

No. 71615-8-I

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION ONE**

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**STATE OF WASHINGTON, Appellant,**

**v.**

**TRAVIS J. BIRD, Respondent.**

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in concluding that the State cannot establish Respondent's prior conviction for vehicular assault was one pursuant to RCW 46.61.522(1)(b) on the Skagit County Superior Court record provided.

2. The trial court erred in denying the State's Motion to Reconsider its ruling that that the State could not establish Respondent's prior conviction for vehicular assault was one pursuant to RCW 46.61.522(1)(b) on the Skagit County Superior Court record provided.

**B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR**

1. Whether Respondent's plea to vehicular assault as charged, which included being charged under 46.61.522(1)(b), by operation of law qualifies the said vehicular assault conviction as a predicate offense for the charge of Felony Driving while Under the Influence of Intoxicating Liquor and/or Drugs?

2. Whether the Skagit County Superior Court record from Respondent's prior vehicular assault conviction establishes that Respondent was found guilty under RCW 46.61.522(1)(b) where the the information charged Respondednt under RCW 46.61.522(1)(b) and the Skagit County Superior Court found Respondent guilty as charged; the elements of the offense included on Respondent's guilty plea statement only included those recited in RCW 46.61.522(1)(b); Respondent's sentencing range comports with that of a conviction under RCW 46.61.522(1)(b); the record is replete with references to "DUI;" and the conditions of Respondent's supervision are uniquely tailored to a finding of guilt under RCW 46.61.522(1)(b)?

## C. FACTS

### 1. Procedural facts

On January 24, 2013, the State charged Respondent, Travis J. Bird, with one count of Felony Driving while Under the Influence of Intoxicating Liquor and/or Drugs (“Felony DUI”) for an event on January 19, 2013. CP 3–4. The State charged Bird under RCW 46.61.502(6)(b)(ii), alleging that Bird had a prior conviction for a vehicular assault under RCW 46.61.522(1)(b). *Id.* On January 21, 2014, Bird filed a motion to dismiss the State’s case, arguing that the State was unable to prove the predicate offense of vehicular assault under RCW 46.61.522(1)(b). CP 7–44. On January 30, 2014, the Honorable Judge Snyder of the Whatcom County Superior Court heard argument on Bird’s motion. January 30, 2014, RP 1. On February 3, 2014, Judge Snyder granted Bird’s motion and dismissed the State’s case without prejudice. CP 49–50. On February 5, 2014, the State filed a motion to reconsider. CP 51–52. On February 13, 2014, Judge Snyder heard argument on the State’s motion and denied it; a written order was filed on February 20, 2014. February 13, 2014, RP 1; CP 55. The State timely filed a Notice of Appeal on February 28, 2014, seeking review of both orders. CP 56–59.

## 2. Substantive Facts

On January 19, 2013, law enforcement officers contacted Bird while driving in Whatcom County because he was using two lanes and drifting over the entire road. CP 5. Upon contact, officers noted Bird had slurred speech and red eyes. *Id.* Bird performed field sobriety tests poorly, admitted to drinking earlier in the evening, and provided a portable breath test of .138. *Id.* Officers noted that Bird had a prior vehicular assault conviction and spoke with him regarding this; Bird replied that he knew his actions would result in a felony charge. *Id.*

Bird's prior vehicular assault conviction was filed by the Skagit County Prosecutor's Office on November, 4 2008. CP 15–16. The information charged Bird with two counts of vehicular assault. *Id.* For both counts, the charge was titled: "Vehicular Assault – All Alternatives."

*Id.* The charging language for Count 1 specifically stated:

On or about July 4, 2008, in the County of Skagit, State of Washington, the above-named Defendant did cause substantial bodily harm to another, to wit: Whitney Schultz, and did (1) operate or drive a vehicle in a reckless manner and/or (2) operate or drive a vehicle (a) and have, within two hours after driving, an alcohol concentration of 0.08 or higher, and/or (b) while under the influence of or affected by intoxicating liquor or any drug; and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; and/or (3) operate or drive a vehicle with disregard for the safety of others; contrary to Revised Code of Washington 46.61.522(1)."

CP 15.

On June 12, 2009, Bird entered an *Alford* plea of guilt to Count 1 of the original information. CP 22–30. As stated in his plea, the elements of the offense were that he “did drive a motor vehicle while under the influence of alcohol and did cause substantial bodily harm to another person, to wit[:] Whitney Schultz.” CP 22. In his plea of guilt, he acknowledged that his offender score was zero, his standard range was three to nine months of confinement, and that the prosecutor would recommend, among other things, community custody with “DUI” conditions. CP 23, 25. Bird authorized the court to review and rely upon the probable cause statement and/or police reports for a factual basis to accept his plea. CP 29.

