No. 94759-7

SUPREME COURT OF THE

STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JERRY DALE HUNTOON, PETITIONER

PETITION FOR REVIEW FROM THE COURT OF

APPEALS, DIVISION III

#34359-6-III

PETITION FOR REVIEW

July 10, 2017

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Constitution

Washington State Constitution

Cases

United States Supreme Court

Washington Supreme Court

Washington Court of Appeals

A. IDENTITY OF PETITIONER

Jerry D. Huntoon asks this court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISIONS

Jerry D. Huntoon asks this court to review the decisions of the Court of Appeals determining:

1. That there was probable cause for the seizure and subsequent arrest of Jerry Huntoon for the charge of driving under the influence on September 4, 2014;

2. That Jerry Huntoon's Constitutional right to remain silent was not violated by testimony offered by the State through the arresting Officer that Mr. Huntoon refused to take the field sobriety tests and that refusal was a sign "the person doesn't think they're sober enough to pass the tests", that Mr. Huntoon "didn't disagree" with that statement at the time, and that refusal was factored into the Officer's decision to arrest Mr. Huntoon for driving under the influence;

Issued on June 8, 2017. A copy of the decision is in the Appendix at pages A- 1 to 20.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Officer have probable cause to seize or arrest Mr. Huntoon for driving under the influence on September 14, 2014?

2. Was Mr. Huntoon's Constitutional right to remain silent violated by testimony elicited by the State at trial that Mr. Huntoon's refusal to take the field sobriety tests, and his failure to contest the Officer's statement that a person who refuses to take the field sobriety tests doesn't think they're sober enough to pass those tests, amounted to an admission by Mr. Huntoon that he was under the influence?

D. STATEMENT OF THE CASE

On September 4, 2014, approximately 1:04 a.m., Washington State Trooper Jason R. Bart was on patrol going southbound on North Division Street in Spokane. Near the intersection of Cleveland Avenue he observed a fast moving pickup truck headed northbound on Division Street. RP 24, 247-48. This vehicle was the only one on the roadway at the time. RP 41. Trooper Bart was able to speculate the truck was traveling 41 to 42 miles per hour in a 30 mile zone. RP 24, 247-48. Trooper Bart turned his patrol car around and caught up with the truck near the intersection of Garland Avenue where he paced the truck traveling 40 in a 30 mile per hour zone. RP 24.

The truck then turned left onto West Lacrosse Avenue. RP 24, 248, 275. Trooper Bart followed the truck onto Lacross and activated his emergency lights, but not his siren. RP 24, 248, 276. The truck continued to travel roughly one block, pulling over near the intersection of West Lacrosse Avenue and 4500 North Atlantic Street. RP 24, 248. Prior to pulling over, there was no evidence that the truck weaving, drifting into other lanes of travel or other suggestion of erratic or impaired operation of the vehicle by the driver. RP 24, 40, 247-48, 276.

Trooper Bart immediately contacted the driver, Jerry Huntoon, who had exited his vehicle. RP 24-25. Mr. Huntoon placed his keys on the tool box inside the bed of his truck. RP 249, 251. After doing so, he identified himself to the Trooper. RP 249-50. Mr. Huntoon advised the officer that he lived at the residence immediately adjacent to where he parked. RP 25, 249, 277-78. Mr. Huntoon explained that he had not seen the over head lights of the patrol car until after he had stopped in front of his home. RP 39, 278, 374. Mr. Huntoon stated he had not heard any instruction from Trooper Bart to stay in his truck, until after he had already exited his vehicle. RP 374.

Trooper Bart noticed that Mr. Huntoon's eyes seemed red and watery, his face appeared flushed and there was an odor of intoxicants. RP 25, 38, 250, 278. He also opined that Mr. Huntoon seemed "stunted" and he had an "intoxicated appearance" about him. RP 25, 28. Mr. Huntoon was then asked whether he had anything to drink that evening. Mr. Huntoon responded that he had two drinks. RP 26, 27, 250, 251, 279, 374.

