

NO. 90246-1

E
RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Oct 15, 2015, 3:08 pm
BY RONALD R. CARPENTER
CLERK

kyh
RECEIVED BY E-MAIL

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH WAYNE SANDHOLM,

Respondent.

**SUPPLEMENTAL BRIEF OF PETITIONER
REGARDING STATE V. FRANCO**

DANIEL T. SATTERBERG
King County Prosecuting Attorney

AMY R. MECKLING
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

 ORIGINAL

FILED AS
ATTACHMENT TO EMAIL

TABLE OF CONTENTS

	Page
A. <u>SUPPLEMENTAL ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	2
D. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

Page

Table of Cases

Washington State:

In re Pers. Restraint of Jeffries, 110 Wn.2d 326,
752 P.2d 1338 (1988)..... 2, 5

In re Stranger Creek, 77 Wn.2d 649,
466 P.2d 508 (1970)..... 9

Seattle v. Molin, 99 Wash. 210,
169 P. 318 (1917)..... 3

State v. Ahmed, No. 71937-8
(Div. 1, June 29, 2015)..... 8

State v. Arndt, 87 Wn.2d 374,
553 P.2d 1328 (1976)..... 2, 3

State v. Franco, 96 Wn.2d 816,
639 P.2d 1320 (1982)..... 1, 2, 3, 4, 9, 10, 11

State v. Linehan, 147 Wn.2d 638,
56 P.3d 542 (2002)..... 5

State v. Martines, ___ Wn.2d ___,
355 P.3d 1111 (2015)..... 8

State v. Ortega-Martinez, 124 Wn.2d 702,
881 P.2d 231 (1994)..... 2

State v. Owens, 180 Wn.2d 90,
323 P.3d 1030 (2014)..... 2, 6

State v. Peterson, 168 Wn.2d 763,
230 P.3d 588 (2010)..... 4, 5, 7

State v. Smith, 159 Wn.2d 778,
154 P.3d 873 (2007)..... 2, 4

State v. Whitney, 108 Wn.2d 506,
739 P.2d 1150 (1987)..... 2

Statutes

Washington State:

Former RCW 46.61.502(1) (1979) 1, 3, 10
Former RCW 46.61.502(1) (2008) 1, 7, 10
RCW 9A.82.050..... 6
RCW 46.61.502(1) (2013) 9

A. SUPPLEMENTAL ISSUE PRESENTED

This Court concluded in State v. Franco,¹ that former RCW 46.61.502(1) (1979) set forth alternative means of committing the single crime of driving while under the influence of intoxicating liquor or any drug. While the statute contained three subsections, the facts presented to the court involved only the first two subsections, the “per se” blood-alcohol concentration prong, and the “alcohol or any drug” prong. The case did not present the question of whether the third subsection, the “alcohol and any drug” prong, is a third alternative means of committing a DUI, so the language in Franco regarding “three” alternative means is dicta. Should this Court conclude that former RCW 46.61.502(1) (2008) contains two distinct alternative means of committing the crime: (1) having a blood alcohol concentration of .08 or higher within two hours of driving; and (2) being under the influence of or affected by alcohol, any drug, or any combination thereof?

B. STATEMENT OF THE CASE

The State’s supplemental brief, filed September 26, 2014, contains a summary of the substantive and procedural history of Sandholm’s case. On September 8, 2015, this Court determined that additional briefing regarding Franco was necessary to properly decide the case. The State

¹ 96 Wn.2d 816, 639 P.2d 1320 (1982).

now files this supplemental brief in response to the court's September 2015 order.

C. ARGUMENT

In Franco, this Court considered whether the driving while under the influence of intoxicating liquor or any drug ("DUI") statute set out distinct crimes, or merely alternative means of committing the same offense. The court concluded that the statute outlined alternate ways of committing a single offense. Franco, 96 Wn.2d at 821.

