NO. 31595-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE HERNANDEZ,

Appellant.

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

APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

Statutes

A. ARGUMENT IN REPLY

Resentencing is required because the trial court declined to follow the plain language of the statute and this Court's decisions in *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (2012) and *State v. Jacob*, 176 Wn. App. 351, 308 P.3d 800 (2013) when sentencing Enrique Hernandez for a 2012 driving under the influence offense. As the State concedes, resentencing is also required because the trial court exceeded its statutory authority by imposing a combined term of incarceration and community custody that exceeds the statutory maximum. The parties disagree on a related issue, whether the term of the interlock ignition device requirement may exceed the statutory maximum.

1. The State asks this Court to ignore the plain language of the statute and the Court of Appeals cases applying it so as to uphold Mr. Hernandez's improper sentence.

At sentencing, an 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 (2011).[1] Although that list starts generally with all prior convictions, it is

[1] As with the opening brief, Mr. Hernandez relies throughout on the 2011 version of RCW 9.94A.525, a copy of which is attached as Appendix B to the opening brief.

narrowed by the washout provisions of RCW 9.94A.525(2). Next, the specific provisions in RCW 9.94A.525(3) through (22) dictate how to calculate (or count) the score from those included prior convictions. RCW 9.94A.525; *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010); *see Morales*, 168 Wn. App. at 492. The State would discount subsection (2) and skip immediately to subsections (3) through (22). But this reading is in plain contravention of our Supreme Court's interpretation in *Moeurn* and would render subsection (2) meaningless.

The statute, and case law interpreting it, is clear that subsection (2)(e) is a specific provision directed at which offenses are to be included when sentencing an individual for felony DUI—the offense at issue here. RCW 9.94A.525(2)(e); *Morales*, 168 Wn. App. at 499, 500. The provisions relating to class C felonies and serious traffic offenses, subsections (c) and (d), state at the outset that they apply "except" in those cases which subsection (e) applies. RCW 9.94A.525(2)(c), (d). Subsection (e), in turn, applies "If the present conviction is felony driving while under the influence of intoxicating liquor or any drug" (as well as other related offenses not at issue here). As in *Morales* and *Jacob*, "Because scoring for this case is controlled by subsection (2)(e)," subsections (2)(c) and (d) are not relevant to scoring for the

current crime. *Morales*, 168 Wn. App. at 499-500; *accord Jacob*, 176 Wn. App. at 357-60.

In an attempt to circumvent this clear application, the State argues that subsection (2)(e) and *Morales* only apply to prior offenses specifically enumerated in subsection (2)(e) and that non-listed prior offenses are governed by (2)(c) and (d). Resp. Br. at 4-6. But this argument ignores the plain language of subsection (2) and (2)(e), which dictate subsection (e) it applies to all class C felonies and serious traffic offenses that can be included in an offender score where the offense at conviction is driving under the influence. RCW 9.94A.525(2)(e). Subsections (c) and (d) do not apply by their specific terms, which state "Except as provided in (e) of this subsection." RCW 9.94A.525(2)(c), (d). The State hangs its argument on the *Morales* court's inclusion of an "other current offense" of attempting to elude in Mr. Morales's offender score. Resp. Br. at 6, 15-16. But the parties in *Morales* did not contest that other current offense and the issue of whether it is properly included was not before the court. *Morales*, 168 Wn. App. at 492, 501.[2]

[2] In its conclusion, the State argues that the Legislature's recent amendments to RCW 9.94A.525 support its reading of the statute because they "more clearly provide" that which the State is currently arguing. Resp. Br. at 23-

The State's contention that *Jacob* "does not dictate a different result" is unsupportable. Resp. Br. at 10. Relying on the plain language of the statute and *Morales*, *Jacob* held that Mr. Jacob's prior felony drug offense could not be included in his offender score on a felony driving under the influence conviction. 176 Wn. App. at 357-60. Like *Morales*, *Jacob* agrees that subsection (2)(e) provides the only prior class C offenses that may be included in a DUI offender score under the SRA. *Jacob*, 176 Wn. App. at 357-58, 360. The court held,

> only RCW 9.94A.525–specified prior convictions count as offender score points for purposes of sentencing a defendant convicted of former RCW 46.61.502(6) (2008) felony DUI. Accordingly, we agree with Jacob and hold that, like the improper inclusion of Morales' prior assault conviction in his offender score, the trial court here similarly erred in including Jacob's 1993 drug conviction in his offender score because drug convictions are not among the statutorily specified prior convictions for offender score inclusion under subsection (i) of RCW 9.94A.525(2)(c).

