

No. 42914-4-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

**TERRY JACOB,**

Appellant.

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

The Honorable Amber Finlay

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APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENTS OF ERROR**

1. The trial court violated Mr. Jacob's right to present a defense by excluding relevant evidence.

2. The sentencing court miscalculated Mr. Jacob's offender score.

3. Defense counsel provided ineffective assistance.

4. The trial court violated RCW 9.94A.701(9) when it imposed an indeterminate combined sentence of imprisonment and community custody.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Did the trial court violate Mr. Jacob's right to present a defense where it excluded evidence that the defendant consumed asthma medication that day, which was relevant to the test reading numbers used to prove both intoxication and the blood/alcohol alternatives of DUI?

2. Did the trial court, at sentencing, miscalculate Mr. Jacob's offender score as 9 by disregarding the offender scoring provisions of RCW 9.94A.525(2)(e), which limit the use of prior convictions for purposes of offender scoring and "washout" purposes in sentencing persons convicted of DUI?

3. May Mr. Jacob challenge the sentencing court's legal error on appeal, where the offender scoring issue in this case involves an argument of incorrect application of the law?

4. Was defense counsel ineffective to the extent that he may have contributed to the court and parties' disregard of the proper statutory authority applicable to sentencing in DUI cases?

5. The Sentencing Reform Act (SRA) is the sole source of a trial court's sentencing authority. RCW 9.94A.701(9) requires that, where the combined term of community custody and confinement exceed the statutory maximum for an offense, the court must reduce the term of community custody. Where the trial court imposed a 60-month sentence of imprisonment, the maximum term for Mr. Jacob's felony DUI conviction, and imposed a 12-month term of community custody, must this Court correct the erroneous sentence?

### **C. STATEMENT OF THE CASE**

**1. Charging.** Terry Jacob was charged with Felony Driving Under the Influence (Felony DUI) per RCW 46.61.502(1) and 46.61.502(6)(b)(iv), based on his appearance and his performance on field sobriety tests following a stop of his vehicle on a warrant, by a Mason County sheriff's deputy. CP 42-43, 52-55. The DUI offense, as

filed in the second amended information, was charged under two statutory alternatives: driving while under the influence of or when affected by alcohol; and having an alcohol concentration of .08 or higher within 2 hours after driving a vehicle, as shown by breath or blood testing. CP 42-43.

Mr. Jacob refused to submit to a BAC test at the Mason County Jail; his blood was drawn at the hospital approximately 4 hours after he was stopped, at which time it registered a blood ethanol concentration of .10. 12/1/11RP at 133-36. Mr. Jacob was also charged with Driving While License Revoked in the First Degree, per RCW 46.20.342(1)(a). CP 42-43.

**2. Trial.** At trial, Deputy Kelly LaFrance testified that she stopped Mr. Jacob's vehicle as he was driving on State Route 300, on October 3, 2011, at approximately 6:05 p.m. 12/1/11RP at 23-26. The Deputy "ran the vehicle reg through Macecom" which "advised it came back to Terry Jacobs [and] [h]e was revoked first and had a confirmed warrant." 12/1/11RP at 27. The Deputy had no concerns regarding Mr. Jacob's driving, but when he was contacted, a strong smell of alcohol or intoxicants came from inside his car. 12/1/11RP at 28. Mr. Jacob's eyes were red and watery and he had a slight slur to his speech.

12/1/11RP at 28. After being read his Miranda rights, Mr. Jacob was asked if he understood them, and he replied, "just take me to jail."

12/1/11RP at 30-31. It was unclear if this statement referred simply to his warrant status or other matters. 12/1/11RP at 30-31<sup>1</sup>

Deputy Duain Dugan was called to the scene by Deputy LaFrance and arrived at approximately 6:30 p.m., where he conducted Field Sobriety Tests on Mr. Jacob, who performed with mixed results, following which he was arrested. 12/1/11RP at 39-50. At the Mason County Jail, Mr. Jacob refused to submit to breath testing by use of a Blood Alcohol Content (BAC) machine. 12/1/11RP at 57. His blood was drawn at the Mason General Hospital pursuant to a search warrant at approximately 10:20 p.m, and Deputy Dugan submitted the sample for toxicology testing. 12/1/11RP at 57-68.