Drawing such a distinction is critical because where a single offense is committed in more than one way, it is unnecessary for the jury to unanimously agree as to the mode of commission, so long as sufficient evidence supports each alternative means submitted to the jury. E.g., State v. Arndt, 87 Wn.2d 374, 376, 553 P.2d 1328 (1976) (grand larceny); State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987) (first-degree rape); In re Pers. Restraint of Jeffries, 110 Wn.2d 326, 338, 752 P.2d 1338 (1988) (aggravating circumstances to first-degree murder); State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994) (second-degree rape); State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007) (common law definitions of assault); State v. Owens, 180 Wn.2d 90, 95, 323 P.3d 1030 (2014) (first-degree trafficking in stolen property).

However, when a statute describes separate offenses, there must be a unanimous verdict as to each distinct crime described. Franco, 96 Wn.2d at 823. See Seattle v. Molin, 99 Wash. 210, 213, 169 P. 318 (1917) (general liquor ordinance contained several separate offenses arising out of a variety of independent acts).

The DUI statute at issue in Franco read:

A person is guilty of driving while under the influence of intoxicating liquor or any drug if he drives a vehicle within this state while:

- (1) He has 0.10 percent or more by weight of alcohol in his blood as shown by chemical analysis of his breath, blood, or other bodily substance made under RCW 46.61.506 as now or hereafter amended; or
- (2) He is under the influence of or affected by intoxicating liquor or any drug; or
- (3) He is under the combined influence of or affected by intoxicating liquor and any drug.

Former RCW 46.61.502(1) (1979); Franco, 96 Wn.2d at 819. The court applied the analysis outlined in Arndt to determine whether the DUI statute set forth separate crimes or simply alternate means of committing a single offense. 96 Wn.2d at 821. As stated in Arndt, to determine the legislature's intent, courts consider: (1) the title of the act; (2) whether there is a readily perceivable connection between the acts; (3) whether the acts are consistent with rather than repugnant to each other; and (4) whether the acts may inhere in the same transaction. Arndt, 87 Wn.2d at 379. Applying these factors, Franco determined that the statute

contained alternate means of committing the single crime of DUI.

96 Wn.2d at 821 (concluding that the “clear, concise, unambiguous” language of the statute met all four tests for a single offense).

Franco’s conclusion that the DUI statute does not outline separate offenses is correct. However, the analysis in Franco is incomplete to fully resolve the present case. Although the court stated that there are *three* alternate ways of committing DUI, the facts before the court presented only *two* – the “per se” blood-alcohol concentration prong, and the “under the influence of intoxicating liquor or any drug” prong. 96 Wn.2d at 819. As such, Franco’s evaluation of the DUI statute was limited to whether the first two subsections constitute separate offenses versus alternative means of a single offense. Although the court found that the DUI statute was an alternative means statute, the court was not presented with the issue here – whether the second two subsections of the statute constitute a single means of committing a DUI. Thus, Franco’s broad statement that there are *three* alternate ways of committing a DUI was unnecessary to its holding and is mere dicta.

An alternative means offense sets forth distinct acts that amount to the same crime. State v. Peterson, 168 Wn.2d 763, 770, 230 P.3d 588 (2010); see also Smith, 159 Wn.2d at 784 (statute sets forth alternative means offense when it provides that the proscribed conduct may be proved

in a variety of ways). Discerning whether a criminal statute outlines a single offense committed by alternate means is not always simple. Because the legislature has not statutorily defined which crimes are alternative means offenses, the judiciary must assess legislative intent. Peterson, 168 Wn.2d at 769. There is no bright-line rule by which courts make this determination; rather each case is evaluated individually. Peterson, 168 Wn.2d at 769. Nonetheless, a consistent principle across cases is that a statute's use of a disjunctive does not alone create alternative means. Jeffries, 110 Wn.2d at 339; Peterson, 169 Wn.2d at 770.

