

percent, he admitted consuming six beers and two tequilas. State v. Keller, 36 Wn. App. 110, 672 P.2d 412 (1983). In contrast, the limited circumstantial evidence in this case does not establish beyond a reasonable doubt that Harris was under the influence of alcohol, drugs, or a combination of the two at the time he was driving. His conviction for driving while under the influence of alcohol must be reversed and dismissed.

4. Harris's case must be remanded for correction of his sentence for driving while under the influence of alcohol.

The superior court has the power to sentence only as authorized by the legislature. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Harris was convicted of the gross misdemeanor of driving while under the influence of alcohol, and the jury found that he refused to undergo a breath test. Former RCW 46.61.502(5); CP 51. Defense counsel did not object when the State asserted that Harris had a prior conviction for driving while under the influence of alcohol within the past seven years for purposes of his sentence for driving while under the influence of alcohol.⁶ 3RP 449.

⁶ The conviction was not counted in determining Harris's SRA offender score for attempting to elude a pursuing police vehicle because it "washed out." 3RP 438.

As a result, Harris's mandatory minimum sentence for that crime included a \$750 fine. RCW 46.61.5055(2)(b)(ii).⁷

The trial court imposed all mandatory financial obligations, including the DUI fine. 3RP 449, 452; CP 58, 65. The Judgment and Sentence for the misdemeanor offenses, however, states that Harris is required to pay "\$1,545.50 because this is a 2nd DUI offense within 7 years, pursuant to RCW 46.61.5055." CP 65. While the judgment does not specify that the \$1,545.50 is a fine, the reference to the statute makes it clear that the court intended the amount as the mandatory DUI fine. CP 65; 3RP 449.

The trial court stated she was imposing the mandatory minimum penalties for the DUI offense. 3RP 449. RCW 46.61.5055 establishes minimum and maximum sentences for the offense of driving while under the influence of alcohol. In this case, Harris could be sentenced to between 45 and 365 days in jail and a fine of between \$750 and \$5,000. RCW 46.61.5055(2)(b). \$1,545.50 is not the mandatory minimum fine provided by RCW 46.61.5055, and the case should therefore be remanded to superior court to correct Harris's financial obligations.

⁷ RCW 46.61.5055 has been amended several times since Harris's September 6, 2010, offense, but the mandatory minimum fine has remained the same.

E. CONCLUSION

Harris's convictions for hit and run of an attended vehicle, attempting to elude a pursuing police vehicle, and driving under the influence of alcohol must be reversed and dismissed because the State did not prove every element of each crime beyond a reasonable doubt.

In the alternative, his driving while under the influence of alcohol conviction must be remanded to correct the mandatory fine.

DATED this 20th day of March 2012.

Respectfully submitted,



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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)
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 Respondent,)
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 v.)
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 JOHN HARRIS, JR.,)
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 Appellant.)

NO. 69202-0-I

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STATE OF WASHINGTON
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