Justin Knoy, the Washington State Patrol Crime Laboratory toxicologist who analyzed Mr. Jacob's blood and produced a report submitted as Exhibit 9, stated that his blood ethanol concentration was 0.10 grams per hundred milliliters. 12/1/11RP at 133-36; Exhibit 9.

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<sup>1</sup> Defense counsel earlier waived a 3.5 hearing, in further part because he assessed this evidence as reflecting Mr. Jacob's knowledge of his DOC warrant, rather than as being prejudicial on the issue of driving under the influence. 11/30/11RP at 11-14.

Department of Licensing records custodian Annette Bailey testified that she searched the Department's driver licensing records and determined Mr. Jacob's license was in suspended status on the date in question as a result of being a habitual traffic offender. 12/1/11RP at 95-101; Exhibit 11.

Mr. Jacob stipulated to having been convicted of Felony DUI in 2009. CP 41 (stipulation); 2/1/11RP at 153. In his trial testimony, he also admitted that his driver's license was revoked when he was driving on October 3. 12/1/11RP at 169.

Mr. Jacob testified that he drank a small amount of alcohol at Jimmy D's bar in Belfair, between 5 and 6 p.m on the date in question, which consisted of a sipping liquor that burned the potentially cancerous growth in his esophagus, following which he ordered a beer to cool his throat.<sup>2</sup> 12/1/11RP at 169-70. He had not had any alcohol before or after that time. 12/1/11RP at 169-70. He was not under the influence when he was driving and Deputy LaFrance pulled him over. 12/1/11RP at 167-71.

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<sup>2</sup> Sentencing in Mr. Jacob's case was initially delayed for treatment of this condition, but was then held, despite his protests that imprisonment at Shelton Correction Center for processing would preclude necessary treatment for a minimum of six weeks. 12/8/11RP at 268-70.

This was confirmed by Karen Gribble, an employee of Jimmy D's who also knew Mr. Jacob well, and stated that Mr. Jacob drank a bottle of beer and one shot of liquor sometime after 5 p.m. on October 3. When Mr. Jacob left the establishment about 45 minutes later, he did not appear intoxicated at all. 12/1/11RP at 152-54.

When asked by the prosecutor if he was an experienced drinker, Mr. Jacob mentioned that he had clean urinalysis (UA) tests with the Department of Corrections. 12/1/11RP at 181-82. In cross-examination, Mr. Jacob stated that the UA's he had said were "clean" were Department of Corrections-imposed UA's. His last UA test was May 4, 2011, and he was obligated to continue reporting to DOC to do UA's, but he did not do so after that date. 12/2/11RP at 217-18.

In the State's rebuttal case, Deputy Dugan testified that he went to Jimmy D's bar, where he watched the bar's videotape taken on the evening in question; the deputy confirmed it did show the defendant arriving at 5:17 p.m, and leaving at 6:02. From the video it appeared Mr. Jacob ordered a second shot after pouring what was left of the first into the beer he had purchased. Mr. Jacob then "continued drinking both of those until he left," and he ordered no food. 12/2/11RP at 220-21.

**3. Verdicts and sentencing.** Following the evidence phase, Mr. Jacob was convicted by the jury of Felony DUI, along with driving with a revoked license in the first degree. CP 20-21, 12/2/11RP at 265.

At sentencing, Mr. Jacob was ordered to serve 60 months incarceration on the felony conviction, and 364 days on the driving with a revoked license conviction, a gross misdemeanor. 12/8/11RP at 291-92; CP 7-9.

Mr. Jacob appeals. CP 5.

