

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

vs.

DONALD LEON NEKOLITE,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT
McCOOK COUNTY, SOUTH DAKOTA

HONORABLE TIMOTHY W. BJORKMAN
Circuit Court Judge Presiding

APPELLANT'S BRIEF

Michael E. Unke
Attorney at Law
341 N. Main, Box 529
Salem, South Dakota 57058
Telephone (605) 425-3131

Attorney for the Defendant and Appellant

The Honorable Marty J. Jackley
Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
Telephone (605) 773-3215

Attorney for Plaintiff and Appellee

Notice of Appeal was filed on June 18, 2013.

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JURISDICTIONAL STATEMENT

This is an appeal of Timothy W. Bjorkman, First Circuit Judge, Order Affirming Judgment of Conviction of Magistrate Judge Patrick Kiner's Judgment and Sentence of Conviction dated February 3, 2013. Notice of Entry of Order was served on June 12, 2013. Notice of Appeal was filed on June 18, 2013. The transcript of oral arguments was served on July 1, 2013.

This appeal is a matter of right pursuant to SDCL 23A-32-2 of a final judgment of conviction.

STATEMENT OF THE ISSUE

Did the Circuit Court commit error by affirming the magistrate's decision, Judgment and Sentence that defendant had violated SDCL 32-23-1 by having actual physical control of his vehicle with .08 or over blood alcohol?

The Circuit Court affirmed the magistrate court's decision that defendant had violated SDCL 32-23-1 by having actual physical control of his vehicle with .08 or over blood alcohol.

Relevant cases:

State v. Kitchens 498 N.W.2d 649 (SD 1993)

People v. Guynn 338 N.E.2d 239 (Ill. App. Ct. 1975)

State, City of Falcon Heights v. Pazderski 352 N.W.2d 85
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State v. Hall 353 N.W.2d 37 (SD 1984)

Relevant statutes:

SDCL 32-23-1

SDCL 15-38-12

PRELIMINARY STATEMENT

In this brief appellee, State of South Dakota, shall be referred to as "State", defendant and appellant, Donald Leon Nekolite, as "Nekolite", and Nekolite's girlfriend, Jill Cameron, as "Cameron". McCook County Deputy Sheriffs Matthew Bormann and Jeremy VanTassell shall be referred to as "Bormann" and "VanTassell" respectfully. Reference to the Register of Actions shall be by "R.A." followed by the appropriate page(s). Reference to the trial transcript shall be by T.T. followed by the appropriate page number(s). Reference to the transcript of Oral Argument shall be by T.O.A. followed by the appropriate page number(s).

STATEMENT OF THE CASE

Nekolite was charged in the First Judicial Circuit, McCook County, South Dakota pursuant to an information for a violation of SDCL 32-23-1(1) or in the alternative SDCL 32-23-1(2). R.A. 14-16 On February 19, 2013, Nekolite, following a court trial in magistrate court, the Honorable Patrick Kiner presiding, was found guilty of SDCL 32-23-1(1), being in actual physical control of his vehicle with .08 or more by weight of alcohol in his blood. A Judgment

and Sentence was entered by the Magistrate Judge, Patrick Kiner on February 22, 2013. R.A. 78 Notice of Appeal was filed on March 3, 2013 appealing the Judgment to Circuit Court. R.A. 3 & 4

The First Circuit Court Judge, Timothy W. Bjorkman, entered a Memorandum Decision affirming the conviction on May 24, 2013. R.A. 35-46 An Order Affirming Judgment of Conviction dated June 3, 2013, was served on June 12, 2013. R.A. 47 A Notice of Appeal was served and filed on June 18, 2013. R.A. 50-67 An Order for Transcript for the May 6, 2013 Oral Argument was served on June 18, 2013. R.A. 68-70 The transcript was received by Nekolite on July 1, 2013. R.A. 71-72

STATEMENT OF THE FACTS

On September 15, 2012, Nekolite and Cameron were at a dance at the Battle Creek Bait Shop. Nekolite drove there; however, Cameron was the designated driver. Nekolite was drinking heavy at the dance, his blood test was .284. Cameron's PBT was .000. T.T. pp.14, 16, 18-19 Nekolite and Cameron went outside to smoke. Nekolite from the passenger side reached in to get his cigarette that had fallen on the floor next to the pedals. Nekolite bumped the gear shift, which cause the vehicle to go out of gear

and roll back striking another parked vehicle. T.T. p.19
Judge Kiner found this story to be credible stating:

I also take into account that the story I have here is fairly consistent as far as reaching in and not actually driving the vehicle. Although he was highly intoxicated causing the vehicle to roll back, I don't find that to be as aggravating as actually being in the vehicle and driving away or attempting to drive away. T.T. p.35