Trooper Bart asked whether Mr. Huntoon would agree to take the field sobriety tests. RP 251. He informed Mr. Huntoon that the tests were not mandatory in any sense, but were strictly "voluntary" in nature. RP 26, 35, 251, 279-80. Mr. Huntoon declined to take the field tests. RP 26, 251-52, 279. Trooper Bart acknowledged that Mr. Huntoon was neither argumentative nor disagreeable in this regard, but simply chose not to take the field sobriety tests offered him. RP 27-28, 252, 375. Trooper Bart testified on direct examination at motions and trial that he had a "conversation" with Mr. Huntoon about what it means when a person refuses to take the field sobriety tests. RP 27, 251. He testified that he told Mr. Huntoon "essentially the person doesn't think they're sober enough to pass the tests" and ". . . you say you only had two drinks, but your not willing to show me your sober." RP 27, 251. The State then pressed, "[d]id he make any response to that statement?" and "[w]hat happened at that point?" RP 27, 251. Trooper Bart responded "He didn't disagree. . .", and, at trial, "[he] said he wasn't". RP 27, RP 251. And further, as if to add emphasis, Trooper Bart went on to testify that he explained to Mr. Huntoon how he (the Trooper) would have to make a decision based only on what he had so far, and that Mr. Huntoon understood this but was still choosing not to take the field sobriety tests. RP 28-29, 251. Trooper Bart later testified that Mr. Huntoon's refusal to take the field sobriety tests was a "bad sign" that demonstrated he must have had something to hide. RP 38,

279-82, 294.

Trooper Bart, in summary, told the Court and the jury he decided to seize and arrest Mr. Huntoon because, 1) he was speeding, 2) it was 1:00 A.M. in the morning, 3) he did not stay in his truck, 4) he put his keys on the truck, 5) his facial expression, 6) bloodshot watery eyes, 7) odor of intoxicants, and 8) because he refused the field sobriety tests. RP 28, 251. Trooper Bart concluded that Mr. Huntoon was under the influence and not safe to drive. RP 251-53. Mr. Huntoon was handcuffed and placed under arrest. RP 28, 40-41, 287-88. This arrest occurred only a couple of minutes after Mr. Huntoon had first been contacted by the Trooper. RP 287-88. This immediate arrest took place in spite of the fact that there was no evidence presented that Mr. Huntoon had slurred speech, that he was experiencing any difficulty in communicating with Trooper Bart, or displayed any inability to understand or comprehend what was transpiring. Neither was there any evidence presented was he unsteady on his feet or struggling with his motor skills. RP 40, 284-85.

On September 8, 2014, Mr. Huntoon, was charged by information with Count I: felony driving while under the influence in violation of RCW 46.61.502(1)(a) and (b), (6)(a) and having previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(13), Count II: first degree driving while license suspended or revoked in violation of RCW 46.20.342(1)(A) and Count III: violation of ignition interlock requirement in violation of RCW 46.20.740(G). CP 1-2. On May 14, 2015,

Count 1 of the information was amended by the State wherein it was alleged that Mr. Huntoon "had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood and/or while under the influence of or affected by intoxicating liquor or any drug; and further, the defendant previously incurred four or more prior offenses within ten years as defined in RCW 46.61.5055(14)." CP 11-12. The amended information mirrored the alternative language set forth in RCW 46.61.502(1)(a) and (b).

On October 28, 2015, Mr. Huntoon filed a motion to suppress all evidence obtained by law enforcement following his arrest for driving under the influence on September 4, 2014, insofar as there was no probable cause to support the arrest under Article I, section 7, of the Washington State Constitution. CP 15, 26- 20. That motion was not heard until immediately prior to trial on January 26, 2016. RP 14, 53. The Superior Court ruled that there was, under the totality of the circumstances, including his refusal to take the field sobriety tests, probable cause to arrest Mr. Huntoon. RP 54.

The case proceeded to trial before a jury on January 27 and 28, 2016. The jury returned a verdict of guilty of the crime of driving while under the influence as charged on January 26, 2016. RP 427-29; CP 73.

On June 8, 2017, the Court of Appeals, Division III, filed an unpublished opinion affirming the conviction.

E . ARGUMENTS WHY REVIEW SHOULD BE ACCEPTED.

1. The Court of Appeals Decision Supporting the Trial Court's Finding that there was Probable Cause to Seize and Arrest Mr. Huntoon for Driving Under the Influence is in Conflict with Current Supreme Court Rulings. Review is Appropriate Pursuant to RAP 13.4 (b) (1) & (2).

Under both the Fourth Amendment and Article 1, Section 7, of the Washington Constitution, warrantees searches and seizures are per se unreasonable and violate constitutional protections. Terry v. Ohio, 392 U.S. 1, 16-19, 88 S.Ct. 1868, 20 L. Ed. 2d 889 (1968), State v. Parker, 139 Wn.2d 486, 527, 987 P.2d 73 (1999), State v. Ladson, 138 Wn.2d 343, 350-351, 979 P.3d 668 (1999). The State bears the burden of rebutting this presumption by demonstrating that a warrantees seizure or arrest falls within a recognized exception to the warrant requirement. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000).