#### **D. ARGUMENT.**

**1. THE TRIAL COURT VIOLATED MR. JACOB'S RIGHT TO PRESENT A DEFENSE BY EXCLUDING EVIDENCE THAT WAS RELEVANT TO HIS .10 BLOOD/ETHANOL LEVEL AND WHETHER THE STATE PROVED INTOXICATION AND DRIVING UNDER THE INFLUENCE.**

The trial court violated Mr. Jacob's right to present a defense where it prevented the defendant from testifying that had consumed asthma medication the day of his arrest, by use of an inhalant device. His right to defend against the State's allegations is protected by the Sixth and Fourteenth Amendments and the Washington Constitution, Article 1, Section 22. Chambers v. Mississippi, 410 U.S. 284, 294, 35 L.Ed. 2d 297, 93 S. Ct. 1038 (1973), State v. Austin, 59 Wn. App. 186,

194, 796 P.2d 746 (1990). This evidence would have had an affect on the actual alcohol test reading offered by Dr. Knoy, and was thus directly relevant to the percentage testing numbers that the State used below to prove both intoxication and the blood/alcohol alternatives of DUI.

**a. Mr. Jacob sought to present relevant evidence in his defense.** During trial, before further examination of Mr. Jacob, his counsel noted to the court that the toxicologist, Knoy, had testified that a person's blood alcohol level can be affected by the presence of medications in the person's blood. 12/2/11RP at 213-14.

Knoy indeed testified he was not a scientist at the Washington State Patrol Crime Laboratory with a focus on illegal drugs; rather he was employed by the Toxicology Laboratory in Seattle. His expertise was in a broad area of drug effects on the body along with alcohol effects, and he was trained in biological poisons, for example. 12/1/11RP at 106-09. Regarding neurological observation testing for alcohol intoxication, he stated that his laboratory's processes tested for "central nervous system depressants such as alcohol or inhalants or PCP being in the person's system." 12/1/11RP at 126.

Counsel argued that Mr. Jacob's inhalant use was directly relevant, because it may have affected the tested reading measuring how much of these substances, as, performed by the State's medical witnesses. 12/2/11RP at 212-14.

In response, first, the prosecutor stated he had no procedural objection to the proposed questioning of the defendant, despite the possible argument that this would be outside the scope of cross-examination or that examination should not be re-opened. 12/2/11RP at 213.

But the State argued the evidence sought to be elicited was not relevant and had no foundation. This was incorrect. Evidence is generally admissible so long as it is relevant, that is, that it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable." ER 401, 402. Evidence without adequate foundation is not relevant, for essentially the identical reasoning, because it is deemed not useful in making material facts more or less likely. See 5A Karl B. Tegland, Washington Practice § 611.5 (4th ed.1999); State v. Swan, 114 Wash.2d 613, 659, 790 P.2d 610 (1990).

Here, the toxicologist's testimony provided foundation for this evidence, when he stated the basic fact that the testing he conducted measured central nervous depressants, which included both alcohol and inhalants. The measured numbers of .10 and the statutory standard of .08 rendered Mr. Jacob's "inhalant" use directly relevant.

Importantly, Mr. Jacob was not arguing that the defendant had used the inhalant device after his arrest by Deputy Dugan, just that the defendant would testify he used it that day. 12/2/11RP at 214. The prosecutor stated that Dugan had said the defendant consumed nothing after arrest, but the defense was not trying to show he did. 12/2/11RP at 214-15. Use of the medication administered by inhalant that day was relevant enough, going as it did to the material matter of the scientific testing used to prove the case as charged. Thus it was not tenable for the prosecutor to argue in the same breath it would have to re-call the deputy to ask if the defendant consumed anything after he was stopped. 12/2/11RP at 214.

In its ruling, the court deemed the matter simply not relevant without evidence that inhalant use could affect the "reading." The court appeared to miscomprehend the issue by believing that an inhaler, [perhaps because it is used like a breathing device], only could affect a

breath test. The Court emphasized that Mr. Jacob had not taken a BAC test:

So, unless you have testimony that this actually does effect the use of the alcohol – excuse me, the alcohol reading – it’s not relevant that he did it [used the inhaler]. Because what I’m hearing, -- obviously, he didn’t take a breath test, so we’re not looking at whether he had – was using something during a particular window of time; we’re looking at whether or not it actually had an effect on the actual reading, which is more of a scientific nature. You need to have some type of evidence to establish that. So, unless you have that, the Court would find that it’s not relevant.

