SUPREME COURT NO. 98883-8
NO. 76672-4-I consolidated with No. 78070-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

NICHOLAS ANDERSON,

Respondent.

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

The Honorable Cheryl B. Carey, Judge

ANSWER TO STATE'S PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

Respondent Nicholas Anderson, the appellant below, asks this Court to deny the State's Petition for Review.

B. COURT OF APPEALS DECISION

The State seeks review of the Court of Appeals' unpublished decision in State v. Anderson, WL 3047246 (2020).

C. STATEMENT OF THE CASE

Anderson was convicted in part of four counts of vehicular homicide. CP 139-45. Among other sentencing enhancements, the sentencing court imposed two consecutive 24-month enhancements based on Anderson's prior convictions of driving under the influence and reckless driving. The sentencing court concluded that the 2005 reckless driving conviction, to which Anderson pled guilty, qualified as a "prior offense" under RCW 46.61.5055. CP 155-65. The statute defines "prior offense" in relevant part as "a conviction for violation of RCW … 46.61.500 [reckless driving] … that was originally filed as a violation of RCW 46.61.500 [DUI]."

Anderson challenged the enhancement on two basis: First, that the prosecution was required to prove to a jury that the

reckless driving conviction constituted a "prior offense" and second, that the prosecution was required to prove that the "prior offense" involved drugs or alcohol. Brief of Appellant (BOA) at 26-52; Reply Brief of Appellant (RBOA) at 1-10.

The Court of Appeals unanimously agreed in a published opinion that the prosecution was required to prove to a jury that Anderson's reckless driving conviction qualified as a "prior offense." State v. Anderson, 9 Wn. App. 2d 430, 446-47, 462, 447 P.3d 176 (2019). As the Court of Appeals concluded, "[w]hether Anderson's reckless driving conviction qualifies as a prior offense requires a factual finding that a jury must make because the enhancement cannot apply based on the fact of the reckless driving conviction." Id. at 446-47.

The Court of Appeals disagreed as to what factual question the jury had to decide. Two judges concluded that the prosecution was required to prove to a jury that the reckless driving involved drugs or alcohol. Id. at 462. Judge Leach concluded that the prosecution was required to prove to a jury that the reckless driving conviction had originally been charged as a driving under the influence (DUI). Id. at 447-48.

The prosecution petitioned this Court for review but asked that consideration of its petition be stayed until after this Court issued its opinion in State v. Wu. After issuing its decision in State v. Wu, 194 Wn.2d 880, 453 P.3d 975 (2019), this Court granted the prosecution's petition and remanded Anderson's case to the Court of Appeals for reconsideration. State v. Anderson, WL 3047246 (2020).

In a unanimous unpublished opinion, the Court of Appeals again concluded that the prosecution was required to prove to a jury that Anderson's prior reckless driving conviction was originally charged as a DUI. Anderson, WL 3047246 at *1-2. Consistent with Wu, the Court of Appeals held that the jury need not decide that the reckless driving conviction involved drugs or alcohol. Id.

The prosecution filed a motion to reconsider. At the direction of the panel, Anderson responded. The Court of Appeals denied the prosecution's motion to reconsider, and the prosecution has again asked this Court to grant review.

Anderson now files this Answer to the petition under RAP 13.4(d).

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

This Court should deny review because the Court of Appeals decision is correct, based on the facts and law, and this case does not meet any of the criteria for review under RAP 13.4(b).

1. There Is No Conflict With Other Decisions.

Under the Sixth Amendment right to a jury trial, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). Traditionally, questions of "pure historical fact" are for the jury to decide, as are mixed questions of law and fact where the jury applies the facts to the legal standard to render a verdict. United States v. Gaudin, 515 U.S. 506, 512-14, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The trial court only retains authority to decide "pure questions of law." Id. at 513.

Whether a prior conviction for reckless driving qualifies as a "prior offense" as defined by RCW 46.61.5055(14)(a) is a factual

determination, not a legal one. The issue cannot be decided as a matter of law because the existence of a conviction for reckless driving does not in and of itself prove that the offense was originally charged as a DUI as required by RCW 46.61.5055(14)(a).

"[T]he *existence* of a prior conviction need not be presented to a jury and proved beyond a reasonable doubt." State v. Olsen, 180 Wn.2d 468, 473, 325 P.3d 187, (emphasis added), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014). "But when it comes to the question of what facts were established by a prior conviction," courts "may assess 'only facts that were admitted, stipulated to, or proved beyond a reasonable doubt' during the prior proceeding." State v. Allen, 5 Wn. App. 2d 32, 37, 425 P.3d 529 (2018) (quoting Olsen, 180 Wn.2d at 473-74). In examining a prior conviction, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense" without running afoul of the Sixth Amendment right to a jury trial. Mathis v. United States, __U.S.__, 136 S. Ct. 2243, 2252, 195 L. Ed. 2d 604 (2016).