Courts consistently cite to theft as a readily apparent example of an alternative means crime because the criminal act of theft can be committed in clearly distinct ways: (1) wrongfully obtaining or exerting control over another's property, or (2) obtaining control over another's property through deception. State v. Linehan, 147 Wn.2d 638, 644-45, 647, 56 P.3d 542 (2002). Indeed, the less varied the actions that could constitute the crime, the less likely a court is to declare the existence of alternative means. For example, in Peterson, this Court concluded that although the different deadlines for registering as a sex offender are statutorily presented in the disjunctive, a person commits the crime of failure to register by his act of moving without notice; the different deadlines do not

themselves constitute alternate criminal acts. 168 Wn.2d at 770. “[T]he failure to register statute contemplates *a single act* that amounts to failure to register . . . the fact that different deadlines may apply . . . does not change the nature of the criminal act: moving without registering.” Id. (emphasis in original).

An example of the analysis necessary to resolve the issue here is contained in Owens, where this Court distinguished alternative means based on the variation between the acts that can comprise the crime. This court rejected the Court of Appeals’ conclusion that the first-degree trafficking in stolen property statute outlines eight different alternative means. Owens, 180 Wn.2d at 98-99. The trafficking statute defines the crime as occurring when

a person knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property.

RCW 9A.82.050. This Court concluded that the statute set forth just two alternative ways to commit the offense: (1) the first group of seven terms modifying “the theft of property for sale to others”; and (2) knowingly trafficking in stolen property. Id. at 98-99. Owens reasoned that the first seven terms merely describe various ways to participate *in the same act* – the theft of property so that it can be sold. The court noted that it may be difficult to distinguish between the seven terms, and that any particular act

of stealing may involve more than one of the terms. Id. at 99. Consistent with its reasoning in Peterson, the court concluded that an individual's conduct "does not vary significantly between the seven terms listed in the first clause, but does vary significantly between the two clauses." Id. at 99.

With these principles in mind, this Court should hold that former RCW 46.61.502(1) (2008) contains only two alternative means: (1) having a blood-alcohol concentration of .08 or higher within two hours of driving; and (2) driving while under the influence of or affected by alcohol, any drug, or a combination thereof.

A person acts in contradiction of subsection (a) of the statute if his or her blood-alcohol concentration is at or above a certain level at a specified time. The criminal act that comprises this "per se" violation of the DUI statute varies significantly from subsections (b) and (c), which both refer to *a single criminal act*, driving while "under the influence of or affected by" certain substances. Although subsections (b) and (c) of the statute are presented in the disjunctive, they do not describe distinct criminal acts; rather the substance(s) involved are mere factual circumstances underlying the single criminal act of driving under the influence. The legislature's structuring of this portion of the statute into two different subsections can be explained by a simple desire to make it

abundantly clear that a person is accountable for driving while impaired no matter what substance or combination of substances he has ingested.

A contrary conclusion – that (b) and (c) are alternate means of committing a DUI – leads to an argument that the State must prove (and the jury must agree on) *which* particular substance(s) a driver is under the influence of where the evidence shows that the defendant’s blood contains both alcohol and another drug or multiple drugs. In such a case, a defendant could argue that in order to present sufficient evidence as to both the “combined influence” prong and the “alcohol or drug” prong, the State must present sufficient evidence that alcohol alone, a drug alone, each independently of the other, or a specific combination of drug(s) and/or alcohol contributed to the defendant’s impairment.² Of course, when two or more substances are present, it is a scientific impossibility for the State to prove which substance, or which combination of substances, affected the defendant’s driving to an appreciable degree. C.f. State v. Martines, ___ Wn.2d ___, 355 P.3d 1111, 1116 (2015) (warrant authorizing the testing of a blood sample for intoxicants does not require separate findings of probable cause to suspect drug and alcohol use so long as probable cause exists to suspect intoxication that may be caused by alcohol, drugs, or a combination of both).

² This Court currently has before it a petition for review in a case raising this precise argument. State v. Ahmed, No. 71937-8 (Div. 1, June 29, 2015).

There is no reason to think that the legislature intended a defendant's guilt to depend on such subtle distinctions, or that a defendant should escape punishment simply because he ingested multiple substances. Instead, the legislature intended that a defendant commit a single criminal act of DUI when she drives while impaired by alcohol, drugs, or both.

