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IN THE UTAH COURT OF APPEALS

ELIZABETH VICTORIA COOK, Defendant and Appellant, v. **STATE OF UTAH,** Plaintiff and Appellee.	Case No. 20150847-CA

REPLY BRIEF OF APPELLANT

ON APPEAL TO THE UTAH COURT OF APPEALS
FROM A JUDGMENT ENTERED BY
THE FIFTH DISTRICT JUDICIAL COURT,
IN AND FOR IRON COUNTY, STATE OF UTAH

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ORAL ARGUMENTS/PUBLISHED OPINION REQUESTED

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IN THE UTAH COURT OF APPEALS

ELIZABETH VICTORIA COOK, Defendant and Appellant, v. **STATE OF UTAH,** Plaintiff and Appellee.	Case No. 20150847-CA

REPLY BRIEF OF APPELLANT

Cook hereby adopts the Statement of the Case and Facts from the *Opening Brief of Appellant* and the terms therein defined as though fully set forth herein. Cook hereby submits the following reply to the State of Utah's *Brief of Appellee*, (the "**State's Brief**"):

ARGUMENT

I. THE TRIAL COURT COMMITTED ERROR IN FAILING TO PROPERLY FIND AND CONCLUDE THAT COOK MANUEVERED THE DIRECTION OF THE FOUR-WHEELER IN ORDER TO BE IN "ACTUAL PHYSICAL CONTROL."

'[A]ctual physical control' in its ordinary sense means 'existing' or 'present bodily restraint, directing influence, domination or regulation.' " (citations omitted)) *State v. Vialpando*, 2004 UT App 95, ¶ 21, 89 P.3d 209. In light of the purpose of the actual physical control provision, however, we conclude that, a passenger who grabs the steering wheel of a moving car and alters the car's movement has assumed actual physical control for purposes of the DUI statutes. *State v. Rivera*, 207 Ariz. 69, 74, 83 P.3d 69, 74 (2004); *citing Atkinson v.*

State. 331 Md. 199, 627 A.2d 1019, 1027 (1993). "A person drives a vehicle when he or she *intentionally cause it to move by exercising actual physical control over it.* The person must cause the vehicle to move, but the movement may be slight." (*Italics* added) *In re F.H.* 192 Cal.App.4th 1465, 1470, 122 Cal.Rtr.3d 43, 46 (2011). Concerning the scope of "actual physical control," this Court concluded that "the determination must be made through examining the 'totality of the circumstances.'"" *State v. Vialpando,* 2004 UT App 95, ¶22, 89 P.3d 209 (2004); *citing State v. Bugger,* 25 Utah 2d 404, 483 P.2d 442, 478 (1971).

"Merely giving a driver directions does not amount to control over the vehicle equal to that the drive exercises." *Benson v. Sorrell,* 627 N.E.2d 866, 869. (Indiana Ct App. 1994). In *Leuck v. Goetz,* the Indiana Court of Appeals ruled that "a [passenger] had the right to give [a driver] directions and, to be sure, could well have had a duty to warn if and only if she know of an impending danger and the [driver] was unaware of its presence." *Ibid.* 151 Ind.App 528, 541, 280 N.E.2d 847, 855 (Indiana Ct. App. 1972); *citing Holmes v. Combs,* 120 Ind. App. 331, 335, 90 N.E.2d 822, 824 (1950).

The Utah Supreme Court has stated that judges can "disregard or discredit the prosecution's evidence only when it is 'wholly lacking and incapable of creating a reasonable inference regarding a portion of the prosecution's claim.'" *State v. Jones,* 2016 UT 4, ¶ 14, 365 P.3d 1212 (2016); *citing State v. Virgin,* 2006 UT 29 ¶ 24, 137 P.3d 787 (citations omitted). "When evaluating a challenge to the sufficiency of the evidence, appellate courts 'review the evidence and all inferences which may reasonably be drawn from it in the light most favorable to the verdict of the jury. *State v. Ring,* 2013 UT App 98, ¶2, 300 P.3d 1291 (2013); *citing State v. Shumway,* 2002 UT 124, ¶ 15, 63 P.3d 94 (2002).

The legal concept in Utah that "actual physical control" requires existing directing of influence, domination or regulation comports with other jurisdictions' holdings that a passenger only legally takes that control from a driver by first voluntarily taking personal physical action to show intent, and then altering of the vehicle's movement to show control, which are both elements of the underlying crime itself. *Vialpando* at ¶ 21; *Rivera,* 207 Ariz. at 74, 83 P.3d at 74; *Atkinson*, 331 Md. 199, 627 A.2d at 1027; *F.H.* 192 Cal.App.4th at 1470, 122 Cal.Rtr.3d at 46. No evidence was presented to show movement of the vehicle from its intended path—the control element—under examination of the totality of the circumstances. *Vialpando* at ¶22; *Bugger* at 478.

