Court of Appeals No. 31595-9-III
Published at _Wn. App. __, 342 P.3d 820 (2015)

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE HERNANDEZ,

Petitioner.

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

PETITION FOR REVIEW

GREGORY C. LINK
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Pursuant to RAP 13.4. Petitioner Enrique Hernandez asks this Court to accept review of the published opinion of the Court of Appeals in *State v. Hernandez*, __ Wn. App. __, 342 P.3d 820 (2015).

B. OPINION BELOW

Contrary to published decisions of both Divisions One and Two, the court concluded former RCW 9.94A.525(2)(e) the court here conclude that former RCW 9.94A.525(2)(e) did not limit the offenses which could be included in the offender score calculation for a felony Driving Under the Influence.[1]

C. ISSUE PRESENTED

A court must determine a person's offender score pursuant to the provisions of RCW 9.94A.525. Several prior opinions have interpreted the provisions of RCW 9.94A(2)(e) as limiting the type of prior offenses which may be included in the offender score ro this offense. Where that opinion in this case is directly contrary to every other published opinion on this point, is review warranted under RAP 13.4?

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[1] This issue is presently before this Court in *State v. Sandholm*, 90246-1 (argued November 18, 2014).

D. STATEMENT OF THE CASE

Mr. Hernandez was charged with driving under the influence of alcohol or intoxicants (DUI), which was elevated to a felony offense based on Mr. Hernandez's prior felony DUI offense. CP 4. He was also charged with assault in the third degree, for assaulting a law enforcement officer during investigation of the DUI, and three other charges. CP 4-5.

Prior to trial, Mr. Hernandez asked the court for a declaration of his offender score. CP 6-43. Under RCW 9.94A.525(2)(e) and (11) and *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (2012), Mr. Hernandez argued only prior offenses enumerated in RCW 9.94A.525(e) count towards his offender score for the DUI count. He calculated his offender score as a five. CP 8-9. The State opposed the calculation, arguing Mr. Hernandez's offender score on the DUI count was a nine plus—he maxed out. CP 44-50. After a hearing before Judge Susan Hahn, the court determined Mr. Hernandez's offender score on the DUI count was a nine. 3/9/13 RP 21-23.

Mr. Hernandez pled guilty to the DUI and assault charges in exchange for the State dismissing the remaining counts. CP 57-65. He explicitly preserved for appeal the calculation of his offender score. CP

59, 64, 72; 4/12/13 RP 5-8. He was sentenced with an offender score of nine plus on the DUI count and eight on the assault in the third degree. CP 67.

E. ARGUMENT

Because the opinion is contrary to other published opinions of the Court of Appeals and is contrary to settled rules of statutory construction, this Court should accept review.

In published opinions, Division One and two have interpreted the provisions for former RCW 9.94A.525(2)(e). Specifically, both courts determined the statute only permitted inclusion of those Class C felonies and serious traffic offenses specified in former subsection(e). *Morales*, 168 Wn. App. at 500; *State v. Jacob*, 176 Wn. App. 351, 308 P.3d 800 (2013). In this published opinion, Division Three offers its disagreement with the conclusions reached in those opinions. What this opinion does not offer, however, is any analytical support for its conclusion. Indeed, as set forth below *Jacob* and *Morales* reached the correct conclusion.

a. The Legislature's 2013 amendment of RCW 9.94A.525(2)(e) to permit inclusion of "[a]ll other convictions" means that the prior statute did not permit that.

To the extent there was any doubt what former RWC 9.94A.525(2)(e) permitted, and what it did not, the Legislature amended the statute in 2013. In it opinion, the Court of Appeals "note[s] the legislature amended subsection (2)(e) in 2013." Opinion at 6. But the opinion does not further assess what that amendment means.

The amendment provides:

> (e) 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~~ all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for 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)) shall always be included in the

offender score. All other convictions of the defendant shall be scored according to this section.

Laws 2013, ch. 35, § 8 (Former text lined out, new text underlined).

By amending RCW 9.94A.525(2)(e) to require "[a]ll other convictions of the defendant shall be scored according to this section" the Legislature has made clear the prior statute did not permit inclusion or scoring of "all other convictions." *See e.g., State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792, 795 (2003). In *Delgado* this Court concluded that the Legislature's amendment of the "two strike" statute to include a clause pertaining to the comparability of other offense necessarily meant the prior statute did not permit inclusion of comparable offenses. *Id.*

"[E]very amendment is made to effect some material purpose." *Vita Food Products, Inc. v. State*, 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If, as the Court of Appeals opines, the former statute already permitted inclusion of all other felonies or permitted the use of the wash-out rules in other portions of the statute the amendment served no material purpose. Thus, the new amendment demonstrates the former statute did not permit this. *Vita Food*, 91 Wn.2d at 134.

