

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,)	NO. 295541
Respondent,)	
)	
vs.)	
)	
DEBORAH DAILY,)	
Appellant.)	

BRIEF OF RESPONDENT

APPEAL FROM THE SUPERIOR COURT FOR
DOUGLAS COUNTY

THE HONORABLE JOHN HOTCHKISS

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Deputy Prosecuting Attorney

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A. IDENTITY OF RESPONDENT

The respondent is the State of Washington. Respondent asks this court to deny Defendant's appeal.

B. SYNOPSIS

Ms. Daily, hereinafter defendant, was cited for driving under the influence of alcohol. At the conclusion of a pre-trial hearing the trial court preliminarily ruled that, based on the evidence at hand, the court would deny defendant's request for a jury instruction on the lesser included offense of physical control. Defendant requested a stipulated facts bench trial and was convicted of DUI. This appeal follows.

The primary issue is whether the trial court abused its discretion in denying defendant's request for a lesser included instruction on physical control and its statutory defense where the evidence showed that: a civilian eyewitness observed defendant swerving into oncoming traffic and driving erratically for several miles; defendant admitted to driving; and four law enforcement officers were en-route before defendant finally pulled over and safely parked her vehicle.

C. STATEMENT OF THE CASE

Facts. Defendant was observed by a civilian eyewitness erratically driving her vehicle over a distance of several miles. The witness called 911 at 1:41 p.m. and gave a rolling description of his observations to include weaving, crossing the fog-line and centerline numerous times, traveling in the oncoming lane of traffic, and nearly striking other vehicles on the highway. CP 199. Four state troopers were dispatched and en-route for approximately 10 minutes when, at 1:55 p.m., Defendant pulled into a gas station parking lot and parked her vehicle. CP 86, 200. When the troopers arrived at 1:57 p.m. defendant was found asleep in her car. CP 200. Defendant admitted to driving the vehicle. CP 40, 113. Defendant admitted to consuming alcohol the evening prior. CP 99. Defendant was intoxicated and provided a valid breath sample of .13 BAC within two hours of driving. CP 201-02.

Procedure. Defendant was cited for DUI. At the conclusion of a suppression hearing where the trial court heard the relevant facts of the case, defendant asked that the jury be allowed to consider the lesser included offense of Physical

Control, RCW 46.61.504(1) and its statutory defense of 'safely off the roadway', RCW 46.61.504(2). CP 126. The court denied that request preliminarily based on the facts presented, but the court reserved its decision to see how the facts developed at trial. CP 142. At defendant's request a bench trial upon stipulated facts was held and she was convicted of DUI. CP 148, 151-170.

D. AUTHORITY AND DISCUSSION

1. Physical Control defense does not apply to DUI.

Defendant's request for this court to disregard her dangerous drunk driving because she safely pulled over before the police arrived should be denied. Defendant concedes that "there was evidence to support both a DUI and physical control." Brief of Defendant, p. 8. Defendant essentially argues that DUI and physical control are interchangeable charges that should be treated the same with respect to the policy considerations underlying the statutory defense for physical control; but that is not the law. The 'safely off the roadway' defense is strictly limited to the charge of physical control under RCW 46.61.504(1), and is not available to the charge of DUI under RCW 46.61.502. See *State v. Hazzard*, 43 Wash.App. 335, 716 P.2d 977 (1986); and

State v. Beck, 42 Wash.App. 12, 707 P.2d 1380 (1985). See also State v. Votava, 149 Wash.2d 178, 187 (2003) (“A defendant who must prove the more serious crime of driving while under the influence runs the risk of taking the case out of the actual physical control where the defense exists and *being charged with DUI for which the defense is not available.*”).

Defendant’s statement in her brief at page 9 that “[t]his court has determined that the affirmative defense of ‘Safely off the Roadway’ is available to those charged with driving under while intoxicated” mischaracterizes the holdings in McGuire v. City of Seattle, 31 Wn.App. 438 (1982); and State v. Votava, 149 Wash.2d 178 (2003).

In State v. Votava, 149 Wash.2d at 187, our supreme court expressly acknowledged the statutory defense for physical control is not available for a person charged with DUI. *Votava* did not, as defendant contends, expand the use of the affirmative defense to DUIs in any way, shape or form. The real issue in *Votava* was whether persons who did not personally drive a vehicle to a safe location but were nevertheless in physical control of the vehicle were entitled to use the statutory defense. Under the previous

case law, persons charged with physical control were not allowed to use the statutory defense unless they admitted to driving the vehicle to its present location, thus exposing them to an upgraded charge of DUI; or they would have to get into the vehicle, drive it onto the road, and then park it safely off the roadway – an absurd result in order to use the defense, but again exposing the driver to a DUI and endangering the public. *State v. Votava, supra*.