In the instant matter, J.C. testified that she had been driving the four-wheeler not Cook. J.C. stated that she felt in control of the four-wheeler. R142. When asked if Cook helped her steer J.C. replied: "she did at first because I almost crashed into the thing..." R136. The problem with the phrase "at first" was that no time frame was established for precisely ***when*** this occurred during the course of the family outing. The State elicited no testimony from J.C. to clarify if she was referring to when they very "first" started out on their journey or if she meant when they "first" observed Burton. It can be presumed she meant when they first started out on their trip since there is no evidence she came to a stop for any other reason when they saw Burton than the fact that he was an officer requesting such. Additionally, there is simply not enough evidence to establish a direct nexus between "at first" and when Cook became intoxicated above 0.08%. Had Cook actually helped J.C steer on the onset of their journey, the State cannot prove she was intoxicated above 0.08% at that point in time, and it only becomes a crime at that level of intoxication. Without the

specifics of what J.C. had been referring too, one cannot assume that Cook had exercised her dominion and control and was in "actual physical control" of the four-wheeler while also being intoxicated above the legal limit. *See, Vialpando* at ¶ 21.

The State's evidence elicited was "wholly lacking and incapable of creating a reasonable inference" as to the exact point in time that J.C. was referring to when mentioning that "at first Cook helped her steer" and to the point in time that Cook became intoxicated while out on their little ride. *See, Jones* at ¶ 14 *citing Virgin* at ¶ 24. Therefore, the evidence with and all inferences drawn in the light most favorable to the verdict does not support Cook's conviction of Driving Under the Influence of Alcohol and/or Drugs, a class A misdemeanor. *See, Ring* at ¶2 *citing Shumway* at ¶ 15.

J.C. testified that Cook gave her directions by saying "turn this way and all she did was hold my shoulders. R136 and R138. Cook providing directions to J.C. did not "amount to control over the four-wheeler." *See, Benson* at 869. J.C. testified that she felt in control of the four-wheeler and no evidence was offered to suggest that Cook exhibited "present bodily restraint, directing influence, domination or regulation" over J.C. *See, Vialpando* at ¶ 21. This element is intended to be tied to voluntary personal physical action as meant by use of the phrase "present bodily restraint", which is modifying to say what type of "direction of influence, domination or regulation." Otherwise, an intoxicated person could be held responsible for others' voluntary decisions by simply making any suggestions while intoxicated. The law does not allow a person to shift blame to another for their personal choices unless actions are taken under duress or coercion—similar to the "influence,

domination, or regulation" language. There is simply no evidence of this from J.C.'s testimony regarding Cook.

J.C. was driving a four-wheeler on a snow packed road, and Cook had the "right to provide direction as a duty to warn of any impending danger" of which J.C. could have been unaware. *See, Leuck* at 151 Ind.App. 541, 280 N.E.2d at 855 *citing Holmes* at 120 Ind.App. 335, 90 N.E.2d at 824. It also would have been appropriate for Cook to provide J.C. with directions so that she would stay on the road, or directions toward the cabin where they had been staying. These directions would not amount to control over the four-wheeler. *See, Benson.*

In order to have assumed "actual physical control" of the four-wheeler, Cook needed to have fulfilled two (2) requirements: (1) grabbing the steering wheel; and (2) causing the vehicle to move. *See, Rivera* at 207 Ariz. 74, 83 P.3d 74 *citing Atkinson* at 331 Md. 199, 627 A.2d 1027 and *F.H.* at 192 Cal.App.4th 1470, 122 Cal.Rtr.3d 46. During trial, when asked if he noticed or saw who had been steering the four-wheeler, Burton testified that "Elizabeth Cook had her hand on the handlebars when I made initial contact..." R099. By Burton's own words, Cook's hands were just on the handlebars. Burton never testified that he saw Cook actually move the handlebars nor turn the handlebars in any direction. In fact, the State did not present any further evidence to prove that Cook moved the handlebars or that she had "altered the movement" of the four-wheeler even by the "slightest movement" from its intended course when initially observed by Burton in order to assume "actual physical control." *See, Rivera citing Atkinson* and *F.H.* at 192 CalApp.4th 1470, 122 Cal.Rtr.3d 46.