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24. But, if the statute had already said that, the Legislature would not have needed to amend it. While an amended statute is interpreted in light of court decisions that may have prompted the amendment (if the amendment is in clear response to case law), precedent is not overruled to retroactively change the interpretation of the prior version of the statute. *See State v. Calderon*, 102 Wn.2d 348, 351, 684 P.2d 1293 (1984); *State v. Dubois*, 58 Wn. App. 299, 303, 793 P.2d 439 (1990). The State furthermore ignores that if there is any ambiguity as to whether RCW 9.94A.525(2)(c) and (d) should apply to sentences for DUI convictions, the rule of lenity requires this Court to resolve that ambiguity in favor of the defendant. *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010).

Id. at 360. Thus Division Two plainly read subsection (e) to limit the prior offenses that may be included in the offender score.

The State contends that the *Morales* and *Jacob* courts' reading of RCW 9.94A.525(2)(e) would render subsection (2)(a) meaningless. Resp. Br. at 9-10 (contending class A felony and sex offenses would not be counted under Hernandez's argument). But the State misunderstands the statutes. The subsections of RCW 9.94A.525(2) apply to different crimes or classes of crimes. Class A and prior felony sex convictions are governed by RCW 9.94A.525(2)(a), which states that all such prior convictions are included in the offender score. Subsections (c) through (e) apply to class C felonies and serious traffic offenses. The range of prior offenses that could be included in Mr. Hernandez's offender score are limited to the class C felonies and serious traffic offenses listed in subsection (e) because he does not have any prior convictions for class A felonies or sex offenses. *See* CP 58 (guilty plea statement); CP 67 (judgment and sentence). Thus subsection (a) is not implicated and Mr. Hernandez doe not contend

that any such prior offenses should washout or not otherwise be counted.[3]

Finally, Mr. Hernandez appropriately recognizes that, when counting his offender score under subsections (3) through (22), a point should be added because he was on community custody at the time of the offense. RCW 9.94A.525(19). Contrary to the State's contention, this does not contradict his argument as to which felonies wash and which are included under subsection (2). *See* Resp. Br. at 19. Subsection (2) governs which felonies and other prior offenses remain in an offender score. Subsections (3) through (22) govern how to count those felonies and other offenses as well other factors, such as community custody, which affect the calculation of the score. *Moeurn*, 170 Wn.2d at 175. Subsection (19) does not apply to prior offenses but to the offender's status at the time of commission of the present offense. Thus, subsection (2) does not alter how subsection (19) is applied.

[3] Unlike subsections (2)(c) and (d), subsections (2)(a) and (2)(b) do not include the language "except as provided in (e) of this subsection." RCW 9.94A.525. To Mr. Hernandez's knowledge, no court has yet interpreted how those provisions interact under the 2011 version of the statute where the sentence imposed is for driving under the influence. As discussed, this case does not present that issue.

In short, the washout provisions of RCW 9.94A.525(2)(e) along with the counting provisions of RCW 9.94A.525(11) govern which prior offenses should be included in Mr. Hernandez's offender score for the DUI count. According to Mr. Hernandez's prior offense history, only the felony DUI convictions, misdemeanor DUI convictions (as serious traffic offenses), and felony physical control convictions are eligible to be included in the offender score. CP 58, 67; RCW 9.94A.525(2)(e); RCW 9.94A.03(44) (defining serious traffic offense). The sentencing court improperly included convictions for possession of stolen property, attempt to elude, malicious mischief, forgery and robbery. *See* CP 67. The court also improperly included Mr. Hernandez's other current offense for assault in the third degree because other current offenses must be treated the same as a prior conviction for purposes of calculating the offender score. RCW 9.94A.525(1); RCW 9.94A.589; CP 67; 3/9/13 RP 4-5, 21-23; *State v. Graciano*, 176 Wn.2d 531, 536, 295 P.3d 219 (2013).[4] Therefore, Mr. Hernandez's maximum offender score is six (one point each for felony DUI (2009), felony physical control (2003 and 2006), and DUI (2001

[4] Mr. Hernandez cites to *Graciano* simply to support the proposition that other "current offenses are treated as prior convictions. RCW 9.94A.589(1)(a)." 176 Wn.2d at 536. Thus, Mr. Hernandez does not respond to the State's argument relating to "same criminal conduct." Resp. Br. at 16-17.

and 2007); plus one point for being on community supervision at the time of the instant offense). CP 9, 58, 67; 3/9/13 RP 3-4.