The probable cause statement revealed that on July 4, 2008, Bird attended a fireworks show on Guemes Island in Skagit County. CP 18. After the fireworks show, he drove his 1990 Ford Mustang with four passengers on Guemes Island Road towards the ferry terminal intent on making the 12:00 a.m. ferry to Anacortes. *Id.* A witness reported Bird passed him while the witness was driving the posted speed limit of thirty-five miles per hour and continued to accelerate away from the witness’s vehicle after the pass. CP 19. Near the 7400 block of Guemes Island Road, while still traveling in excess of the posted speed limit, Bird

swerved to avoid hitting a deer. *Id.* Bird's car left the roadway and hit a tree injuring two of his passengers. *Id.* One passenger suffered a fractured left forearm while the second sustained a serious head injury requiring an airlift to Harborview Medical Center; as of October 7, 2008, this passenger remained hospitalized. CP 18–21. Following the collision, a Good Samaritan attended to the injured at the scene and noted an order of marijuana coming from Bird. CP 19. After Bird was transported to a local hospital, Washington State Trooper Yzaguirre contacted him. CP 20. Trooper Yzaguirre noted an odor of alcohol coming from Bird, that his eyes were pink, and that his speech was somewhat slurred. *Id.* Trooper Yzaguirre arranged to draw Bird's blood, which was later sent to the Washington State Patrol Laboratory. *Id.* A toxicology analysis of Bird's blood revealed that approximately one and a half hours after the collision, Bird's blood contained .04 g/100 ml Blood Ethanol and 2.6 ng/ml of THC. *Id.*

Pursuant to Bird's plea, the Honorable Judge Needy of the Skagit County Superior Court entered findings of fact and conclusions of law regarding the validity of the *Alford* plea. CP 31–32. In his findings of fact, Judge Needy specifically found that the evidence reviewed supported a finding that the Bird was "guilty as charged." CP 32. Judge Needy then proceeded to sentencing and entered a judgment and sentence ("J&S").

CP 33–44. In the J&S, Judge Needy again found Bird guilty of “Vehicular Assault – All Alternatives . . . as charged in the Original Information.” CP 33. A hand written notation above “All Alternatives” stated “(DUI).” *Id.*

Judge Needy also found that Bird had an offender score of zero and his range was three to nine months of confinement. CP 36. As part of his sentence, Judge Needy placed Bird on community custody for a period of twelve months. CP 39. An appendix entitled “DUI Appendix” enumerated some of Bird’s conditions while on supervision. *Id.* Contained in said conditions were several specifically tailored to persons found guilty of driving under the influence (“DUI ”), such as attending a DUI victim panel, complying with any court ordered ignition interlock requirements, not using or possessing drugs or alcohol, participating in alcohol/substance abuse treatment, and submitting to urinalysis and Breathalyzer examinations as directed. CP 43–44.

#### **D. ARGUMENT**

The trial court’s ruling that Bird’s prior vehicular assault conviction did not qualify as a predicate offense for Felony DUI should be reversed for two independent reasons. First, the information charging Bird included the alternative mean of RCW 46.61.522(1)(b) and Bird pled to vehicular assault as charged in the informaiton. Because a plea to any

crime is a plea to all alternative means charged, Bird's vehicular assault conviction is a predicate offense by operation of law. Second, the Skagit County information, probable cause statement, Bird's plea of guilt, the Skagit Superior Court's findings and the J&S, when considered together in their totality, clearly indicate that Bird was convicted of vehicular assault pursuant to RCW 46.61.522(1)(b).

To convict Bird of Felony DUI as charged, the State must prove that he was previously convicted of vehicular assault while under the influence of intoxicating liquor or any drug pursuant to RCW 46.61.522(1)(b). RCW 46.61.502(6)(b)(ii). There are three independent alternative means of committing the crime of vehicular assault. RCW 46.61.522; *and State v. Hursh*, 77 Wn. App. 242, 248, 890 P.2d 1066 (1995) *abrogated on other grounds by State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005) (stating the statute creates alternative methods of committing vehicular assault). They are the reckless prong under RCW 46.61.522(1)(a); the DUI prong under RCW 46.61.522(1)(b); and the disregard for the safety of others ("DSO") prong under RCW 46.61.522(1)(c). Only a conviction under the DUI prong will cause all future DUIs to be elevated to a Felony DUI. RCW 46.61.502(6)(b)(ii).

"[T]he question of whether a prior conviction qualifies as a predicate offense for purposes of elevating a crime from a misdemeanor to

a felony is a threshold question of law for the court to decide.” *State v. Chambers*, 157 Wn. App. 465, 477, 237 P.3d 352 (2010). Questions of law are reviewed *de novo* by appellate courts. *State v. Vasquez*, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001) *aff’d*, 148 Wn.2d 303, 59 P.3d 648 (2002). If a prior offense qualifies as a predicate offense, the State is required to prove the existence of the offense to a fact finder beyond a reasonable doubt. *Chambers*, 157 Wn. App. at 481. On the other hand, if a prior offense is not a predicate offense, the prior offense will not be admissible into evidence in order to prove the existence of a predicate offense. *Id.* at 479.