As a passenger on the four-wheeler, Cook would have had to complete each one of the two (2) requirements as set forth in *Rivera* to assume "actual physical control" for the purpose of meeting the elements contained within the DUI statute. *See, Rivera citing Atkinson.* Cook did not maneuver nor change the direction the four-wheeler had been traveling. Cook placed her hands in the middle of the handlebars in order to protect J.C. when the four-wheeler was sliding to a stop on a snow packed road upon observing Burton. Without the completion of actually moving the vehicle, Cook could not have been found to be in "actual physical control" of the four-wheeler.

Taken as a whole, the totality of the factual circumstances did not prove Cook maneuvered the four-wheeler even the slightest and was in "actual physical control." *See F.H.* Therefore, Cook thus requests reversal of the Judgment, and remand for resentencing.

II. THE TRIAL COURT COMMITTED ERROR IN FAILING TO HAVE DETERMINED THAT A 17 MINUTE CUSHION WAS ENOUGH TO HAVE MET *BAKER* WHEN THE SYNCHRONIZATION OF THE TWO DEVICES HAD NOT BEEN PROPERLY ESTABLISHED.

This Court can exclude relevant evidence when "its probative value is substantially outweighed by a danger of . . . unfair prejudice." UT. R. EVID. 403.

In order for Cook's BAC results to be admissible, "the State must present evidence, inter alia, that: (1) the intoxilyzer machine had been properly checked by a trained technician, and that the machine was in proper working condition at the time of the test; (2) the test was administered correctly by a qualified operator; and (3) a police officer observed the defendant during the fifteen minutes immediately preceding the test to ensure that the defendant introduced nothing into his or her mouth during that time." *State v. Vialpando,*

2004 UT App 95, ¶ 14, 89 P.3d 209; *see In re Oaks,* 571 P.2d 1364, 1367 (Utah 1977) (Maughan, J., dissenting) (citing *State v. Baker,* 56 Wash.2d 846, 355 P.2d 806, 809–10 (1960) (articulating foundation elements for intoxilyzer tests)); *see also Salt Lake City v. Womack,* 747 P.2d 1039, 1041 (Utah 1987) (affirming the necessity of the pre-test observation period).

In *State v. Baker,* the Supreme Court of Washington, En Banc., provided the reasons as to why the 15 (fifteen) minute rule is so important before a BAC is conducted.

> This rule is recognized by Robert L. Donigan, general counsel for the Traffic Institute of Northwestern University, in his work entitled 'Chemical Tests and the Law,' at page 173, where the author states: 'A breath test will only give an accurate measure of the concentration of alcohol in the circulating blood, if there has been a lapse of *at least* 15 minutes between the taking of the last drink and the taking of the breath for analysis. During this 15-minute interval, any alcoholic liquor remaining in the mouth and throat or under a dental plate will have been washed down by saliva. Thereafter, the alcohol concentration of the *breathed air* (alveolar breath) will reflect the alcohol concentration of the blood circulating through the lungs.' (First italics ours)

Ibid. 566 Wash.2d 846, 857, 355 P.2d 806, 812 (1960). The *Baker* court went on to further state that "the [S]tate is bound by its own evidence to the effect that the minimum period of delay must be fifteen minutes." *Id.*

In the instant matter, Cook does not contest that the State presented sufficient evidence to meet the first two (2) requirements under *Baker,* however, Cook's argues the fact the a "seventeen (17) minute cushion" is not sufficient to meet the last and most crucial element of *Baker* when no evidence was provided as to the synchronization of the two (2) timing devices in order for the BAC to be admissible evidence.

Burton first testified at trial that he "probably used his cell phone" to note the time of *Baker.* R110. After further questioning, Burton testified that he did not use his cell phone to

time the *Baker* fifteen (15) minute requirement period. R115. Based upon Burton's testimony, two (2) timing devices were used to administer *Baker* on Cook; however, the State did not present evidence as to the exact timing devices that were used and if the times were at all synchronized. *Baker* was observed on Cook at 14:34 and Burton administered her BAC at 14:15. R109-10. The trial court admitted Cook's BAC because they found that a two (2) minute cushion of seventeen (17) minutes met the fifteen (15) minute observation requirement period of *Baker*. *See, Vialpando* at ¶ 14, *citing Oaks* at 1367, *Baker* at 809-10 and *Salt Lake City* at 1041. Without synchronization, the court's finding of a two (2) minute cushion is without sufficient evidentiary support since only the synchronization could indicate whether any cushion existed at all.