However Mr. Hernandez's 2001 conviction for DUI must wash out under subsection (2)(e) because it was not committed within 10 years of the instant charge. Under subsection (2)(e) prior convictions may only 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." RCW 9.94A.525(2)(e). The offender score must use either (2)(e)(i) or (2)(e)(ii), 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). Subsection (ii) applies only if the defendant has committed qualifying DUI-related offenses within 10 years. *Id.* A felony DUI charge is a qualifying prior offense that elevates DUI to a felony crime. Subsection (i) only applies when (ii) does not—that is, when the defendant has fewer than four prior offenses or no felony DUI within 10 years as defined in RCW 46.61.5055. *Id.* at 537-38.

Only subsection (2)(e)(ii) applies in this case. Mr. Hernandez was arrested on November 18, 2012 for the instant DUI charge. CP 1-4; RCW 46.61.5055(14)(c). He committed qualifying DUI-related offenses within 10 years and is thus subject to subsection (ii), and not (i). Accordingly, Mr. Hernandez's 2001 DUI charge cannot be included in his offender score. His offender score is a five, yielding a presumptive sentence range is 33 to 43 months. RCW 9.94A.510 (sentencing grid); RCW 9.94A.515 (seriousness level of V for DUI). *See* CP 58, 67.

2. The State concedes the sentencing court exceeded its authority by imposing a term of confinement which combined with the community custody term exceeds the statutory maximum.

For the reasons set forth in Mr. Hernandez's opening brief and in the State's response brief, the Court should accept the State's concession that the combined term of confinement and community custody exceed the sentencing court's statutory authority, requiring remand for resentencing. *See* Op. Br. at 16-18; Resp. Br. at 21.

3. The sentence should be remanded because the ten-year ignition interlock device requirement exceeds the statutory maximum.

At the outset, the State concedes that an ignition interlock device cannot be required as part of community custody in this case.

Accordingly, even the State argues that the ignition interlock requirement should be stricken from section 4.C.2 of the judgment and sentence. Resp. Br. at 21, 23, 24; CP 69.

The State argues nonetheless that the 10-year requirement survives. Resp. Br. at 21-23. But because there is none, the State offers no basis for the sentencing court to impose a 10-year requirement where the statutory maximum is five years and no statute provides for an extension of the trial court's jurisdiction over the 10-year period.

The SRA specifically limits a trial court's authority over a felony offender's sentence. RCW 9.94A.505(5); *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980). While the Legislature authorized the imposition of an ignition interlock requirement, it required the length of that requirement extend no further than the court's jurisdiction. *See* RCW 76.20.720(1) (limiting length of interlock ignition requirement to length of court's jurisdiction); RCW 46.20.720; RCW 46.61.5055(5). In RCW 9.94A.505(5), the Legislature enumerated limited circumstances in which the court may impose requirements that exceed the statutory maximum. Those exceptions apply only to restitution. RCW 9.94A.505(a).

There is no exception to exceed the statutory maximum term by imposing a lengthy ignition interlock device requirement. The absence of such an exception, where it is otherwise provided for restitution, must be given meaning. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

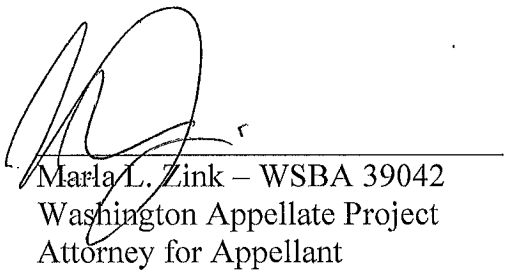
The sentencing court fulfilled the statutory maximum when it imposed a 60-month term of incarceration for the DUI count. CP 68; RCW 46.61.502(6); RCW 9A.20.021. The court's jurisdiction does not extend further for purposes of the ignition interlock device requirement. Thus, the ten-year ignition interlock requirement exceeds the court's authority. This Court should remand with instructions to strike the ignition interlock device requirement.

B. CONCLUSION

This Court should remand for resentencing to correct the offender score on Mr. Hernandez's DUI conviction, to strike the term of community custody, and to strike the ignition interlock device requirement.

DATED this 2nd day of June, 2014.

Respectfully submitted,



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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON, Respondent, v. ENRIQUE HERNANDEZ, Appellant.	)))))))))	NO. 31595-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 2ND DAY OF JUNE, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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