

No. 70913-5-I

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

STATE OF WASHINGTON, Respondent,

v.

STEVEN HOUSER, Appellant.

BRIEF OF RESPONDENT

**DAVID S. McEACHRAN,
Whatcom County Prosecuting Attorney
By HILARY A. THOMAS
Appellate Deputy Prosecutor
Attorney for Respondent
WSBA #22007 / ADMIN. #91075**

**Whatcom County Prosecutor's Office
311 Grand Avenue, Second Floor
Bellingham, WA 98225
(360) 676-6784**

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A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the information charging the defendant with Felony Driving under the Influence was constitutionally defective for failure to cite an element of the offense where the information failed to allege that the prior offenses were committed within ten years.

C. FACTS

On May 22, 2013 Appellant Steven Houser was charged by information with Felony Driving under the Influence, in violation of RCW 46.61.502(1)(6), and Driving while License Suspended in the First Degree, in violation of RCW 46.20.342(1)(a), for his acts on or about May 19, 2013. CP 4-5. Houser was tried by a jury and found guilty of both offenses on August 14, 2013. CP 41-42. During the course of the trial Houser stipulated that he had four prior offenses within ten years. CP 8. He was sentenced on an offender score of 6, a standard range of 41-54 months on the felony, to 44 months imprisonment on the felony and assessed fines and other legal financial obligations.¹ CP 43-46; 9/16/13RP 4, 9, 12, 14.

¹ The State does not reference any other facts and is not addressing the other issues raised by Houser in this appeal because the State is conceding that the case must be dismissed

D. ARGUMENT

1. The State concedes that the information was constitutionally defective for failing to include the time period regarding the prior offenses.

Houser asserts that the information charging him with Felony Driving Under the Influence was defective because it did not include the language that the prior offenses occurred within ten years of the current offense. This Court held in State v. Cochrane that whether the prior offenses occurred within 10 years of the current offense is an element of the Felony Driving under the Influence that must be included in the information. Therefore, the State concedes that the information was constitutionally defective, and that the information should be dismissed without prejudice.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of a charging document is

without prejudice to refile. If the case is refiled and retried, the issue regarding the introduction of the documents underlying the four prior offenses will only arise again if Houser again stipulates to the four prior offenses occurring in ten years and if the State again seeks to introduce those documents. Similarly, the issue regarding the offender score and Houser's ability to pay his legal financial obligations, which were not raised by defense at sentencing here, will only arise if Houser is found guilty again. (Houser in fact agreed that his offender score was six and that the standard range was 41-54 months. 9/16/13RP 9). Presumably defense will raise those issues upon any new sentencing.

challenged for the first time on appeal, courts liberally construe the information in favor of validity. Id. at 103. A different standard of review is employed post verdict in order to “encourage defendants to make timely challenges to defective charging documents and to discourage ‘sandbagging,’ i.e., waiting to assert a defect in the charging document because asserting it in a timely manner would only result in an amendment of the information. Id. Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. If the information failed to allege the essential elements, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). “Essential elements consist of the statutory elements of the charged crimes and a description of the defendant’s conduct that supports every statutory element of the offense.” State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 493 (2009), *overruled on other grounds*, State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). It is

generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’ Kjorsvik, 117 Wn.2d at 100.

The offense of Felony Driving under the Influence is defined by RCW 46.61.502, and elevates the crime of driving under the influence to a Class C felony if, among other means, “the person has four or more prior offenses within ten years as defined in RCW 46.61.5055.” RCW 46.61.502(6)(a). Whether the prior offenses occurred within ten years is an element that the State must prove beyond a reasonable doubt and must be alleged in the information. *See, State v. Cochrane*, 160 Wn. App. 18, 23-24, 253 P.3d 95 (2011) (accepting State’s concession that the State must allege and prove beyond a reasonable doubt that the four prior offenses occurred within ten years). While “prior offenses” is further defined in RCW 46.61.5055, the specifics of the priors need not be alleged in the information. Cochrane, 160 Wn. App. at 25; *see also, State v. Chambers*, 157 Wn. App. 465, 237 P.3d 352 (2010) (whether a prior offense qualifies as an offense under RCW 46.61.5055 is not an essential element that must be proven to the jury).

The information here did not include an allegation that the prior offenses “occurred within ten years.” Under Cochrane, the information is constitutionally deficient even under the liberal standard of review because the information did not contain this essential element. The case must be dismissed without prejudice to refile and retry the case. Houser does not dispute this is the remedy.

E. CONCLUSION

The State concedes this Court must dismiss this case, but should do so without prejudice so that the State may refile the charges.

Respectfully submitted this 15th day of July, 2014.


HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
Admin. No. 91075

CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the foregoing document to this Court, and appellant's counsel of record, addressed as follows:

Whitney Rivera
Washington Appellate Project
1511 3rd Ave Suite 701
Seattle, WA 98101

T. A. Stavik
Legal Assistant

7/15/14
Date