68413-2

68413-2

No. 68413-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SANDHOLM,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON, FOR KING COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Statutes

Court Rules

Other Authorities

A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Sandholm of his right to a unanimous jury.

2. The trial court abused its discretion in admitting evidence of Mr. Sandholm's prior convictions.

3. The trial court deprived Mr. Sandholm of a fair trial contrary to the Fourteenth Amendment Due Process Clause by admitting evidence of Mr. Sandholm's prior convictions.

4. The trial court erred in calculating Mr. Sandholm's offender score.

5. The trial court erred in imposing a term of community custody.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Article I, section 21 and Article I, section 22 together provide the right to a unanimous jury in all criminal trials. This right in turn requires that in cases in which the State alleges a single crime may have been committed by alternative means, the court must instruct the jury it must unanimously agree upon a single alternative means. Where the trial court does not provide the required unanimity instruction and there

is insufficient evidence to support at least one of the alternatives means must this Court reverse Mr. Sandholm's conviction?

2. Generally a court may only admit relevant evidence. Under ER 404, evidence of prior acts is not admissible to prove propensity and is only admissible if relevant to some other material purpose. Evidence of Mr. Sandholm's prior offenses was not relevant for any material purpose in proving the crime of Driving Under the Influence. Did the court abuse its discretion in admitting evidence of the prior convictions?

3. The Due Process Clause of the Fourteenth Amendment guarantees a criminal defendant a fair trial. The admission of unfairly prejudicial evidence of prior crimes may deprive a defendant of a fair trial. Did the court's erroneous admission of Mr. Sandholm's prior convictions deprive him a fair trial and due process?

4. A court must determine a person's offender score pursuant to the provisions of RCW 9.94A.525. Where a court miscalculates an offender score the matter must be remanded for resentencing. Where the court erroneously calculated Mr. Sandholm's offender score as "8" must this Court remand the matter for resentencing?

5. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority for felony offenses. Under RCW 9.94A.701(9) the trial court must reduce the term of community custody where the combined term of community custody and confinement exceeds the statutory maximum for an offense. Where the trial court imposed a 60-month sentence for a Class C felony yet also imposed a 12-month term of community custody, must this Court order the trial court to correct the erroneous sentence?

C. STATEMENT OF THE CASE

On October 29, 2009, a State Patrol trooper stopped Mr. Sandholm. 1/31/13. The trooper had observed Mr. Sandholm commit three minor lane infractions over a span of about two miles. *Id.* at 102-10, 123. When he spoke with Mr. Sandholm, the officer noticed an odor of alcohol. *Id.* at 124-26.

Following his arrest, Mr. Sandholm agreed to provide breath samples. The samples provided results of .079 and .08. 2/7/13 RP 31-33. The margin of error results in range as low as .072. *Id.*

Nevertheless, the State charged Mr. Sandholm with Driving Under the Influence (DUI). CP 329-30.

Over Mr. Sandholm's objection the jury was permitted to hear evidence of his prior convictions for the same offense. The trial court concluded the evidence was necessary to prove an element of the offense, believing that prior offenses which merely elevated the punishment of the offense were elements. 11/3/10 RP 85-86. The evidence was admitted by a stipulation after the court denied the motion to exclude the evidence. 11/3/10 RP 85. The first trial resulted in a hung jury.

Subsequently the trial court on two occasions started trial only to declare a mistrial on the first and dismissed the jury venire on the second. 12/12/11 RP 31; 1/23/12

During a second trial, the jury heard evidence of Mr. Sandholm's prior convictions by stipulation. 2/7/12 RP 73. The jury convicted Mr. Sandholm of DUI. CP 1441.

D. ARGUMENT

1. Mr. Sandholm was denied his right to a unanimous jury.

a. Jury unanimity is required when the State charges a defendant with an offense consisting of alternative means.

