90246-1

No.
Court of Appeals No. 68413-2-I

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

KENNETH SANDHOLM,

Respondent.

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

ANSWER

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A. INTRODUCTION AND IDENTITY OF RESPONDENT

Respondent Kenneth Sandholm asks this Court to deny the State's petition for review because it does not meet the criteria of RAP 13.4. Alternatively, if this Court grants review, the Court should also grant review of the violation of Mr. Sandholm's right to a unanimous jury and he admission of evidence of Mr. Sandholm's prior offenses.

B. ISSUES PRESENTED

1. A court must determine a person's offender score pursuant to the provisions of RCW 9.94A.525. Based upon prior cases interpreting the provisions of that statute as applied to the offense of driving under the influence, the Court of Appeals concluded the trial court miscalculated. Where that opinion is wholly consistent with other decisions of the Court of Appeals and this Court is review warranted?

2. 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's opinion mandates that the conviction must be reversed. Is review warranted where the Court of Appeals found insufficient evidence of one alternative yet did ot reverse the conviction?

3. 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. Further, 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. Evidence of Mr. Sandholm's prior offenses was not relevant for any material purpose in proving the crime of Driving Under the Influence. Where this Court has repeatedly held that prior convictions are not elements of the substantive offense does the contrary conclusion by the Court of Appeals warrant review?

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. The opinion of the Court of Appeals properly concludes the trial court miscalculated Mr. Sandholm's Offender score.

On appeal, Mr. Sandholm has argued his offender score was miscalculated under former RCW 9.94A.525(2)(e). Specifically he contended the trial court could not include his two prior felonies convictions. The State filed a response conceding that under the decision in *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (2012), the trial court erred in including the two convictions at issue.

Less than one week prior to oral argument in this matter the State withdrew its concession. And filed a brief arguing for the first time that the prior offenses were properly included in the offender score. In an unpublished opinion, the Court of Appeals concluded the issue was squarely controlled by *Morales* and concluded Mr.

Sandholm's offender score was miscalculated. In a new variation of its argument, the State now contends the opinion is contrary to this Court's opinion in *State v. Moeurn*, 170 Wn.2d 169, 240 P.3d 1158 (2010).

As set forth below, the opinion does not conflict with any decision of this Court or the Court of Appeals. Additionally, because of the evolving nature of the State's argument and the fact the opinion is unpublished, this case presents a poor to address that claim in any event. Finally, any concerns the State has with respect to calculating the offender score of person conviction of driving under the influence, those question were resolved by 2013 legislation amending the statue at issue.

Having never raised this contention before, the State now attempts to manufacture a conflict with this Court's decision in *Moeurn.* There this Court construed RCW 9.4A.525 sayin:

> 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.

Id. at 175

Here, the Court of Appeals applied the statute in precisely the manner which *Moeurn* requires. Because there is no dispute as to Mr. Sandholm's criminal history, the court passed over the first step to then apply the provisions of RCW 9.94A.525(2). Relying on its prior decisions in *Morales*, 168 Wn. App. at 493, the Court concluded "only those prior convictions listed in subsection (2)(e) are properly counted." Opinion an 15.

The State agreed the prior convictions in question could not count under (2)(e), but contended they count under (2)(c). As it had in *Morales*, the Court of Appeals rejected that argument noting that it rendered subsection 2(e) wholly superfluous. Opinion at 17. Moreover, the court recognized that argument ignores the plain language of subsection 2(c) which states the section applies expect "as provided in (e) of this subsection." Opinion at 17; *see also State v. Jacob*, 176 Wn. App. 351, 356-60, 308 P.3d 800 (2013).

As the State originally conceded, Mr. Sandholm's two prior drug convictions cannot be included in his offender score. That result is dictated by the plain statutory language. That result is wholly consistent with *Morales* and with this Court's opinion in *Moeurn*. In truth the State's dispute is simply with the conclusion the court reached not the

process it employed. The unpublished opinion is not in conflict with any other opinion of this Court of the Court of Appeals.