That presumption may be rebutted only by clear evidence that the legislature intended the amendment to merely clarify existing law.

Roe v. TeleTech Customer Care Management (Colorado) LLC, 171 Wn.2d 736, 751, 257 P.3d 586 (2011); *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). This is only the case where the legislation clarifies or technically corrects a statute "without changing prior case law constructions of the statute." *Barstad v. Stewart Title Guar. Co., Inc.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002). Once a statute has been subject to judicial construction, subsequent "clarifying" legislation cannot apply retrospectively, otherwise the Legislature would be given "license to overrule [the judiciary], raising separation of powers issues." *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976); *see also, Dunaway*, 109 Wn.2d at 216 n.6.

There is no clear evidence of a legislative intent to merely clarify the provisions of former RCW 9.94A.525(2)(e) and thus the amendment cannot be deemed a clarification. *Roe*, 171 Wn.2d at 751. Even if there were such evidence, because former RCW 9.94A.525(2)(e) has been judicially construed to mean something else, the amendment could not apply retroactively. *Johnson*, 87 Wn.2d at 925-26. Prior to the 2013 amendment, both Divisions One and Two interpreted former RCW 9.94A.525(2)(e) as limiting the prior offenses which may be included in the offender score. Specifically, both courts

determined the statute only permitted inclusion of those Class C felonies and serious traffic offenses specified in former subsection(e). *Morales*, 168 Wn. App. at 500; *Jacob*, 176 Wn. App. 351. Following the 2013 amendment, the statute *now* specifies "[a]ll other convictions of the defendant shall be scored according to this section." In enacting this change, the Legislature has made clear that the former version at issue in Mr. Hernandez's case did not permit inclusion of all other convictions. *Vita Food*, 91 Wn.2d at 134.

b. The opinion is contrary to rules of statutory construction.

As it existed at the time of Mr. Hernandez's offense, RCW 9.94A.525(2) provided in relevant part:

> . . . .
> (c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex 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 five consecutive years in the community without committing any crime that subsequently results in a conviction.
> (d) Except as provided in (e) of this subsection, serious traffic convictions 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 spent five years in the community

> without committing any crime that subsequently results in a conviction.
> (e) 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.
>
> If the language of a statute is unambiguous, it alone controls.

State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005); *Tommy P. v. Board of County Commissioners*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982). On several occasions, Divisions One and two have interpreted these provisions as limiting the prior offenses which may be included in the offender score calculation for driving under the influence. *Morales*, 168 Wn. App. at 498; *Jacob*, 176 Wn. App. at 358-59. Specifically, former subsection (e) limits the prior felonies which can be included in the offender score to two specified felonies: prior felony convictions of driving under the influence or physical control. *Morales*, 168 Wn. App. at 498; *Jacob*, 176 Wn. App. at 360.

The Court of Appeals in this case opines that subsection (c) and (d) apply in addition to former subsection (e). Opinion at 5. If that is correct and subsection (c) applies in addition to former subsection (e) then the fact that the latter lists two specific Class C felonies, felony DUI and physical control, would be entirely superfluous to (c). Because by the Court's theory all Class C felonies are already included in the offender score under subsection (c) it was entirely unnecessary to specify in former subsection (e) how two particular Class C felonies were to be included. "Under *expressio unius est exclusio alterius*, a canon of statutory construction, to express one thing in a statute implies the exclusion of the other." *In re the Detention of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002). By listing two felonies to be included in the offender score for driving under the influence it must be presumed the Legislature did not intend inclusion of any others.

Additionally, the language "except as provided in (e) of this subsection" that appears in subsections (c) and (d) means those two subsections do not apply where the current conviction is for a felony conviction of driving under the influence. The meaning of a word or phrase "may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the

provision in question." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (Internal quotations omitted.) An examination of other provisions of the SRA which employ the term "[e]xcept as provided in" again leads to the conclusion that by using that term the Legislature did not intend subsection (c) to apply in circumstances in which former subsection (e) applied. Specifically that the term "except as provided in (e) of this subsection" means "subsection (c) only applies if (e) does not."