The Washington Constitution requires a unanimous jury verdict in criminal matters. Const. Art. I, § 21. When the State alleges a

defendant has committed a crime by alternative means, the right to a unanimous jury is offended unless the State elects the means upon which it is relying or the jury is instructed that it must unanimously agree on a single means. *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) (citing *State v. Petrich*, 101 Wn.2d 566, 569, 683 P.2d 173 (1984)). Where neither of these options is met, reversal is required unless the evidence supporting each alternative is sufficient to the support the conviction. *State v. Ortega–Martinez*, 124 Wn.2d 702, 707–08, 881 P.2d 231 (1994).

b. Although the State alleged Mr. Sandholm committed the crime by alternative means the jury was not instructed that it must be unanimous..

RCW 46.61.502(1) sets forth three alternatives means of committing driving under the influence: driving while: (1) having an alcohol concentration of 0.08 or higher within two hours after driving, (2) being under the influence of any intoxicating liquor or drug, or (3) being under the influence of a combination of intoxicating liquor or any drug. *State v. Shabel,* 95 Wn. App. 469, 474, 976 P.2d 153 (1999); *see also, State v. Rivera-Santos*, 166 Wn.2d 722, 728, 214 P.3d 130, 132 (2009).

The State alleged Mr. Sandholm committed the offense under two alternatives: (1) with driving while under the influence of or while affected by intoxicating liquor, or (2) while under the combined influence of or while affected by intoxicating liquor and any drug. CP 329. The trial court instructed the jury on both alternatives. CP 1431-32. Mr. Sandholm objected to the instruction, arguing the State had not presented any evidence that he was under the influence of drugs. 2/9/12 RP 100.

The jury was not instructed that it must unanimously agree as to the alternatives means. Indeed the court affirmatively instructed the jury they need not unanimously agree. CP 1431-32. That instruction misstates the law.

> c. Because there was insufficient evidence of one of the charged alternatives, the Court must dismiss that charge and remand for retrial on the remaining count.

The Supreme Court has said:

> If the evidence is *sufficient* to support each alternative means submitted to the jury a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm the conviction because we infer that the jury rested its decision on a unanimous finding as to the means. On the other hand, if the evidence is *insufficient* to present a jury question as to the whether the defendant committed the

> crime by any one of the means submitted to the jury, the conviction will not be affirmed.

Ortega-Martinez, 124 Wn.2d at 707-08 (Emphasis in original, internal citations omitted). Nothing in that holding suggests that unanimity is not required. Instead, the court was merely defining the appellate standard, i.e., that the failure to ensure unanimity is harmless only if there is sufficient evidence of each alternative. Thus, affirmatively instructing the jury that it need not be unanimous was error.

That error requires reversal because the State did not offer sufficient evidence of both alternatives. Specifically, the State offered no evidence that Mr. Sandholm was under the combined influence or effect of drugs and alcohol. Indeed, the State did not offer any evidence of drug impairment at all. Absent such proof, no reasonable jury could find Mr. Sandholm was under the combined effect of drugs and alcohol.

The State did not prove each alternative beyond a reasonable doubt. The absence of jury unanimity requires reversal of Mr. Sandholm's conviction and dismissal of the unsupported alternative – the combined-affect alternative. *State v. Green*, 94 Wn.2d 216, 233, 616 P.2d 628 (1980).

2. The trial court deprived Mr. Sandholm of a fair trial by admitting evidence of his prior crimes.

a. Mr. Sandholm objected to the admission of evidence of his prior convictions.

Well before trial, Mr. Sandholm made a motion to exclude evidence of his prior convictions. 11/3/10 RP 85. Specifically, he argued the evidence was not relevant under ER 403 and was inadmissible under ER 404. 11/3/10 RP 85. Mr. Sandholm noted the only relevance of the prior convictions was to determine his punishment if the jury convicted him. *Id.* The trial court denied the motion, erroneously believing the proof of prior convictions was an element of the offense. *Id.* at 89-90.

b. The fact that Mr. Sandholm is a recidivist is not an element of the offense of driving under the influence.

