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COURT OF APPEALS DIV I  
STATE OF WASHINGTON

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No. 66133-7-1

COURT OF APPEALS,  
OF THE STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON, Respondent

v.

ANTHONY FISHER, Appellant

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ON APPEAL FROM THE SUPERIOR COURT OF  
THE STATE OF WASHINGTON SKAGIT COUNTY  
NO: 09-1-00706-2

**OPENING BRIEF OF APPELLANT**

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## **A. ASSIGNMENTS OF ERROR AND ISSUES**

### **Assignments of Error**

No. 1. The court failed to instruct the jury on a lesser include offense or alternatively, failed under principles of due process to instruct the jury on an alternative criminal charge.

No. 2. The defendant was found guilty of vehicular assault without a finding of *mens rea*, alternatively the defendant is guilty of a status crime because the question of whether or not he intended to commit the vehicular assault was taken from the jury.

### **Issues Pertaining to Assignments of Error**

No. 1. Whether or not the legislature intended to place medical doctor prescribed medicine on a par with taking illegal drugs and with driving after consuming alcohol.

No. 2. Whether or not due process requires that a person charged with vehicular assault solely related to the proper and lawful consumption of prescription medicine, is in absence of being charged with lesser included or multiple driving offenses of driving while intoxicated, reckless driving, or negligent driving, is entitled to

have the jury consider these less punishable offenses.

## **B. STATEMENT OF THE CASE**

### ***Introduction***

This is a case of first impression in that it deals with the violation of the vehicular assault statute of Washington, RCW 46.61.522(1), by a defendant who had ingested neither alcohol nor illegal drugs. (Trans, Vol.2 . p.7-8 ) His offense was that he took a lawful drug in a lawful manner prescribed by a lawful physician. The defendant was incapable of formulating the intent of violating the law and was unaware that taking the drug would result in his being found guilty of vehicular assault. (Trans, Vol. 1. p.44-45 and p. 138 )

The facts of the case are straight forward and not in dispute. The defendant did not take the stand nor did he present any witnesses. The evidence of what happened came in through direct and cross examination of the State's witnesses.

### ***Facts***

Mr. Fisher, who was living on Guemes Island in Skagit County, suffers from insomnia for which he was prescribed Ambien. (Trans, Vol. 1. p. 154) On September 9, 2009, the date of

the accident, Mr. Fisher had not slept for three days and was out of his Ambien. (Trans, Vol. 2. p. 154) He traveled by car and ferry to the Safeway Store in Anacortes to pick up his refill on his Ambien prescription. (Trans, Vol. 2. p. 17) Mr. Fisher's experience with Ambien was that the medication took 30 minutes to take effect. (Trans, Vol.1 . p. 120) He consumed the medication on his return trip after he drove on to the Ferry in Anacortes knowing that he would be home within 20 minutes. (Trans, Vol. 1. p. 120) Mr. Fisher had trouble driving off the ferry when it docked on Guemes Island. (Trans, Vol. 1. p. 30) After driving off the Ferry and traveling in the direction of his home, Mr. Fisher attempted to pass another vehicle when he struck a bicyclist who was riding in the left lane facing oncoming traffic and did not see Mr. Fisher's car. (Trans, Vol. 1. p. 74) Mr. Fisher did not realize that his car came in contact with the bicyclist. (Trans, Vol. 1. p. 44-45) The police officer in charge of the investigation, Officer Witman was surprised when Mr. Fisher's alcohol screening was negative. (Trans, Vol. 2. p. 5) On a second requested test, Officer Witman asked the laboratory to search for Ambien. (Trans, Vol. 1. p. 106) When the test now came back positive for Ambien, Mr. Fisher was charge with vehicular assault. (Trans, Vol. 1. p. 138)

The case went to jury trial on August 9, 2010 and at the close of the case Mr. Fisher offered an instruction of a lesser included offense, which would have given the jury the option of finding negligent driving and would have allowed the jury an alternative to finding him guilty of vehicle assault under the strict liability approach of the trial court. (CP pg 35, Supp. Designation) The court denied defendant's proposed jury instruction of negligent driving. (Oral Ruling on 8-11-10\*) The court also ruled that the usual WPIC DUI jury instruction would not be included in the court's Instructions, as the court ruled that DUI (and negligent driving) were not proper in cases where the charge is for vehicle assault committed through the influence of "any drug." (CP pg 13 and Oral Ruling on 8-11-10\*) Under the court's instructions the jury was (\* Oral Ruling not originally transcribed has now been ordered transcribed ) effectively bound to find that Mr. Fisher guilty of the felony of vehicular assault if they found that his Ambien medication was influencing or affecting his driving to any unspecified appreciable degree. (CP pgs 3-17) No evidence of misuse or abuse of the medication was introduced into evidence. (Trans, Vol. 1. p. 138)