The police were called. The first on the scene was Deputy Bormann. Bormann testified that Nekolite stated that his pickup rolled back into the car. T.T. p.9
Bormann made no other observations that would bear on the issue whether Nekolite was the driver of the vehicle when it rolled. Bormann called VanTassell to assist him.
T.T.p.10

VanTassell arrived at the scene and approached Nekolite's vehicle. VanTassell testified that Nekolite was in the driver's seat and Cameron was in the passenger seat. VanTassell could not recall if the vehicle was running.
T.T. p.12

VanTassell's report stated: "while in my patrol car, Nekolite, informed me that he and his female passenger had

went to leave the bait shop and as he pushed the clutch in on his pickup it rolled backwards into the parked vehicle." No part of this conversation was recorded. VanTassell's audio and video were not working. VanTassell testified that Nekolite was very intoxicated and had trouble communicating. VanTassell never asked Nekolite if he was driving the vehicle. VanTassell arrested Nekolite for DUI. T.T. p.15

VanTassell was informed there were witnesses; however, he made no attempt to talk to anyone. VanTassell was aware that Cameron's PBT was .000. T.T. p.16

The State rested. Nekolite made a motion for judgment of acquittal and a dismissal, which was denied. T.T. p.17

The defense called Cameron. Cameron testified that she was the designated driver. Nekolite and her had left the dance to go outside to have a cigarette. Cameron described the accident as follows:

A. He went in, reached around through the passenger side to get the smokes. They were on the floor by the clutch, and it was in reverse. And when the gear shift is in reverse, it does rest right on the seat of the truck. So in his condition, I'm sure he just wasn't as coordinated and he bumped the shift lever when he was reaching for the

cigarettes and lighter and it came and went into neutral and started rolling.

Q. And you witnessed that?

A. Yes. T.T. p.19

Cameron testified when Bormann arrived where she was at as follows:

Q. When Deputy Bormann arrived, where were you at?

A. When I got back into the passenger side, the truck was still in the accident position where we left it. We were waiting for the law enforcement to show up before we moved the vehicle forward. So it was still right next to the white truck.

Q. And where was Donald Nekolite?

A. He was out talking to the other party discussing insurance things and exchanging information.

Q. Were the keys in the ignition?

A. No, they were in his little cubbyhole up there by the dash. He usually takes them out and throws them in there.

Q. And you absolutely were going to be the only driver of that vehicle that night?

A. Yes. T.T. pp.21-21

On cross Cameron testified that Nekolite leaned into

the pickup to retrieve his cigarette when he hit the gear shift. When the vehicle started to move they tried to stop it by holding onto the door. T.T. pp.24-25

Nekolite was called as a witness and he described the accident as follows:

I just opened up the passenger door of the vehicle and stuff, reached in to go grab my cigarettes, and I caught my arm against that stick shift. I didn't believe it would do it, but that's not the original transmission in that pickup. It was a five-speed and that wrapped too tight against the seat. In other words, the seat was helping depress that stick shift and she popped out of gear and started sliding back on me, the pickup did. So I rolled it back.

Q. Did you drive that vehicle into Jennifer Schenkel's vehicle?

A. No, I did not.

Q. Did you back it into that vehicle?

A. No, I did not. T.T. p.29

Nekolite also testified that Bormann had him move the vehicle. Nekolite was quite intoxicated and was not sure of that. T.T. p.30

When the defense recalled Bormann Judge Kiner stated "I'm not going to consider as a reason to convict him of anything that he moved the vehicle after he was told to move it." Bormann would have testified that he did not ask Nekolite to move the vehicle nor was the vehicle moved. Cameron testified the vehicle was in the same position as it was when it rolled back into the other vehicle. Cameron stated "we were waiting for the law enforcement to show up before we moved the vehicle forward." T.T. p.21

The magistrate court found Nekolite guilty of DUI relying on State v. Kitchens. The magistrate court found specific intent to drive is not an element of actual physical control. All that is necessary to establish actual physical control of a vehicle as required to support conviction of driving under the influence of alcohol is showing that the vehicle was operable and that the defendant was in position to manipulate controls which would cause it to move.

The magistrate court found in this case that the vehicle was operable as it was driven there. Further, that the vehicle was being manipulated by Mr. Nekolite in that he admitted he reached in, struck the gear shift mechanism which caused the vehicle to move, and that is sufficient

for purposes of the statute and the case law pursuant to State v. Kitchens to establish being in physical control of the vehicle while under the influence of an alcoholic beverage or in the alternative with greater than .08 percent. T.T. pp.32-33.

