

**FILED**

**SEP 13 2012**

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

NO. 30666-6-III

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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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CITY OF YAKIMA,

Respondent,

v.

JULIO MENDOZA GODOY,

Appellant.

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On appeal from the Honorable Judge Scott Sparks  
Yakima Superior Court

---

**BRIEF OF RESPONDENT**

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CITY OF YAKIMA LEGAL DEPARTMENT

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**A. Statement of the Issue**

I. Did the trial court correctly exclude a jury instruction on the “safely off the roadway” defense to the crime of physical control while under the influence when Mendoza Godoy was intoxicated, in physical control of a vehicle, and stated that prior to being pursued by law enforcement he did not (1) move the vehicle off the roadway himself or (2) direct another to move the vehicle off the roadway, thus not meeting the requirement set out by *State v. Votava* that the defendant either (1) move the vehicle him/herself or (2) direct another person to move the vehicle? (Appellant’s Assignment of Error 1)

**B. Statement of the Facts**

On May 26, 2007, the defendant Julio Mendoza Godoy was arrested for being in actual physical control of a motor vehicle while under the influence of intoxicating liquor, in violation of RCW 46.61.504. CP 74, ll. 24-25; CP 75, ll. 1-3.

During the late hours of the evening on May 26, 2007, Officer Joseph Deccio of the Yakima Police Department was dispatched to a call regarding loud noises. CP 71, ll. 21-22. When he arrived at the scene he began to hear a vehicle engine revving up and down—he proceeded to investigate and noted that the vehicle was located in the central area of an empty parking lot. CP 71, ll. 23-24; CP 72, ll. 1-15.

When he approached the vehicle he noticed that the car had inside it a single occupant—a male seated in the driver’s seat; this individual would later be identified as the defendant/appellant, Julio Mendoza Godoy CP 72, ll. 21-25. Moreover, he noticed that the keys were in the vehicle, the vehicle was still running, Mendoza Godoy was holding onto a beer, and it appeared that Mendoza Godoy had also spilled beer in the car. CP 73, ll. 2-8. Ofc. Deccio had to knock on the window of the car to get Mendoza Godoy’s attention, at this time Ofc. Deccio noted the distinct odor of intoxicants coming from the breath of Mendoza Godoy. CP 73, ll. 22-25; CP 74, ll. 2-4.

When Ofc. Deccio asked Mendoza Godoy to identify himself, Mendoza Godoy simply ignored Ofc. Deccio. CP 74, ll. 14-17. At this time Ofc. Deccio removed Mendoza Godoy from the vehicle; once out of the vehicle Mendoza Godoy could barely walk and Ofc. Deccio had to hold onto him to help him keep his balance. CP 75, ll. 4-12. Ofc. Deccio, based on his training and experience believed the defendant to be very intoxicated. CP 77, ll. 8-14. Furthermore, Ofc. Deccio believed that Mendoza Godoy was not safely situated because he felt that there was a danger that that Mendoza Godoy was trying to drive off prior to being arrested. CP 77, ll. 15-22.

At trial, Mendoza Godoy exercised his right to testify. CP 107, ll. 12-13. Mendoza Godoy stated that the night he was arrested he was in the parking lot in the car, and was intoxicated. CP 108, ll. 12-21; CP 110, ll. 24-25. Mendoza Godoy explained that he had gone to the car to meet a friend, and that he stayed at the car in case a mechanic did not show up. CP 109, ll. 12-17. When Mendoza Godoy was asked if he drove to the car, he said, “no,” and explained that friends had driven him to the car. CP 109, ll. 18-21. Mendoza Godoy further relayed that when he got to the car his friends were waiting for a mechanic. CP 109, ll. 22-24. When asked who had parked the vehicle, Mendoza Godoy stated that he did not know and that the car did not belong to him. CP 110, ll. 8-11.

At the conclusion of both parties presentation of evidence, Mendoza Godoy proposed a jury instruction on the affirmative defense known as “safely off the roadway.” CP 123, ll. 14-15. The City objected to the jury instruction. CP 123, ll. 16-19; CP 126, ll. 16-25; CP 127, ll. 1-8. The court after hearing argument from both parties granted the City’s objection, and declined to allow Mendoza Godoy an instruction on the affirmative defense known as “safely off the roadway.” CP 127, ll. 19-25; CP 128, ll. 1-8.

### C. Argument

The Court in its capacity as an appellate court reviews issues of statutory interpretation and issues of alleged errors in the jury instructions de novo. *State v. Becklin*, 163 Wn.2d 519, 525, 182 P.3d 944 (2008).

#### I. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT THE INSTRUCTION ON THE AFFIRMATIVE DEFENSE OF SAFELY OFF THE ROADWAY BECAUSE THERE WAS NO EVIDENCE ON THE RECORD TO JUSTIFY GIVING THE INSTRUCTION TO THE JURY.