1. **Bird’s plea to vehicular assault was as charged, which included the DUI prong, and therefore by operation of law his prior conviction qualifies as a predicate offense.**

In Bird’s Skagit County case, he was charged with vehicular assault under all three alternative means including the DUI prong. Where a defendant is charged with multiple alternative means, a plea to the charge includes a plea to each and every alternative mean. Therefore, when Bird pled guilty as charged to vehicular assault, he necessarily pled guilty to vehicular assault under the DUI prong.

Washington law does not “include a right to plead guilty to only one alternative means out of several that are charged. Where an

information alleges more than one means of committing a single crime, the right to plead guilty is a right to plead guilty to the one crime charged.” *State v. Bowerman*, 115 Wn.2d 794, 801, 802 P.2d 116 (1990); *accord In re Richey*, 162 Wn.2d 865, 870-71, 175 P.3d 585 (2008) (“When a defendant pleads guilty to a crime charged in the alternative, he has no right to plead guilty to only one of the alternatives; rather, the guilty plea is to the charged crime.”).

In *Bowerman*, the defendant faced a charge of aggravated first degree murder. *Bowerman*, 115 Wn.2d at 797. On the day of trial, concerned about the defendant’s diminished capacity defense, the State moved to amend the information to add a count of first degree felony murder. *Id.* The trial commenced and Bowerman was convicted of aggravated first degree murder. *Id.* at 798. On appeal, she argued that the trial court did not properly arraign her and therefore she did not have the opportunity to plead to the felony murder charge—a charge which included a possibility of parole, unlike premeditated murder. *Id.* at 796, 798. She in turn argued that had she been allowed to plea to felony murder, a trial on the premeditated murder charge would have been foreclosed. *Id.* at 798. The Supreme Court disagreed, holding that had she wanted to plea, she could only have pled as charged and not solely to felony murder. *Id.* at 799. Relying on *State v. Dunhaime*, 29 Wn. App.

842, 631 P.2d 964 (1981), the *Bowerman* Court held that the “right to plead guilty is only a right to plead as charged.” *Id.*

The rule first clearly announced in *Bowerman*, that when a defendant pleads, he or she pleads as charged, continues to be consistently applied. *See e.g. In re Pers. Restraint of Fuamaila*, 131 Wn. App. 908, 131 P.3d 318 (2006) (holding that defendant’s plea to second degree murder was facially valid despite the fact that defendant was charged with second degree felony murder based on predicate second degree assault, because defendant was also charged in the alternative with intentional second degree murder). Most recently, the Washington Supreme Court in 2008 affirmed *Bowerman*’s holding. In *In re Richey*, the Supreme Court held that attempted first degree felony murder does not exist. *In re Richey*, 162 Wn.2d at 870. Nonetheless, the court found the defendant’s judgment for attempted first degree murder facially valid because he was charged with attempted first degree murder in the alternative, by felony murder and intentional murder. In denying defendant’s petition the court stated: “When a defendant pleads guilty to a crime charged in the alternative, he has no right to plead guilty to only one of the alternatives; rather, the guilty plea is to the charged crime.” *Id.* at 870-71.

Here, the Skagit County information explicitly included all three alternatives of vehicular assault, including RCW 46.61.522(1)(b). In his

guilty plea statement, Bird pled guilty to one count of vehicular assault as charged in the original information. Judge Needy accepted his plea and made a factual finding in two separate court documents that Bird was guilty as charged. Under *Bowerman* and its progeny, Bird's plea to vehicular assault as charged necessarily included all alternative means charged, including the Felony DUI predicate offense of vehicular assault under the DUI prong. Therefore, the trial court erred by ruling the State was unable to establish the existence of the predicate offense and dismissing the information.

**2. The Skagit County Superior Court record establishes that Bird was found guilty of the DUI prong of vehicular assault.**

Assuming *arguendo* *Bowerman* does not mandate a finding that Bird's prior vehicular assault conviction is a predicate offense for purposes of Felony DUI, the record from Bird's prior vehicular assault conviction clearly indicates that it qualifies. First, the DSO prong is eliminated as a prong that Judge Needy found Bird guilty under based on Bird's sentencing range. Second, when considered as a whole, the information, probable cause statement, plea statement, findings of fact regarding the plea, and the J&S clearly indicate Bird was found guilty under the DUI prong.

