

**FILED**

APR 29 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 295541

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

---

STATE OF WASHINGTON,

RESPONDENT,

v.

DEBORAH DAILY,

APPELLANT.

---

APPEAL FROM THE SUPERIOR COURT FOR  
DOUGLAS COUNTY

THE HONORABLE JOHN HOTCHKISS

BRIEF OF APPELLANT

ELIZABETH A. PADULA  
WSBA# 24612  
AND  
DRUE KIRBY COATS  
WSBA# 18955

PADULA & ASSOCIATES  
2320 130<sup>TH</sup> AVE NE  
BUILDING E, SUITE 250  
BELLEVUE, WA 98005  
425 883 2883

**FILED**

APR 29 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 295541

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

---

STATE OF WASHINGTON,

RESPONDENT,

v.

DEBORAH DAILY,

APPELLANT.

---

APPEAL FROM THE SUPERIOR COURT FOR  
DOUGLAS COUNTY

THE HONORABLE JOHN HOTCHKISS

BRIEF OF APPELLANT

ELIZABETH A. PADULA  
WSBA# 24612  
AND  
DRUE KIRBY COATS  
WSBA# 18955

PADULA & ASSOCIATES  
2320 130<sup>TH</sup> AVE NE  
BUILDING E, SUITE 250  
BELLEVUE, WA 98005  
425 883 2883

## TABLES

### Cases

<i>Condit v. Lewis Refrigeration Co.</i> , 101 Wn.2d 106, 676 P.2d 466 (1984).....	10
<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 684 P.2d 692 (1984).....	13
<i>Edmonds v. Ostby</i> , 48 Wn. App. 867, 740 P.2d 916 (1987).....	11
<i>McGuire v City of Seattle</i> , 31 Wn. App. 438, 642 P.2d 765 (1982).....	9, 13
<i>State v. Malone</i> , 106 Wn.2d 607, 724 P.2d 364 (1986).....	10
<i>State v. Huyen Bich Nguyen</i> , 165 Wn.2d 428 at 437, 197 P.3d 673 (2008).....	7, 8, 9
<i>State v Votava</i> , 149 Wn.2d 178, 66 P.3d 1050 (2003) .....	9
<i>State v. Workman</i> , 90 Wn. 2d 443, 584 P.2d 382 (1978).....	8, 9
<i>Vance v. Dep't of Licensing</i> , 116 Wn. App. 412, 65 P.3d 668 (2003) .....	10
<i>Wilkinson v. Smith</i> , 31 Wn. App. 1, 639 P.2d 768 (1982).....	13

### Statutes

RCW 10.61.006.....	8
RCW 46.61.502.....	5, 7
RCW 46.61.504.....	7

## **INTRODUCTION**

Ms. Deborah Daily was charged with one count of Driving under the Influence. The issues to be decided by this Court are whether the Trial Court erred by refusing to give a jury instruction on the included offense of “Physical Control”. And whether the Trial Court erred by refusing to give the affirmative defense of “Safely off the Roadway”.

## **ASSIGNMENTS OF ERROR**

1. The Trial Court in its oral decision on January 13, 2010, erred as a Matter of Law by denying Ms. Daily’s motion to give a jury instruction on the lesser included offense of Physical Control of a Motor Vehicle.
2. The Trial Court in its oral decision on January 13, 2010, erred as a Matter of Law by denying Ms. Daily’s motion to give a jury instruction on the Affirmative Defense of “Safely off the Roadway”.
3. The Trial Court erred as a Matter of Law by making a finding that Ms. Daily was being pursued by law enforcement prior to getting safely off the roadway thus making a legal determination of the meaning of pursuit by law enforcement officer.