An element is "essential" if its "specification is necessary to establish the very illegality of the behavior." *State v. Yates*, 161 Wn.2d 714, 757, 168 P.3d 359 (2007). Although not using the term "element," the United States Supreme Court "explicitly [held] that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364, 90

S. Ct. 1068, 25 L. Ed. 2d 368 (1970). But the Court has made clear that this constitutional standard does not apply to prior offenses, even where recidivist facts increase the maximum punishment for an offense. *Almendarez-Torres v. United States*, 523 U.S. 224, 241, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

In *Almendarez-Torres* the Court found the recidivist fact was not an element of the offense for a variety of reasons. First, because although it was contained in the same statute as the "elements" of the offense, Congress had not stated its intent that the recidivist fact be considered an element. 523 U.S. at 234. Next the Court noted recidivism was a fact that "is neither 'presumed' to be present, nor need be 'proved' to be present, in order to prove the commission of the relevant crime. *Id.* at 241. Noting the unfair prejudice which flows from evidence of prior offenses, and the absence of an expressed contrary intent, the Court stated "we do not believe, other things being equal, that Congress would have wanted to create this kind of unfairness in respect to facts that are almost never contested." *Id.* at 235. Finally, the Court concluded that its precedent interpreting the constitutional parameters of which facts constitute elements did not require a different conclusions because "recidivism . . . is a traditional, if not the most traditional, basis for a

sentencing court's increasing an offender's sentence." *Id.* at 243. The Washington Supreme Court has echoed that conclusion saying "[t]raditional factors considered by a judge in determining the appropriate sentence, such as prior criminal history, are not elements of the crime." *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). Thus, merely because a fact increases the punishment for an offense, even substantially so, does not make that fact an element of the offense.

Moreover, the penalty classification of the offense is not an element of the offense. *State v. Williams*. 162 Wn.2d 177, 187-88, 170 P.3d 30 (2007). This is so even if the penalty classification is contained in the same statute setting forth the elements of the offense. *Id.* Using an analysis similar to that in *Almendarez-Torres*, *Williams* rejected an argument that the penalty classification of bail jumping, specifically the nature of the offense on which the person was admitted to bail, was an element of the offense. 162 Wn.2d at 188.

The bail jumping statue, RCW 9A.76.170, provides in relevant part:

> (1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required

> is guilty of bail jumping.
> . . .
> (3) Bail jumping is:
> (a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;
> (b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in the first degree;
> (c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;
> (d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor.

Williams concluded that because "Subsection (1) defines the elements of bail jumping and does not explicitly or implicitly reference the penalties in subsection (3)" the provisions of subsection (3) were not elements of the offense. 162 Wn.2d at 188.

RCW 46.61.502 mirrors the bail jumping statute at issue in *Williams* and the federal statute at issue in *Almendarez-Torres*. RCW 46.61.502 provides:

> (1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506; or
> (b) The person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood made under RCW 46.61.506; or
> (c) While the person is under the influence of or

affected by intoxicating liquor, marijuana, or any drug; or

(d) While the person is under the combined influence of or affected by intoxicating liquor, marijuana, and any drug.

. . . .

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if:

(a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or

(b) The person has ever previously been convicted of:

(i) Vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a);

(ii) Vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b);

(iii) An out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection; or

(iv) A violation of this subsection (6) or RCW 46.61.504(6).

The legislature did not include the existence of prior offenses within the elements of DUI set forth in RCW 46.61.502(1). Nor does that subsection reference the penalties set forth in subsection (6). As in *Almendarez-Torres*, subsection (6) does not alter the "pre-existing definition of a well-established crime." 523 U.S. at 246. As in *Williams* the acts which establish the "illegality of the behavior" are set forth in subsection (1). As in *Williams*, subsection (6) merely determines the punishment which flows from the illegality.