12/2/11RP at 215. This reasoning was in error. Since the evidence was relevant, it was the State which should have been required to prove some countervailing factor of prejudice, that would outweigh the defendant’s need for this relevant evidence. State v. Darden, 145 Wn.2d 612, 622, 41 P.3d 1189 (2002); State v. Gallegos, 65 Wn. App. 230, 236-37, 828 P.2d 37, review denied, 119 Wn.2d 1024 (1992). Certainly, no state interest could be compelling enough to preclude evidence with inherently high probative value, which bore directly on actual alcohol reading. State v. Reed, 101 Wn. App. 704, 709, 6 P.3d 43 (2000).

Exclusion was error. The court’s ruling violated the right to present relevant evidence in defense of the DUI charge.

**b. The error requires reversal.** The trial court's error in excluding the inhalant evidence requires reversal of the DUI conviction, because there was no showing Mr. Jacob engaged in any unsafe physical operation of the car, and the State's blood/alcohol case was already weak, where Mr. Jacob's blood draw was taken after twice the presumptively accurate time window had passed, four hours after he had last driven a vehicle. See RCW 46.61.502 (3), 4). Evidence bearing on the effect of the tested numbers representing blood ethanol content would have been critically important below, because they bore on both intoxication and specific required percentages under within two hours of driving, where the current case involved a test 4 hours later. The result of Knoy's blood tests was a matter of significant debate at trial; both counsel elicited varying numerical expressions from Mr. Knoy regarding percentage error rate, and the possibility of mismeasurement in the blood testing. 12/1/11RP at 135-48.

Reasonably, this error probably affected the verdict. However, it certainly was not harmless beyond a reasonable doubt, as required to affirm following constitutional error, because this Court cannot say it is beyond a reasonable doubt that the error did not affect the verdict.

State v. Austin, supra, 59 Wn. App. at 194; State v. Guloy, 104 Wn.2d

412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

Mr. Jacob requests that this court reverse his conviction.

**2. MR. JACOB'S OFFENDER SCORE WAS INCORRECTLY CALCULATED UNDER THE DUI SCORING STATUTE.**

Mr. Jacob's VUCSA drug conviction could not properly be included as a point in his offender score. Similarly, his DUI conviction with an arrest date of January 31, 2001 was not properly included, and only the four DUI convictions from 1997, and 2001, were properly included.

**a. Mr. Jacob objected to his scoring and further, the offender score was legal error and may be challenged for the first time on appeal.** At sentencing, the trial court calculated Mr. Jacob's offender score on the Felony DUI conviction as 9, based primarily on DUI convictions from 2009, 2003, 2001 (three convictions), 1997, and 1988-89,<sup>3</sup> but also including a 1992-93<sup>4</sup> VUCSA drug conviction as a

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<sup>3</sup> This DUI was occasionally referred to by the parties and court as being from 1987, 1988, and/or as being from 1989, but it was ultimately clarified that Mr. Jacob was arrested in 1988 and sentenced in 1989. 12/8/11RP at 279. For purposes of clarity it is referred to as above.

<sup>4</sup> This conviction was occasionally referred to by the parties and court as being from 1992, while the judgment and sentence lists the crime date as 1991 and the conviction as having been entered in 1993. For purposes of clarity it is referred to as above.

point, and including an additional point on the basis that Mr. Jacob was on community custody at the time of the current offense. CP 7; 12/8/11RP at 271-72.

Mr. Jacob's personal objection to inclusion of the 1992-93 VUCSA conviction and the 1988-89 DUI was noted. 12/8/11RP at 278-79. Counsel made clear he was maintaining an objection to the offender score on this basis. 12/8/11RP at 286-87. Counsel also stated that there was no defense challenge to the existence of the prior convictions for purposes of calculating Mr. Jacob's offender score. 12/8/11RP at 285-86.

The prosecutor argued that the 1988-89 DUI did not "washout" because of various misdemeanor convictions between that time and the subsequent felony, and argued that the 1992-93 VUCSA conviction must be counted because of the short time elapsed after the period of imprisonment and the next conviction. The prosecutor also stated that Mr. Jacob had a conviction for fourth degree assault and other offenses in 1995. 12/8/11RP at 279-80.