This matter was appealed to Circuit Court pursuant to SDCL 15-38-12. R.A. 3-4. The Circuit Court entered its Memorandum Decision and affirmed the conviction. R.A. 35-47 The Circuit Court decision was appealed to this Court. R.A. 50-67.

ARGUMENT

An appellate court reviews a circuit court's review of a magistrate court's factual determinations under the clearly erroneous standard. State v. Mattson, 2005 S.D. 71 ¶ 14, 698 N.W.2d 538, 544-45 (*citing State v. De La Rosa*, 2003 S.D. 18, ¶ 5, 657 N.W.2d 683, 685). Once the facts have been determined, however, the application of a legal standard to those facts is a question of law reviewed de novo. Spenner v. City of Sioux Falls, 1998 S.D. 56, ¶ 13, 580 N.W.2d 606, 610. This is the same standard for review by this Court. Facts are reviewed under the clearly erroneous standard and questions of law are reviewed de nova. State v. Lamont 631 N.W.2d 603, (SD 2001)

Did the circuit court commit error by affirming the magistrate court's Judgment of Conviction holding that the defendant had violated SDCL 32-23-1 by having actual physical control of his vehicle with .08 or over blood alcohol? Both the magistrate and circuit court relied on State v. Kitchens 498 N.W.2d 649 (SD 1993). "All that is necessary to establish actual physical control of a vehicle is a showing that the vehicle was operable and that the defendant was in a position to manipulate the controls which would cause it to move." Kitchen at 653

The facts in Kitchen are not the same as in the present case. Kitchens was found sleeping behind the steering wheel of his vehicle which was parked in a convenience store's parking lot, close to a city street. The keys were within quick and easy reach in one of his pockets. No one else could have had control of the vehicle unless Kitchens first relinquished his. Kitchens at 650

The South Dakota Supreme Court in Kitchens referred to People v Guynn 33Ill.App3d 736, 338 N.E.2d 239 (Ill.App.Ct.1975) The Illinois Supreme Court stated: We believe it would be preferable, and in line with legislative intent and social policy, to read more

flexibility into Gynn. In those rare instances where the facts show that a defendant was furthering the goal of safer highways by voluntarily "sleeping it off" in his vehicle, and that he had no intent of moving the vehicle trial courts should be allowed to find that the defendant was not "in actual physical control" of the vehicle for purposes of section 11-501. People v. Cummings, 125 Ill.Dec. at 517, 530 N.E.2d at 675 (emphasis added).

The soundness of this view is well represented in State, City of Falcon Heights v. Pazderski, 352 N.W.2d 85 (Minn.Ct.App.1984). The defendant had quarreled with his girl friend with whom he lived. He then drove to two nearby taverns where he became intoxicated. He returned home and parked in a parking area adjacent to the garage in a place where he would normally park for the night. He entered the house but after deciding he did not wish to confront his girl friend, the defendant returned to his car and stretched out on the front seat where he fell asleep. Police officers later found the defendant sleeping on the front seat, sitting on the driver's side with his head over toward the passenger side. The car was not running and the keys were not in the ignition. There was no evidence the car had been driven recently. There was no record evidence

the defendant had any intention other than sleeping the rest of the night in the car. The defendant was convicted for being in physical control of a motor vehicle while under the influence of alcohol. In reversing his conviction, the Minnesota Court of appeals reasoned: "The facts in this case do not support the conclusion that appellant exercised the necessary physical control. Conviction in this case would serve no purpose related to the statute." Id. at 88

This is the case here. Conviction of Nekolite would serve no purpose related to the statute concerning actual physical control. The keys were not in the ignition, and Nekolite had a designated driver who was not going to let him drive.

Also, Nekolite did not have actual physical control. The approved jury instruction in State v. Hall 353 N.W.2d 37, 41-42 (S.D. 1984) quoted in Kitchens at 651:

A person is in "actual physical control" of a vehicle within the meaning of these instructions when the vehicle is operable and he is in a position to manipulate one or more of the controls of the vehicle that cause it to move or affects its movement in some manner or direction. It means existing or present bodily restraint, directing influence, domination or regulation of the vehicle. It means such control as would enable the defendant to actually operate his vehicle in the usual and ordinary manner. "Actual physical control" of a vehicle results, even though

the [vehicle] merely stands motionless, so long as a person keeps the vehicle in restraint or is in a position to regulate its movements.

Accidentally hitting the gear shift causing it to roll back is not operating a vehicle in the usual and ordinary manner. The circuit court also attached a lot of significance to VanTassell's testimony. The first time the credibility of VanTassell was brought up was at oral argument. T.O.A. 7. The magistrate found the testimony of Cameron and Nekolite to be credible. Their testimony was at odds with VanTassell.

