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Court of Appeals  
Division III  
State of Washington

No. 33096-6-III

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

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STATE OF WASHINGTON,

Respondent,

v.

JAVIER OROZCO,

Appellant.

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

The Honorable Judge John D. Knodell

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APPELLANT'S OPENING BRIEF

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## **A. SUMMARY OF ARGUMENT**

Javier Orozco was charged with felony driving under the influence and three other criminal charges. The case went to trial on the felony driving under the influence count and two other counts. Mr. Orozco stipulated to the prior conviction element of the felony DUI charge. Defense counsel requested the trial court bifurcate the trial or the jury instructions, requesting the jury first decide whether Mr. Orozco committed the crime of driving under the influence, and then whether he had the requisite prior convictions. The trial court denied defense counsel's request and instructed the jury on the prior conviction element. Defense counsel did not request a limiting instruction regarding this evidence. The jury found Mr. Orozco guilty on all three counts.

The trial court sentenced Mr. Orozco to 60 months confinement for the felony driving under the influence count, plus 12 months community custody on another felony count.

Mr. Orozco now appeals, challenging defense counsel's failure to request a limiting instruction on the prior conviction element of the felony driving under the influence charge and the total length of his sentence as exceeding the statutory maximum sentence.

## **B. ASSIGNMENTS OF ERROR**

1. Mr. Orozco was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a limiting instruction regarding the prior conviction element of the felony DUI charge.
2. The trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.
3. The trial court erred by not reducing Mr. Orozco's 12 month term of community custody to zero, so that the total sentence did not exceed the statutory maximum, as required by RCW 9.94A.701(9).

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

Issue 1: Whether Mr. Orozco was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a limiting instruction regarding the prior conviction element of the felony DUI charge.

Issue 2: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.

## **D. STATEMENT OF THE CASE**

On the morning of January 19, 2014, officers pulled over a car after observing the driver speeding and failing to turn left while the traffic light was green. (2 RP<sup>1</sup> 127-134, 175-176, 203, 205-208). As one of the officers approached the car, he observed the odor of intoxicants coming from the interior of the car. (2 RP 135). The driver gave the officer a driver's license with the name Daniel Oliver Hernandez. (2 RP 135-136).

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<sup>1</sup> The Report of Proceedings consists of one consecutively paginated volume transcribed by Amy Brittingham, containing the pre-trial and post-trial hearings, and three consecutively paginated volumes transcribed by Tom R. Bartunek, containing the trial. The volume transcribed by Amy Brittingham is referred to herein as 1 RP. The volumes transcribed by Tom R. Bartunek are referred to herein as 2 RP.

The officer later learned the driver's name was Javier Orozco. (2 RP 172-174, 233-235, 344-347, 352).

The officer observed Mr. Orozco's eyes were bloodshot and watery. (2 RP 137, 208). Mr. Orozco told the officer he had a margarita that evening. (2 RP 137). At the officer's request, Mr. Orozco got out of the car and performed field sobriety tests. (2 RP 138-149, 177-181, 208-211, 226-228). After these tests, the officer arrested Mr. Orozco for driving under the influence. (2 RP 149-150, 213).

During a search of Mr. Orozco incident to arrest, the officer found a glass pipe with a white crystalline substance inside in Mr. Orozco's outer jacket pocket. (2 RP 150, 182-185, 213-214). This white crystalline substance later tested positive for methamphetamine. (2 RP 245).

Mr. Orozco was transported to the Moses Lake Police Department, where he submitted to a breath test. (2 RP 155, 159-162, 166-172, 190-191, 230-234). The breath test results were .096 and .094. (2 RP 319). Mr. Orozco had four or more prior driving under the influence convictions in the past ten years. (CP 124-125, 210, 232-271, 281; 1 RP 218-221, 224-225, 233-235, 241; 2 RP 6-11, 24-26, 311-312, 341, 361).

The State charged Mr. Orozco with one count of felony driving under the influence (felony DUI), one count of possession of a controlled substance (methamphetamine), and one count of refusal to give

information to or cooperate with an officer.<sup>2</sup> (CP 1-4). The case proceeded to a jury trial, and witnesses testified consistent with the facts stated above. (2 RP 125-352).

Prior to trial, for purposes of the felony DUI, Mr. Orozco stipulated that he has four or more prior offenses within ten years as defined in RCW 46.61.5055. (CP 124-125, 210; 2 RP 6-11, 24-26, 311-312, 341, 361). Defense counsel asked the trial court to bifurcate the trial (or, essentially, the jury instructions) on the felony DUI, requesting that the jury first consider only whether Mr. Orozco is guilty of driving under the influence, and then:

If he is convicted on a DUI, why then we could just instruct the jury that they are to return a verdict of yes as to the question of does he have four or more prior convictions. Or does his criminal history satisfy the requirement of the elevation of the offense to a felony. And we can just instruct them that you are instructed to answer this yes.