Similar language is used in RCW 9.94A.589 regarding concurrent and consecutive sentences. RCW 9.94A.589(1)(a) provides in part:

> Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score . . . .

RCW 9.94A.589(1)(b) and (c) then provide exceptions to the general rule requiring consecutive sentences where the current offenses are either serious violent offenses which arose from separate and distinct conduct or specific firearm offenses in which case they must be served consecutively. This Court has interpreted this language to mean that subsection (1)(a) only applies in circumstances in which (1)(b) or (1)(c)

do not. *See In re the Personal Restraint of Charles*, 135 Wn.2d 239, 246, 955 P.2d 798 (1998).[2] Thus, the term "[e]xcept as provided in" in former RCW 9.94A.525(e) means the Legislature did not intend subsection (c) to apply in circumstances in which former subsection (e) applied.

Former RCW 9.94A.525(2)(e) limited the prior felonies which could be included in the offender score calculation for a current felony conviction of driving under the influence. Because Mr. Hernandez's prior offenses are not among the felonies specified by former RCW 9.94A.525(2)(e), the Court improperly concluded they could be included in his offender score.

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[2] *Charles* concluded the general rule of concurrent as opposed to consecutive sentences required firearm enhancements be served concurrently. In response the Legislature amended the statute governing such enhancements to require consecutive sentences. Laws of 1998, ch. 235, sec. 1.

F. CONCLUSION

For the reasons above this Court should accept review of the opinion in this case.

Respectfully submitted this 25th day of March, 2015.

GREGORY C. LINK – 25228
Washington Appellate Project – 91072
Attorneys for Petitioner

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COURT OF APPEALS, STATE OF WASHINGTON, DIVISION III

STATE OF WASHINGTON, Respondent, v. ENRIQUE HERNANDEZ, Appellant.	)	No. 31595-9-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration of this court's decision of February 3, 2015, and having reviewed the records and files herein, is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the appellant's motion for reconsideration is hereby denied.

DATED: 2/24/15

PANEL: Jj. Brown, Siddoway, Lawrence-Berrey

FOR THE COURT:

LAUREL H. SIDDOWAY
CHIEF JUDGE

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

STATE OF WASHINGTON, Respondent, v. ENRIQUE HERNANDEZ, Appellant.	)	No. 31595-9-III PUBLISHED OPINION

BROWN, J. – Enrique Hernandez pled guilty to felony driving while under the influence of alcohol (felony DUI) and third degree assault. He appeals his offender score computation and two sentencing conditions. Mr. Hernandez contends the trial court (1) impermissibly considered offenses other than those listed in RCW 9.94A.525(2)(e) when calculating his offender score, (2) erred when it imposed a term of confinement and community custody greater than the statutory maximum for third degree assault, and (3) erred when it imposed a term of confinement coupled with a 10-year ignition interlock requirement in excess of the statutory maximum for felony DUI. We disagree with Mr. Hernandez' first contention but agree with his second and third contentions and remand for resentencing in a manner consistent with this opinion.

FACTS

The State charged Mr. Hernandez with felony DUI and third degree assault. Before trial, Mr. Hernandez moved the court to declare his offender score. He argued his felony DUI offender score should be 5 while the State believed his offender score was 9. Mr. Hernandez pled guilty to the felony DUI and assault charges. The court calculated his offender score for the felony DUI at 9+ and his offender score for third degree assault at 8. In calculating the offender score, the court considered the following criminal history: a 1994 juvenile conviction for second degree robbery, a 1998 forgery conviction, a 2001 DUI, physical control convictions in 2003 and 2006, a 2007 DUI, a 2003 second degree malicious mischief conviction, a 2003 conviction for attempt to elude, a 2006 second degree possession of stolen property conviction, and a 2009 felony DUI. The court sentenced Mr. Hernandez to 60 months for the felony DUI and 57 months for third degree assault, with the sentences running concurrently. The court ordered community custody for 12 months after his release and required use of an ignition interlock device for 10 years. Mr. Hernandez appealed.

ANALYSIS

A. Felony DUI Offender Score

The issue is whether the trial court incorrectly calculated Mr. Hernandez' offender score for his felony DUI conviction by including all of his prior offenses in that calculation. Mr. Hernandez contends RCW 9.94A.525(2)(e) limits the prior offenses that can be used in his offender score calculation to felony DUI convictions, misdemeanor

DUI convictions, and felony physical control convictions. Thus, he argues, the court should not have included any of his other prior convictions in his offender score calculation, making his maximum offender score 6 instead of 9+.

