

NO. 44512-3-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN K. SMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 12-1-00281-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in not taking count I, felony driving under the influence, from the jury for lack of sufficiency of the evidence.
02. The trial court erred in imposing a community custody condition requiring Smith to have a chemical dependency evaluation.
03. The trial court erred in imposing a period of community supervision that, when combined with the incarceration portion of the sentence, resulted in a sentence that exceeded the statutory maximum of 60 months.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether there was sufficient evidence that Smith drove his motor vehicle while under the influence of or affected by intoxicating liquor? [Assignment of Error No. 1].
02. Whether the trial court acted without authority in ordering Smith to have a chemical dependency evaluation? [Assignment of Error No. 2].
03. Whether the trial court, despite the inclusion of a “Brooks notation,” erred in imposing a period of community supervision that, when combined with the incarceration portion of the sentence, resulted in a sentence that exceeded the statutory maximum of 60 months? [Assignment of Error No. 3].

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C. STATEMENT OF THE CASE

01. Procedural Facts

Steven K. Smith was charged by amended information filed in Mason County Superior Court January 25, 2013, with felony driving under the influence, count I, driving while license suspended in the first degree, count II, and operating a vehicle without ignition lock, count III, contrary to RCWs 46.61.502(1), 46.61.502(6)(a), 46.20.342(1)(a) and 46.20.740, respectively. [CP 48-50].

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [RP 30; CP 54]. Smith pleaded guilty to counts II and III [RP 23-29; CP 38-47], and trial to a jury commenced January 29 on the remaining charge of felony driving under the influence, the Honorable Toni A. Sheldon presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 194].

Smith was found guilty as charged, sentenced within his standard range and timely notice of this appeal followed. [CP 2-22].

02. Substantive Facts¹

On June 12, 2012, at approximately 3:45 in the afternoon [RP 57], Officer Mark Hinton was dispatched to the scene of a motor vehicle accident, where it was determined the vehicle driven by

¹ The facts are limited to the offense for which Smith was tried.

Smith had swerved over the center lane of traffic before striking a vehicle in the oncoming lane, which was stopped in the turn lane preparing to make a left-hand turn. [RP 52, 64-65]. Smith exhibited a flushed face, smelled of alcohol and responded in a delayed manner to Hinton's requests for identification. [RP 63, 89]. A six-pack of cold beer with one open and partially consumed container was in his vehicle. [RP 66, 68, 124]. Smith declined a field sobriety test [RP 71], and after being transported to jail, declined to take a breath alcohol test. [RP 77]. Certified copies of his four prior convictions for driving under the influence within the last 10 years were admitted into evidence. [RP 102, 150-52, 154].

Smith admitted to drinking between two-thirds and three-quarters from the open container found in his car, saying he had purchased the six-pack "(p)robably three minutes" before the accident and that he had not had anything to drink before that. [RP 164]. After mentioning his wife's dog was with him, he also admitted to causing the collision:

As I was leaving the stop sign, the dog jumped over, which he has a tendency to do, and he jumped over in my lap. I had the steering wheel up and I just lost control of the vehicle and went into the other lane.

[RP 165]. He denied he was impaired, other than by the dog. [RP 165].

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D. ARGUMENT

01. THERE WAS INSUFFICIENT EVIDENCE THAT SMITH DROVE HIS MOTOR VEHICLE WHILE UNDER THE INFLUENCE OF OR AFFECTED BY INTOXICATING LIQUOR.

Due Process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; Const. art. 1, § 3; In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

As charged and instructed in this case [CP 33, 48-50], the State was required to prove that Smith drove his vehicle while under the influence of or affected by intoxicating liquor. [CP 33, 48-49]. To do this, it had to prove his ability to drive was “lessened in any appreciable degree” as a result of the consumption of the intoxicating liquor [CP 32], which it failed to do.

The evidence spoke only to Hinton’s observations of Smith: flushed face, odor of intoxicants, delayed response to request for identification. [RP 63, 89]. There was no evidence that Smith was driving erratically or speeding immediately prior to the accident. [RP 116]. He exhibited no difficulty in walking or maintaining his balance. [RP 117, 129]. And while Hinton did detect the odor of intoxicants [RP 63], the tests Smith declined to take were voluntary and his speech was neither slurred nor fast nor repetitive. [RP 121-22, 127]. Smith admitted to drinking from the open container, which was cold and thus corroborative of his claim of recent purchase. [RP 68, 164]. He also openly admitted to causing the accident, explaining that his vehicle swerved only after his wife’s dog had jumped onto his lap. [RP 165].