#### D. ARGUMENT

The issues raised in this appeal have been addressed by our Supreme Court in the 1965 in the case of Kaiser v. Suburban Transp. System, 57 Wn2d 461 (1965) where the court was faced with a civil lawsuit arising out of an accident caused when the bus driver fell asleep as a result of medication he was taking. In its analysis our Supreme our said;

We do not think that one who innocently takes a pill, which is prescribed by a doctor, can be convicted of a crime under this statute and thus be negligent per se unless he has knowledge of the pill's harmful qualities. To hold otherwise would be to punish one who is not culpable.

We find the reasoning and the rule to be particularly well stated in the case of State v. Brown, 38 Kan. 390, 16 Pac. 259 (1888). There the defendant was charged with being drunk in a public place. The Kansas court held that the [page 467] crime was malum in se, and that if the drunkenness was produced by an innocent mistake of fact, the defendant would not be guilty. The court said:

". . . General terms inflicting punishment upon 'any person' who might do any particular act should be construed to mean only such persons as act voluntarily and intelligently in the performance of the interdicted act. We should not suppose, in the absence of specific words saying so, that the legislature intended to make accidents and mistakes crimes. Human actions can hardly be considered as culpable either in law or in morals, unless an intelligent consent of the mind goes with the actions; and to punish where there is no culpability would be the most reprehensible tyranny. The legislature usually in enacting criminal statutes, enacts them in general terms

so as to make them by their terms include all persons; and yet it is always understood that some persons, as idiots, insane persons, young children, etc., are not to be considered as coming within the provisions of the statute. It is always understood that the courts will construe the statute in accordance with the general rules of statutory construction, and apply the act only to such persons as the legislature really intended to apply it; that is, to apply the act to such persons only as should intelligently and voluntarily commit the acts prohibited by the legislature. . ."

15 Am. Jur., Criminal Law § 341, states the following:

"If intoxication is involuntary, as where it is caused by medical treatment, fraud, etc., it is a complete defense to a criminal charge based on an act done under its influence. The test of involuntary drunkenness is whether there was an absence of an exercise of independent judgment and volition on the part of the accused in taking the intoxicant. . . ."

What has changed since 1965 is the wording of the law, but not the legal reasoning. The trial court's approach ignored the legal reasoning of Kaiser and interpreted the statute, as no amended statute to reverse this reasoning.

The court used the Washington Pattern Instructions, Criminal; Third Edition (WPICs) to instruct the jury on the elements of vehicular assault charge arising from an accident involving a motor vehicle driver under effects of properly used prescription medication. The trial court's instruction No. 5, which is based on WPIC 90.01, simply reads: "A person commits the crime of

vehicular assault when he or she operates or drives any vehicle while under the influence of any drug and proximately causes substantial bodily harm to another.” (CP pg 10) This jury instructions constitutes a crime of status because there is no requirement of intent, no notice to a responsible person and is without due process as will be established in this brief.

Attempting to obtain a longer sentence the county prosecution only charged Mr. Fisher with vehicular assault as opposed to driving under the influence or reckless driving, or in combination with these other driving offenses involving intoxicants and drug use. The jury of course did not realize that if Mr. Fisher had been charged with either of these offenses that under the current status of appellate rulings they would have received instructions to allow jury consideration of the lesser included charges of negligent driving.

The prosecutor’s deft single charging of vehicular assault coupled with Instruction No. 5's wording of “any drug” which includes the lawful use of prescribe medicine resulted in Mr. Fisher being criminally penalized for his unintended status of his lawful use of medicine.

Instruction No. 5 based in whole upon WPIC 90.01

criminalizing a person's lawful conduct of following a doctor's prescribed medication use for involuntarily and unintentional consequences, notwithstanding the unfortunate subsequent injuries.

Applying strict liability principles to vehicle assaults committed by voluntary alcohol consumption was settled in State v. Rivas, 126 Wn.2d 443; 896 P.2d 57 (1995). The WPIC editors, citing State v. Rivas, produced pattern jury instructions for vehicle assault statute guiding juries to find guilt where voluntary alcohol consumption lessens a person's ability to drive in any appreciable degree.

