

65125-1

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NO. 65125-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON O'GRADY

Appellant.

2010 SEP -9 PM 3:44
COURT OF APPEALS
STATE OF WASHINGTON
FILED

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

The Honorable Steven J. Mura, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information was constitutionally deficient as it did not include all essential elements for felony driving under the influence (DUI).

2. The State provided insufficient evidence of the four prior offenses needed to support a felony DUI conviction.

3. The trial court erred when it sentenced appellant beyond the statutory maximum term.

Issues Pertaining to Assignments of Error

1. RCW 46.61.502(1) and (6) require the State to prove a defendant charged with felony DUI has been convicted of four prior DUI offenses within the last 10 years. Any prior conviction beyond 10 years is too remote and cannot support a felony DUI conviction. The information charged appellant had been previously convicted of four DUI offenses, but it did not charge that the prior offenses occurred within the last 10 years. Was the information constitutionally deficient?

2. To support a felony DUI conviction, the State sought to prove the necessary prior DUI offenses by offering documentary evidence of four prior judgments. Although the subject of the judgments was identified as Jason O'Grady, the State was required

to prove beyond a reasonable doubt appellant was the “Jason O’Grady” referenced in the documents. The State’s only evidence connecting appellant to the documents was the arresting officer’s testimony about what he believed to be appellant’s date of birth (DOB). However, there is no proof that the officer obtained this evidence from data obtained from a source other than the judgments. Was the evidence insufficient to support a felony DUI conviction?

3. Did the trial court err when it sentenced appellant potentially in excess of the statutory maximum term without specifically stating the term of confinement combined with the term of community custody could not exceed the sixty-month statutory maximum?

B. STATEMENT OF THE CASE

On November 4, 2009, officers noticed the car appellant Jason O’Grady was driving had only one functional headlight. RP 19, 95. Officer Dave Hintz pulled him over. RP 96.

After O’Grady had stopped but before Hintz approached his window, O’Grady swallowed a large quantity of heroin, perhaps as much as 16 grams. RP 126, 208; CP 36. When Hintz approached O’Grady’s window, he noticed O’Grady was jittery and had

extremely restricted pupils. RP 98. Hintz asked O'Grady for his driver's license, but O'Grady did not have one. RP 101. He produced a Washington State Identification (WSI) card instead. RP 101. The WSI card identified appellant as Jason O'Grady.¹ RP 101. Hintz took the card and ran O'Grady's name on his computer, discovering that a Jason O'Grady had a suspended license and prior convictions for driving under the influence (DUI).² RP 102.

Hintz asked O'Grady to step out of the car and conducted field sobriety tests, which O'Grady failed. RP 103-118. O'Grady voluntarily submitted to a portable breath test, showing he was not under the influence of alcohol. RP 118-19.

Hintz believed O'Grady was under the influence of some narcotic and arrested him. RP 119. Hintz testified he read O'Grady the adult version of his Miranda³ rights because he believed O'Grady's DOB was August 6, 1970. RP 125.

¹ Notably, Hintz did not testify he obtained a DOB from the WSI card appellant submitted. RP 101, 125.

² Again, Hintz did not testify that he had identified appellant's DOB prior to accessing computer data on "Jason O'Grady." RP 102.

³ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Upon searching O'Grady, Hintz discovered marijuana and a scale with trace amounts of heroin. RP 65, 119-22. Afterward, O'Grady informed Hintz he had just eaten a large amount of heroin, had injected a gram of heroin about hour prior, had taken Kloponin and valium, and had smoked some marijuana and methamphetamine. RP 126-128.

O'Grady was taken to the hospital and read the implied consent warnings. RP 131. He consented, and blood was drawn. RP 131. Ultimately, the blood work indicated the presence of the drugs O'Grady had admitted taking. RP 145-46, 149, 221-29.

On November 10, 2009, the Whatcom County prosecutor charged O'Grady with one count felony DUI, one count unlawful possession of heroin, one count driving with a suspended license, and one count unlawful possession of marijuana.⁴ CP 37-39. Appellant waived his right to a jury trial and proceeded with a bench trial. CP 31-32.

At trial, the State offered certified copies of four DUI judgments with attached pleas to prove appellant had previously been convicted four times for driving under the influence. RP 186-

⁴ This last count was dismissed prior to trial, due to the prosecutor's failure to timely produce the necessary lab results. RP 11.

90. The name on the documents was the same as appellant's name. Ex. 14-17.

After the State rested, the defense moved to dismiss. RP 194. Defense counsel argued the State had not offered sufficient proof that appellant had been convicted of four prior DUIs. RP 194-95. Specifically, he cited State v. Huber, 129 Wn. App. 499, 119 P.3d 388 (2005), for the proposition that the State must provide evidence independent of the proffered documents affirmatively identifying appellant as the "Jason O'Grady" referred to in those documents. RP 195, 200-01.

In response, the State argued that Hintz had testified appellant was born on August 6, 1970, and three of the judgments identified the same DOB. RP 197. Ex. 15-17. According to the state, this provided a distinct identifying trait sufficient to establish that appellant was the subject of those judgments. RP 196. The prosecutor further argued that once his identity was established pertaining to those documents, the trial court could compare the signature on those documents with the one on the document without a DOB and conclude that appellant was also the James O'Grady referred to in that judgment. RP 196-97, 202; Ex. 14-17.

The trial court denied the motion to dismiss. RP 202. Looking at the evidence in the light most favorable to the State, it found the officer's testimony about the DOB was sufficient independent evidence to link appellant to the offered documents. RP 197-98, 202.

At the end of trial, the defense again challenged the sufficiency of the evidence offered by the State to prove the required four prior DUI convictions, citing Huber. RP 269-70. The trial court ultimately concluded appellant was previously convicted of four DUI offenses. CP 13-18; RP 288, 290.