The trial court counted the 1988-89 DUI as part of the offender score, because there were "intervening crimes . . . between that and then the next conviction, which would be the '92 VUCSA." 12/8/11RP

at 288. The court also counted the VUCSA conviction as a point, and added an additional point for Mr. Jacob being on community custody, for an offender score of 9. 12/8/11RP at 288. The court noted that the standard range would be 60 months whether the offender score was 8 or 9.<sup>5</sup> 12/8/11RP at 289.

**b. Appealability.** Mr. Jacob may appeal. A defendant may always challenge a miscalculated offender score for the first time on appeal where the alleged error is a failure to apply the correct sentencing law. State v. Wilson, 170 Wn.2d 682, 688–89, 244 P.3d 950 (2010) (offender scoring is a matter of statutory authority).

Further, to any extent that defense counsel misconstrued the correct law and contributed to the court's and the parties' misreading of RCW 9.94A.525, counsel violated Mr. Jacob's right to effective assistance under the Sixth Amendment, because the confusion resulted in a higher score and non-deficient representation would have resulted in correct scoring. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); U.S. Const. amend. 6.

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<sup>5</sup> The judgment and sentence lists 8 convictions and an additional point for being on community custody, and states the standard range as 60 months, but lists Mr. Jacob's offender score as 8. CP 7.

**c. Offender scoring for Felony DUI is limited to a statutorily delineated class of convictions and a special set of “washout” rules.**

The appellate court reviews a trial court's sentencing calculation *de novo*. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010).

The present case is governed by RCW 9.94A.525(2) which, at subsections (d) and (e), provides rules for offender scoring that pertain to sentencing on a conviction for Felony DUI. Those subsections state as follows, in pertinent part:

(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 . . . 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.

RCW 9.94A.525(2)(d), (e).

In the recent case of State v. Morales, this Court made clear that where a person has been convicted of Felony DUI, such conviction falls within the provisions of RCW 9.94A.525(2)(e). State v. Morales, --- P.3d ----, 2012 WL 1947882 (Wash.App. Div. 1, May 29, 2012, Slip Op. at p. 2). Under this subsection, which establishes offender score calculation rules particular to the offense of felony driving while under the influence, a delineated set of prior convictions count as points in the defendant's score pursuant to the rules in the above statutory provisions. The Morales Court stated:

[S]ubsection (2)(e) also makes clear that the “[t]he prior convictions” that shall be included in the calculation of the offender score are limited to these: “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[.]”

State v. Morales, Slip Op. at p. 2. Pursuant to RCW 9.94A.030(43), "serious traffic offense" means “(a) Nonfelony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502), nonfelony actual physical control while under the influence of intoxicating liquor or any drug (RCW 46.61.504), reckless driving

(RCW 46.61.500), or hit-and-run unattended vehicle (RCW 46.52.020(5))[".]”

The prior convictions listed above could properly be included in Mr. Jacob's offender score pursuant to these provisions. State v. Morales, Slip Op. at pp. 2-3; see also p. 5 (“[The] use of Morales's fourth degree assault conviction in his offender score is contrary to the provisions of subsection (2)(e)(i) [because] the classes of 'prior convictions' that qualify for scoring for DUI related-felonies are limited, as set forth in the first part of section (2)(e)").

Accordingly, therefore, Mr. Jacob's VUCSA drug conviction could not properly be included as a point in his offender score.

The Morales Court next addressed the specific rules of offender scoring calculation using these convictions for sentencing on Felony DUI convictions, which rules appear in subsection (2)(e).

As an initial matter, Mr. Jacob's past convictions which qualified as “prior offenses within ten years” as defined in RCW 46.61.5055 could properly be included in his score. Subsection (2)(e)(ii). Specifically, RCW 46.61.5055(14)(c) provides that “[w]ithin ten years” means that “the arrest for a prior offense occurred within ten

years before . . . the arrest for the current offense.” See Morales, Slip Op. at p. 3.

In Mr. Jacob's case, these provisions properly brought within his offender score for his current offense (committed October 3, 2011) the conviction for Felony DUI with an arrest date of January 3, 2009, and the conviction for DUI with an arrest date of March 6, 2003, but not the third conviction listed in his offender scoring in the judgment -- a DUI conviction with an arrest date of January 31, 2001 -- or any of the convictions before that date. This results in an accumulation of 2 points for offender score purposes.