VanTassell testified that when Nekolite came back to his patrol car for questioning, Nekolite stated "that he and his female friend had intended to leave the bar, and he had pressed the clutch in and rolled backwards into the vehicle". VanTassell also stated "He flat out told me he was behind the wheel and that he intended to leave and that he had pressed the clutch in and rolled back into the vehicle". T.T. 12, 15

VanTassell acknowledged that Nekolite was extremely intoxicated and had trouble communicating. VanTassell never asked Nekolite if he was driving the vehicle. VanTassel was informed there were witnesses;

however, he made no attempt to talk to anyone. VanTassell was aware that Cameron's PBT was .000. T.T. 15

Magistrate Judge Kiner stated:

I also take into account that the story that I have here is fairly consistent as far as reaching in and not actually driving the vehicle. Although he was highly intoxicated causing the vehicle to roll back, I don't find that to be as aggravating as actually being in the vehicle and driving away or attempting to drive away.

What he made for statement under a highly intoxicated state has some bearing, but I also take into account that he's at a .30 at the time that he's making those statements. T.T. 35-36

The Circuit Court committed error by violating a fundamental principal of appellate review. "It is emphatically not an appropriate function of this Court in a criminal case to resolve conflicts in the evidence, pass on the credibility of witnesses, or weigh the evidence."

State v. Markel 230 N.W.2d 223 at 235 (SD 1975) This is based on the fact that the fact finder, here the magistrate, had the ability to observe the witnesses, their

manner of testifying, and other observations to judge their credibility.

CONCLUSION

For the reasons herein stated, Nekolite requests that the Circuit Court's Order Affirming the Magistrate's Judgment of Conviction be reversed and a Judgment of Acquittal and Dismissal be entered in favor of Nekolite.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument of twenty minutes.

Respectfully submitted,

Michael E. Unke
Attorney for Appellant

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CERTIFICATE OF SERVICE

The undersigned, Michael E. Unke, attorney for the appellant, hereby certifies that he did serve a true and correct copy of Appellant's Brief, on the following:

The Honorable Marty J. Jackley
Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501

Mike C. Fink
McCook County State's Attorney
P.O. Box 444
304 N. Main Avenue
Bridgewater, SD 57319

by United States mail, postage prepaid, this ____ day of August, 2013.

Michael E. Unke
Attorney for Appellant
341 N. Main, Box 529
Salem, South Dakota 57058
Telephone: (605) 425-3131
Facsimile: (605) 425-2977

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26725

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

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Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
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THE HONORABLE TIMOTHY W. BJORKMAN
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Kirsten E. Jasper
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

ATTORNEYS FOR PLAINTIFF
AND APPELLEE

Michael E. Unke
Attorney at Law
341 N. Main, Box 529
Salem, SD 57058
Telephone: (605) 425-3131

ATTORNEY FOR DEFENDANT
AND APPELLANT

Notice of Appeal filed June 18, 2013

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26725

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

DONALD LEON NEKOLITE,

Defendant and Appellant.

PRELIMINARY STATEMENT

For purposes of brevity and clarity, the State of South Dakota, will be referred to as the “State.” The Defendant and Appellant, Donald Leon Nekolite, will be referred to as “Nekolite.” The settled record consists of McCook County file CR. 12-64 and will be cited as “SR” followed by the appropriate page number(s). References to Nekolite’s brief will be referred to as “NB” followed by the page number(s) cited. The transcript of the Court Trial held on 02/19/2013, will be cited as “CT” followed by the referenced page number(s). References to exhibits admitted into evidence will be cited as “EX” followed by the assigned number or letter.

JURISDICTIONAL STATEMENT

The State acknowledges this Court has jurisdiction over this matter pursuant to SDCL § 15-26A-3.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

The State elects to restate the issue as presented by Nekolite as follows:

WHETHER NEKOLITE VIOLATED SDCL § 32-23-1 BY DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WITH .08 PERCENT OR MORE BY WEIGHT OF ALCOHOL IN HIS BLOOD?

The Magistrate Court found that Nekolite was manipulating the vehicle and found sufficient evidence that Nekolite was in actual physical control of the vehicle with a BAC over .08 and guilty of driving under the influence in violation of SDCL § 32-23-1. CT 32-33. The Magistrate then issued its sentence. SR 7-8.