Additionally the Legislature has since amended the provisions of RCW 9.94A.525(2)(e) effective September 28, 2013 to include all prior convictions of driving under the influence in the offender score, and to include prior felony convictions. Laws 2013 2nd sp.s. ch. 35 § 8, p2899. That amendment resolve this issue going forward. Moreover, it indicates that the statute did not previously permit inclusion of all prior offense in the offender score. "Every amendment is made to effect some material purpose." *Vita Food Prods., Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the former statute already permitted inclusion of prior non-driving offenses or permitted the use of the wash-out rules in other portions of the statute, as the State argues, the present amendment would serve no material purpose. Thus, the new amendment demonstrates the former statute did not permit this.

This opinion of the Court of Appeals regarding Mr. Sandholm's offender score does not present any issue meriting review under RAP 13.4.

2. If this Court grants review is should grant review of the violation of Mr. Sandholm's right to a unanimous jury.

Article I, section 21 requires a unanimous jury verdict in criminal matters. 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).

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.

The Court of Appeals recognized the State had not presented any evidence that Mr. Sandholm was under the combined effects of drugs and alcohol. Opinion at 12-13. That recognition requires reversal of the conviction. *Ortega-Martinez*, 124 Wn.2d at 707-08. However, rather than simply apply this Court's opinion, the Court of Appeals concludes this was merely an instructional error, and thus applies a harmless error analysis. Opinion at 13-14. That analysis is directly at

odds with *Ortega-Martinez*. Thus, if this Court grants the State's petition for review it should accept review of this issue under RAP 13.4.

3. If the Court grants review it should also review the trial court's violation of Mr. Sandholm's right to a fair trial by admission of evidence of his prior crimes.

> The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an "element" or "ingredient" of the charged offense

Alleyne v. United States, _ U.S._, 133 S. Ct. 2151, 2158 (2013) (internal citations omitted). Put another way, if a fact need not be submitted to the jury, it is not an element.

Both this Court and United States Supreme Court have repeatedly stated that prior convictions are not elements of a crime even where those facts increase the defendant's punishment. *Almendarez-Torres v. United States*, 523 U.S. 224, 241, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998); *State v. Wheeler*, 145 Wn.2d 116, 120, 34 P.3d 799 (2001). Both courts have reasoned that prior offenses are a traditional, if not the most traditional, sentencing factor on which judges have relied. Further, 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.* Therefore, Mr. Sandholm's four prior convictions are not elements of the offense of driving under the influence.

Prior offenses do not alter the present crime in any way, they merely aggravate the punishment that may be imposed; the elements of driving under the influence remain the same. In this regard the prior offenses are indistinguishable from the prior offenses at issue in *Wheeler,* or the offense of confinement in *Williams.* More recently this Court has reaffirmed its long-settled rule that prior convictions are not elements which need be submitted to a jury. *State v. McKague,* 172 Wn.2d 802, 803, n.1, 262 P.3d 1225 (2011).

It is clear the mere fact that a prior offense elevates the punishment does not communicate the legislative intent to treat the prior offense as an element. If it were, the fact that a prior offense elevates a person's offender score would mean the prior offense is an element. But it is not. *Almendarez-Torres,* 523 U.S. at 243;

Wheeler, 145 Wn.2d at 120. It is equally clear that simply including a fact, recidivism or other, in the substantive criminal statute is not constitutionally relevant to whether that fact is or is not an element. *Blakely v. Washington,* 542 U.S. 296, 303-04, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004) (aggravating factors are elements even when contained in separate chapter from substantive offense); *Williams.* 162 Wn.2d at 187-88 (nature of prior conviction is not element even when contained in same statute of as substantive elements of offense).

The Legislature has not expressed an intent to make recidivism an element of driving under the influence, and in light of the prejudicial nature of such evidence, that intent should not be presumed. *Almendarez-Torres,* 523 U.S. at 235. There is no basis to conclude that the prior offenses are elements of driving under the influence. Instead, they are merely sentencing factors.
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.

The adoption by the Court of Appeals of additional elements is contrary to this court's decisions and the decisions of the United States Supreme Court. Additionally it presents a substantial constitutional question.

E. CONCLUSION

This Court should deny review of the issue presented in the State's petition for review. Alternatively, and only if it grants review of the State's claim, this court should accept review of the issues addressed by Mr. Sandholm above.

Respectfully submitted this 24th day of April, 2014.

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DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Answer to Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 68413-2-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

☒ petitioner Jennifer Joseph, DPA
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☒ respondent

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Date: April 24, 2014