Whether a person has been seized, implicating constitutional considerations, is a mixed question of law and fact. State v. Armenta, 134 Wn.2d. 1, 9, 948 P.2d 1280

(1997). "Where an officer commands a person to halt or demands information from the person, a seizure occurs". State v. Cormier, 100 Wn. App. 457, 460, 997 P.2d 950 (2000). Of particular importance in this case, a request to take field sobriety tests is now a "seizure" under the Washington State Constitution. State of Washington v. Mecham, 186 Wn.2d 128, 148, 375 P.3d 604 (2016).

Under Terry v. Ohio, supra 21, police officers may conduct a brief investigative detention where the seizure is based on 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion". State v. Mendez, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *quoting* Terry, supra at 21. The suspicion articulated to justify a *Terry* stop, however, cannot be generalized, it must show "a substantial possibility that criminal conduct has occurred or is about to occur". Mendez, supra at 223. In other words, the so called "circumstances" must be more consistent with criminal conduct than innocent conduct. Mendez, supra.

In Mr. Huntoon's case there was an initial seizure when he was asked to take field sobriety tests, which Mr. Huntoon refused, and an actual arrest based on very limited observations by Trooper Bart. As set forth in detail in the facts above, there was no objective evidence whatsoever that Mr. Huntoon was under the influence of or affected by alcohol or any drug at the time of his seizure and arrest. In

fact, this case is most conspicuous for what it lacks in reasonable suspicion or probable cause. The Trooper observed only bloodshot watery eyes and a smell of alcohol that was more consistent with criminal conduct than not. Speeding, getting out of the truck, putting his keys on the truck, a befuddled look on his face, and refusing to take the field sobriety tests are all within the realm of non criminal activity. What is noticeably lacking are signs that should be factored in to any evaluation of probable cause for this seizure or crime. Mr. Huntoon's actual motor skills, the impairment of which are normally associated with intoxication, were not affected at all at the time of his seizure and arrest. There is no indication Mr. Huntoon was sluggish, unsteady on his feet, that he swayed while walking or standing, or even that he slurred his words. Factors that were, for the most part, present in Mecham, supra at 131-132.

Mr. Huntoon, moreover, had no problem communicating with the Trooper, to the extent that the Trooper observed that Mr. Huntoon was processing well enough to understand a detailed discussion about why a refusal to take the field sobriety tests made him look guilty. The irony of that observation as a basis supporting a seizure or probable cause for intoxication is beyond comprehension given the recent ruling by this Court. This Court will clearly recognize a looming inconsistent

quandary. A seizure, the request to take the field sobriety tests and refusal, was cited by the Trial Court and the Court of Appeals as one aspect of the "totality of the circumstances" for the initial seizure and probable cause for the subsequent arrest. RP 54, Appendix A, page 8.

The "totality of the circumstances" test for reasonable suspicion or probable cause cannot give carte blanch authority for an officer to arrest a person simply because that person refuses to cooperate. That is the inherent danger. There must be a nexus between the "circumstances" and the crime for which a person is seized. In this case, the Trooper's observations, and whether the person exhibits indications of impaired ability to operate a motor vehicle. The Courts are charged with protecting the public from unreasonable search and seizure. Where are we if we concede that if the officer says he thought there was probable cause there was probable cause. This case lacks all indication that the Trooper observed any symptom or conduct that would indicate Mr. Huntoon's ability to operate a motor vehicle was lessened in any appreciable degree by the consumption of alcohol prior to his asking Mr. Huntoon to take the field sobriety test or placing Mr. Huntoon under arrest.

Based upon the foregoing, Mr. Huntoon respectfully requests this Court accept review of the Court of Appeals decision upholding the Trial Court's finding of probable

cause for the seizure and subsequent arrest of Mr. Huntoon, and reverse that ruling.

2. The Court of Appeals ruling that the State did not Violate Mr. Huntoon's Right to Remain Silent when it Elicited Testimony From the Trooper on Direct Examination that Mr. Huntoon's Refusal to Take the Field Sobriety Tests was Indicative of Guilt is in Conflict with Supreme Court rulings and Makes Review by the Supreme Court Appropriate Under RAP 13.4 (1)(2) & (3).

The Fifth Amendment to the United States Constitution as well as Article one, section nine of the Washington State Constitution guarantee that no person in a criminal case shall be compelled in any criminal case to give evidence against himself. State v. Unga, 165 Wn.2d 95, 196 P.3d 645 (2008). In State v. Modica, 18 Wn App. 467, 475, 569 P.3d 1161 (1977), the Court quoted the United States Supreme Court in Doyle v. Ohio, 426 U.S. 610, 617-619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976), in stating ". . . it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial".