This Court can disapprove of the dicta in Franco regarding “three alternative means” without overruling its conclusion that the DUI statute is an alternative means crime. However, should this Court disagree with the State's characterization of Franco, it should overrule it to the extent that it holds that the DUI statute outlines *three* alternative means. This Court should conclude instead that the DUI statute in effect at the time of Sandholm's offense contains only *two* alternative ways to commit a DUI – the “per se” blood-alcohol concentration prong, and the “under the influence of or affected by” prong.³

The doctrine of stare decisis requires a “clear showing that an established rule is incorrect and harmful” before precedent is abandoned. In re Stranger Creek, 77 Wn.2d 649, 653, 466 P.2d 508 (1970). If this

³ Such a holding would mean that the current iteration of the statute contains *three* alternative means – (1) having a blood-alcohol concentration of .08 or higher, (2) having a THC concentration in the blood at a level of 5.00 or higher, and (3) being under the influence of or affected by alcohol, marijuana, any drug, or any combination thereof. See RCW 46.61.502(1) (2013).

Court determines that Franco holds that the second two subsections of former RCW 46.61.502(1) (1979) are alternative means of DUI, that holding is clearly incorrect. Both subsections address the single criminal act of driving while under the influence. The particular substance (or substances) that impair the driver cannot be scientifically proven when presented in combination, and do not themselves create alternative methods of committing the crime.

Additionally, a conclusion that the second two subsections are alternative means is harmful because of the potential for unnecessary reversal where, as here, the jury was provided with the “combined influence” language in the absence of evidence of drug consumption, and the jury did not render a particularized expression of unanimity. Because the legislature did not intend for the State to prove *which* substance impaired the driver (an impossible task in the presence of more than one substance), reversal in the absence of such proof is unwarranted and harmful.

D. CONCLUSION

Former RCW 46.61.502(1) (2008) contains two alternative methods of committing a DUI: (1) having a blood-alcohol concentration of .08 or higher within two hours of driving; (2) and being under the

influence of or affected by alcohol, any drug, or any combination thereof. Franco's statement that there are three alternative means of committing a DUI should be disapproved of, or if central to its holding, overruled as incorrect and harmful.

Finally, if this Court disagrees and concludes that subsections (b) and (c) of the statute present alternative means of committing the crime of DUI, it should hold that the error here was harmless beyond a reasonable doubt because there was no plausible basis for a rational juror to rely on the combined influence means to the exclusion of the alcohol-only means.

DATED this 15th day of October, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
AMY R. MECKLING, WSBA #28274
Senior Deputy Prosecuting Attorney
Attorneys for Petitioner
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the respondent, Gregory Link, at greg@washapp.org, containing a copy of the SUPPLEMENTAL BRIEF OF PETITIONER RE: STATE V. FRANCO, in STATE V. KENNETH WAYNE SANDHOLM, Cause No. 90246-1, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of October, 2015

Name
Done in Seattle, Washington

OFFICE RECEPTIONIST, CLERK

To: Ly, Bora
Cc: Meckling, Amy; 'wapofficemail@washapp.org'; 'greg@washapp.org'
Subject: RE: Kenneth Wayne Sandholm/90246-1

Received on 10-15-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Ly, Bora [mailto:Bora.Ly@kingcounty.gov]
Sent: Thursday, October 15, 2015 3:04 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Meckling, Amy <Amy.Meckling@kingcounty.gov>; 'wapofficemail@washapp.org' <wapofficemail@washapp.org>; 'greg@washapp.org' <greg@washapp.org>
Subject: Kenneth Wayne Sandholm/90246-1

Dear Supreme Court Clerk:

Attached for filing in the subject case is the **SUPPLEMENTAL BRIEF OF PETITIONER**.

Please let me know if you have problems opening the attachment.

Thank you,

Bora Ly
Paralegal
Criminal Division, Appellate Unit
King County Prosecutor's Office
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104
Phone: 206-296-9489
Fax: 206-205-0924
E-Mail: bora.ly@kingcounty.gov

For

Amy Meckling
Senior Deputy Prosecuting Attorney
Attorney for Petitioner