Next, the Court addressed the inclusion of other, older convictions within the class of scorable. First, the Court stated:

[T]he plain language of RCW 9.94A.525 indicates that arrests occurring more than 10 years before Morales's December 2009 arrest shall not be included under subsection (2)(e)(ii).

Morales, Slip Op. at p. 3. In Mr. Jacob's case, this means that the remaining convictions listed in the offender scoring in his judgment were not properly included in his score, at least not pursuant to RCW 9.94A.525, subsection (2)(e)(ii).

Then, the Court stated, the question became whether these older convictions could be part of the offender score under subsection (2)(e)(i). Morales, Slip Op. at p. 3. This Court stated as follows:

The classes of prior convictions that qualify for scoring are set forth in the first part of [(2)(e)(i)]. They include “serious traffic offenses” as well as two other classes of offenses. All of Morales's convictions from March 1990 through April 1992 are serious traffic offenses. The question is how many of these prior convictions were within five years of either “the last date of release from confinement (including full-time residential treatment) or entry of judgment of sentence.” [Where] there were more than five years between “the last date of release from confinement (including full-time residential treatment) . . . or entry of judgment and sentence[]” [t]his gap requires a washout of all of Morales's convictions from March 1990 through April 1992.

Morales, Slip Op. at pp. 3-4.

Under these rules, Mr. Jacob's 1988-89 conviction for DUI is not properly included in his offender score, but the four DUI convictions from 1997 and 2001 (three convictions on separate dates) do count as 4 points.

Importantly, only the specified class of prior convictions prevents *washout* under the five-year rule. As the Morales Court stated,

unlike subsection (2)(d) of RCW 9.94A.525, subsection (2)(e)(i) does not include a provision requiring that the defendant spend five years in the community “without

committing any crime that subsequently results in a conviction.” Morales's assault conviction does not count for his offender score, nor does it interrupt the time between his 2001 DUI conviction and 1991 physical control conviction.

Morales, Slip Op. at p. 5. Thus, there are no convictions, including the 1992-93 VUCSA conviction, which could prevent the "washout" of Mr. Jacob's 1988-1989 DUI under the special rules for scoring DUI convictions. That conviction was not properly included in the offender score.

The remedy for a miscalculated offender score is resentencing.

State v. Wilson, supra, 170 Wn.2d at 691. Mr. Jacob asks that his sentence be reversed and that the case be remanded for resentencing.

**3. THE COURT EXCEEDED ITS AUTHORITY IN IMPOSING INCARCERATION AND A TERM OF COMMUNITY CUSTODY THAT EXCEEDED MR. JACOB'S STATUTORY MAXIMUM.**

Mr. Jacob was ordered to serve 60 months incarceration on the Felony DUI conviction. 12/8/11RP at 291-92; CP 7-9. At the sentencing hearing, defense counsel argued that with a standard range of 60 months on the Felony DUI, which was the maximum term, there should be no "supervision attached," 12/8/11RP at 289; see RCW 46.61.502(1), (6); RCW 9A.20.021(1)(c).

The trial court stated that a term of 12 months community custody would be imposed, with Mr. Jacob to be supervised for any period of earned early release, but directing that the total sentence of incarceration and community custody was not to exceed 60 months. The court made a similar notation on the judgment and sentence. 12/8/11RP at 289-93; CP 8-9. This was error.

a. **The SRA requires a determinate sentence in which the combined terms of incarceration and community custody do not exceed the statutory maximum.** The statutory maximum for an offense sets the ceiling of punishment that may be imposed. RCW 9A.20.021; In re Pers. Restraint of Brooks, 166 Wn.2d 664, 668, 211 P.3d 1023 (2009). A term of community custody must be authorized by the legislature. RCW 9.94A.505; RCW 9A.20.021. The controlling statutes instruct the trial court that a term of community custody may not exceed the statutory maximum when combined with the prison term imposed. Id.; RCW 9.94A.701(9). Specifically, RCW 9.94A.701(9) provides:

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

RCW 9.94A.701(9). Pursuant to recent authority construing RCW 9.94A.701(9), the trial court was required to reduce the term of community custody imposed, as required by RCW 9.94A.701(9), in order that the combined terms of incarceration and community custody did not exceed the statutory maximum of 60 months. State v. Boyd, \_\_\_ Wn.2d \_\_\_, 275 P.3d 321 (Supreme Court No. 86709-7, May 3, 2012); State v. Winborne, 167 Wn. App. 320, 273 P.3d 454 (Wash.App. Div. 3, March 20, 2012).

