

FILED
September 13, 2012
Court of Appeals
Division III
State of Washington

NO. 30666-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

CITY OF YAKIMA,

Plaintiff/Respondent,

V.

JULIO MENDOZA GODOY,

Defendant/Appellant.

AMENDED APPELLANT'S BRIEF,

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ASSIGNMENT OF ERROR

1. The Municipal Court's refusal to give an instruction on the affirmative defense of "safely off the roadway," along with the Superior Courts affirmation of that refusal, violates Julio Mendoza Godoy's constitutional right to present a defense.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Is Mr. Godoy entitled to the affirmative defense provided by RCW 46.61.504(2) where he was neither the owner nor driver of the vehicle, had not been pursued by a pursuing police vehicle, and was merely sitting in a car in a parking lot?

STATEMENT OF CASE

Mr. Godoy was arrested on May 26, 2007 for actual physical control of a motor vehicle while under the influence of intoxicating liquor and/or drugs. Officer Deccio of the Yakima Police Department effected the arrest in a parking lot at 3710 Tieton Drive. (CP 67, ll. 24-25; CP 70, ll. 8-9; CP 71, ll. 8-13; ll. 21-24).

The officer was responding to a complaint of loud noise coming from a dumpster. As he arrived in the parking lot he heard an engine revving. He saw a car parked near the middle of the parking lot. The car was correctly parked in a parking stall. He made contact with Mr. Godoy who was in the driver's seat. (CP 72, ll. 22-23; CP 78, ll. 22-25; CP 99, ll. 11-16).

Mr. Godoy had an open beer in his hand. The keys were in the ignition and the car was running. There was also beer in different areas of the car. (CP 73, ll. 3-8; CP 116, ll. 3-24).

Officer Deccio knocked on the car window to get Mr. Godoy's attention. When the door opened he detected a strong odor of intoxicants. Mr. Godoy was uncooperative. He was removed from the car. He appeared uncoordinated and could not walk without help. (CP 73, ll. 22-23; CP 74, l. 2; ll. 14-17; CP 75, ll. 4-13).

Officer Deccio arrested Mr. Godoy because he felt the he might drive off and that it was not a safe situation. In his opinion Mr. Godoy was very intoxicated. (CP 77, ll. 8-22).

There were no other vehicles in the area. There were no pedestrians in the area. It was 10:36 at night. (CP 79, ll. 7-10; ll. 15-16).

Officer Cavin contacted Mr. Godoy in a holding cell at the police station. He noted that Mr. Godoy's speech was slurred and repetitive.

There was a strong odor of intoxicants. His eyes were watery, droopy and bloodshot. (CP 83, ll. 20-22; CP 88, ll. 4-23; CP 89, ll. 2-5; CP 90, ll. 14-16).

Mr. Godoy refused the BAC after having been read the implied consent warnings. It was Officer Cavin's opinion that Mr. Godoy was impaired. (CP 93, ll. 9-11; CP 95, ll. 1-3; CP 98, ll. 4-6).

A jury trial was conducted on September 1, 2011. Mr. Godoy testified following the Court's denial of a motion to dismiss after the City rested its case. (CP 100, l. 10; CP106, ll. 9-20).

Mr. Godoy claimed that the car was not his. He admitted drinking in the car and that he was intoxicated. He denied any intent to drive the car. He stated that friends had driven him to the parking lot and that he was just sitting in the car. (CP 109, ll. 18-21; CP 110, ll. 10-11; ll. 20-25; CP 111, ll. 16-17).

The trial court declined to give an instruction on the affirmative defense contained in RCW 46.61.504(2) - "safely off the roadway." Defense counsel objected and a lengthy colloquy was conducted. (CP 123, l. 14 to CP 132, l. 1).

The jury found Mr. Godoy guilty of actual physical control.

Mr. Godoy filed a Notice of Appeal on September 23, 2011. (CP 1).

The Superior Court affirmed Mr. Godoy's conviction on February 1, 2012. The decision determined that the affirmative defense was not available to Mr. Godoy. (CP 184).

Mr. Godoy's Motion for Discretionary Review was approved by a Commissioner's Ruling on April 18, 2012.

SUMMARY OF ARGUMENT

Legislative intent is that the affirmative defense provided by RCW 46.61.504(2) be made available to any individual under the influence of intoxicating liquor and/or drugs who is found in a car that has been safely moved off the roadway prior to being pursued by a police vehicle.

ARGUMENT

RCW 46.61.504(2) provides, in part: "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.**"

(Emphasis supplied.)

There can be no dispute that the car was safely off the roadway. It was correctly parked in the middle of a parking lot. The issue is whether

or not Mr. Godoy, being neither the owner nor driver of the car, is entitled to the affirmative defense.