The legislature has not expressed an intent to make recidivism an element. And in light of the prejudicial nature of such evidence, that intent should not be presumed. *Almendarez-Torres*, 523 U.S. at 235.

The State might respond that the existence of the recidivist fact is critical because it determines whether an offense may be charged in district court as opposed to superior court. But this Court has held that facts which merely determine which court may hear a case, i.e., jurisdictional facts, are not elements which must be proved to the jury beyond a reasonable doubt. *State v. Childress*, 169 Wn. App. 523, 532, 280 P.3d 1144 (2012), *review denied*, 176 Wn.2d 1002 (2013). Further, the same argument could be raised with respect to the bail jumping statute, yet *Williams* concluded that fact was not en element.

The recidivist facts merely determine the punishment for DUI under RCW 46.61.502(6) and are not elements of the offense of DUI. Judge St. Clair recognized as much when prior to the first trial, he prohibited the State from referring to the offense as "felony DUI." 5/11/11 RP 64. Judge St. Clair recognized that the statute defines a single offense and then sets forth different penalties based upon the prior offense.

Within constitutional limits, the legislature is free to define the elements of a crime. The legislature has defined the elements of DUI in

RCW 46.61.502(1). Those elements do not include proof of prior convictions.

c. Evidence of Mr. Sandholm's prior convictions was not relevant.

Evidence is admissible only if it is relevant. ER 402. Evidence is relevant if it makes a material fact more or less likely. ER 401. Even if relevant, evidence is inadmissible if its improper prejudice outweighs its probative value. ER 403.

Generally, evidence of prior acts of the defendant admitted solely to prove propensity to commit an offense is not admissible. ER 404(a). But, ER 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The purpose of ER 404(b) is to prevent consideration of prior acts evidence as proof of a general propensity for criminal conduct. *State v. Halstien*, 122 Wn.2d 109, 126, 857 P.2d 270 (1993). Here, there was no proper purpose identified for the admission of the prior convictions. Instead, the court found the evidence admissible due to the court's erroneous belief that Mr. Sandholm's prior convictions were an

element of his current offense. But as set forth above, that is not the case.

Because they were not relevant and not admissible for any proper purpose under ER 404(b), the court erred in admitting Mr. Sandholm's prior convictions.

d. The right to a fair trial includes the right to be tried for the charged offense, without irrelevant accusations of other wrongful conduct years ago.

An accused person's right to a fair trial is a fundamental part of due process of law. United States v. Salerno, 481 U.S. 739, 750, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987); U.S. Const. Amend. XIV; Const. Art. I, § 22. Erroneous evidentiary rulings can violate due process by depriving the defendant of a fundamentally fair trial. *Estelle v. McGuire*, 502 U.S. 62, 75, 112 S. Ct. 475, 116 L.Ed.2d 385 (1991); *Dowling v. United States*, 493 U.S. 342, 352, 110 S. Ct. 668, 107 L. Ed. 2d 708 (1990) (the introduction of improper evidence deprives a defendant of due process where "the evidence 'is so extremely unfair that its admission violates fundamental conceptions of justice.'").

Compliance with state evidentiary and procedural rules does not guarantee compliance with the requirements of due process. *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir. 1991). Due process is

violated where evidence was admitted that renders the trial fundamentally unfair. *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986).

An accused person has a fundamental right to be tried only for the offense charged. *State v. Mack*, 80 Wn.2d 19, 21, 490 P.2d 1303 (1971); Const. Art. I, §22; U.S. Const. amend. V. The "fundamental concept" that a "defendant must be tried for what he did, not who he is," is violated by introducing evidence designed to show a propensity for committing certain offenses. *State v. Cox*, 781 N.W.2d 757, 769 (Iowa 2010).

> Th[e] forbidden inference [of propensity] is rooted in the fundamental American criminal law belief in innocence until proven guilty, a concept that confines the fact-finder to the merits of the current case in judging a person's guilt or innocence.