O'Grady was sentenced on March 17, 2010. Regarding Count I, the trial court sentenced him to the maximum sentence of 60 months confinement. CP 22-25. It also sentenced him to a term of community custody for 9-18 months. CP 25. The trial court did not explicitly set forth that the combined amount of time must not exceed the statutory maximum sentence of 60 months. CP 21-30.

C. ARGUMENT

I. THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT AS IT DID NOT ALLEGE ALL ELEMENTS OF FELONY DUI.

All essential elements of a crime, statutory or otherwise, must be included in a charging document to afford notice to an

accused of the nature and cause of the accusation against him. Const. art. 1, § 22 (amend. 10). Appellate courts review a charging document challenged for the first time on appeal under a liberal standard. State v. Johnson, 119 Wn.2d 143, 149-50, 829 P.2d 1078 (1992). But even under that standard, the necessary elements must appear in some form. State v. O'Neal, 126 Wn. App. 395, 414, 109 P.3d 429 (2005). If an information fails to include all statutory elements, prejudice is presumed. State v. Moavenzadeh, 135 Wn.2d 359, 363, 956 P.2d 1097 (1998) (quoting State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995)).

Here, the charging language did not include all the statutory elements necessary of felony DUI, failing to afford O'Grady constitutionally required notice.

Felony DUI is committed when a person (1) drives a vehicle within this state, (2) is under the influence of intoxicants, and (3) has four or more qualifying prior offenses or has previously been convicted of vehicular homicide or vehicular assault. RCW 46.61.502(1), (6); State v. Castle, 156 Wn. App. 539, 543, 234 P.3d 260 (2010).

Regarding the last element, to qualify as a prior offense for purposes of elevating a DUI offense to a felony, the prior offense

must be a DUI that occurred within 10 years. RCW 46.61.502(6); Castle, 156 Wn. App. at 544-45. In other words, DUI convictions more than ten years old are too remote to support a felony DUI charge. Id. Hence, the ten-year time frame is an essential element of a felony DUI offense that must be set forth in a charging document.

Here, the information charged:

That on or about the 4th day of November, 2009, the said defendant, JASON HENRY O'GRADY, then and there being in said county and state, did drive a vehicle...while under the influence of or affected by an intoxicating liquor or drug...; And further, that the Defendant has four (4) or more prior offenses for Driving Under the Influence of Alcohol or Drugs as defined in RCW 46.61.5055; contrary to the Revised Code of Washington 46.61.502(1) & (6), which violation is a Class C Felony.

CP 38. While this language provides notice that the State must prove four or more prior DUI convictions, it does not provide notice that those convictions must have occurred within the last ten years. Thus, it is missing an essential element required under RCW 44.61.502(6).

Because the charging language does not include all essential elements of felony DUI, this Court should reverse O'Grady's felony DUI conviction and dismiss the charge. O'Neal,

126 Wn. App. at 415.

II. THE STATE'S EVIDENCE WAS INSUFFICIENT TO SUPPORT A FELONY DUI CONVICTION.

The evidence was insufficient to prove appellant was the same Jason O'Grady referenced in the judgments proffered by the State to prove the necessary prior convictions under RCW 44.61.502(6).

When criminal liability depends on the accused being the person to whom a document pertains, the State must do more than authenticate and admit documentary evidence -- it must prove that the person named in the document is the same person on trial. Huber, 129 Wn. App. at 502. It must do this by producing "evidence independent of the record." Id. (citations omitted). The State can meet this burden in multiple ways, including introducing booking photographs, booking fingerprints, eyewitness identification or distinctive personal information. Id.

Here, the State offered Hintz's testimony that he believed appellant's DOB was August 6, 1970 – a DOB which matched that on the proffered judgments. Because the burden was on the State to prove some distinctive personal trait, it needed to prove beyond a reasonable doubt Hintz's information was independent of the

judgments. The officer never stated where he obtained that information, however. While he could have obtained the DOB from the WSI card appellant handed him, it is just as likely that he obtained it from computer data generated from the same judgments being offered by the State. If it was the latter, then the DOB would not be independent of the judgments and would not satisfy Huber.

Without sufficient proof of appellant's DOB, the State was unable to link appellant to the judgments via independent evidence. Consequently, the evidence does not support a felony DUI conviction and appellant's felony conviction must be reversed. Huber, 129 Wn. App. at 503.

III. THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT BEYOND THE STATUTORY MAXIMUM TERM.

Under the SRA, a court may not impose a sentence in which the total time of confinement and community custody served exceeds the statutory maximum. RCW 9.94A.505(5).

Here, the trial court sentenced O'Grady to the statutory maximum confinement of 60 months, plus 9 to 18 months of community custody. CP 22, 25. When added together, the potential sentence exceeds the statutory maximum term of 60 months. The trial court did not clarify that the combined term of

custody and community custody could not exceed 60 months. Thus, "the appropriate remedy is to remand to the trial court to amend the sentence and explicitly state that the combination of confinement and community custody shall not exceed the statutory maximum." In re Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

D. CONCLUSION

For the reasons stated above, appellant respectfully asks this Court to reverse his felony DUI conviction and remand for resentencing.

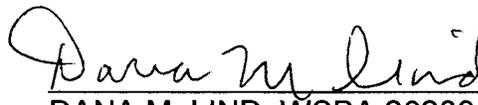
Dated this 9th day of September 2010.

Respectfully submitted

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Respondent,)	
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v.)	COA NO. 65125-1-I
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JASON O'GRADY,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF SEPTEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] WHATCOM COUNTY PROSECUTOR'S OFFICE
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[X] JASON O'GRADY
DOC NO. 950999
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF SEPTEMBER 2010.

x *Patrick Mayovsky*