A defendant charged with physical control is not entitled to an instruction on the affirmative defense known as “safely off the roadway,” unless there is evidence on the record tending to support the assertion that, prior to being pursued by law enforcement, the defendant *had moved* the vehicle safely off the roadway. RCW 46.61.504(2) (emphasis supplied). The physical control statute sets out an affirmative defense commonly known as “safely off the roadway” to the offense of physical control; it reads 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.” *Id.* (emphasis supplied). Moreover, absence of the “safely off the roadway” exception is not an element of the charge that the City must prove beyond a reasonable doubt, but rather is an affirmative defense that the defendant bears the burden of proving by a preponderance of the evidence. *City of Spokane v. Beck*, 130 Wn. App.

481, 486, 123 P.3d 854 (2005), *See also McGuire v. City of Seattle*, 31 Wn. App. 438, 444, 642 P.2d 765 (1982) *rev'd on other grounds by State v. Votava*, 149 Wn.2d. 178, 66 P.3d 1050 (2003) (holding that moving a vehicle safely off the road is not an element of the offense of being under the influence and in actual physical control of a vehicle but is rather an excuse permitted by the statute for otherwise culpable conduct, and it is up to the defendant to present the evidence which will exculpate him).

When a defendant is raising an affirmative defense, the defendant must offer sufficient evidence to justify giving the instruction to the jury. *E.g., State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993) (with regard to a self defense instruction a defendant cannot present a self-defense instruction to the jury without first producing some evidence which tends to prove that the killing occurred in circumstances amounting to self-defense); *State v. Buford*, 93 Wn. App. 149, 967 P.2d 548 (1998) (whether unwitting possession defense instruction warranted); *State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994) (whether entrapment instruction is justified). Thus, because “safely off the roadway” is an affirmative defense, the defendant bears the burden of proving the defense of “safely off the roadway” by preponderance, and is not entitled to the instruction. Rather, the defendant must offer sufficient evidence to justify the affirmative defense before the instruction is given to the jury.

- A. Under the holding of the Washington State Supreme Court case *State v. Votava*, a defendant is not entitled to an instruction on “safely off the roadway” when the evidence shows that the defendant did not (1) move the vehicle personally or (2) direct another person to move the vehicle.

Mendoza Godoy was not entitled to present the “safely off the roadway” defense to the jury because there was an absence of evidence on the record tending to prove that Mendoza Godoy, prior to being pursued by law enforcement, **had moved** the vehicle off the roadway. The meaning, or as Mendoza Godoy argues the lack of meaning, of the words “has moved” is at the heart of the issue.

Statutory analysis begins with the statute's plain meaning. Unless a statute is ambiguous a court must derive its meaning from actual statutory language, and any language not defined must be given its ordinary meaning. *State v. Smith*, 117 Wn.2d 263, 270-71, 814 P.3d 652 (1991). A statute's plain meaning “is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). The court in *Rest. Dev., Inc. v. Cananwill, Inc.* succinctly stated, “A court also must construe statutes such that all of the language is given effect, and 'no portion [is] rendered meaningless or superfluous.’” *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). A court should

also consider the context of the statute that the provision in question is found in when discerning plain meaning; specifically physical control is alcohol related traffic offense and, “In general, laws prohibiting driving while intoxicated are deemed remedial statutes, to be ‘liberally interpreted in favor of the public interest and against the private interests of the drivers involved.’” *State v. Smelter*, 36 Wn. App. 439, 444, 674 P.2d 690 (1984).

In *State v. Votava*, 149 Wn.2d 178, 66 P.3d 1050 (2003) the Washington State Supreme Court, applying a plain meaning analysis stated the language “the person has moved the vehicle” is clear and not defined by statute, and thus after considering its ordinary meaning, held that the language “the person has moved the vehicle” can be satisfied by (1) the defendant moving the vehicle personally or (2) the defendant directing another person to move the vehicle. *Id.* at 183-88. In *Votava* the defendant after a night of drinking asked a friend to drive his car because he felt ill. *Id.* at 181. The defendant then suddenly thought he was going to be sick and asked his friend to pull the car over, his friend stopped the car in a parking lot not far from her car and then ultimately left on foot for her own car. *Id.* The defendant proceeded to move out of the passenger’s seat and into the driver’s seat; eventually the defendant fell asleep in the driver’s seat and was arrested for physical control. *Id.* The trial court

refused to instruct the jury on “safely off the roadway” because the defendant had not moved the vehicle off the roadway—rather, his friend had. *Id.* at 181-182. The Washington State Supreme Court however, found that the defendant was entitled to the defense if the defendant caused the vehicle to be moved off the roadway, even if the defendant did not personally drive the vehicle off the roadway. *Id.* at 188.