State v. Wade, 98 Wn. App. 328, 336, 989 P.2d 576, *reversed on other grounds*, 138 Wn.2d 460 (1999). Courts have long recognized the unfair prejudice of permitting jurors to hear evidence of prior convictions, and found "it is usually excluded except when it is particularly probative" to prove a relevant fact. *Spencer v Texas*, 385 U.S. 554, 560, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967).

Here, there was no proper basis for admission of Mr. Sandholm's prior convictions. The admission of that evidence denied him a fair trial.

e. The erroneous admission of Mr. Sandholm's prior convictions requires reversal.

An error resulting in the denial of a constitutional right, such as a fair trial, requires reversal unless the State proves beyond a reasonable doubt the misconduct did not contribute to the verdict obtained. *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The State cannot meet that burden here.

The State's evidence that Mr. Sandholm was affected by alcohol was relatively weak. The trooper observed three relatively minor lane incursions committed over a distance of about two mile. 1/31/12 RP 99-110. The weakness of the State's case is illustrated by the fact that the first trial resulted in a hung jury. In light of that, the State cannot prove beyond a reasonable doubt that the jury would have reached the same verdict had it not heard the erroneously admitted evidence.

Even if the Court were to conclude the erroneous admission of the prior conviction evidence did not constitute constitutional error, reversal would be required under the lesser standard governing evidentiary errors. The erroneous admission of ER 404(b) evidence

requires reversal if the error, within reasonable probability, materially affected the outcome." *State v. Stenson*, 132 Wn.2d 668, 709, 940 P.2d 1239 (1997). This Court must assess whether the error was harmless by measuring the admissible evidence of guilt against the prejudice caused by the inadmissible testimony. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997); *State v. Acosta*, 123 Wn. App. 424, 438, 98 P.2d 503 (2004).

Again, in light of the weakness of the State's case, it is clear the admission of evidence of Mr. Sandholm's prior offenses materially affected the outcome of the case, and this Court should reverse Mr. Sandholm's conviction.

3. The trial court miscalculated Mr. Sandholm's offender score.

a. The prosecution must prove a person's criminal history before the court may calculate the accurate criminal history at sentencing.

The calculation of a criminal defendant's standard sentence range is determined by the "seriousness" level of the present offense as well as the court's calculation of the "offender score." RCW 9.94A.530(1). The offender score is determined by the defendant's criminal history, which starts with a list of his prior convictions. *See* RCW 9.94A.030(11); RCW 9.94A.525.

> The legislature intended the rules for calculating offender scores [in RCW 9.94A.525] to be applied in the order in which they appear. In that regard, subsection (1) defines a "prior conviction," and subsection (2) explains how to sift through the prior convictions in order to eliminate those that wash out. Subsections (7) through (18) then provide specific rules regarding the actual calculation of offender scores, instructing courts to "count" the prior offenses by assigning different numerical values to the prior offenses.

State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

The proper interpretation of these statutes is reviewed *de novo*. *State v. Mutch*, 171 Wn.2d 646, 653, 254 P.3d 803 (2011). Where an offender score is legally erroneous due to a misapplication of the statute a reviewing court must reverse the sentence regardless of whether the appellant previously raised the argument. *In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 872, 50 P.3d 618 (2002). Indeed, the sentence must be reversed even where the appellant agreed to the erroneous sentence. *Id.* at 873-74.

b. The court miscalculated Mr. Sandholm's offender score.