The trial's court finding of a two (2) minute "cushion" was clearly erroneous because Burton could not adequately pin-point what two (2) timing devices he used to time *Baker*. The State cannot prove all elements of *Baker* occurred without the identification of the two timing devices, the two devices available for inspection by defense, and a record made by Burton as to the synchronization. If one of the devices was off by a few minutes from the other device, the fifteen (15) minute time period was not fully observed and *Baker* was not fulfilled. The State was bound by their own evidence to prove all elements of *Baker* in order for Cook's BAC to be admissible. *See, Baker* at 566 Wash.2d 857, 355 P.2d at 812. The State's evidence is lacking foundational support for the lawful admittance of Cook's BAC.

Without the identification of what two (2) timing devices were used, the State cannot prove that the "minimum period of delay was actually fifteen (15) minutes," in order for Cook's BAC to give an "accurate measure of the concentration of alcohol circulating in her

blood stream." *See, Id.* Therefore, the admittance of Cook's BAC was unfairly prejudicial and should not have been found to be admissible. *See,* UT. R. EVID. 403. Cook requests a remand for resentencing with specific instructions that her BAC be excluded as evidence.

III. BURNS WAS INEFFECTIVE FOR FAILING PROTECT COOK'S CONSTITUTIONAL RIGHT'S AND FOLLOW-THROUGH WITH A "CRITICAL" SUPPRESSION HEARING.

The Fifth and Fourteen Amendments to the United States Constitution provide that the accused shall not be deprived of life, liberty or property without Due Process. The Sixth Amendment provides the accused with the right to counsel.

In *State v. Curry,* the Utah Court of Appeals stated that "[u]nder both the United States Constitution and the Utah Constitution, [Defendant] had the right to the assistance of counsel at all critical stages of his criminal proceeding." *Ibid,* 2006 UT App 390, ¶ 6, 147 P.3d 483, *citing Wagstaff v. Barnes,* 802 P.2d 774, 778 (Utah App.1990); *see also* U.S. CONST. AMEND VI; UTAH CONST. ART. I, § 12. "The accused's right to the assistance of counsel during the critical stages of a criminal proceeding has long been recognized as a fundamental constitutional right." *Id.* at 776-77.

Burns' filed the Motion requesting the suppression of Cook's BAC test results; however, he failed to follow-through and have a suppression hearing heard on the Motion. R060 and R113. Burns was not entitled to waive Cook's constitutional rights in favor of trial strategy, specifically when he stated that he would have addressed *Baker* issues during a suppression hearing. Cook's Due Process rights were violated when Burns failed to follow through with the Motion. *See,* U.S. CONST. AMEND. V. and U.S. CONST. AMEND. XIV.

Whether or not the evidence against Cook was determined to be overwhelming does not matter. Cook's guilt or innocence was not a factor in order for a suppression hearing to be held. A suppression hearing was a necessity to the outcome of Cook's case. Cook was entitled to a suppression hearing because her BAC was unconstitutionally obtained during a *Baker* violation that occurred when the fifteen (15) minute observation period was not actually observed. Cook was entitled to "effective assistance of counsel" throughout the duration of her criminal case. *See,* U.S. CONST. AMEND. VI and *Curry citing Wagstaff at* 778. The suppression hearing was "critical" to Cook and a hearing that she was entitled too. *See, Curry* ¶ 6 *citing Wagstaff* at 778. Thus, Cook requests this Court remand her case for resentencing.

CONCLUSION

WHEREFORE, based upon the foregoing, Cook respectfully requests that this Court reverse the *Judgment, Sentence and Commitment* and remand with appropriate instructions for re-sentencing in this matter.

DATED this 20th day of June, 2016.

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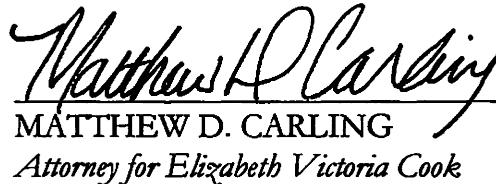
MATTHEW D. CARLING
Attorney for Elizabeth Victoria Cook

RULE 24(f)(1)(C) CERTIFICATE OF COMPLIANCE

Counsel herein certifies that this *Reply Brief of Appellant* is in compliance with the type-volume limitations contained in UT. R. APP. P. 24(f)(1)(A) in that it contains 3023 words, as was determined by the word processing system used to prepare *Reply Brief of Appellant.*

DATED this 20th day of June 2016.

CARLING LAW OFFICE, PC



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CERTIFICATE OF MAILING

I hereby certify that I mailed a true and correct copy, postage pre-paid, of the foregoing *Reply Brief of Appellant*, with attachments, on this 20th day of June, 2016, to the following:

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