SDCL § 32-23-1

State v. Bordeaux, 2006 S.D. 12, 710 N.W.2d 169

State v. Kitchens, 498 N.W.2d 649 (S.D. 1993)

State v. Hall, 353 N.W.2d 37 (S.D. 1984)

STATEMENT OF THE CASE AND FACTS

A. The Facts

On September 15, 2012, at 10:15 p.m. McCook County Chief Deputy Sheriff, Matt Bormann, was called out to the Battle Creek Steakhouse and Bait Shop (Battle Creek) by Lake Vermillion where a vehicle had struck another vehicle in the parking lot. CT 8-9; SR 32. Upon Deputy Bormann's arrival, Nekolite was in the driver's seat and Nekolite informed Deputy Bormann that Nekolite's pickup had rolled back into the other vehicle. CT 9; SR 32. Nekolite did not provide any further details. CT 9. Nekolite was slurring his speech, moving very

slowly, and smelled of alcohol. CT 9; SR 32. Deputy Bormann began writing up the accident report and called Deputy Jeremy VanTassel to assist with the investigation. CT 10.

When Deputy VanTassel arrived Deputy Bormann asked him to determine whether Nekolite was intoxicated. CT 12. According to Deputy VanTassel, Nekolite's eyes were bloodshot and watering, Nekolite struggled maintaining his balance, and had trouble communicating. CT 12, 15; SR 32. Nekolite told Deputy VanTassel that he and Jill Cameron, his girlfriend, "intended to leave the bar, and he had pressed the clutch in and rolled backwards into the vehicle." CT 12. VanTassel testified that Nekolite "flat-out told me that he was behind the wheel and that he intended to leave and that he pressed the clutch in and rolled back into the vehicle." CT 15. Deputy VanTassel was not informed that Cameron was the designated driver for the evening. CT 12, 16. Nekolite refused to perform sobriety tests, but submitted to a breathalyzer test for Deputy VanTassel, which resulted in a reading of .306. CT 13; SR 32. Nekolite was arrested for driving while intoxicated. CT 14; SR 32. After the arrest Nekolite submitted a blood test which resulted in a blood alcohol content of .284. SR 10, 17; EX 1.

Nekolite testified at the court trial that he and Cameron went to Battle Creek to attend a dance. CT 28. Cameron testified that at some point they went out to Nekolite's pickup truck for a cigarette. CT 19. They had not decided whether they were going to leave yet, but were "just

going to sit in the truck and have a cigarette.” CT 25. Cameron testified Nekolite leaned in through the passenger side of the truck to get his cigarettes, which were on the driver’s side floor by the clutch, when Nekolite “bumped” the gear shift. CT 19, 24. The gear shift “popped” into neutral and the truck rolled back. CT 19. Cameron testified that the truck was not running and the keys were in the “little cubbyhole up there by the dash.” CT 20, 22.

Nekolite testified that when he opened the passenger door and reached in to grab his cigarettes he caught his arm against the stick shift and popping it out of gear. CT 29. Then the pickup truck slid back into the other vehicle. CT 29. Nekolite testified he did not quite remember everything that happened that night. CT 30.

B. The Case

A Complaint charging Nekolite with driving or actual physical control of vehicle with .08 percent or more by weight of alcohol in his blood in violation of SDCL § 32-23-1 was filed on September 28, 2012. SR 26-27. A preliminary hearing was held on November 13, 2012, and the Magistrate found sufficient evidence to proceed with the charge. SR 28-29. An Information charging Nekolite with driving or actual physical control of vehicle with .08 percent or more by weight of alcohol in his blood in violation of SDCL § 32-23-1 was filed on November 13, 2012. SR 14-15. Nekolite was arraigned on January 7, 2013, where he pleaded not guilty and the matter was set for a court trial. SR 11.

Nekolite signed an Acknowledgment of Advisement of Rights on October 15, 2012, and filed on November 13, 2012. SR 18-22.

The court trial was held on February 19, 2013, before Magistrate Court Judge Patrick W. Kiner. CT 1. After hearing the testimony, the Magistrate, pursuant to *State v. Kitchens*, specifically found the vehicle operable and that it

was being manipulated by Mr. Nekolite in that he admitted he reached in, struck the gear shift mechanism which caused the vehicle to move, and that [was] sufficient for purposes of the statute and the case law pursuant to *State versus Kitchens* to establish being in physical control of a vehicle while under the influence of an alcoholic beverage[.]

CT 33. The Magistrate then found Nekolite guilty and the parties proceeded to sentencing. CT 33-34. During the sentencing phase, the Magistrate stated “that the story that I have here is fairly consistent as far as reaching in and not actually driving the vehicle.” CT 35.

The Judgment and Sentence, finding Nekolite guilty of driving under the influence and sentencing him to 180 days in jail, with 180 days suspended, fines and costs, was filed on February 25, 2013. SR 7-8. Nekolite filed a Notice of Appeal from the Magistrate’s judgment on May 4, 2013. SR 3-4. The Honorable Timothy W. Bjorkman issued a Memorandum Decision on May 24, 2013, affirming the Magistrate’s decision finding Nekolite was in actual physical control of the vehicle and therefore in violation of SDCL § 32-23-1. SR 35-46. In coming to this determination the Circuit Court stated “under these specific and rather unusual facts, while somewhat of a close call, the court concludes that

Nekolite's own version of the facts establishes that he had actual physical control of the vehicle[.]” SR 44. The Circuit Court issued an Order Affirming Judgment of Conviction which was filed on June 6, 2013. SR 47. A Notice of Entry of Order was issued and served on Nekolite on June 12, 2013. SR 48. Nekolite filed his Notice of Appeal to this Court on June 18, 2013. SR 50.