The trial court determined Mr. Sandholm's offender score to be 8. CP 1661. To arrive at the number the court included eight prior offenses. The court's finding of Mr. Sandholm's criminal history provides:

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
CONT SUBST VIOL- SECTION(D)	12/27/2000	ADULT	001011719	PIERCE CO
CONT SUBST VIO A: MFG/DELVR/P	3/27/1998	ADULT	971086325	KING CO
DRIVING/INTOX/UNDER INFLUENCE DRUG	12/27/2000	Adult Misd.	001011719	PIERCE CO
DUI- GROSS MISDEAMEANOR	5/28/2008	Adult Misd.	081016341	PIERCE CO
	Disposition Date			
DUI	4/12/2007	Adult Misd.	B00221259	TACOMA
DUI	2/5/2005	Adult Misd.	5yc000526	PIERCE CO
DUI	6/23/1999	Adult Misd.	99c001724	PIERCE CO
DUI	6/12/1998	Adult Misd.	980255974	BELLEVUE

CP 1666.

The determination of which prior offense may be included in the offender score for a DUI related felony is controlled by RCW 9.94A.525(2)(e). *State v. Morales*, 168 Wn. App. 489, 500, 278 P.3d 668 (2012). If the language of statute is unambiguous it alone controls. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of Cy. Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). RCW 9.94A.525(2)(e) provides:

> If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and serious traffic offenses shall be included in the offender score if: (i) The prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence; or (ii) the prior convictions would be

> considered "prior offenses within ten years" as defined in RCW 46.61.5055.

Importantly, RCW 9.94A.525(2)(d) does not apply where the current offense is DUI, as that subsection specifically states "except as provided in (e) of this subsection." *Morales*, 168 Wn. App. at 500.

i. RCW 9.94A.525(2)(e) does not permit inclusion of any offense which is not specifically listed in a person's offender score.

By its plain terms RCW 9.94A.525(2)(e) limits those offenses which may be included in the offender score for DUI-related felonies to those prior offenses specifically listed in subsection (e). *Morales*, 168 Wn. App. at 498. Specifically *Morales* said:

> subsection (2)(e)(i) states "***the*** prior convictions [,]" indicating that only the specific classes of prior offenses stated immediately before this provision shall be counted in an offender's score for a DUI-related felony conviction.

Id. Thus, the Court rejected the State's argument to include other offenses.

Here, the trial court included two prior drug offenses in Mr. Sandholm's offender score, reasoning they had not washed out under RCW 9.94A.525(2)(c). CP 1661, 1666; 3/2/12 RP 7. However, those offenses are not among "the specific classes of prior offenses stated" in

RCW 9.94A.525(2)(e). Pursuant to *Morales* those offenses cannot be included in Mr. Sandholm's offender score. 168 Wn. App. at 498.

ii. RCW 9.94A.525(e) did not permit the inclusion of Mr. Sandholm's 1998 and 1999 offenses in his offender score.

As to Mr. Sandholm's remaining six prior offenses for DUI, this Court has interpreted RCW 9.94A.525(2)(e) to require a sentencing court use either subsection (i) or subsection (ii) to determine which prior offense will be used to calculate the score but not both. *State v. Draxinger*, 148 Wn. App. 533, 537, 200 P.3d 251 (2008), *review denied* 166 Wn.2d 1013, 210 P.3d 1018 (2009). *Draxinger* concluded the language of RCW 9.94A.525(2)(e) makes clear that "Subsection (ii) applies only if the defendant has committed at least four DUI-related offenses in 10 years." *Id.* Subsection (i) is inapplicable unless the defendant has fewer than four prior offenses within 10 years as defined in RCW 46.61.5055. *Id.* at 537-38. Thus, for example, subsection (i) would apply where a present DUI is sentenced as a felony because the defendant has previously been convicted of vehicular homicide. *See e.g.* RCW 46.61.502(6)(b)(i)(ii) (making DUI a felony based on prior conviction of vehicular homicide or vehicular assault if the prior was committed while under the influence). However, because the State

alleged Mr. Sandholm had four prior offenses within ten years, subsection (ii) applies and subsection (i) cannot. *Draxinger*, 148 Wn. App. At 537-38. Mr. Sandholm had only four prior offense within 10 years and pursuant to *Draxinger* his offender score could be no higher than 4.

