

IN THE UTAH COURT OF APPEALS

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State of Utah,)	MEMORANDUM DECISION	
)	(Not For Official Publication)	
Plaintiff and Appellee,)		
)	Case No. 20090079-CA	
v.)		
)	F I L E D	
Eddie Raymond Bustos,)	(April 15, 2010)	
)		
Defendant and Appellant.)	<table border="1"><tr><td>2010 UT App 84</td></tr></table>	2010 UT App 84
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Second District, Ogden Department, 051906366
The Honorable Pamela G. Heffernan

Attorneys: Randall W. Richards, Ogden, for Appellant
Mark L. Shurtleff and Jeanne B. Inouye, Salt Lake
City, for Appellee

Before Judges McHugh, Orme, and Thorne.

ORME, Judge:

We have determined that "[t]he facts and legal arguments are adequately presented in the briefs and record and the decisional process would not be significantly aided by oral argument." Utah R. App. P. 29(a)(3). Moreover, the issues presented are readily resolved under applicable law.

Although Defendant's argument on appeal combines merger and lesser-included-offense analysis, "these doctrines . . . are analytically distinct." State v. Kerr, 2010 UT App 50, ¶ 2 n.1. It is clear that Defendant's appeal turns on lesser-included-offense analysis rather than the merger doctrine. See id. "[A]n offense is lesser included when proof of one crime necessarily proves all of the elements of the second crime." State v. Brooks, 908 P.2d 856, 861 (Utah 1995) (emphasis added). "In other words, where the two crimes are such that the greater cannot be committed without necessarily having committed the lesser, then as a matter of law they stand in the relationship of greater and lesser offenses, and the defendant cannot be convicted or punished for both." Perez-Avila, 2006 UT App 71, ¶ 10, 131 P.3d 864 (citation and internal quotation marks omitted).

Automobile homicide is proven by showing that Defendant caused the death of another person when he operated his vehicle in a criminally negligent manner while he was impaired by the use of drugs or alcohol. See Utah Code Ann. § 76-5-207(3)(a)(ii) (Supp. 2009). Automobile homicide does not require proof that an officer gave a signal that Defendant willfully disregarded or that, upon being signaled, Defendant attempted to flee. Thus, proving automobile homicide does not prove all the elements of failure to respond to an officer's signal to stop, see Utah Code Ann. § 41-6a-210 (2005), and, accordingly, failure to respond cannot be a lesser included offense of automobile homicide. Cf. Perez-Avila, 2006 UT App 71, ¶ 20 (determining that DUI was a lesser included offense of automobile homicide because the two offenses both required the identical element of driving while under the influence of drugs or alcohol, but automobile homicide required one additional element of causing the death of another person, and therefore proving automobile homicide also proved all DUI elements).

By the same token, although proving failure to respond may establish some elements of automobile homicide, the automobile homicide element that Defendant was "under the influence of alcohol, any drug, or the combined influence of alcohol and any drug to a degree that renders the person incapable of safely operating a vehicle," Utah Code Ann. § 76-5-207(3)(a)(ii), is not an element required to prove failure to respond. Because all of the automobile homicide elements are not established by proving failure to respond, automobile homicide is not a lesser included offense of failure to respond. See Brooks, 908 P.2d at 861; Perez-Avila, 2006 UT App 71, ¶ 10.

Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Carolyn B. McHugh,
Associate Presiding Judge

William A. Thorne Jr., Judge