STANDARD OF REVIEW

“Once the facts have been determined, however, the application of a legal standard to those facts’ is fully reviewable by this Court.” *State v. Aaberg*, 2006 S.D. 58, ¶ 8, 718 N.W.2d 598, 600 (citations omitted). The record does not reflect any factual determination or findings of fact were made. See SDCL § 23A-18-3. Rather, the record reflects that the Magistrate merely accepted Nekolite’s version of the facts, which he determined were alone sufficient to establish a violation of SDCL § 32-23-1.

ARGUMENT

NEKOLITE VIOLATED SDCL § 32-23-1 BY DRIVING OR BEING IN ACTUAL PHYSICAL CONTROL OF A VEHICLE WITH .08 PERCENT OR MORE BY WEIGHT OF ALCOHOL IN HIS BLOOD.

The Legislature defined driving or control of a vehicle while under the influence, in part, as follows:

No person may drive or be in actual physical control of any vehicle while:

(1) There is 0.08 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance[.]

SDCL § 32-23-1 (emphasis added). “The intent of the Legislature in enacting laws is ascertained primarily from the language used in the statute. . . . We give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject.” *State v. Bordeaux*, 2006 S.D. 12, ¶ 8, 710 N.W.2d 169, 172 (citations omitted). Nekolite does not contest that he was intoxicated or his level of intoxication. Nekolite only asserts that the facts, as he admitted them,¹ do not meet the definition of “actual physical control.” NB 13-14.

While this Court has “not mandated the use of pattern jury instructions, we note the pattern jury instructions have been carefully drafted to reflect the law.” *State v. Eagle Star*, 1996 S.D. 143, ¶ 15, n.2,

¹ Nekolite also attempts to assert that the Magistrate found Cameron’s and Nekolite’s testimony credible over that of the Deputy VanTassel and Deputy Bormann. NB 14. However, no such findings were made; in fact neither party requested specific factual findings from the Magistrate. SDCL § 23A-18-3 provides:

In a case tried without a jury a court shall make a general finding and shall in addition, on request made before submission of the case to the court for decision, find facts specially. Such findings may be oral. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact appear therein.

The Magistrate merely accepted Nekolite’s version of the facts, as they were the most favorable to Nekolite, and based his legal determination that Nekolite was in actual physical control on those facts—his general finding. No credibility determinations were made regarding any witness who testified and was not necessary given the Magistrate’s general finding that even the most favorable facts established actual physical control.

558 N.W.2d 70, 73. This Court has previously found that the jury instruction regarding SDCL § 32-23-1 properly instructs on the terms contained within the statute in compliance with South Dakota law. See *State v. Hall*, 353 N.W.2d 37, 41-42 (S.D. 1984). In this case, South Dakota Pattern Jury Instruction (Criminal) 3-10-10 provides:

A person "drives" a vehicle when, by operating one or more of the controls of the vehicle, the person causes the same to move or affects its movement in some manner or direction.

A person is in "actual physical control" of a vehicle within the meaning of these instructions when the vehicle is operable and the person is in position to manipulate one or more of the controls of the vehicle that cause it to move or affect its movement in some manner or direction. (It means existing or present bodily restraint, directing influence, domination or regulation of the vehicle.) It means such control as would enable the defendant to actually operate the vehicle in the usual and ordinary manner. "Actual physical control" of a vehicle results, even though the vehicle merely stands motionless, so long as a person keeps the vehicle in restraint or is in a position to regulate its movements.

(referencing *Bordeaux, supra*; *State v. Kitchens*, 498 N.W.2d 649 (S.D. 1993); and *Hall, supra*.)

Under this instruction, and the case law upon which it relies, Nekolite's admitted actions meet both the definition of "drive" and the definition of "actual physical control". Nekolite admitted catching his arm against the gear shift, causing the vehicle to "pop out of gear" into neutral and move backwards. By this action Nekolite operated the gear shift, a control of the vehicle, the result being that the pickup truck moved backwards. This action results in a legal determination that Nekolite drove the pickup truck, by "operating one . . . of the controls of

the vehicle[, causing the vehicle] to move or affect its movement in some manner or direction.” S.D. Pattern Jury Instruction (Criminal) 3-10-10.