The Rivas-based WPIC instructions (alcohol + death = guilt), makes perfectly good common sense against alcohol and illegal drug users since as consumers and members of the general competent public they are reasonably strictly charged with the common knowledge that one should not "drink and drive" nor consume illegal unprescribed drugs or they will face severe criminal penalties when their alcohol/illegal drug consumption adversely affects their driving. This is such common knowledge today that people who do choose to drink alcohol and travel either have designated drivers or hesitate to drink more than one-to-two alcohol

beverages before driving.

The WPICs use of the wording "any drug" does not address the nature of the drug or how it came into that person's system. Not even being able to raise the sector of an accidental use or the improper instructions from a pharmacist or a prescribing doctor denies due process to Mr. Fisher. The WPIC 90.01, and Instruction No. 5, which are both based on Rivas, do not differentiate between "any drug" and a person's normal and proper use of prescription medicine, because the WPIC presumes that "any drug" use lessening vehicle control is also based on the same strict liability standard Rivas imposed on persons who drive after consuming alcohol, a knowledge and societal well-defined risk of committing a crime.

The jury under Instruction No. 5 was directed to find lawfully prescribed and used Ambien as "any drug". But, Mr. Fisher did not knowingly risk committing a driving offense when he consumed his prescribed medicine. Mr. Fisher falls into a class of persons whose driving control may be unknowingly affected by normal, proper, and legal consumption of prescribed medicine. To render him strictly liable by virtue of a single charge of vehicular assault, denying a negligent driving alternative offense jury instruction, and by fair

extension not allowing the jury to consider accidental use of wrongly prescribed medication, denies fair process before imposition of criminal incarceration.

While the prosecution may claim that the legislature has dealt with drug use in the strict liability application of Rivas to the state's vehicular assault statute, the actual reality is that there is neither legislative history nor appellate case that discusses strict liability for driving offenses caused by normal, proper, and legal consumption of prescribed medicine.

Where the greater punishable crime of vehicle assault, as opposed to DUI, is charged for causing injuries while under the influence of or affected by "any drug" is charged against a person for his or her normal, proper, and legal consumption of prescribed medicine the person is denied due process if the jury is not permitted to consider the alternative charges of DUI and negligent driving. Instruction No. 5 and its counterpart WPIC 91.01 criminalizes lawful conduct of prescribed medication use for its involuntarily and unintentional consequences.

Any statute that imposes strict liability by definition violates Article 1, Section 3 of the Washington State Constitution which provides that "[n]o person shall be deprived of life, liberty or

property without due process of law. Because the Washington State Legislature followed the process of declaring the consequences of drinking and driving or taking illegal drugs as rendering the actor strictly liable then there is no violation of the due process clause because by engaging voluntarily in such activity the actor exposes himself to strict liability. Our legislature has not declared the taking of prescription drugs as a public menace thereby exposing the actor to strict liability. For this reason the application of RCW 46.61.522(1) to Mr. Fisher deprives him of the due process of law. Mr. Fisher has done nothing to put himself into the class of people who are visited by strict liability as a result of conduct which the legislature determined was a public nuisance.

### **The *Bosio* Case and Lesser Included Offense**

In the recent case of State v. Bosio, 107 Wn.App. 462 (2010), ( a Division II case that was not appealed to the Supreme Court), that Appellate Court dealt with the narrow question of whether or not negligent driving in the first degree is a lesser included offense of vehicular assault.

Ms. Bosio was in a one car accident following an evening of drinking and celebration on her obtaining her Associate Degree.

Ms. Bosio's passenger received a broken arm and she was charged with vehicular assault. Ms. Bosio requested the lesser included offense instruction of negligent driving which was denied and she was convicted of vehicular assault and appealed.

In upholding the conviction for vehicular assault The Court of Appeals on page 465 sets out the standard for giving a lesser included offense instruction.

In general, a defendant is entitled to a jury instruction on a lesser-included offense if (1) each of the elements of the lesser offense is a necessary element of the charged offense (the legal test), and (2) the evidence supports an inference that the defendant committed the lesser offense (the factual test). *State v. Workman*, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978); *State v. Newbern*, 95 Wn. App. 277, 286, 975 P.2d 1041, review denied, 138 Wn.2d 1018 (1999).