Our fundamental objective in statutory interpretation "is to ascertain and carry out the legislature's intent." *State v. Morales*, 168 Wn. App. 489, 492, 278 P.3d 668 (2012). A court must give effect to a statute's plain meaning if the meaning is plain on the statute's face. *Id.* "Such meaning is derived from all that the legislature has said in the statute and related statutes that disclose legislative intent about the provision in question." *Id.* Interpretations rendering any portion of a statute meaningless should not be adopted. *Id.* "[S]trained meanings and absurd results should be avoided." *Id.*

We review offender score calculations de novo. *State v. Wilson*, 113 Wn. App. 122, 136, 52 P.3d 545 (2002). Offender scores are calculated in three steps: "(1) identify all prior convictions; (2) eliminate those that wash out; (3) 'count' the prior convictions that remain in order to arrive at the offender score." *State v. Moeurn*, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010).

Former RCW 9.94A.525 (2011) applies here. Subsection (2)(e) states:

> 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 convictions within ten years" as defined in RCW 46.55.5055.

According to the *Morales* court, "the '[t]he prior convictions' that shall be included in the calculation of the offender score are limited to these: 'felony driving 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.'" *Morales*, 168 Wn. App. at 493 (quoting RCW 9.94A.525(2)(e) (2011)). Mr. Morales had seven prior serious traffic offense convictions and a fourth degree assault conviction. *Id.* at 493-94, 497. The court stated RCW 9.94A.525(2)(e) was applicable and RCW 9.94A.525(2)(d), discussing when serious traffic offenses wash out, had no bearing on the offender score calculation. *Id.* at 500-01. The court determined four of the serious traffic convictions washed out and the fourth degree assault conviction should not have been counted because "it [was] not among th[e] limited classes of prior offenses." *Id.* at 497, 501. Including the current attempting to elude conviction, the defendant's offender score was 4 instead of 8 as calculated by the trial court. *Id.* at 491, 501.

Division Two of this court recently adopted part of Division One's *Morales* holding in *State v. Jacob*, 176 Wn. App. 351, 360, 308 P.3d 800 (2013). The court decided "under subsection (i) 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." *Id.* The court reasoned the sentencing court erred by including the defendant's drug convictions 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)[(e)]." *Id.*

When calculating Enrique Hernandez' offender score, the sentencing court identified 10 prior convictions. Our focus is the second step: determining whether any of these prior convictions wash out. RCW 9.94A.525(2) contains several provisions detailing when certain types of prior convictions wash out. For example, subsection (2)(a) provides class A and sex felonies never wash out, subsection (2)(b) provides class B felonies other than sex offenses wash out after the offender spends 10 crime-free years in the community, and subsections (2)(c) and (d) provide class C felonies and serious traffic offenses wash out after the offender spends five crime-free years in the community *except* as provided in subsection (2)(e).

The holdings in *Morales Jacob* do not bind us. While Divisions One and Two were persuaded the plain meaning of subsection (2)(e) means solely those crimes specifically enumerated in the subsection could count in an offender score calculation for a felony DUI, we reason the plain meaning is that subsection (2)(e) acts as an exception to the wash out provisions seen in subsections (2)(c) and (d). Subsection (2)(e) revives certain offenses that would wash out under (2)(c) and (d), but solely in cases where the current conviction is for felony DUI or felony physical control.

Reading subsection (2)(e) differently leads to strained and absurd results. Subsection (2)(a) provides class A and sex felonies never wash out. Under Mr. Hernandez' interpretation of subsection (2)(e), class A and sex felonies cannot be

included in calculating the offender score for a felony DUI. And, RCW 9.94A.525(11) states how to score offenses when the present conviction is for a felony traffic offense: "for each felony offense count one point for each adult and ½ point for each juvenile conviction."[1] Nothing in subsection (11) limits calculating an offender score for a felony traffic offense to solely those crimes enumerated in subsection (2)(e). Considering the statute as a whole supports the argument that subsection (2)(e) does not limit prior convictions to only those laid out in that subsection. *See State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974).