This case unique in the fact that Mr. Huntoon was compelled to be a witness against himself by the use by the State in pretrial motions and at trial of reference to his refusal to take the field sobriety tests as evidence of guilt. This was not just a simple reference to a "refusal". Even should this Court determine that a refusal to take the field sobriety is not testimonial for the purpose of the right to remain silent, this case was rife with testimony that Mr. Huntoon's refusal to take the field sobriety tests was demonstrative of his consciousness of guilt. Trooper Bart testified repeatedly that Mr. Huntoon would, in essence, take those tests to "show" him he was not intoxicated if he were not, and that he discussed the implications of not taking the field sobriety test with Mr. Huntoon in detail. He testified that Mr. Huntoon understood but refused anyway, and that refusal was an implication of guilt. This testimony negated the effect of any limiting instruction that may have been proffered by either party, and squarely told the Jury that Mr. Huntoon did not take those tests because he believed himself to be intoxicated. This implication goes well beyond what this Court deemed appropriate in Mecham, supra, and allowed the Jury to infer guilt from the refusal. To that extent, Mr. Huntoon was compelled to be a witness against himself beyond what would normally be displayed in a public context, and his Constitutional rights against self incrimination and to remain silent were

violated.

Based on these several violations of Mr. Huntoon's Constitutional rights to remain silent, he respectfully requests this Court accept review and reverse the Court of Appeals decision affirming the conviction in the Trial Court.

F. CONCLUSION

Based on the foregoing, Jerry D. Huntoon respectfully requests the Court grant review and reverse the Court of Appeals rulings on the grounds set forth above.

Respectfully Submitted this 10th, day of July, 2017.

TRACY SCOTT COLLINS, # 20839
Attorney for Jerry D. Huntoon

APPENDIX A

FILED
JUNE 8, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. JERRY DALE HUNTOON, Appellant.	)	No. 34359-6-III UNPUBLISHED OPINION

LAWRENCE-BERREY, A.C.J. — Jerry Dale Huntoon appeals his conviction for felony driving under the influence (DUI). He argues the trial court erred twice: first, when it denied his pretrial motion to suppress; and second, when it instructed the jury it need not be unanimous as to which alternative means for felony DUI had been proved, provided each juror finds one of the alternative means proved beyond a reasonable doubt.

Mr. Huntoon also argues in a statement of additional grounds for review (SAG) that: (1) his sentence exceeds the statutory maximum, (2) the State did not present adequate proof of prior convictions at sentencing, (3) trial counsel was ineffective for not showing the video recording of his traffic stop and arrest, and (4) his offender score was improperly calculated with out-of-state DUI convictions. We agree that Mr. Huntoon's

sentence exceeds the statutory maximum and remand for the trial court to either amend the community custody term or resentence Mr. Huntoon. In all other respects, we affirm.

FACTS

Factual background

On September 4, 2014, around 1:00 a.m., Trooper Jason Bart of the Washington State Patrol observed a truck coming toward him traveling over the posted speed limit of 30 m.p.h. Trooper Bart used his radar gun and determined the truck was traveling 41 to 42 m.p.h. He followed the truck.

The truck made a left turn and Trooper Bart activated his emergency lights. The truck continued one block and then pulled over near a house. Despite Trooper Bart's warnings to remain in the truck, the driver, later identified as Mr. Huntoon, got out of the truck and placed his keys on top of a tool chest in the bed of the truck. Mr. Huntoon told Trooper Bart that he lived at the house where he had stopped.

Trooper Bart noticed that Mr. Huntoon's eyes were bloodshot and watery, his face was flushed and had a stunned or intoxicated expression. Trooper Bart was aware from many prior DUI arrests that these were typical indicators of alcohol consumption.

The two spoke briefly outside the truck. Trooper Bart smelled intoxicating liquor coming from Mr. Huntoon. Mr. Huntoon told Trooper Bart he had had two drinks.

Trooper Bart asked Mr. Huntoon if he would perform field sobriety tests and take a portable breath test. Mr. Huntoon declined. Trooper Bart commented, "'You had two drinks and you're not willing to show you're sober?'" Clerk's Papers (CP) at 29. Mr. Huntoon shook his head. Trooper Bart then arrested Mr. Huntoon for suspicion of DUI and took him to a facility where Mr. Huntoon could provide breath samples. An hour after he parked his truck, Mr. Huntoon gave breath samples registering blood alcohol content of 0.157 and 0.156.

Procedural history

The State charged Mr. Huntoon with violation of ignition interlock requirement, and with first degree driving while license suspended or revoked. The State also charged Mr. Huntoon with felony DUI by the alternative means of: (1) having a blood or breath alcohol concentration of 0.08 or higher (per se), or (2) while under the influence of or affected by intoxicating liquor or any drug (affected by).