Thus, the *Votava* court did not hold the statutory language “has moved” meaningless, but rather held that the language was clear. The court, after considering the language’s “ordinary meaning” held that it could encompass methods other than driving. *Id.* at 183-84. Therefore, the *Votava* case can properly be understood as holding that a person can move a vehicle by (1) driving (moving) it personally or (2) directing another to move it.

The case at hand is distinguishable from *Votava*; Mendoza Godoy would have this Court believe that *Votava* stands for the proposition the language “has moved” is meaningless and/or superfluous. However, such a precept is far from true. Reading *Votava* in its entirety it is clear that when presented with the opportunity to hold that the statutory language “has moved” meaningless and/or superfluous, the Washington State Supreme Court decidedly demurred. Rather, it is obvious the court afforded great deference to legislature and expressed sincere apprehension

about changing the language “has moved;” indeed, the court rejected the state’s narrow interpretation of “has moved” to include only driving because the court stated that to adopt such a narrow interpretation would require the court *to change the language* from ‘has moved’ to ‘has driven.’ Id. at 184. Thus, rather than striking the language “has moved,” the Washington State Supreme Court gave the words full effect; had the court in *Votava* found the “has moved” language inconsequential there would have been little reason for the court to have embarked upon a lengthy voyage into the seas of statutory analysis in search of the languages ordinary meaning—rather, the Court would have summarily cast the language asunder without any further consideration to its true meaning or value.

Ultimately, the principal holding in *Votava* runs contrary to Mendoza Godoy’s assertion that the words “has moved” are meaningless. Moreover, while the defendant in *Votava* was entitled to the “safely off the roadway” instruction because he satisfied the rule set out in *Votava* by directing another person to move his vehicle, Mendoza Godoy, in the case at hand, was not entitled to the instruction because of key factual differences. In our case Mendoza Godoy testified that he did not know who had parked the vehicle and that the vehicle did not belong to him. CP 110, ll. 8-11. Moreover, he testified that friends had driven him to the

vehicle, that the vehicle was already parked when he arrived at the location, and that friends were waiting for an auto mechanic to come for the car. CP 109, ll. 18-24; CP 110, ll. 2-3.

Thus, Mendoza Godoy clearly stated that the vehicle was not his, that it was already parked when he arrived at the scene, and that he had no idea who had parked it. Mendoza Godoy did not testify at anytime that he had directed another party to move the vehicle or had anything to do with the vehicle being in the location it was. In *Votava* the defendant moved the vehicle by directing another to move it, in our facts Mendoza Godoy had nothing to do with the vehicle moving—he did not personally move it nor did he direct another to move it—he merely assumed physical control of a vehicle that was already parked off the roadway. Therefore, Mendoza Godoy is erroneous in arguing that the *Votava* holding supports his position, because under the rule set out in *Votava* Mendoza Godoy was not entitled to the “safely off the roadway” instruction.

- B. Because the Washington State Supreme Court in *State v. Votava*, held that the “safely off the roadway” language is clear, plain meaning analysis applies and the statute is not subject to statutory construction analysis; however, even if the court did look to legislative intent, giving the words “has moved” full effect best preserves the purpose of the physical control statute as a preventative measure.

The “has moved” language in the “safely off the roadway” statutory provision is clear. Thus, when the language of a statute is clear,

as it is in this case, a reviewing court should apply the statute as written and should not look to legislative history or the principles of statutory construction. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). In the case at hand, the holding in *Votava* aside, Mendoza Godoy also argues that the trial court’s denial of the “safely off the roadway” instruction when there is no evidence to show he moved the vehicle prior to being contacted by law enforcement is contrary to the legislative intent behind the statute. However, with regard to legislative intent, case law has established that reviewing courts have a limited role in attempting to ascertain legislative intent where the words of the statute are clear and unambiguous; this principal was firmly set out by the court in *Shelton Hotel Co. v. Bates*, 4 Wn.2d 498, 104 P.2d 478 (1940) when it said:

The process of interpreting and applying a statute must begin with the assumption that the purpose and meaning of the legislature are correctly and definitely expressed by the language employed in the act . . . even if the court is fully persuaded that the legislature really meant and intended something entirely different from what it actually enacted, and that the failure to convey the real meaning was due to inadvertence or mistake in the use of language, yet, if the words chosen by the legislature are not obscure or ambiguous, but convey a precise and sensible meaning (excluding the case of obvious clerical errors or elliptical forms of expression), then the court must taken the law as it finds it, and give it its literal

interpretation, without being influenced by the probable legislative meaning lying back of the words.

*Id.* at 507-08; *see also State v. Miller*, 72 Wash. 154, 158, 129 P. 1100 (1913) (so long as language used is unambiguous, departure from plain meaning is not justified by any consideration of consequences or public policy).