The DSO prong is eliminated as one of the three prongs Judge Needy sentenced Bird under based on the calculation of Bird's standard sentencing range. The standard range sentence of a vehicular assault conviction is determined in part by which prong of vehicular assault a defendant is convicted. This is because the seriousness level of a vehicular assault is determined by which prong of vehicular assault a defendant is convicted. If a defendant is convicted under the DSO prong, the seriousness level is a III. RCW 9.94A.515. If a defendant is convicted under the Reckless or DUI prong, the seriousness level is a IV. *Id.* A defendant with an offender score of zero, as Bird had here, would therefore be facing a range of one to three months of incarceration for a conviction of a level III offense. RCW 9.94A.510. A zero point offender convicted of a level IV offense would face a standard range sentence of three to nine months. *Id.* Here, Bird agreed and Judge Needy found that the seriousness level of his crime was a IV and his standard range sentence was three to nine months. Such a range would be incorrect if Judge Needy treated Bird's vehicular assault conviction as falling under the DSO prong. Thus, Bird's standard range for his vehicular assault conviction would only be proper under the reckless prong or DUI prong.

While Bird's standard range sentence supports the possibility that he was found guilty under RCW 46.61.522(1)(b), inspection of other

sections of the J&S and remaining Skagit County documents mandate such a holding. For instance, Bird's guilty plea statement listed the elements of the offense he was pleading to as: "did drive a motor vehicle while under the influence of alcohol and did cause substantial bodily harm to another person . . . ." Omitted is any mention of the elements for the reckless prong or the DSO prong. Furthermore, the probable cause statement that Bird stipulated to includes facts regarding Bird's consumption of alcohol and marijuana and the effects of said drugs on him, establishing the factual basis for Judge Needy to find Bird guilty under the DUI prong.

Another indication that Bird was found guilty under the DUI prong is found on the face of the J&S. In the section of the J&S indicating what Judge Needy was finding him guilty of, a hand written notation of "DUI" appears above the words "Vehicular Assault – All Alternatives."<sup>1</sup> This is a clear indication that Judge Needy was treating the vehicular assault as one committed under the DUI prong.

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<sup>1</sup> The J&S reflects that Bird was found guilty of "Vehicular Assault –All Alternatives . . . as charged in the Original Information." In the information's charging language, all three alternatives, including RCW 46.61.522(1)(b), are explicitly included and cited. In his guilty plea statement, Bird pled guilty to one count of vehicular assault as charged in the original information. Although neither the J&S nor the plea form explicitly reference RCW 46.61.522(1)(b), such talismanic language is not required. It is clear that where Bird pled guilty as charged in the original information, the J&S referenced "Vehicular Assault –All Alternatives . . . as charged in the Original Information" and the elements of RCW 46.61.522(1)(b) are explicitly cited in the original information, Judge Needy found Bird guilty under RCW 46.61.522(1)(b).

Finally, the conditions of Bird's community custody evidence that his vehicular assault conviction fell under the DUI prong. A considerable number of Bird's community custody conditions were listed in an appendix labeled "Appendix B – DUI." Included on the appendix are conditions that would only reasonably relate to a conviction under the DUI prong. They include, but are not limited to, a condition that Bird complete a DUI impact panel; that Bird not drive a motor vehicle while having an alcohol concentration of .08 or more within two hours after driving or under the influence of drugs; that Bird comply with any court ordered ignition interlock requirements; and that Bird not use or possess drugs or alcohol, participate in alcohol/substance abuse treatment, and submit to urinalysis and Breathalyzer examinations as directed. Judge Needy could only order such affirmative and prohibitive conditions if they were crime related. RCW 9.94A.505(8); *see also State v. Autrey*, 136 Wn. App. 460, 466–67, 150 P.3d 580 (2006) (reviewing community custody conditions to determine if they reasonably related to the convicted crime). The aforementioned conditions would be unlawful had Judge Needy not found Bird guilty under the DUI prong.

When considered in *totum*, it is clear from the Skagit County Superior Court record that Bird was found guilty of vehicular assault

under the DUI prong.<sup>2</sup> The record is replete with references to DUI, Bird's sentencing range comports with that of the DUI prong, the elements of the offense included on the guilty plea statement include those for the DUI prong only, and conditions of Bird's supervision are uniquely tailored to the DUI prong. Therefore, based on the Skagit County Superior Court record, the trial court erred in finding the State cannot establish Bird's prior conviction for vehicular assault was one pursuant to RCW 46.61.522(1)(b).

**E. CONCLUSION**

The State requests that this Court hold that Bird's prior vehicular assault qualifies as a predicate offense for Felony DUI and reverse the trial court's ruling dismissing the information.

Respectfully submitted this 22<sup>nd</sup> day of May, 2014.



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<sup>2</sup> There is perhaps no stronger evidence of this fact than Bird's own understanding of the proceedings. On the night he was arrested for DUI, he himself acknowledged it would be a felony. This could only be true if he were found guilty of a vehicular assault under the DUI prong.

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

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