The real issue in *McGuire v. City of Seattle*, 31 Wn.App. 438 (1982), is that a defendant is not prejudiced by an amendment of DUI to the lesser included charge of physical control at the time of trial. To the extent that *McGuire*, 31 Wash.App. at 444, stated in dicta that a defendant could not avail himself of the safely off roadway defense unless he personally moved the vehicle to its present location, that part was overruled by *State v. Votava*, 149 Wn.2d 178, 182, 188-89 (2003).

Defendant argued below the jury should be allowed to consider physical control as an alternative to DUI where defendant has pulled off the roadway prior to the arrival of law enforcement, even when there is direct evidence of driving, and then to allow consideration of the “safely off the roadway”

defense. CP 138. The trial court opined that such an approach “would be totally confusing for the jury.” CP 142. Defendant wants the jury to be able to pick the alternative charge of physical control and then acquit on the statutory defense based on the policy rationale that the defendant should be given the benefit of having pulled over before the police arrived. The practical effect of such an approach would be to extend the statutory defense for physical control to DUI. Had the legislature wanted DUI and physical control to share the same defense, it would have expressly done so.

This case involves a drunk driver who committed the “greater offense” of DUI, who was observed driving dangerously by an eyewitness, and who admitted driving to the investigators who arrived shortly after she pulled over. This is not a situation like *Votava* where the defendant who was not observed driving was originally charged with physical control, but, in order to use the statutory defense, was put in a hard choice of having to admit driving, evidence the state did not have, and then face a greater charge. The defendant had already admitted to driving and was already charged with DUI. And this is not a situation where denial

of the defense will result in absurd results such as drunk driving, because defendant was already doing that.

2. Lesser included offense – Workman test.

There are factual and legal distinctions between DUI and physical control which make improper the defendant's request to extend the policy considerations underlying the statutory defense for physical control to someone also charged with DUI. The first reason to deny the lesser included instruction is because the facts show that defendant is guilty of DUI. Since "[t]he charge of 'driving while intoxicated' contains all of the elements of 'being in physical control' and has the additional element of vehicular motion," State v. McGuire, 31 Wn.App at 442, it is rightly described as "a greater crime than [physical control]... .", State v. Votava, 149 Wash.2d at 186. When the facts support a DUI charge, it is not an abuse of discretion for a trial court under the factual prong of the Workman test, described below, to not instruct the jury on the lesser charge of physical control.

"A defendant is entitled to a lesser included offense instruction if (1) each of the elements of the lesser offense is a necessary element of the offense charged (legal prong) *and* (2)

the evidence in the case supports an inference that only the lesser crime was committed (factual prong). *State v. Workman*, 90 Wash.2d 443, 447-48, 584 P.2d 382 (1978). The factual prong is satisfied when, viewing the evidence in the light most favorable to the party requesting the instruction, substantial evidence supports a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater one. *State v. Fernandez-Medina*, 141 Wash.2d 448, 461, 6 P.3d 1150 (2000).” *State v. LaPlant*, 157 Wash.App. 685, 687, 239 P.3d 366 (2010)(Workman test).

“We review de novo the legal prong of a request for a jury instruction on a lesser included offense. *State v. Walker*, 136 Wash.2d 767, 772, 966 P.2d 883 (1998). We review for abuse of discretion the factual prong of a request for a jury instruction on a lesser included offense. *Walker*, 136 Wash.2d at 771-72, 966 P.2d 883.” *State v. LaPlant*, 157 Wash.App. at 687.

While the legal prong of the *Workman* test is satisfied because physical control is always a lesser included offense of DUI (*State v. Nguyen*, 102 Wn.2d 161 (2008); *State v. McGuire*, *supra*), the facts of this case do not satisfy the factual prong of the

test. In *State v. Nguyen*, the trial court allowed the state, over defendant's objection, to amend to the lesser included offense of physical control because there were factual deficiencies as to whether defendant was driving the vehicle. In *Nguyen* the officer came upon a car pulled onto the gore point of an on ramp with its engine running, defendant was in the driver's seat talking on a cell phone, but no one had reported seeing the vehicle in motion or had seen the defendant driving the vehicle. The real issue in *Nguyen* was whether physical control was a lesser included offense even though it had the same, not lesser penalties than DUI. *Nguyen* does not, as Defendant contends, stand for the proposition that the lesser included offense of physical control should be given whenever the defendant has pulled off the roadway prior to the arrival of law enforcement.