Because, *Votava* held that the “has moved” language is clear, plain meaning analysis is the correct standard and the Court should not engage in any statutory construction analysis, however, even so, it is plainly obvious that Mendoza Godoy’s proposed interpretation of the statute would run contrary to legislative intent. The court in *Smelter* clearly outlined the purpose of physical control statutes by stating, “actual physical control statutes have been characterized as ‘preventative measures’ . . . which deter individuals who have been drinking intoxicating liquor from getting into their vehicles except as passengers . . . and which enable the drunken driver to be apprehended before he strikes.” *Smelter*, 36 Wn. App. at 444.

The defendant is essentially asking this Court to erase the language “has moved” from the statute, and to render it “meaningless and/or superfluous.” If the Court were to follow Mendoza Godoy’s lead, invariably it would end up in thorny thicket far from the legislature’s

likely intent. In *Votava* the court noted that a person who remains in control after personally driving off and the roadway and a person who regains control after the vehicle was moved off the roadway both arguably demonstrate an intention to return to the roadway and pose a danger. *Votava*, 149 Wn.2d at 188. However, Mendoza Godoy's position expands the defense to people who get into any car after drinking. By taking the defendant outside of the causation chain the whole policy underpinning for the statute (encouraging impaired people to pull over) is undermined. The physical control statute would no longer possess the teeth to serve as a preventative measure designed to deter the would be drunk driver from getting into a vehicle other than as a passenger—rather, the motor vehicle would become a safe haven for intoxicated individuals to pass the hours. No longer would the statute help police apprehend drunken drivers before they strike, instead the “safely off the roadway” affirmative defense would provide a shelter to the would be drunk driver, and thus, the exception would swallow the rule. The *Votava* holding advances the legislative intent by making “safely off the roadway” available in a narrow circumstances, whilst also continuing the wise public policy of encouraging intoxicated individuals not get into vehicles after consuming intoxicating liquors.

Ultimately, however, arguments over the legislative intent are strictly academic because the language “has moved” is clear, and thus, a legislative intent inquiry is unwarranted.

**D. Conclusion**

Mendoza Godoy was not entitled to present the “safely off the roadway” affirmative defense instruction to the jury because there was no evidence on the record to justify giving the instruction. Mendoza Godoy did not testify that he moved the vehicle off the roadway (in fact he testified to the contrary), and Mendoza Godoy did not testify that he directed another party to move the vehicle (he stated he did not know who moved it). Because Mendoza Godoy did not provide any evidence showing that he moved the vehicle in either way outlined by *Votava* as a matter of law he failed to meet his burden and was not entitled to the instruction.

Additionally, because the Washington State Supreme Court found the language in the “safely off the road” statute to be clear, the language should be applied in a literal sense and the Court should not attempt to ascertain legislative intent.

Finally, the denial of the “safely off the roadway” defense did not deny Mendoza Godoy his constitutional right to present a defense.

Mendoza Godoy maintained the ability to contest the elements of physical

control, primarily he retained the ability to argue he was not in actual physical control of the vehicle and/or he was not under the influence of alcohol and/or drugs. The “safely off the roadway” provision is an affirmative defense that the defendant is not automatically constitutionally entitled to; rather the defendant must offer sufficient evidence to justify giving the instruction.

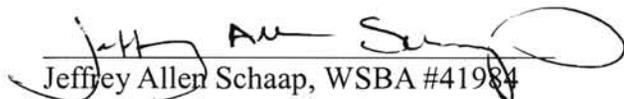
Because Mendoza Godoy failed to provide evidence tending to support the affirmative defense of safely off the roadway, and based on his own testimony, no rational trier of fact could have found that he had moved the vehicle off the roadway, the trial court was correct in denying Mendoza Godoy’s request to give the “safely off the roadway” instruction.

**E. Prayer for Relief**

For the reasons set out above the City respectfully requests that the Court uphold the judgment of the Superior Court and affirm the defendant’s conviction.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of September, 2012.

CITY OF YAKIMA LEGAL DEPARTMENT

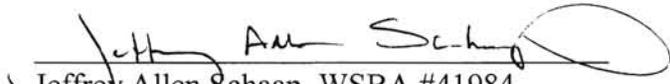
  
Jeffrey Allen Schaap, WSBA #41984  
Assistant City Attorney

CERTIFICATE OF SERVICE

I certify that on September 12<sup>th</sup>, 2012, a copy of the foregoing  
Brief of Respondent was mailed, postage prepaid, to the following:

Dennis W. Morgan  
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Dated this 12<sup>th</sup> day of September, 2012.

  
Jeffrey Allen Schaap, WSBA #41984  
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Attorney for Respondent City of Yakima