Issues Pertaining to Assignments of Error

1. A fellow motorist observed and called 911 reporting that Appellant was driving erratically. Law enforcement was dispatched but no available officers were in the vicinity. Without any indication that law enforcement was enroute Ms. Daily pulled off the roadway at a gas station; legally parked her car in the back area of the parking lot; and was found by law enforcement officers a short time later reclined and asleep in her car. She was given field tests and an eventual breath test indicating she was under the influence. Did the Trial Court err by denying Ms. Daily's request for the jury to be instructed on the lesser included offense when each of the elements of the included offense are a necessary element of the offense charged and the evidence supports an inference that the included crime was committed? (Assignment of Error 1)

2. The Affirmative Defense of "Safely off the Roadway" applies: "if prior to being pursued by law enforcement officers, the person has moved the vehicle safely off the roadway." Ms. Daily moved her car off the roadway at approximately the same time the arresting Trooper was enroute to the scene, but still miles away. The Trial Court found that pursuit began when the arresting Trooper got in his car to respond to the 911 call. Based on this, the Court refused to instruct the jury on the affirmative defense. Did the Trial Court err when it held that the

facts supporting the defense were an issue of law? (Assignment of Error 2)

3. The Affirmative Defense was designed for people who get in their cars after drinking too much. It encourages people who realize they have had too much to drink, to pull safely off the roadway. Ms. Daily did exactly what legislators intended. When the Court denied her requested jury instruction on the affirmative defense, did the Trial Court abuse its discretion? (Assignment of Error 3)

#### **STATEMENT OF THE CASE**

On May 18, 2009, around 1:40 P.M. hours Trooper Richmond of the Washington State Patrol received a dispatch of a possible DUI driver (erratically driven car) on Southbound 97 near Orondo, WA. CP 18 – 19. He was the closest unit but his car was being serviced in Wenatchee. CP 19 – 20. Trooper Richmond was on the road heading toward the scene at 1:55 P.M. and arrived at 2:00 P.M. CP 20 -21. Approximately the same time that Trooper Richmond got on the road, the suspect car (later identified as Ms. Daily's) pulled off the road at a gas station in the Lincoln Rock area. Her car was found legally and safely parked behind and to the side of the business with her asleep inside. CP 22, 29, 30, 31.

After knocking on the window and waking Ms. Daily, Trooper Richmond eventually had her perform Field Sobriety Tests. Upon conclusion of these tests, the Trooper determined he had probable cause to arrest Ms. Daily (and did) for violation of RCW 46.61.502, driving under the influence. CP 33, 38, 48, 58.

At no time did law enforcement see Ms. Daily driving. They relied upon the statements of the reporting party who was at the scene and witnessed Ms. Daily's driving. CP 113.

During the course of the case the Trial Court made the following ruling on the Defense motion to include a jury instruction on the lesser included offense and the affirmative defense of safely off the roadway.

THE COURT(in part) : The second, then, request is to allow a jury instruction for the lesser included of physical control of a motor vehicle while under the influence of intoxicants, plus the affirmative defense of safely moving a vehicle off the roadway prior to being pursued by a police officer. And in this case I'm going to deny that motion also. I believe in this case we have a charge of driving under the influence. All of the evidence will be of driving by the private person, who is subpoenaed to testify, and the officer, as indicated -- we have indications here today from the CAD log of what

that testimony would be and also the officer's indication of what he was told prior to the person pulling off the road at the gas station on Baker Flats.

I don't think -- To me it would be totally confusing for the jury to give a lesser included, and then an affirmative defense to, and include a defense, to say that if you're pulled off the road before pursuit. I think before pursuit becomes a legal issue rather than an issue for the jury. Well, I guess that may or may not be the case of whether that becomes a jury issue prior to pursuit. I would allow Counsel the opportunity to renew this motion with some information about prior to pursuit at the time of trial, but at this point I'm denying the original motion. Right. I'm not saying that it can't be renewed, but I would need -- My concern is that prior to pursuit, because the CAD logs that have been indicated would indicate you have least four officers in pursuit before she pulls off the roadway. CP 141-142.

At the Stipulated trial, the Court made further findings which are reflected below:

The Court: ... And prior to during this time (sic), after the first call is when they started getting responding officers to that location, and there was a responding -- the Trooper Richmond was the one whose car was up on the lift at the Cascade Chevrolet. There was a, I think, a

sergeant responding from the office there on Euclid, and it seems like there was another Trooper and I can't -- there was another Trooper, I can't remember the Trooper's name, responding from 28. So they were all responding probably for almost 10 minutes before she pulled off the road. CP 154.