Nonetheless, the trial court included Mr. Sandholm's 1998 and 1999 DUI convictions, reasoning that because he had not spent five years in the community without committing a new offense those offenses had not washed. CP 1661, 1666; 3/2/12 RP 7. That conclusion is incorrect for three reasons.

First, RCW 9.94A.525(2)(d), which pertains to the washout of serious traffic offense in cases other than DUI- related felonies, does not apply in this case as subsection (e) specifically deals with the felony sentence for driving under the influence. *Morales*, 168 Wn.2d at 499-500. Contrary to the State's argument below, that does not render subsection (d) superfluous as it would still provide the washout period for serious traffic offenses when used in scoring other felony traffic offenses under RCW 9.94A.525(11) or water-craft offenses under RCW 9.94A.525(12).

Second, as discussed above, *Draxinger* makes clear that only RCW 9.94A.525(2)(e)(ii) applies in this case. *Draxinger*, 148 Wn. App. At 537-38. Because neither the 1998 nor 1999 offenses would be considered "prior offenses within ten years" as defined in RCW 46.61.5055, they do not count in Mr. Sandholm's offender score. RCW 9.94A.525(2)(e)(ii).

Third, even if both subsections (e)(i) and (e)(ii) could apply, the result is the same. RCW 9.94A.525(2)(e)(i) permits prior offenses to be included only if the "prior convictions were committed within five years since the last date of release from confinement (including full-time residential treatment) or entry of judgment and sentence." This language differs in several important respects from the language used in the other washout provisions of RCW 9.94A.525(2)(b-d). For example, RCW 9.94A.525(2)(b), pertaining to prior Class B felonies, states those offenses:

> shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction.

See also, RCW 9.94A.525(2)(c) and (d) (pertaining to Class C felonies, and prior serious traffic offenses where current offense is not a DUI respectively). Plainly the legislature used different language in RCW 9.94A.525(2)(e) than in RCW 9.94A.525(2)(b-d). "When the legislature uses different words within the same statute, [courts] recognize that a different meaning is intended." *State v. Beaver,* 148 Wn.2d 338, 343, 60 P.3d 586 (2002); *see also*, *Morales* 168 Wn. App. at 499(same).

Overlooking this critically different language in these subsections, the trial court read into RCW 9.94A.525(e)(i) a crime-free requirement. *See* 3/2/12 RP 7 ("there hasn't been a five-year period where he has not reoffended so they do not [wash]"). Unlike the general washout provisions in the preceding subsections of the statute, RCW 9.94A.525(e)(i) does not include the requirement that a defendant remain crime free for a specified period after release from confinement for each prior offense in order for the offense to wash. *Morales* 168 Wn. App at 499-500. Instead, RCW 9.94A.525(2)(e) draws a finite boundary within which a prior offense must have occurred if it is to be included – "within five years since the last date of release from confinement . . . or entry of judgment and sentence." That reading is in

harmony with the language of RCW 9.94A.525(2)(e)(ii) which fixes the arrest date for the current offense as the single date from which the ten year prior offense bar is measured. *Morales*, 168 Wn. App. at 497.

Mr. Sandholm's last date of confinement was sometime after his 2008 conviction. Mr. Sandholm was sentenced on May 28, 2008. CP 1568. The court imposed a sentence of 365 days with credit for 57 days served. *Id.* Thus Mr. Sandholm's last date of release was 308 days after he was sentenced – April 1, 2009. Pursuant to RCW 9.94A.525(2)(e)(i) only offenses "within five years" of that date could be included in Mr. Sandholm's offender score. Only three of his prior offenses fall within that window. CP 1666.[1] And each of those three offenses is already included in the offender score under RCW 9.94A.525(2)(e)(ii).