“To satisfy the factual prong of *Workman*, the evidence must support an inference that the lesser offense was committed *instead of* the greater offense. In other words, “the record must support an inference that *only* the lesser offense was committed.” *State v. Prado*, 144 Wash.App. 227, 242 (2009)(citing *State v. Karp*, 69 Wash.App. 369, 376, review denied 122 Wash.2d 1005

(1993)). Because there is direct eyewitness observation of defendant's driving a motor-vehicle on a highway, and defendant's admission that she was driving, it cannot be argued that such evidence gives rise to a reasonable inference that defendant committed only physical control instead of and to the exclusion of the greater offense of DUI. As defendant has conceded in her brief, there is evidence to support a DUI, and so, under the factual prong of the Workman test, the trial judge was well within her discretion to deny the lesser included instruction.

3. Jury cannot consider physical control because defendant had pulled safely off roadway – City of Spokane v. Beck, 130 Wash.App. 481 (2005).

The second reason for not allowing physical control to be charged in addition to DUI is because the defendant is not guilty of physical control. The state's case of DUI is focused on the driving aspect while on the roadway, and not for being in physical control of the vehicle while it was in the parking lot. Because the trooper testified that defendant had pulled safely off the roadway (CP 200), as a matter of law, she cannot be prosecuted for physical control. See *City of Spokane v. Beck*, 130 Wash.App. 481 (2005)(Div. III). In *Beck*, this court of appeals held that when an officer testifies and concedes a vehicle is parked safely off the

roadway, there is insufficient evidence for a jury to conclude that a defendant is not safely off the roadway. *Beck*, supra at 488. Beck was found asleep in a car parked in a store parking lot. At trial the officer testified the defendant had safely pulled off the roadway. The state argued that whether a vehicle was safely off the roadway was an issue of fact for the jury to decide. Although the jury convicted, the overturning of the verdict by the superior court on RALJ appeal was upheld by this court of appeals because “no reasonable trier of fact would disregard this plain admission that provided the factual basis for the elements of the defense from a trained police officer on the scene.” *Id.*

4. Pursuit by law enforcement – statutory construction.

The third reason for denying the alternative charge of physical control and not allowing its statutory defense is because the defendant did not pull safely off the roadway *prior* to being pursued by law enforcement. The issue of the court denying the giving of the safely off the roadway defense under the facts presented must first abide the determination of whether the court abused its discretion in denying the motion to give the lesser included offense of physical control in the first place. If the first

decision was proper, then discussion of the second issue is moot. If the first decision was improper and the lesser included offense should have been given, and this matter is remanded for a new trial, then this court is invited to give guidance to the trial court because the issue will surely arise below.

The trial court ruled, in part, that the statutory defense to physical control would not be available because the troopers had commenced their pursuit prior to defendant pulling off the roadway. Defendant argues the statutory defense should be available in such a situation if the defendant did not have knowledge of the pursuit. But subjective knowledge of the pursuit is not an express element of the statutory defense.

The statutory defense for physical control, RCW 46.61.504(2), provides, "No person may be convicted under this section if, prior to being pursued by a law enforcement officer, the person has moved the vehicle safely off the roadway." The plain reading of the statute does not contain a knowledge element on the part of the driver; and the respondent has provided neither case law authority nor legislative history directly on this issue or statute. "In interpreting a statute, this court looks first to its plain

language. If the plain language of the statute is unambiguous, then this court's inquiry is at an end. The statute is to be enforced in accordance with its plain meaning." *State v. Armendariz*, 160 Wash.2d 106, 110, 156 P.3d 201 (2007) (emphasis added) (citations omitted). "When statutory language is unambiguous, we look only to that language to determine the legislative intent without considering outside sources." *State v. Delgado*, 148 Wash.2d 723, 727, 63 P.3d 792 (2003) (emphasis added); see also *Tingey v. Haisch*, 159 Wash.2d 652, 657, 152 P.3d 1020 (2007) (when a " 'statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent' " (quoting *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005) (internal quotation marks omitted))). Statutory construction is reviewed de novo. *City of Spokane v. County of Spokane*, 158 Wash.2d 661, 672-73, 146 P.3d 893 (2006).

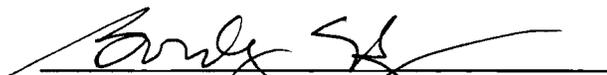
A trial court's decision whether to give a particular jury instruction, including an affirmative defense, is reviewed for abuse of discretion. See *State v. Cuthbert*, 154 Wash.App. 318, 225 P.3d 407 (2010). Since the plain language of the statutory

defense does not expressly provide that defendant have knowledge of the pursuit, then defendant's knowledge is not an issue for the jury to consider. The trial court did not abuse its discretion in denying the defense instruction because the undisputed facts show the troopers were in pursuit 10 minutes prior to defendant safely parking her vehicle and then arriving approximately two minutes later.

D. CONCLUSION

The State respectfully requests the court to deny defendant's appeal where the trial court did not abuse its discretion when it denied the motion to allow the jury to consider the lesser included offense of physical control and its statutory defense.

Respectfully submitted this 3rd day of May, 2011.


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