Simply, the evidence presented at trial was insufficient to establish that Smith’s ability to drive was “lessened in any appreciable degree” as a

result of the consumption of intoxicating liquor, with the result that his conviction for felony driving under the influence must be reversed.

02. THE TRIAL COURT ACTED WITHOUT
AUTHORITY IN ORDERING SMITH
TO HAVE A CHEMICAL
DEPENDENCY EVALUATION.

As conditions of community custody, the court ordered that Smith:

... shall have a chemical dependency ...
evaluation while in confinement or within 30 days
of release from custody, provide a copy of the
evaluation to the CCO, successfully participate in
and complete all recommended treatment, and sign
all releases necessary to ensure the CCO can consult
with the treatment provider to monitor progress and
compliance;

[CP 17].

““In the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”” State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (quoting State v. Ford, 37 Wn.2d 472, 477, 973 P.2d 452 (1999)). This court reviews whether a trial court had statutory authority to impose community custody conditions de novo. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

The court erred in ordering a chemical dependency evaluation and any recommended treatment without first making a finding of chemical dependency under RCW 9.94A.607(1), which provides:

Where the court finds that the offender has a chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonable related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender. (emphasis added).

See State v. Jones, 118 Wn. App. 199, 209-10, 76 P.3d 258 (2003) (failure to make statutorily required finding before ordering mental health treatment and counseling was reversible error even though record contained substantial evidence supporting such a finding). This condition must be stricken.

03. THE TRIAL COURT, DESPITE THE INCLUSION OF A "BROOKS NOTATION," ERRED IN IMPOSING A PERIOD OF COMMUNITY SUPERVISION THAT, WHEN COMBINED WITH THE INCARCERATION PORTION OF THE SENTENCE, RESULTED IN A SENTENCE THAT EXCEEDED THE STATUTORY MAXIMUM OF 60 MONTHS.

Smith's presumptive sentence range for felony driving under the influence was 51 to 60 months [CP 5], for which he was

sentenced to 55.5 months and ordered to be on community custody for 12 months “up to the statutory maximum of 60 months.” [CP 8]. This notation is derived from In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009), and is commonly referred to as the “Brooks notation.”

Our Supreme Court has held that that a sentence in excess of statutory authority is subject to collateral attack and “that a defendant cannot agree to punishment in excess of that which the Legislature has established.” In re Goodwin, 146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). In defining the limitations to this holding, the court, citing State v. Majors, 94 Wn.2d 354, 616 P.2d 1237 (1980) as instructional, went on to explain that waiver does not apply where the alleged sentencing error is a legal error leading to an excessive sentence, as opposed to where the alleged error “involves an agreement to facts (e.g., agrees to be designated as habitual offender in hopes of obtaining a shorter sentence), later disputed, or if the alleged error involves a matter of trial court discretion.” Id.

RCW 9.94A.701(9),² first enacted in 2009, provides that

(t)he 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

² This subsection was originally codified as RCW 9.94A.701(8) but was renumbered to subsection (9) in 2010. Laws of 2010, ch. 224, § 5.

the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.³

Following enactment of this statute, in State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012), our Supreme Court held that sentences imposed after the effective date of the statute no longer comply with statutory requirements, despite the inclusion of the “Brooks notation.” 174 Wn.2d at 472.

Accordingly, this court should remand to the trial court to either amend the community custody term or resentence Smith on the felony driving under the influence conviction consistent with RCW 9.94A.701(9).

E. CONCLUSION

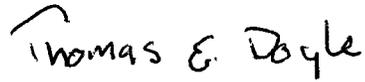
Based on the above, Smith respectfully requests this court to reverse and dismiss his conviction for felony driving under the influence or to remand to strike the community custody condition and to amend the community custody term or resentence Smith on the felony driving under the influence conviction consistent with the arguments presented herein.

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³ Law of 2010, ch. 224, § 5.

DATED this 25th day of June 2013.



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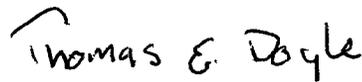
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Tim Higgs
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Steven K. Smith #876675
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DATED this 25th day of June 2013.



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DOYLE LAW OFFICE

June 25, 2013 - 4:08 PM

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