Pursuant to RCW 9.94A.525(2)(e)(ii), the only relevant criminal history for purposes of Mr. Sandholm's offender score are the four prior DUI's committed within ten years of the current offense. *Morales*, 168 Wn. App. at 498. RCW 9.94A.525(11) instructs those each count

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[1] While one might surmise that Mr. Sandholm was released earlier based upon some measurement of "good time," none of the documents submitted by the State at sentencing establish any such date. The State bears the burden of proof at sentencing. *State v. Hunley*, 175 Wn.2d 901, 909-10, 287 P.3d 584 (2012); *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009); *State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999); U.S. Const. amend. XIV; Const. Art. I, § 3. Because the State has not offered any proof of an alternative release date, the April 1, 2009, must be the date of release.

as a single point, yielding a score of 4.[2] The trial court's calculation of Mr. Sandholm's offender score as 8 is plainly incorrect.

4. The trial court erred in imposing alternative terms of community custody.

"A trial court only possesses the power to impose sentences provided by law." *In re the Personal Restraint Petition of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). RCW 9.94A.701(9) provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Following the 2009 amendments to RCW 9.94A.701, and elimination of former RCW 9.94A.715, a trial court no longer has the authority to impose a variable term of community custody. *State v.*

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[2] RCW 9.94A.525(11) provides:

> If the present conviction is for a felony traffic offense count two points for each adult or juvenile prior conviction for Vehicular Homicide or Vehicular Assault; for each felony offense count one point for each adult and 1/2 point for each juvenile prior conviction; for each serious traffic offense, other than those used for an enhancement pursuant to RCW 46.61.520(2), count one point for each adult and 1/2 point for each juvenile prior conviction; count one point for each adult and 1/2 point for each juvenile prior conviction for operation of a vessel while under the influence of intoxicating liquor or any drug.

RCW 9.94A.030(25)(a) includes driving under the influence within the definition of "felony traffic offense" if the offense resulted in a felony sentence.

Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011). Instead, *Franklin* recognized,

> [u]nder the amended statute, a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing. RCW 9.94A.701(1)- (3); *cf.* former RCW 9.94A.715(1).

Franklin, 172 Wn.2d at 836. The Court more recently clarified that for persons sentenced after August 2009, the trial court and not the Department of Corrections is responsible for fixing the appropriate term of community custody. *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012).

Mr. Sandholm's offense is a Class C felony with a statutory maximum of 60 months. RCW 9A.20.020(1)(c); RCW 46.61.502(6). RCW 9.94A.701(1)(a) authorizes a one-year term of community custody for Mr. Sandholm's offense. Because Mr. Sandholm's standard range sentence is 60 months, however, RCW 9.94A.701(9) required the trial court to reduce the term of community custody to "0." *Boyd*, 174 Wn.2d at 472.

Nonetheless, the Judgment and Sentence provides:

(c) [X] ***COMMUNITY CUSTODY - for qualifying crimes committed after 6-30-2000*** is ordered for the following established range or term:

[ ] Sex Offense, RCW 9.94A.030 - 36 months—when not sentenced under RCW 9.94A.507
[ ] Serious Violent Offense, RCW 9.94A.030 - 36 months
[ ] If crime committed prior to 8-1-09, a range of 24 to 36 months.
[ ] Violent Offense, RCW 9.94A.030 - 18 months
[X] Crime Against Person, RCW 9.94A.411 or Felony Violation of RCW 69.50/52 - 12 months
[ ] If crime committed prior to 8-1-09, a range of 9 to 12 months.

The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of sentence for any offense, as specified in this judgment. L=60 months maximum

CP 1664. Because it is contrary to RCW 9.94A.701, the Court must strike the alternate term of community custody.

E. CONCLUSION

For the reasons above this Court must reverse Mr. Sandholm's conviction and sentence.

Respectfully submitted this 19th day of March, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KENNETH SANDHOLM, Appellant.	)))))))))	NO. 68413-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF MARCH, 2013, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF MARCH, 2013.

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