Nothing in the legislative history indicates the legislature intended to limit subsection (2)(e) as decided in *Morales* and *Jacob*. Mr. Hernandez argues the legislature was unconcerned with unrelated class C felony offenses when writing subsection (2)(e). He relies on sections of the bill reports stating "prior offenses" are those under DUI laws. *See, e.g.*, House Bill Report on H.B. 3317, at 1-2, 59th Leg., Reg. Sess. (Wash. 2006). But, that discussion was in relation to misdemeanor DUIs, not felony DUIs. The bill reports then discuss felony sentencing, including how offender scores are calculated under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A

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

> (11) 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 ½ 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 ½ point for each juvenile prior conviction; count one point for each adult and ½ point for each

RCW, specifically noting the provisions of RCW 9.94A.525(11) and when certain non-felony crimes, such as serious traffic offenses, count in an offender score. *See, e.g.*, Final Bill Report on H.B. 3317, at 1-2, 59th Leg., Reg. Sess. (Wash. 2006). This discussion does not evince an intention to treat differently felony DUIs from other felony crimes. We note the legislature amended subsection (2)(e) in 2013:

> 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)), all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for 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)) shall always be included in the offender score. *All other convictions of the defendant shall be scored according to this section.*

RCW 9.94A.525(2)(e) (emphasis added).

Given our analysis, we conclude the trial court did not err by including all of Mr. Hernandez' prior convictions.

B. Community Custody Exceeding Statutory Maximum

The State correctly concedes the trial court erred when it imposed a term of confinement plus a term of community custody exceeding the statutory maximum for assault in the third degree. Thus, we remand to the trial court to resentence Mr. Hernandez on the third degree assault consistent with RCW 9.94A.701(9).

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juvenile prior conviction for operation of a vessel while under the influence

C. Ignition Interlock Requirement

The issue is whether the trial court erred when it imposed a 10-year ignition interlock requirement on Mr. Hernandez. He contends the court exceeded its authority because imposing the 10-year ignition interlock requirement exceeded the statutory maximum: his 60-month sentence was the statutory maximum.

We review erroneous sentence claims de novo. *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 667, 211 P.3d 1023 (2009). When someone is convicted of a felony, a court must impose a sentence as provided in the SRA. RCW 9.94A.505(2)(a). The SRA applies to those convicted of felony DUI. RCW 9.94A.505(2)(a)(xii); RCW 9.94A.603. As it relates to community custody, a court cannot impose an aggregate term of confinement and community custody beyond the statutory maximum. *State v. Boyd*, 174 Wn.2d 470, 472-73, 275 P.3d 321 (2012) (interpreting RCW 9.94A.701(9)). A felony DUI is a class C felony and carries with it a maximum five-year sentence. RCW 46.61.502(6); RCW 9A.20.021(1)(c).

Under RCW 46.61.5055(5)(a), a court must "require any person convicted of a violation of RCW 46.61.502 . . . to comply with the rules and requirements of the department [of licensing] regarding the installation and use of a functioning ignition interlock device." RCW 46.20.720(1) provides a

> court may order that after a period of suspension, revocation, or denial of driving privileges, and for up to as long as the court has jurisdiction, any person convicted of any offense involving the use, consumption, or possession of alcohol while operating a motor vehicle may drive only a motor vehicle equipped with a functioning ignition interlock.

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of intoxicating liquor or any drug.

The court must state how long the ignition interlock is required. RCW 46.20.720(1).

The sentencing court gave Mr. Hernandez the statutory maximum of 60-month' confinement and ordered him to use an ignition interlock device for 10 years after his driver's license was restored. The court was required to order Mr. Hernandez to comply with the requirements of the department of licensing regarding the use of an ignition interlock device, however, the court exceeded its authority in ordering him to use such a device for 10 years after his release from confinement. The court had the discretion to order the use of an ignition interlock device under RCW 46.20.720(1). But that discretion is limited to the length of time the court retains jurisdiction; here five years was the limit. The legislature knows how to create an exception to the jurisdictional requirement; it did not do so here. *See* RCW 9.94A.750; RCW 9.94A.753. The Department may require the use of an ignition interlock device for ten years, but the court erred in imposing the 10-year requirement because its sentencing discretion was limited to the 5-year maximum.

Remanded for resentencing consistent with this opinion.

Brown, J.

WE CONCUR:

Siddoway, C.J.

Lawrence-Berrey, J.

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ENRIQUE HERNANDEZ, Petitioner.	)))))))))	COA NO. 31595-9-III

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF MARCH, 2015, I CAUSED THE ORIGINAL **OPENING 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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Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710