SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2003-000397-001 DT 03/17/2004

HONORABLE MICHAEL D. JONES

CLERK OF THE COURT
P. M. Espinoza
Deputy

FILED:_____

STATE OF ARIZONA JAMES D NEUGEBAUER

v.

LINDSAY ANN LEMKE (001) CAMERON A MORGAN

REMAND DESK-LCA-CCC
SCOTTSDALE CITY COURT

RECORD APPEAL RULE / REMAND

SCOTTSDALE CITY COURT

Cit. No. #1532122

Charge:
1) DUI-LIQUOR/DRUGS/VAPORS/COMBO
2) DUI W/BAC OF .F08 OR MORE
3) LIQ-ALLOW INTOXICATED PERSON TO BUY
4) DRIVE ONE LANE/UNSAFE LANE CHANGE
5) SPEED/REASONABLE AND PRUDENT

DOB: 08/02/83

DOC: 07/17/02

This Court has jurisdiction of this criminal appeal pursuant to the Arizona Constitution Article VI, Section 16, and A.R.S. §12-124(A).

This matter has been under advisement and I have has considered and reviewed the record of the proceedings from the trial court, exhibits made of record and the memoranda submitted.

Facts

On July 17, 2002, Appellant, Lindsay Lemke, was pulled over for speeding and failing to remain in one lane. The officer observed noticed signs of intoxication and a DUI investigation ensued. Appellant was cited for violation of A.R.S. §28-1381(A)(1)[1], A.R.S. §28-1381(A)(2)[2], and A.R.S. §4-244.33[3] - Appellant was 19 years old at the time of the incident. The trial court found Appellant guilty of all of the above-mentioned charges. Appellant now brings the matter before this court having filed a timely Notice of Appeal.

Issues and Analysis

The first issue is whether a violation of A.R.S. §4-244.33 (Person under 21, driving with any liquor in body) is a lesser-included offense of the DUI statutes A.R.S. §28-1381(A)(1) and (A)(2). In Arizona, there are two tests to determine whether an offense constitutes a lesser-included offense. A crime is a lesser-included offense when either: (1) the offense, by its very nature, is always a constituent part of the greater offense, so that it is impossible to commit the greater offense without necessarily committing the lesser offense; **or** (2) when the charging document describes the lesser offense even though the lesser offense would not always form a constituent part of the greater offense.[4]

The first test provides that a lesser offense is a constituent part of a greater offense if the lesser offense is composed solely of some, but not all, of the elements of the greater crime.[5] This court must now assess whether A.R.S. §4-244.33 is a lesser-included offense of A.R.S. §28-1381(A)(1) and (A)(2). A.R.S. §4-244.33 states:

> For a person **under the age of twenty-one** years to drive or be in physical control of a **motor vehicle** while there is **any spirituous liquor** in the person's body.

To pass the first test, the elements of A.R.S. §4-244.33 (under 21, driving a motor vehicle, with any spirituous liquor in their body) must be a constituent part of A.R.S. §28-1381(A)(1) and (A)(2). A.R.S. §28-1381(A)(1) states:

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[1] DUI – Impaired to the slightest degree.
[2] DUI – BAC .08% and above.
[3] Person under 21, driving with any liquor in body.
[4] *State v. Hurley*, 197 Ariz. 400, 4 P.3d 455 (App. 2000); See *State v. Griest*, 196 Ariz. 213, 994 P.2d 1028 (App. 2000); *State v. Celaya*, 135 Ariz. 248, 660 P.2d 849 (1983); *State v. Scott,* 177 Ariz. 131, 139-40, 865 P.2d 792, 800-01 (1993).
[5] *State v. Celaya,* 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983)[citing *State v. Malloy,* 131 Ariz. 125, 639 P.2d 315 (1981)].

> It is unlawful for a person to **drive** or be in actual physical control of **a vehicle** in this state under any of the following circumstances:
>
> 1. While under the influence of **intoxicating liquor**, any drug, a vapor releasing substance containing a toxic substance or any combination of liquor, drugs or vapor releasing substances if the person is **impaired to the slightest degree.** [emphasis added]

It is clear that there is one element[6] in A.R.S. §4-244.33 that is not an element of A.R.S. §28-1381(A)(1), namely the requirement that the person be under the age of twenty-one. Therefore, it is possible to commit the greater offense, A.R.S. §28-1381(A)(1), without necessarily committing the lesser offense, A.R.S. §4-244.33. A.R.S. §28-1381(A)(2) states:

> It is unlawful for a person to **drive** or be in actual physical control of **a vehicle** in this state under any of the following circumstances:
>
> 2. If the person has **an alcohol concentration of 0.08 or more within two hours** of driving or being in actual physical control of the vehicle and the alcohol concentration results from alcohol consumed either before or while driving or being in actual physical control of the vehicle.