Mr. Huntoon moved the court for a hearing on his motions pursuant to CrR 3.5 and CrR 3.6. His CrR 3.6 motion challenged only probable cause to arrest. Trooper Bart testified at an evidentiary hearing and the video recording of Mr. Huntoon's arrest was played. Mr. Huntoon's counsel agreed to show the video for purposes of the hearing, but

noted a forthcoming objection to the jury seeing the video. At the conclusion of the hearing, the trial court ruled on the motions, and for the suppression motion stated:

> THE COURT: The Court had an opportunity to hear the testimony, obviously watch the video that was done.
>
> I would agree that in order to find probable cause, the Court has to look at the totality and the facts and circumstances that were known to the officer at the time of the arrest, that a reasonably cautious person to believe an offense was committed.
>
> In looking over the testimony that the trooper gave, the trooper noted that he was speeding 40 in a 30. That is a violation of the traffic laws. So based on that and the officer had cause to stop him for the violation of the speeding. The trooper noted that he failed to stop quickly, and that he actually made a turn, failed to follow directions by not remaining in the truck, the odor of alcohol, the flush face, the bloodshot watery eyes, the refusal to do the [field sobriety tests], and the admission to two drinks, obviously with his training and experience looking at the totality of the circumstances, is there enough at this time to determine there's probable cause with the totality of the circumstances? It doesn't have to be bad driving or sloppy driving. It's was there a violation of the traffic laws.
>
> . . . So at this time, the Court would have to find that there's probable cause for the arrest based on the totality of the circumstances.

Report of Proceedings (RP) at 54-55. Mr. Huntoon subsequently pleaded guilty to a violation of ignition interlock requirement and to first degree driving while license suspended or revoked.

Mr. Huntoon brought several motions to exclude evidence, including the video of his arrest. The State stipulated to not showing the video to the jury. Mr. Huntoon stipulated to having four or more qualifying offenses.

The parties presented their cases and the trial court instructed the jury. The trial court gave the following to-convict instruction:

> To convict the defendant of the crime of felony driving while under the influence, each of the following three elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 4, 2014, the defendant drove a motor vehicle in the State of Washington;
>
> (2) That the defendant at the time of driving a motor vehicle
>
> (a) was under the influence of or affected by intoxicating liquor[1] or
>
> (b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant's breath
>
> and
>
> (3) That the defendant has four or more prior offenses within ten years.

CP at 65.

The jury found Mr. Huntoon guilty of felony DUI. At sentencing, the State offered Mr. Huntoon's Michigan driving record and certified docket documents as proof of his prior convictions for DUI, which the trial court scrutinized in the record before accepting. Mr. Huntoon objected, arguing that the State did not provide a certified copy of the judgment and sentence for each conviction. Eventually, Mr. Huntoon stipulated that he

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[1] The State withdrew the "or any drug" language that appeared in its amended information.

was the same person as the person mentioned in the documents and that the State's proof was sufficient.

Next, Mr. Huntoon challenged the inclusion of his Michigan DUI convictions, arguing that they were not comparable to the Washington equivalent. The trial court disagreed and found that they were legally comparable despite allowing the State to prove blood alcohol concentration for a per se DUI via urine testing.

The trial court sentenced Mr. Huntoon to 60 months' confinement and 12 months' community custody. The judgment and sentence contained a *Brooks*[2] notation that read, "combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701." CP at 90. Mr. Huntoon timely appealed.

ANALYSIS

MOTION TO SUPPRESS

Mr. Huntoon contends the trial court erred in denying his motion to suppress. He contends Trooper Bart lacked probable cause to arrest him for DUI. The trial court did not enter written findings of fact and conclusions of law pertaining to Mr. Huntoon's denied motion.

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[2] *In re Pers. Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009).

This court reviews a trial court's denial of a suppression motion to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law. *State v. Radka*, 120 Wn. App. 43, 47, 83 P.3d 1038 (2004). This court reviews conclusions of law de novo. *Id.* If a trial court did not enter written findings and conclusions after the hearing as required by CrR 3.6(b), the court's oral ruling may still provide sufficient information for review. *Id.* at 48.

A. *Probable cause*

Mr. Huntoon does not challenge the trial court's oral findings, only the conclusion of law that Trooper Bart had probable cause to arrest him. Whether probable cause exists is a legal question we review de novo. *State v. Grande*, 164 Wn.2d 135, 140, 187 P.3d 248 (2008). "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). Probable cause requires more than "[a] bare suspicion of criminal activity." *Id.* However, it does not require facts that would establish guilt beyond a reasonable doubt. *State v. Conner*, 58 Wn. App. 90, 98, 791 P.2d 261 (1990). The probable cause determination "rest[s] on

the totality of facts and circumstances within the officer's knowledge at the time of the arrest." *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979).