In Anderson's case, the State needed to prove more than just the existence of Anderson's prior reckless driving conviction. It also needed to prove that it was originally charged as a DUI. RCW 46.61.5055(14)(a). Anderson's prior reckless driving conviction itself does not establish that it was originally charged as a DUI. See BOA at 26-52; RBOA at 1-10. Anderson's Statement of Defendant on Plea of Guilty makes no reference to the reckless driving having involved drugs or alcohol. And while the statement indicates Anderson is pleading guilty to reckless driving "as amended" it makes no reference what the pled charge was amended from. BOA at 50-51 (citing CP 242-342).

Similarly, the judgement and sentence for reckless driving makes no reference to the crime involving drugs or alcohol. Significantly, the "drug related" box is not checked, nor is any box checked indicating that Anderson had a registered blood alcohol content. All the "mandatory conditions of sentence" pertaining to drugs and alcohol are crossed out. Id.

While the "additional conditions of sentence" require Anderson to attend a DUI victim's panel and follow the treatment recommendations of an "alcohol drug treatment provider" that is

not dispositive of whether it was originally charged as a DUI. Although conditions of probation for felony convictions under the SRA, chapter 9.94A RCW, "'must relate directly to the crime for which the offender was convicted," probation conditions attached to misdemeanors need only "bear a reasonable relation to the defendant's duty to make restitution or ... tend to prevent the future commission of crimes.'" State v. Deskins, 180 Wn.2d 68, 77, 322 P.3d 780 (2014) (quoting State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), review denied, 140 Wn.2d 1006, 999 P.2d 1261 (2000)). Thus, "[c]ourts have a great deal of discretion when setting probation conditions for misdemeanors and are not restricted by the [SRA]." Id.

The Court of Appeals properly concluded that, "whether Anderson's reckless driving conviction qualifies as a prior offense requires a factual finding that a jury must make because the enhancement cannot apply based only on the fact of the reckless driving conviction." Anderson, 9 Wn. App. 2d at 446-47; see also Anderson, WL 3047256 at *1 (properly recognizing that Wu concluded a jury must decide whether an earlier reckless driving conviction was originally charged as a DUI). This conclusion is

correct based on the facts of Anderson's case and existing case law.

In Wu, this Court concluded that for purposes of proving a "prior offense" under RCW 46.61.5055(14)(a) in the context of a felony DUI, the State was required to prove, in part, to a jury that Wu had a prior reckless driving conviction that was originally charged as a DUI. 194 Wn.2d at 889-91. The Court emphasized the crucial distinction between the trial court's threshold "legal determination" of whether a "prior offense" satisfied the statutory definition of RCW 46.61.5055(14)(a) such that it could be submitted to the jury, and the jury's role in deciding the "question of fact" of whether the essential element of the crime had in fact been proven beyond a reasonable doubt. Id. at 889. Having assessed the trial documents introduced by the State, the jury determined that Wu's conviction for reckless driving was originally charged as a DUI and therefore satisfied the "prior offense" requirement of RCW 46.61.5055(14)(a). Id. at 889-91.

The prosecution's position is that Wu does not control because it involved "prior offenses" in the context of a felony DUI case rather than "prior offenses" affecting a sentencing

enhancement at issue here. Petition at 15. This is true, but it is a distinction without significance. RCW 46.61.5055(14)(a) requires the same "prior offense" showing in either situation. Moreover, "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 103, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013) (citing Apprendi v. New Jersey, 530 U.S. 466, 483 n.10, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)). As the Court of Appeals properly recognized, the relevant question is not whether the "prior offense" is being proven as an element of the underlying offense or as a sentencing enhancement, but rather, the critical distinction between what is required to prove a "prior conviction" versus a "prior offense". Anderson, 9 Wn. App. 2d at 446-47; Anderson, WL 3047256, *1. Wu explicitly affirms this line of reasoning:

> [W]hether a prior offense meets the statutory definition is a threshold question of law to be decided by the trial court prior to admitting the evidence to the jury. To the extent Wu can be read to mean that *admissibility* of the prior convictions is a legal question properly for the trial court, we approve such approach.

