

FACTS:

The defendant, Rita Jean Baty, was accused and convicted of driving under the influence of intoxicants. At around 3:00 pm, across from the Beaverton City Hall and Police Department, a Community Service Officer ("CSO") watched as the defendant entered her car and "attempt to back up." Because the CSO had developed a suspicion that the defendant was under the influence of intoxicants, he called for backup. The defendant subsequently failed field sobriety tests and breath tests results confirmed a .17 percent blood alcohol content. The main issue on appeal is whether or not the lower court's judge had failed to properly give an "attempted DUII" instruction.

ISSUES:

- Did the defendant merely "attempt" to drive
- Is there such a thing as "attempted DUII"

WHAT HAPPENED AT TRIAL:

Defendant argued that the CSO had written in his report, and testified, that the defendant was "attempt[ing] to back up" and that she was "trying to back up." Furthermore, because the CSO could not explain why photos of the scene showed the defendant's car pulled all the way forward in the spot, defendant argued that the defendant's vehicle may not have moved and, as a result, was entitled to an instruction regarding the lesser-included offense of "attempted DUII." The general instruction for attempt is: "A person attempts to commit a crime when she intentionally engages in conduct that constitutes a substantial step toward the commission of that crime."

The State argued that under Oregon law there is no offense for an "attempted DUII." As a result, the court cannot create a crime that is not defined in the Vehicle Code. The State also argued that there was evidence that the defendant actually drove, rather than merely attempted to drive.

RULING:

The court rejected the State's argument that there was no offense for "attempted DUII." The court reasoned that it was not creating a crime but rather reading one from its interpretation of the Vehicle Code and the Oregon Revised Statutes ("ORS"). The court held that the State's reading was flawed because it would mean other sections of the ORS would not apply to vehicle offenses (e.g. statute of limitations). Finally, because the CSO's testimony and report supported the defendant's claim that she had merely attempted to drive, a juror could infer that the defendant did not

actually drive. As a result, the lower court erred by refusing to provide a jury instruction for an "attempted DUII."

APPLICATION:

- What is the jury instruction for "attempted DUII"
- What are the repercussions of the court's decision
- How far does "attempt" reach?
 - Walking to the car?
 - Turning the ignition?
 - Driving to the bar?
- DUII is a strict liability crime - does it matter now that the court has attached "intent" to attempted DUII?