This Court has stated “all that is necessary to establish actual physical control of a vehicle is a showing the vehicle was operable and that the defendant was in a position to manipulate the controls which would cause it to move.” *Kitchens*, 498 N.W.2d at 653. Nekolite concedes that the pickup truck was operable and his admission that he leaned into the truck and knocked the gear shift into neutral, is an admission that he “was in a position to manipulate the controls” which did cause the pickup truck to roll back and collide with another vehicle. Nekolite’s action of knocking or catching the gear shift with his arm was a manipulation of a control—the gear shift. Nekolite’s admissions, given South Dakota law, establish he was in “actual physical control” of his pickup truck.

Whether Nekolite intended to “drive” or have “actual physical control” of his pickup is not an element of the crime. *Id.* at 652. Further, it is not a requirement that the keys to the vehicle actually be in the ignition or that the vehicle be running. *Id.*; *See Hall*, 353 N.W.2d at 41-42. While the vehicle was not running, Nekolite had ready access to the keys and his vehicle was not stationary as was the vehicle in *Kitchens* and the cases cited by Nekolite.

This is also not a case where “the defendant was voluntarily sleeping off the effects of alcohol with no intention of moving the vehicle”

as in Nekolite's cited authorities. *See Kitchens*. Rather, Nekolite admitted causing the vehicle to move by his own actions, actions that resulted in an accident, thankfully one without any injury. Nekolite manipulated the gear-shift (intentionally or not) and the vehicle moved. This action fits both under the definition of "drive" which caused the vehicle to move and the definition of "actual physical control", regardless of the version of facts accepted by the Magistrate: Nekolite's or VanTassel's.

CONCLUSION

Nekolite's admitted actions clearly establish a violation of SDCL § 32-23-1, and he has not met his appellate burdens. Therefore, the State respectfully requests that the Judgment and Sentence and Order Affirming Judgment of Conviction entered below be affirmed in all respects.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Kirsten E. Jasper
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215

CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 2,256 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 26th day of September, 2013.

Kirsten E. Jasper
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 26th day of September, 2013, two true and correct copies of Appellee's Brief in the matter of *State of South Dakota v. Donald Leon Nekolite* were served by United States mail, first class, postage prepaid, upon Michael E. Unke, Attorney at Law, 341 N. Main, Box 529, Salem, South Dakota 57058.

Kirsten E. Jasper
Assistant Attorney General

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, # 26725
Plaintiff and Appellee,
vs.
DONALD LEON NEKOLITE,
Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT FIRST JUDICIAL CIRCUIT
McCOOK COUNTY, SOUTH DAKOTA

HONORABLE TIMOTHY W. BJORKMAN
Circuit Court Judge Presiding

APPELLANT'S REPLY BRIEF

Michael E. Unke
Attorney at Law
341 N. Main, Box 529
Salem, South Dakota 57058
Telephone (605) 425-3131

Attorney for the Defendant and Appellant

The Honorable Marty J. Jackley
Attorney General
Kirsten E. Jasper, Assistant Attorney General
1302 E. Highway 14, Ste. 1
Pierre, SD 57501-8501
Telephone (605) 773-3215

Attorneys for Plaintiff and Appellee

Notice of Appeal was filed on June 18, 2013.

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JURISDICTIONAL STATEMENT

The Jurisdictional Statement is the same as Appellant's Brief.

STATEMENT OF THE ISSUE

The Statement of the Issue is the same as Appellant's Brief.

PRELIMINARY STATEMENT

In this brief, Appellee, State of South Dakota, shall be referred to as "State", defendant and appellant, Donald Leon Nekolite, as "Nekolite", and Nekolite's girlfriend, Jill Cameron, as "Cameron". Reference to the Register of Actions shall be by "R.A." followed by the appropriate page(s). Reference to the trial transcript shall be by T.T. followed by the appropriate page number(s).

STATEMENT OF THE CASE

The Statement of the Case is the same as Appellant's Brief.

STATEMENT OF THE FACTS

The Statement of the Facts are the same as Appellant's Brief; however, how the accident happened will be emphasized.