194 Wn.2d at 899 (citing State v. Wu, 6 Wn. App. 2d 679, 431 P.3d 1070 (2018) (emphasis in original). Wu is not in conflict with the Court of Appeals opinion in this case.

Notwithstanding the support Wu provides, the prosecution also ignores the fact that neither Anderson's argument, nor the Court of Appeals opinion, rests exclusively on Wu. See BOA at 30, 39, 45-46 (citing Alleyne, Blakely, and Apprendi).

As Apprendi properly recognizes, in deciding the question of what facts must be subject to a jury finding, "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" 530 U.S. at 494. Accordingly, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). The required finding here is that the "prior offense" of reckless driving was originally charged as a DUI. That finding exposes Anderson to an additional consecutive 24-month prison sentence for each

vehicular homicide conviction. As such, it needs to be found by a jury to comply with the Sixth Amendment, regardless of the descriptive label attached to it.

The prosecution attempts to circumvent Apprendi by citing to State v. Jones, 159 Wn.2d 231, 149 P.3d 636 (2006), State v. Thiefault, 160 Wn.2d 409, 158 P.3d 580 (2007), and Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Petition at 10-15. But these cases are also not in conflict with the Court of Appeals decision in Anderson's case.

Under Jones, Washington courts may determine "as a matter of law" facts "intimately related to the *prior conviction*" such as the dates of conviction, offense dates, and the underlying offense. 159 Wn.2d at 241 (emphasis added). Significantly, each of these facts is apparent from the face of the judgment at issue. As discussed above, whether Anderson's reckless driving conviction was originally charged as a DUI for purposes of a "*prior offense*" is not readily apparent from the face of the judgement and sentence itself. Moreover, the standard of proof for the "prior conviction exception" – such as the community custody determination in Jones, or persistent offender finding in Theifault

– is preponderance of the evidence, not the beyond a reasonable doubt showing required here for a "prior offense" finding. Wu, 194 Wn.2d at 889-91; Theifault, 160 Wn.2d at 418; Jones, 159 Wn.2d at 241, 243, 247.

In Shepard the court stated in dicta that in guilty plea cases, "the statement of factual basis for the charge, … shown by a transcript of a plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact *adopted by the defendant* upon entering the plea" constitute evidence of the facts of the offense upon which a subsequent sentencing court could properly rely. 544 U.S. at 20-21 (emphasis added). But the Shepard court drew a clear distinction between considering facts adopted by the defendant, and those involving disputed facts, such as police reports or complaint applications which are "too much like the findings subject to … Apprendi to say that Almendarez-Torres[1] clearly authorizes a judge to resolve the dispute." 544 U.S. at 25. Again, as discussed above, the facts adopted by Anderson in his Statement of Defendant on

[1] Almendarez-Torres v. United States, 523 U.S. 224, 228, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).

Plea of Guilty makes no reference to the reckless driving having originally been charged as a DUI or otherwise involving drugs or alcohol.

The Sixth Amendment right to a jury trial does not allow the court to usurp the function of the jury and decide the matter on its own authority. This Court should deny the State's petition because the Court of Appeals conclusion that Anderson had the right to have the jury decide as an issue of fact, whether his reckless driving conviction was originally charged as a DUI for purposes of the "prior offense" sentencing enhancement, is correct based on the facts and law.

2. There Is No Issue of Substantial Public Interest.

Wu has already answered the question of what factual determination a jury must make. 194 Wn.2d at 889. The prosecution nonetheless identifies a jury's determination of "prior offenses" as having broad implications for impaired operator sentencing. In reality, the scope of the Court of Appeals' opinion here is extremely limited and will only arise in situations nearly identical to Anderson's.

In many circumstances, the face of the record of the prior conviction will leave nothing left for the prosecution to prove for purposes of a "prior offense." In such instances, the trial court can properly make the necessary determination as a matter of law. The defendant can also admit or stipulate to, the fact that the prior conviction was originally charged as a DUI.

The prosecution also cites examples of what it contends are other "enhanced penalties" affected by a jury's "prior offense" finding. Petition at 15-16. Each of the offered examples is plainly a condition of sentencing however, not an enhancement which extends a defendant's prison sentence beyond the prescribed statutory maximum and requires a jury determination.

There is no conflict in any area of substantial public importance that warrants review.

E. CONCLUSION

The Court of Appeals decision is thorough, limited in scope, and correctly decided under existing law. It presents no new questions of substantial public interest. This Court should deny the State's petition.

DATED this 9th day of September, 2020

Respectfully submitted,

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September 10, 2020 - 10:16 AM

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