The totality of the undisputed facts and circumstances known to Trooper Bart at the time of arrest include the following. It was very late at night and Mr. Huntoon's vehicle was the only one on the road. Mr. Huntoon was traveling 42 m.p.h. in a 30 m.p.h. zone. Once stopped, Mr. Huntoon disobeyed commands to stay in his truck. Trooper Bart saw that Mr. Huntoon's face was flushed with an intoxicated expression and that his eyes were watery and bloodshot. When the two began speaking to each other, Trooper Bart noticed the smell of intoxicants coming from Mr. Huntoon. Mr. Huntoon admitted he had two beers that night. Despite admitting to only two beers, Mr. Huntoon declined to do field sobriety tests or take a portable breath test to confirm his sobriety.

Mr. Huntoon argues that alternative explanations could satisfy many or all of these facts individually. But Trooper Bart needed only probable cause to suspect a crime had been committed, not certainty. The totality of the circumstances was sufficient to warrant a person of reasonable caution in believing that Mr. Huntoon had been driving while affected by intoxicants. The trial court did not err in concluding that Trooper Bart had probable cause to arrest Mr. Huntoon for DUI.

B. *Pretext*

Mr. Huntoon argues for the first time on appeal that the traffic stop was pretextual. Mr. Huntoon did not offer this argument to the trial court in his suppression motion and, he does not attempt to argue or show with citation to authority that the error is manifest. RAP 2.5(a). However, because of constitutional implications, courts have accepted review of a new pretext theory in favor of suppression when a defendant brought a suppression motion below. *See State v. Gallo*, 20 Wn. App. 717, 724, 582 P.2d 558 (1978).

The argument still fails because Trooper Bart determined that Mr. Huntoon was driving substantially above the speed limit and stopped him for that violation. When an actual and legitimate reason exists for a traffic stop, and the officer consciously stops a driver for that reason, it is irrelevant that the officer may have also been motivated to investigate a different offense. *State v. Arreola*, 176 Wn.2d 284, 300, 290 P.3d 983 (2012).

ALTERNATIVE MEANS AND JURY UNANIMITY

Mr. Huntoon next contends the trial court violated his right to a unanimous verdict when it instructed the jury that it need not be unanimous on the two alternate means charged, provided that each juror was convinced beyond a reasonable doubt that the State

had proved one of the means. Mr. Huntoon argues that because substantial evidence does not support each alternative means and there is no express jury unanimity, reversal and remand is required. We disagree, substantial evidence does support each alternative means.

Criminal defendants in Washington have a right to a unanimous jury verdict. CONST. art. I, § 21; *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). "The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury." *Ortega-Martinez*, 124 Wn.2d at 707. Jury unanimity is not required if substantial evidence supports each alternative means. *State v. Kitchen*, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). The evidence is sufficient if "'after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.'" *Ortega-Martinez*, 124 Wn.2d at 708 (quoting *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)). This issue may be raised for the first time on appeal. RAP 2.5(a); *State v. Handyside*, 42 Wn. App. 412, 415, 711 P.2d 379 (1985).

A recent Washington Supreme Court case discusses the unanimity issue presented here in the context of a DUI conviction. *State v. Sandholm*, 184 Wn.2d 726, 364 P.3d 87 (2015). The *Sandholm* court abrogated a prior case to the extent the prior case held that the various affected by prongs of DUI provided alternative means. *Id.* at 736 (abrogating *State v. Franco*, 96 Wn.2d 816, 639 P.2d 1320 (1982)). However, Mr. Huntoon's case does not involve various affected by means; rather, it involves a per se means and an affected by means. RCW 46.61.502. Driving with a blood alcohol concentration of at least 0.08 and driving while affected by intoxicants describe two different criminal acts, and a violation of the per se prong is not necessarily a violation of the affected by prong. Because *Sandholm* does not control, we address the unanimity issue.

The State presented substantial evidence to support the per se means and the affected by means. The State presented evidence that Mr. Huntoon's blood alcohol level was twice the legal limit of 0.08. The State also presented circumstantial evidence that Mr. Huntoon's ability to drive was lessened by any appreciable degree. Specifically, the State's evidence showed that on exiting his truck, Mr. Huntoon smelled of intoxicants, had a flushed face, and bloodshot watery eyes. In addition, Mr. Huntoon refused to perform field sobriety tests. A jury could have inferred that Mr. Huntoon refused because he believed he was affected by alcohol. Considering the circumstantial evidence as a

whole, a jury could have found beyond a reasonable doubt that Mr. Huntoon drove his truck while affected by alcohol to any appreciable degree. Because sufficient evidence supports each means, a unanimity instruction was not required.