Nekolite testified that Cameron and he went outside to smoke. Nekolite from the passenger side reached in to get

his cigarettes that had fallen on the floor next to the pedals. Nekolite bumped the gear shift, which caused the vehicle to go out of gear and roll back striking another parked vehicle. T.T.p.19

Nekolite described the accident as follows: "I just opened up the passenger door of the vehicle and stuff, reached in to go grab my cigarette, and I caught my arm against that stick shift. I didn't believe it would do it, but that's not the original transmission in that pick-up. It was a five-speed and that wrapped too tight against the seat. In other words, the seat was helping depress that stick shift and she popped out of gear and started sliding back on me, the pick-up did so I rolled it back. T.T.p.29

Cameron testified that she was the designated driver. Nekolite and her had left the dance to go outside to have a cigarette. Cameron described the accident as follows:

"He went in, reached around through the passenger side to get the smoke. They were on the floor by the clutch, and it was in reverse. And when the gear shift is in reverse, it does rest right on the seat of the truck. So in his condition, I'm sure he just wasn't as coordinated and he bumped the shift lever when he was reaching for the

cigarettes and lighter and it came and went into neutral and started rolling." T.T.p.19

Magistrate Judge Kiner found this story to be credible stating: "I also take into account that the story I have here is fairly consistent as far as reaching in and not actually driving the vehicle. Although he was highly intoxicated causing the vehicle to roll back, I don't find that to be as aggravating as actually being in the vehicle driving away or attempting to drive away." T.T.p.35

ARGUMENT

Did the Circuit Court commit error by affirming the magistrate's decision, Judgment and Sentence, that Nekolite had violated SDCL 32-23-1 by having actual physical control of his vehicle with .08 or over blood alcohol?

The State argues that Nekolite concedes that the pick-up truck was operable and his admission that he leaned into the truck and knocked the gear shift into neutral, is an admission that he was in a position to manipulate the controls which did cause the pick-up truck to roll back and collide with another vehicle.

The Circuit Court in coming to this same determination stated "under these specific and rather unusual facts, while somewhat of a close call, the court concludes that

Nekolite's own version of the facts establish that he had actual physical control of the vehicle." R.A.44

SDCL 32-23-1 provides in part: No person may drive or be in actual physical control of any vehicle while:

1) There is 0.08 percent or more by weight of alcohol in that person's blood as shown by chemical analysis of that person's breath, blood, or other bodily substance.
(emphasis added)

"The intent of the Legislature in enacting laws is ascertained primarily from the language used in the statute . . . We give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject." State v. Bordeaux 710 N.W.2d 169, 172. While the South Dakota Supreme Court has "not mandated the use of pattern jury instructions, they note that pattern jury instructions have been carefully drafted to reflect the law." State v. Eagle Star, 558 N.W.2d 70.

In this case, South Dakota Pattern Jury Instruction
(Criminal) 3-10-10 provides:

A person "drives" a vehicle when, by operating one or more of the controls of the vehicle, the person causes the same to move or affects its movement in some manner or direction.

A person is in "actual physical control" of a vehicle within the meaning of these instructions when the vehicle is operable and the person is in position to manipulate one or more of the controls of the vehicle that cause it to move or affect its movement in some manner or direction. (It means existing or present bodily restraint, directing influence, domination or regulation of the vehicle.) It means such control as would enable the defendant to actually operate the vehicle in the usual and ordinary manner. "Actual physical control" of a vehicle results, even though the vehicle merely stands motionless, so long as a person keeps the vehicle in restraint or is in a position to regulate its movements. (referencing State v Kitchens 498 N.W.2d 649, State v. Hall 353 N.W.2d 37
(emphasis added))

In Kitchens supra, the facts were as follows: A police officer was dispatched to a local convenience store in order to investigate a person who had passed out in a pick-up in a parking lot ten feet south of a city street. Kitchens was slumped over the steering wheel of the pick-up, his feet were on the floorboard on the driver's side of the vehicle. The pick-up was not running and the keys were not in the ignition. The keys were later found in Kitchens pants.

In Hall supra, Hall was found on a city street slumped over the steering wheel in a position half way between vertical and horizontal. The keys were in the ignition.

In other cases cited by Nekolite in his original brief it is a stretch to say that Nekolite was in a position to operate the vehicle in the usual and ordinary manner or in a position to regulate its movements. The plain meaning of actual physical control as used in the jury instruction should not allow the State's conclusion. The Supreme Court will not read statutes literally if they lead to an absurd or unreasonable result. State v. Jones, 804 N.W.2d 409, 2011 S.D. 60.

CONCLUSION

For all the reasons stated in Nekolite's Brief and Reply Brief, Nekolite would request that his conviction be reversed.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument of twenty minutes.

Respectfully submitted,

Michael E. Unke
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned, Michael E. Unke, attorney for the appellant, hereby certifies that he did serve two true and correct copies of Appellant's Reply Brief, on Kirsten E. Jasper, Assistant Attorney General, 1302 E. Highway 14, Suite 1, Pierre, SD 57501-8501, by United States mail, postage prepaid, this 23rd day of October, 2013.

Michael E. Unke
Attorney for Appellant
341 N. Main, Box 529
Salem, South Dakota 57058
Telephone: (605) 425-3131
Facsimile: (605) 425-2977