The court observed that it did not have to consider the factual test because the case failed the legal test based on the following reasoning:

RCW 46.61.522(1) provides:  
A person is guilty of vehicular assault if he operates or drives any vehicle:  
(a) In a reckless manner, and this conduct is the proximate cause of serious bodily injury to another;  
or  
(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and this conduct is the proximate cause of serious bodily injury to another.

RCW 46.61.5249(1)(a) provides:

A person is guilty of negligent driving in the first degree if he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property, and exhibits the effects of having consumed liquor or an illegal drug.

To commit vehicular assault, a driver must: drive recklessly and cause serious bodily injury or drive intoxicated and cause serious bodily injury. To commit negligent driving in the first degree, a driver must: drive negligently, endanger persons or property and exhibit effects of alcohol or drugs. First degree negligent driving is not a lesser-included offense of the first alternative means of committing vehicular assault because under that alternative, there is no requirement of signs of intoxication. First degree negligent driving is not a lesser-included offense of the second alternative means of committing vehicular assault because under that alternative there is no requirement of negligent driving. Each of the elements of negligent driving in the first degree are [sic] not necessary elements of vehicular assault and the court properly denied the request for the lesser-included instruction. Pages 465-466

The *Bosio* case is distinguishable from the present case in that *Bosio* involved the ingestion of alcohol whereby the defendant was put on notice as a matter of law that his driving would be affected thereby. That is certainly not the case before the court where there was no alcohol or illegal drugs that would put the defendant on notice as a matter of law.

If this court follows the reasoning of Bosio , and since there was no alcohol or illegal drugs involved in the Mr. Fisher's case, then there is no reason why Mr. Fisher should not be entitled to a lesser included offense instruction of Second Degree Negligent Driving which is codified in RCW 46.61.525 and provides as follows;

(1)(a) A person is guilty of negligent driving in the second degree if, under circumstances not constituting negligent driving in the first degree, he or she operates a motor vehicle in a manner that is both negligent and endangers or is likely to endanger any person or property.

(b) It is an affirmative defense to negligent driving in the second degree that must be proved by the defendant by a preponderance of the evidence, that the driver was operating the motor vehicle on private property with the consent of the owner in a manner consistent with the owner's consent.

...

(c) (2) For the purposes of this section, "negligent" means the failure to exercise ordinary care, and is the doing of some act that a reasonably careful person would not do under the same or similar circumstances or the failure to do something that a reasonably careful person would do under the same or similar circumstances.

(3) Any act prohibited by this section that also constitutes a crime under any other law of this state may be the basis of prosecution under such other law notwithstanding that it may also be the basis for prosecution under this section.

The elements of negligent driving in the second degree do

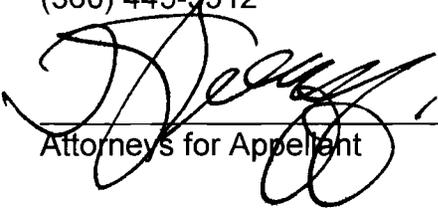
not fail the affinity test used in Bosio in that second degree negligent driving does not contain the element that there is no requirement that defendant's driving be affected by alcohol. For this reason Negligent Driving in the Second degree is a lesser included offense of vehicular assault, and the defendant is entitled to an instruction to that effect.

**E. CONCLUSION**

Defendant requests that the court vacate the jury verdict and order a new trial on the grounds that Defendant's right to due process was violated and remand the case to the Superior Court with instructions that on the retrial defendant is entitled to a lesser included offense instruction.

RESPECTFULLY SUBMITTED this <sup>20<sup>th</sup></sup> day of July 2011.

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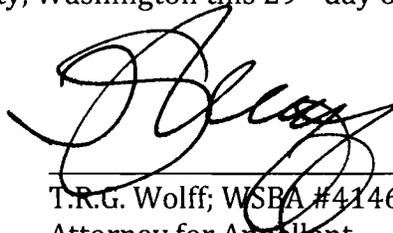
No. 66133-7-I

PROOF OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On July 29, , 2011 at approximately 10:45 a.m., I served the OPENING BRIEF OF APPELLANT and VOLUME I and II of the transcript upon the Russ Brown, Deputy Prosecuting Attorney for Skagit County Courthouse by leaving a copy of said document with his receptionist at 605 South Third Street in Mount Vernon, Washington.

Executed in Conway, Skagit County, Washington this 29<sup>th</sup> day of July 2011.



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PROOF OF SERVICE

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