THE COURT: Okay. Because I remember I did not find it as a lesser included under the case law. I realize you did have a case that said it was a lesser included, but it just didn't seem to fit into this case. CP 164.

Ms. Daily proceeded by a Stipulated Trial and was found guilty of Driving Under the Influence. RCW 46.61.502. CP 169 – 170.

## **ARGUMENT**

### **Issue 1 – Lesser included offense**

The Washington Supreme Court held in *State v. Huyen Bich Nguyen*, 165 Wn.2d 428, 197 P.3d 673 (2008) that RCW 46.61.504 (physical control) is an included offense of RCW 46.61.502 (driving under the influence). In Huyen Bich Nguyen, the defendant was stopped partially in the gore point on an on-ramp to I-5 in downtown Seattle. She was found not guilty of DUI, but guilty of Physical Control. She argued because both charges were gross misdemeanors,

punishable by the same penalties, physical control could not be a “lesser” included offense of DUI.

The *Huyen Bich Nguyen* Court said otherwise, and found that the *Workman* test still applies; each of the elements of the included offense must be a necessary element of the offense charged and the evidence must support an inference that the included crime was committed. *State v. Workman*, 90 Wn. 2d 443, 447-48, 584 P.2d 382, (1978). Although they looked at laws of other jurisdictions, they determined that *Workman* coupled with RCW 10.61.006, did not require nor was there any reference to, a consideration of penalties when determining “lesser” included or rather “included” offense. *HUYEN BICH NGUYEN*, 165 Wn.2d 428 at 437; 197 P.3d 673 (2008).

*Workman* also holds that “Where the evidence supports it, an instruction on an included offense should be given. We hold it was error to fail to give the proposed instruction.” *Workman*, 90 Wn. 2d 443, 447-48, 584 P.2d 382, (1978) (*omitting citations.*)

In Ms. Daily’s case there was evidence to support both a DUI and Physical Control. The independent witness saw and reported erratic driving. Law enforcement saw and reported they found Daily legally parked, in the driver’s seat of her car, reclined and apparently asleep in the parking lot of the gas station when they arrived on scene.

Hence, the Trial Judge in Ms. Daily's case ruled contrary to *Huyen Bich Nguyen, Workman* and RCW 10.61.006. Appellant requests this Court reverse and remand the case for a new trial.

**Issue 2 –Factual determination a legal decision**

This Court has determined that the affirmative defense of “Safely off the Roadway” is available to those charged with driving while intoxicated. *See McGuire v City of Seattle*, 31 Wn. App. 438, 444, 642, P.2d 765 (1982). The *Votava* court later expanded the decision in *McGuire* to include a broadened class of defendants that could use the affirmative defense. The affirmative defense was always available to those individuals who drove a motor vehicle and then elected to move safely off the roadway and now it is also available to individuals who did not personally drive the vehicle off the roadway. *See State v Votava*, 149 Wn.2d 178, 66 P.3d 1050 (2003). The portion of the *McGuire* holding that provides the affirmative defense of “Safely off the Roadway” has been confirmed over time, and is considered settled law. *See State v Nguyen, supra*.

In the present case, it is undisputed that Ms. Daily pulled safely off the roadway; her car was legally parked and she was asleep when law enforcement found her. This is the classic safely off the road way

fact pattern. However, the Trial Judge denied the affirmative defense finding that Ms. Daily was being “pursued” by law enforcement prior to getting safely off the roadway and thus she was not entitled to the instruction.

Appellant could find no case law within the context of DUI which instructed on who exactly needed to be aware of the pursuit (the defendant or law enforcement). To try and analogize our situation with that of “fresh pursuit” or “hot pursuit” would be misplaced due to the jurisdictional aspect of the matter. The Courts have found a driver need not necessarily know they are being pursued for “fresh pursuit” as the statute has to do with what the officer is doing, not the driver. *Vance v. Dep't of Licensing*, 116 Wn. App. 412, 65 P.3d 668; 2003. Again, fresh pursuit is a jurisdictional situation and simply not one that can be analogized with pursuit in our case. Appellant urges this Court to make clear the use of the affirmative defense safely off the roadway.