“We review the trial court’s decision whether to give a particular jury instruction for abuse of discretion.” *State v. Chase*, 134 Wn. App. 792, 803, 142 P. 3d 630 (2006).

...
...”In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, **the court must interpret it most strongly in favor of the defendant** and must not weigh the proof or judge the witnesses’ credibility, which are exclusive functions of the jury.” *State v. May*, 100 Wn. App. 478, 482, 997 P. 2d 956 (2000). **“A refusal to give a requested jury instruction constitutes reversible error where the absence of the instruction prevents the defendant from presenting his theory of the case.”** *State v. Buzzell*, 148 Wn. App. 592, 598, 200 P. 3d 287, *review denied*, 166 Wn. 2d 1036 (2009).

State v. Cuthbert, 154 Wn. App. 318, 341-42, 225 P. 3d 407 (2007). (Emphasis supplied.)

The evidence clearly indicates that the affirmative defense applies to any individual who may have driven the car to the parking lot and parked it. It would also apply to any individual who had directed another person to park the car at that location. *See: State v. Votava*, 149 Wn. 2d 178, 66 P. 3d 1050 (2003).

A strikingly similar case is *Spokane v. Beck*, 130 Wn. App. 481, 123 P. 3d 854 (2005). In *Beck*, the Court noted that

...Ms. Beck's car was running and parked in a lot 20 to 30 yards off of the roadway and she called for a ride before falling asleep in the driver's seat and slumped over onto the passenger's side.

Spokane v. Beck, supra, 488.

The *Beck* Court also ruled that

...appellate review of the sufficiency of the evidence to support a conviction for a physical control charge when challenged with the safely off the roadway affirmative defense is appropriate.

Spokane v. Beck, supra.

Mr. Godoy contends that there was more than sufficient evidence to place the issue of the affirmative defense in the jury's hands.

"...[A] trial court's refusal to instruct the jury on the defendant's theory of the case constitutes prejudicial error if there is evidence in the record supporting the theory." *State v. Stevens*, 158 Wn. 2d 304, 143 P. 3d 817 (2006) (Hn (5)).

Mr. Godoy takes the position that even though he was neither the owner nor the driver of the car, he is entitled to the affirmative defense since he was in actual physical control of the car.

The engine was running. He was in the driver's seat. The keys were in the ignition.

As the *Votava* Court noted at 184:

An officer may charge actual physical control over a vehicle when a person is in a position to control the movement or lack of movement of the vehicle.

The *Votava* Court went on to state, *supra*:

Allowing a defendant who did not drive to present the defense better advances the purposes of the statute. The language of a statute should be construed to carry out, rather than defeat, the statute's purpose. [Citation omitted.] The actual physical control statute was enacted to protect the public by (1) deterring anyone who is intoxicated from getting into a car except as a passenger, and (2) enabling law enforcement to arrest an intoxicated person before that person strikes. *State v. Smelter*, 36 Wn. App. 439, 444, 674 P. 2d 690 (1984).

(Emphasis supplied.)

In *Votava* the facts are again quite similar to Mr. Godoy's case, with the exception that Mr. *Votava* had been a passenger in the car before moving into the driver's seat. Nevertheless, the situation is analogous insofar as the purpose behind the actual physical control statute. The *Votava* Court stated at 187: "...[W]e reject the argument that because *Votava* took

control *after* the car was off the roadway, the defense is not available to him.”

Defense counsel properly objected to the trial court’s refusal to give the affirmative defense instruction. The trial court abused its discretion in denying the instruction.

The absence of the affirmative defense instruction precluded Mr. Godoy from presenting a defense to the charge of actual physical control. He has the constitutional right to present a defense. *See: State v. Otis*, 151 Wn. App. 572, 578, 213 P. 3d 613 (2009).

CONCLUSION

The trial court’s refusal to give an affirmative defense instruction violated Mr. Godoy’s constitutional right to present a defense. The denial prejudiced him by precluding any type of defense.

The Superior Court’s decision fails to take into account the purpose behind the affirmative defense. Mr. Godoy asserts it is contrary to both the *Votava* case and legislative intent. *See: RAP 13.4(b)(1), (3) and (4)*.

Mr. Godoy’s conviction should be reversed and the case remanded to Municipal Court for a new trial directing the Court to give an affirmative defense instruction.

DATED this 12th day of September, 2012.

Respectfully submitted,

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DIVISION III

STATE OF WASHINGTON

CITY OF YAKIMA,)	
)	YAKIMA COUNTY
Plaintiff,)	NO.11 1 01403 2
Respondent,)	
)	CERTIFICATE OF
)	SERVICE
v.)	
)	
)	
JULIO MENDOZA GODOY,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 12th day of September, 2012, I caused a true and correct copy of the *AMENDED APPELLANT'S BRIEF* to be served on:

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