Again, there is one element in A.R.S. §4-244.33 that is not an element of A.R.S. §28-1381(A)(2) - the requirement that the person be under the age of twenty-one. Therefore, it is possible to commit the greater offense, A.R.S. §28-1381(A)(2), without committing the lesser offense, A.R.S. §4-244.33.[7] Hence, under the first test, A.R.S. §4-244.33 is not a lesser-included offense of A.R.S. §28-1381(A)(1) or (A)(2).

The second test provides that even if the lesser offense is not always a constituent part of the greater offense, it may be a lesser-included offense if the charging document describes the

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[6] Appellee's counsel mistakenly argues that another contrasting element exists: a person under age twenty-one can violate A.R.S. §4-244.33 while driving "any means of transportation by land, water or air, and includes everything made use of in any way for such transportation."[6] Appellee's counsel argues that a person under 21 could be in violation even if they were riding a skateboard, riding a bicycle or flying an airplane. It must be pointed out that A.R.S. §4-244.33 specifically states "motor vehicle."

[7] Note that while it is <u>impossible</u> to have a BAC of .08% or higher within two hours of driving [A.R.S. §28-1381(A)(2)] without having <u>any</u> spirituous liquor in the person's body (A.R.S. §4-244.33), it is <u>possible</u> to have a BAC of .08% or higher within 3 hours of driving while under the age of twenty-one, violating A.R.S. §4-244.33, but not violating A.R.S. §28-1381(A)(2). Thus, under the first test, A.R.S. §4-244.33 is not a lesser-included offense of A.R.S. §28-1381(A)(2).

lesser offense. In other words, it is a lesser-included offense if the lesser offense could be committed as described in the charging document without necessarily committing the greater offense.[8] In this case, the charging document was a traffic ticket, which listed the offenses as:

> Count I: 28-1381.A1, Driving While Impaired
> Count 2: 28-1381.A2, BAC .08 or Higher Within Two Hours
> Count 3: 4-244.33, Person Under 21 YOA in Control of a Motor Vehicle with Any Liquor in Body.

Again, by the very language of the charges, it is clear that one can commit underage drinking and driving without committing either form of DUI. Consequently, under the second test, A.R.S. §4-244.33 is not a lesser-included offense of A.R.S. §28-1381(A)(1) or (A)(2).

Most significantly, the Arizona Court of Appeals recently ruled that A.R.S. §4-244.33 is not a lesser-included offense of A.R.S. §28-1381(A)(1) or (A)(2):

> Driving with a blood alcohol content ("BAC") of .01 or greater is not necessarily the same as impaired driving or driving with a BAC of .08 or higher. The offense of underage drinking and driving may be committed without any evidence or presumption of impaired driving. In contrast, the offense of DUI is based on the danger created by impaired drivers and requires evidence of impairment or evidence supporting a presumption of impairment. *See* A.R.S. § 28-1381(A) (1) (Supp.2002) ("impaired to the slightest degree"); A.R.S. § 28-1381 (A)(2), (G)(3) (presumption of impairment at .08 BAC or greater).
>
> Because a person may commit the offense of underage drinking and driving without being impaired, the degree of moral turpitude associated with DUI is not present. And **if an eighteen, nineteen,or twenty year-old driver is actually impaired or has a BAC sufficient to support the presumption of impairment, that driver may be charged with DUI as well as underage drinking and driving** and would be entitled to a jury trial on the DUI charge. *See Rothweiler,* 100 Ariz. at 47, 410 P.2d at 486; *see also* A.R.S. §28-1381(A), (F).[9]

The second issue is whether the trial court violated Appellant's right of allocution. Appellant complains that she was not permitted to provide comment at her sentencing, as required by Rule 26.10(b)(1) of the Arizona Rules of Criminal Procedure. It is possible that the

[8] State v. Gooch, 139 Ariz. 365, 678 P.2d 946 (Ariz. 1984).
[9] Raye v. Jones, 206 Ariz. 189, 76 P.3d 863, 409 Ariz. Adv. Rep. 20 (App. 2003).

trial judge forgot to allow Appellant an opportunity to speak on her behalf. There was no need for Appellant to object to the absence of allocution, for it was the duty of the trial judge to enquire and to give Appellant the opportunity to address the court at the time of her sentencing. Therefore, I will remand this case to the Scottsdale City Court for resentencing.

Conclusion

Under both tests defined by *State v. Hurley*,[10] A.R.S. §4-244.33 is not a lesser-included offense of A.R.S. §28-1381(A)(1) or (A)(2). Also, I will remand this case to the Scottsdale City Court for resentencing, as the trial judge neglected to give Appellant an opportunity to speak on her own behalf prior to entry of judgment of guilt and sentencing.

IT IS THEREFORE ORDERED affirming the findings of guilt by the Scottsdale City Court, but reversing and vacating the sentence imposed.

IT IS FURTHER ORDERED remanding this matter back to the Scottsdale City Court for resentencing, and all other and future proceedings in this case.

/ s / HONORABLE MICHAEL D. JONES

JUDICIAL OFFICER OF THE SUPERIOR COURT

[10] 197 Ariz. 400, 4 P.3d 455, 315 Ariz. Adv. Rep. 3 (App. 2000).