SAG ISSUE I: SENTENCING: EXCEEDS THE STATUTORY MAXIMUM

Mr. Huntoon next argues the trial court sentenced him to a term of confinement in excess of the statutory maximum when it sentenced him to 60 months of confinement and 12 months of community custody and included a *Brooks* notation. We agree that the sentence exceeded the then statutory maximum for this crime.

A defendant may challenge a sentencing error for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). A defendant's sentence cannot exceed the statutory maximum term for the class of crime for which the offender was convicted. RCW 9A.20.021(1). Terms of confinement and community custody are both included in the calculation of the statutory maximum term, and the combination of the two cannot exceed the statutory maximum. RCW 9.94A.505(5); *State v. Boyd*, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). *Brooks* notations no longer comply with statutory sentencing requirements. *Boyd*, 174 Wn.2d at 472. The trial court must reduce the amount of community custody in order to avoid a sentence in excess of the statutory maximum. *Id.* at 473.

Mr. Huntoon was arrested on September 4, 2014, for DUI. The jury found him guilty of felony DUI on January 28, 2016, and the trial court sentenced him on March 18, 2016. At the time of the offense, the conviction, and the sentence, felony DUI was a class C felony.[3] The statutory maximum for a class C felony is five years. RCW 9A.20.021(1)(c). Mr. Huntoon's combined sentence amounts to six years. The remedy is to remand for the trial court to either amend the community custody term or resentence Mr. Huntoon consistent with RCW 9.94A.701(9).

SAG ISSUE II: SENTENCING: PROOF OF PRIOR CONVICTIONS

Mr. Huntoon next contends that the State did not meet its burden of proof in proving his prior convictions beyond a reasonable doubt at sentencing. We disagree with Mr. Huntoon's argument.

"[T]he best method of proving a prior conviction is by the production of a certified copy of the judgment, but 'other comparable documents of record or transcripts of prior proceedings' are admissible to establish criminal history." *In re Pers. Restraint of Adolph*, 170 Wn.2d 556, 568, 243 P.3d 540 (2010) (citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)). The State's burden of proving the conviction is a

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[3] On March 31, 2016, the legislature amended RCW 46.61.502 to make felony DUI a class B felony, effective June 9, 2016. LAWS OF 2016, ch. 87, § 1.

preponderance of the evidence, and that burden is "not overly difficult to meet" and evidence that bears some "minimum indicia of reliability" will suffice. *Adolph*, 170 Wn.2d at 569.

The State relied on stipulations to prove some convictions, certified copies of the judgment for some convictions, and certified docket texts for earlier, out-of-state convictions. The sentencing transcript shows that the trial court carefully read into the record and reviewed all of the submissions by the State to ensure that the documents were reliable. Mr. Huntoon stipulated that the prior Michigan judgments were sufficient proof that he had committed the Michigan offenses and that the only issue was whether the offenses were comparable. Given the stipulation, which appears to be reasonable given the State's proof, Mr. Huntoon is precluded from now arguing that the State's proof was insufficient. *State v. Huff*, 119 Wn. App. 367, 372-73, 80 P.3d 633 (2003).

SAG ISSUE III: INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Huntoon next contends that his trial counsel rendered ineffective assistance of counsel when counsel failed to present to the jury the video recording of his arrest. He argues that during voir dire, potential jurors stated they would like to see physical manifestations of impairment, and the video would help convince the jury that he was not impaired.

The Sixth Amendment to the United States Constitution gives a defendant the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, a defendant must prove the following two-pronged test:

> (1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). There is a strong presumption that counsel's performance was reasonable. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To rebut this presumption, the defendant bears the burden of establishing that no conceivable legitimate tactic exists to explain counsel's performance. *Id.*

Here, legitimate trial tactics explain the decision not to introduce the video. Mr. Huntoon's counsel was concerned that a video of Mr. Huntoon not immediately responding to the police lights, ignoring instructions to stay in the truck, and later being

handcuffed and arrested would be more prejudicial to his case than helpful. Mr. Huntoon's counsel even made a pretrial objection to prevent the jury from seeing the video. The State stipulated that it would not show the video to the jury to avoid prejudice. Defense counsel was justified in preventing the jury from seeing the video for these reasons.

SAG ISSUE IV: OFFENDER SCORE CALCULATION: OUT-OF-STATE CONVICTIONS

Mr. Huntoon next contends the trial court erred in calculating his offender score by using out-of-state convictions for DUI.

This court reviews a superior court's offender score calculation and the trial court's classification of an out-of-state conviction de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003); *State v. Labarbera*, 128 Wn. App. 343, 348, 115 P.3d 1038 (2005).

