

No. 71615-8-I

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

STATE OF WASHINGTON, Appellant,

v.

TRAVIS J. BIRD, Respondent.

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

- 1. By operation of law, Respondent's plea to the charge of vehicular assault charged in the alternative included a plea to vehicular assault under RCW 46.61.522(1)(b).**

Travis J. Bird, Respondent, argues that the case law cited by the State does not support the argument that a plea to a crime charged in the alternative is a plea to each alternative mean. However, previous case law clearly states just that: "When a defendant pleads guilty to a crime charged in the alternative, he has no right to plead guilty to only one of the alternatives; rather, the guilty plea is to the charged crime." *In re Richey*, 162 Wn.2d 865, 870-71, 175 P.3d 585 (2008).

Bird attempts to distinguish *In re Richey*, and *State v. Bowerman*, 115 Wn.2d 794, 802 P.2d 116 (1990), based on the procedural posture of those cases. However, the procedural posture of said cases as compared to Bird's case is not so different as to deserve a distinction. Both *Richey* and *Bowerman* are post-conviction cases where the respective defendants attempted to overturn their convictions on appeal. Here, the procedural difference is that Bird is not directly attacking the validity of his vehicular assault conviction. Instead, Bird in effect argues that although there is nothing invalid about Judge Needy finding him guilty of vehicular assault under all three prongs of vehicular assault, future courts cannot find that

he was guilty under *any* three of the alternatives in particular. Such a proposition has no basis in logic or case law and should be rejected.

Bird acknowledges that at the time of his plea, he could only plead as charged to all three alternatives. *See* Resp't Br. at 8 (explaining that he would not have the right to plead guilty to the disregard for safety of others prong of vehicular assault over the State's objection). Yet, that is effectively what Bird attempts to do here. If Bird could not pick and choose which alternative he pled to at the time he pled to vehicular assault, he should not be allowed to do so now. Such a holding would run afoul of the rule announced in *In re Richey* and *Bowerman*—a rule central to those courts' holdings. These holdings were not dependent on the procedural posture of the cases and mandate that Bird's plea to vehicular assault as charged in the Skagit County case included a plea to vehicular assault under RCW 46.61.522(1)(b) (the "DUI prong").

2. The Skagit County record unambiguously establishes by a preponderance of the evidence that Bird was convicted of the DUI prong of vehicular assault.

In regards to whether or not the record before the Court establishes by a preponderance of the evidence that Bird was convicted of

the DUI prong, the parties fundamentally disagree.¹ The parties do not disagree about what the record is; rather they disagree about what conclusions should be drawn from said record. For reasons stated in the State's initial brief and not sufficiently rebutted by Bird's, there is only one reasonable conclusion that can be drawn from the record here: Bird was convicted of the DUI prong of vehicular assault.² See Appellant Br. at 11–15.

a. Drawing the conclusion, based on the record, that Bird's conviction is one under the DUI prong is not an impermissible inference.

Bird argues that the State is asking the Court to make an impermissible inference in order to conclude Bird's conviction was one under the DUI prong. As authority for this position, Bird cites to *State v. Jackson*, 112 Wn.2d 867, 774 P.2d 1211 (1989). However *Jackson* is a burglary case where the presumption of intent to commit a crime based on entering or remaining in a building without permission was at issue. *Jackson*, 112 Wn.2d at 873. In *Jackson*, the question before the court was whether or not it was constitutionally valid for jury to be instructed on the

¹ It is the State's position that *Bowerman* and *In re Richey* control the answer to this question. Section 1 *supra*. The State merely addresses Bird's additional arguments in this Section 2 should the Court differ.

² Because no ambiguity exists, the rule of lenity does not apply and the trial court erred in relying on it.

presumption. *Id.* at 869. Here, there is no issue of fact to be decided by a fact-finder. Instead, it is an issue of law to be decided by the Court on the record provided. This Court is only able to do so by reviewing the record and drawing conclusions from the facts provided. The State is not requesting the Court draw any inferences, or arguing that a presumption should be applied (*e.g.* If fact A is found, B should be assumed unless rebutted). Rather, the State is arguing that the only reasonable conclusion the Court can arrive at given the record is that Bird was convicted under the DUI prong of vehicular assault.

b. The handwritten “DUI” notation on Bird’s judgment and sentence has equal force as compared to all other language contained in the judgment and sentence and is simply one of many indicators of Judge Needy’s intent.

Bird attempts to diminish the import of the handwritten notation of “DUI” on the judgment and sentence. Bird argues that because “there is nothing in the record as to who wrote the notation, when it was written, or what exactly it was intended to mean,” Resp’t Br. at 6, reduced weight should be attributed to said notation. Resp’t Br. at 11. The fact that there is nothing in the record as to who wrote the notation or when it was written is not relevant to the issue at hand. There is no dispute between the parties that the judgment and sentence before the trial court and this Court is the judgment and sentence entered in the Skagit County case.

January 30, 2014, RP 18. As there is no dispute as to this fact, who wrote the notation and when it was written is not relevant. Judge Needy adopted both the handwritten and typed portions of the judgment and sentence when he signed it. Therefore, the hand written portions of the judgment and sentence have equal force and effect as the type written portions. *In re West*, 154 Wn.2d 204, 211, 110 P.3d 1122 (2005) (including a handwritten notation in the judgment and sentence gave the notation the imprimatur of the trial court) (citing *State v. Phelps*, 113 Wn. App. 347, 357, 57 P.3d 624 (2002)). What exactly the notation means and what weight should be attributed to it is a question for this Court to decide. *Id.* The State argues that it is yet another of many examples of Judge Needy's intention to treat Bird's vehicular assault conviction as one under the DUI prong.

3. Bird is not entitled to an award of attorney fees and costs.

RAP 18.1 states that “[i]f applicable law grants to a party the right to recover reasonable attorney fees or expenses . . . the party must request the fees or expenses as provided in [RAP 18.1].” RAP 18.1(a). RAP 18.1 itself does not create a right recover costs however, it merely establishes the procedure by which one exercises a pre-existing right to recover attorney fees and costs. Bird does not point to any applicable law that

grants him the right to recover reasonable attorney's fees or costs³, therefore his request should be denied.

B. CONCLUSION

The State requests that this Court reverse the superior court's ruling dismissing the information and remand this matter back to the trial court for further proceedings.

Respectfully submitted this 18th day of September, 2014.



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³ Instead, Bird argues that a lack of financial means entitles him to attorney's fees and costs. Even if Bird did have a legal basis to collect fees and costs based on his financial status, he fails to follow the procedure established in RAP 18.1(c) to enable this Court to consider his financial resources in making a determination on awarding costs and fees.

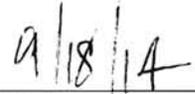
CERTIFICATE

I CERTIFY that on this date I mailed, or otherwise caused to be delivered, a copy of the document to which this Certificate is attached to this Court and Respondent's counsel, addressed as follows:

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