Given that Mr. Jacob's five-year term of incarceration was the statutory maximum, the Mason County Superior Court was required under RCW 9.94A.701(9) to reduce his term of community custody to zero. State v. Winborne, *supra*; State v. Boyd, 275 P.3d at 322-23. Mr. Jacob, whose alleged DUI crime was committed October 3, 2011, was sentenced December 8, 2011. CP 6. The new 2009 statute unquestionably applied to his sentencing. See State v. Boyd, 275 P.3d at 322-23.<sup>6</sup>

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<sup>6</sup> The Boyd Court stated of the appellant in that case:

Boyd was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. See Laws of 2009, ch. 375, § 5. Thus, the trial court, not the Department of Corrections, was required to reduce Boyd's term of community custody to avoid a sentence in excess of the statutory maximum.

The trial court's sentence and its interlineation regarding the combined terms of imprisonment and community custody, although intended in good faith to ensure that Mr. Jacob did not serve terms amounting to a total sentence in excess of the statutory maximum, was in excess of its authority under the SRA.

**b. This Court must correct Mr. Jacob's sentence.** "A trial court only possesses the power to impose sentences provided by law." In re Pers. Restraint of Carle, 93 Wn.2d 31, 33, 604 P.2d 1293 (1980); Wilson, *supra*. 170 Wn.2d at 688-89. This Court reviews *de novo* whether a sentence is legally erroneous. Brooks, 166 Wn.2d at 667; see also Cross, *supra*, 156 Wn. App. at 587.

Here, where the sentence was legally erroneous, this Court has "the duty and power to correct [the] erroneous sentence upon its discovery." In re Pers. Restraint of Call, 144 Wn.2d 315, 332, 28 P.3d 709 (2001). The SRA limits the sentencing court's authority in this case to a combined, determinate total sentence of incarceration and community custody 60 months. Mr. Jacob respectfully asks this Court to remand his case for imposition of a sentence that is in accord with RCW 9.94A.701(9).

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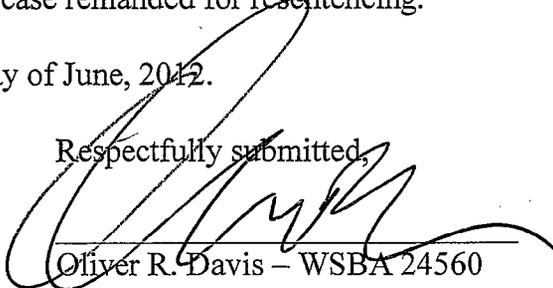
State v. Boyd, 275 P.3d at 322.

## E. CONCLUSION

Mr. Jacob's judgment of guilty should be reversed where the trial court's relevance ruling excluding evidence violated Mr. Jacob's right to present a defense. Mr. Jacob's sentence must also be reversed on ground that the trial court erroneously calculated his offender score, affecting his standard range on the Felony DUI. Additionally, the court imposed a total sentence for the Felony DUI conviction that was in excess of its statutory authority, and the sentence for that conviction must be vacated and the case remanded for resentencing.

Dated this 20th day of June, 2012.

Respectfully submitted,



Oliver R. Davis – WSBA 24560  
Washington Appellate Project  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 42914-4-II
v.	)	
	)	
TERRY JACOB,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 29<sup>TH</sup> DAY OF JUNE, 2012, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> TERRY LEE JACOB 270926 WASHINGTON STATE PENITENTIARY 1313 N 13 <sup>TH</sup> AVE WALLA WALLA, WA 99362	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 29<sup>TH</sup> DAY OF JUNE, 2012.

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# WASHINGTON APPELLATE PROJECT

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