When sentencing a criminal defendant, a trial court determines the standard sentencing range by finding the intersection of the current offense's "seriousness level" and the defendant's offender score on the sentencing grid. RCW 9.94A.530(1). The offender score measures a defendant's criminal history and the sentencing court calculates it by totaling the defendant's applicable prior convictions. *Ford*, 137 Wn.2d at 479.

If a conviction is from another jurisdiction, the State must prove that the conviction would be comparable under Washington law. *Id.* at 480. In determining whether the conviction is comparable, the sentencing court first determines whether the conviction is legally comparable—that is, whether the elements of the out-of-state offense are substantially similar to the elements of the Washington offense. *State v. Thiefault*, 160 Wn.2d 409, 415, 158 P.3d 580 (2007). The elements of the out-of-state offense must be compared to the elements of the Washington offense in effect when the foreign crime was committed. *State v. Morley*, 134 Wn.2d 588, 597, 952 P.2d 167 (1998). If the elements of the out-of-state offense are broader than the elements of the Washington offense, the conviction is not legally comparable. In that event, the sentencing court must then determine whether the conviction is factually comparable—that is, whether the conduct underlying the out-of-state offense would have violated the comparable Washington statute. *Thiefault*, 160 Wn.2d at 415. If the conviction is either legally or factually comparable, the out-of-state conviction can be included in the offender score. *Id.*

Legally comparable

Prior to 1998, the elements of DUI in Washington were: (1) the accused drove a vehicle in the state while (2)(a) having an alcohol concentration of 0.10 or higher within

two hours after driving as shown by breath or blood testing, or (b) while under the influence of or affected by intoxicating liquor or any drug, or (c) while under the combined influence of any drug and intoxicating liquor. Former RCW 46.61.502(1) (1994); *see also State v. Rivera-Santos*, 166 Wn.2d 722, 728, 214 P.3d 130 (2009) (interpreting newer but substantially similar version of statute). In 1998, the legislature lowered the legal limit to a blood alcohol concentration of 0.08. LAWS OF 1998, ch. 213, § 3. The Washington statute limits proof of alcohol concentration to blood or breath testing.

The trial court calculated Mr. Huntoon's offender score by including his three 1995 Michigan operating while intoxicated (OWI) misdemeanor convictions and his 1997 and 2000 Michigan OWI felony convictions. During those years, Michigan's OWI statute prohibited:

> (1) A person, whether licensed or not, shall not operate a vehicle upon a highway or other place open to the general public or generally accessible to motor vehicles, including an area designated for the parking of vehicles, within this state if either of the following applies:
>
> (a) The person is under the influence of intoxicating liquor or a controlled substance, or a combination of intoxicating liquor and a controlled substance.
>
> (b) The person has an alcohol content of 0.10 grams or more per 100 milliliters of blood, per 210 liters of breath, *or per 67 milliliters of urine.*

S.B. 631, 87th Leg., Reg. Sess. (Mich. 1994) (emphasis added); Former MCL 257.625(1) (1995); Former MCL 257.625(1) (1997); Former MCL 257.625(1) (1999).

Mr. Huntoon argues the Washington and Michigan statutes are not legally comparable because the latter allows proof of alcohol content by the additional means of a urine test. Mr. Huntoon's argument misses the point of legal comparability. The point of legal comparability is to determine whether a violation of the out-of-state statute would necessarily be a violation of the comparable Washington statute. This is done by comparing the elements of the out-of-state statute with the elements of the Washington statute. Here, it is obvious that the former Michigan OWI statute proscribes driving with an alcohol content of 0.10 blood alcohol content or greater. Thus, a person whose conduct violated the Michigan statute also would have violated the Washington statute. For this reason, the Michigan OWI statute and the Washington DUI statute are legally comparable. We conclude the trial court did not err by counting the Michigan OWI convictions as prior convictions for calculating Mr. Huntoon's offender score.

Affirmed, but remand to either strike or amend the community custody term.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, A.C.J.

WE CONCUR:

Korsmo, J.

Siddoway, J.

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	)	No. 34359-6-III
vs.	)	CERTIFICATE OF SERVICE
JERRY D. HUNTOON, Petitioner.	)	

COMES NOW Tracy Scott Collins, attorney for Petitioner, and certifies that on July 10, 2017, I served a copy of the Petition for Review to The Washington State Supreme Court on the Spokane County Prosecuting Attorney at 1100 W. Mallon, Spokane, WA 99260 by personal service at that office, and on Jerry D. Huntoon by mail in the United States Postal Service at Airway Height

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Correctional Facility.

I certify under penalty of perjury under the law of the State of Washington that the foregoing is true and correct.

DATED this 10, day of JULY, 2017, at Spokane, Washington.

TRACY SCOTT COLLINS
Attorney at Law, WSBA #20839