When determining the application “{T} he duty of this court in interpreting a statute is to give effect to the intent and purpose of the legislation as expressed in the act as a whole. *State v. Malone*, 106 Wn.2d 607, 724 P. 2d 364 (1986) citing *Condit v. Lewis Refrigeration Co.*, 101 Wn.2d 106, 676 P.2d 466 (1984).

The Legislature enacted the defense “Safely off the Roadway” in order to encourage persons who had too much to drink to get off roadways, and safely park their cars so they no longer pose a danger to the public. *Edmonds v. Ostby*, 48 Wn. App. 867, 740 P.2d 916 (1987).

The Statute is very specific as to what behavior is required of a defendant. It acknowledges that people may make a mistake to drink and drive, but if they recognize the mistake, take affirmative actions to correct the mistake and do, then they can redeem themselves in the eyes of the law. This is exactly what Appellant did.

Understanding the intent of the defense, we now turn to the logical inference of who must possess the requisite knowledge of law enforcement’s pursuit.

To begin with, whether the vehicle was safely off the roadway is a factual issue to be decided by the Trier of fact. *Id.* In *Ostby*, the issue was whether the car defendant’s car was safely off the roadway when it was found in a parking lot, not properly parked, the engine was running and the transmission was in drive with the defendant passed out in the driver’s seat. The Court found that the situation posed a danger to the public as he was not safely off the roadway. This constituted substantial facts to support the finding and conclusion by the Trier of fact.

In our case, there were substantial facts to support Ms. Daily's use of the defense. She had no reason to believe that law enforcement was pursuing her. She didn't see any law enforcement, no one told her they were on their way, and the 911 caller did not try to get her off the road. A reasonable person under similar circumstances would not have had any reason to believe they were being chased, followed or pursued. The Trial Judge even used the word "respond" not pursue when discussing the actions of the Troopers.

Ms. Daily did what the statute required which was to recognize she was effected by alcohol, get off the roadway, go to an area where she was properly and safely parked and thus no longer creating a danger to the public. This behavior is exactly what the legislature envisioned a driver should do under similar circumstances. Again, the legislature was intended to redeem these people, not further demonize them.

Ms. Daily urges this Court to determine that whether she was being pursued by law enforcement is best left for the Trier of Fact to decide. Like any other jury instruction, if there are facts to support the defense, the instruction should be given. The Trial Court took the decision from the Jury, and characterized the actions as both a police response as well as pursuit. A Trial Court that makes the determination

as this one did err as a matter of law by not giving the question to the jury to decide.

This error such as this requires a new trial. *McGuire v City of Seattle*, 31 Wn. App. 438, 642, P.2d 765 (1982).

### **Issue 3. Did the Trial Court abuse its discretion?**

If this Court finds that it was within the Court's discretion to deny the "Safely off the Roadway" instruction, the Trial Court never the less, abused its discretion by doing so. "A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). "[a]n abuse of discretion exists only where no reasonable person would take the position adopted by the trial court." *Wilkinson v. Smith*, 31 Wn. App. 1, 14, 639 P.2d768 (1982).

As stated earlier, the legislative intent behind the law is to recognize that a person may get on the road with too much to drink realize what they have done, pull off the road and park. What Appellant did was exactly as the Legislature envisioned.

The Trial Court however, finds that this fact pattern is too confusing to the jury. The Court found that a majority of evidence indicates Ms. Daily was driving her car. A reasonable person,

knowing the defense, knowing the intent behind the law, could not find that the exact pattern for which the law was intended is confusing.

The Trial Court's holding was an abuse of discretion. This Court should reverse and remand the case so that the Trier of fact can determine whether Ms. Daily was "Safely off the Roadway" prior to pursuit by law enforcement.

### **CONCLUSION**

The Trial Court erred as a matter of law by denying Appellant a jury instruction on the included offense of Physical Control. The Court also erred by denying a jury instruction on the affirmative defense of safely off the roadway. Based upon these errors, Appellant respectfully requests this Court reverse the decisions of the Trial Court and remand the case for a new trial.

Respectfully submitted this 26<sup>th</sup> day of April, 2011.

Presented by:



Drue Kirby Coats, WSBA #18955  
Elizabeth Anne Padula, WSBA #24612  
Attorneys for Appellant