(2 RP 7, 249-250, 332-333).

The trial court denied the motion to bifurcate. (2 RP 253).

The trial court gave the following to-convict jury instruction for the felony DUI count:

To convict the defendant of driving under the influence, each of the following four elements of the crime must be proved beyond a reasonable doubt:

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<sup>2</sup> The State also charged Mr. Orozco with one count of driving while license revoked in the first degree. (CP 2). Mr. Orozco pleaded guilty to this charge on the morning of trial. (CP 126-131, 279-297; 2 RP 18-24). This conviction is not challenged in this appeal.

- 1) That on or about January 19, 2014, the defendant drove a motor vehicle; and
- 2) That the defendant at the time of driving a motor vehicle
  - a) was under the influence of or affected by intoxicating liquor; 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 a criminal history sufficient to satisfy the requirements of RCW 46.61.502(6)(a); and,*
- 4) That this act occurred in the State of Washington.

If you find from the evidence that elements (1), (3), (4), and any of the alternative elements (2)(a), or (2)(b), have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of alternatives (2)(a), or (2)(b), has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2)(a), or (2)(b), (3), or (4), then it will be your duty to return a verdict of not guilty.

(CP 212; 2 RP 362-363) (emphasis added).

Mr. Orozco objected to this instruction on the basis that it did not allow for bifurcation of the DUI elements and the prior conviction element, as he previously requested. (2 RP 7, 249-250, 332-333).

The following stipulation was included in the jury instructions:

The parties have stipulated that the defendant has a criminal history sufficient to satisfy the requirements of RCW 46.61.502(6)(a).

(CP 210; 2 RP 361).

Defense counsel did not request a limiting instruction regarding the prior conviction element of the felony DUI charge. (CP 165-167, 198-223; 2 RP 248-256, 310-312, 332-333).

The jury convicted Mr. Orozco of all three counts. (CP 226-228; 2 RP 430-437).

The trial court sentenced Mr. Orozco to 60 months confinement for the felony DUI count and 12 months plus one day confinement for the possession of a controlled substance (methamphetamine) count, to run concurrently. (CP 279, 283-284; 1 RP 249).<sup>3</sup> The trial court also imposed 12 months community custody on the possession of a controlled substance (methamphetamine) count. (CP 284-285; 1 RP 249-250). The Judgment and Sentence contained the following notation: “[n]ote: combined term of confinement and community custody for any particular offense cannot exceed the statutory maximum. RCW 9.94A.701.” (CP 284).

Mr. Orozco timely appealed. (CP 298-299).

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<sup>3</sup> The trial court also imposed sentence on the driving while license revoked in the first degree count and the refusal to give information to or cooperate with an officer count. (CP 288-289; 1 RP 251).

## E. ARGUMENT

### **Issue 1: Whether Mr. Orozco was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a limiting instruction regarding the prior conviction element of the felony DUI charge.**

Under the Sixth Amendment, a criminal defendant has 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. Kylo*, 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-prong 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)).

Prejudice can also be established by showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial

whose result is reliable.”” *State v. Hicks*, 163 Wn.2d 477, 488, 181 P.3d 831 (2008) (quoting *Strickland*, 466 U.S at 687).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

A DUI increases from a gross misdemeanor to a felony if the defendant “has four or more prior offenses within ten years as defined in RCW 46.61.5055.” RCW 46.61.502(6)(a). “The fact that the defendant has four or more prior offenses is, then, an essential element of felony DUI that the State must prove.” *State v. Santos*, 163 Wn. App. 780, 783-84, 260 P.3d 982 (2011) (citing *State v. Chambers*, 157 Wn. App. 465, 468, 237 P.3d 352 (2010)). “Prior offenses” for purposes of a felony DUI include “a conviction for a violation of RCW 46.61.502 [driving under the influence] or an equivalent local ordinance[.]” RCW 46.61.5055(14)(a)(i).

In *State v. Roswell*, the defendant was charged with, among other things, communicating with a minor for immoral purposes under RCW 9.68A.090(1), which provides that a person who commits the crime is guilty of a gross misdemeanor, except that if the person has been previously convicted of a felony sex offense, it is punishable as a class C felony. *State v. Roswell*, 165 Wn.2d 186, 190, 196 P.3d 705 (2008).

At trial, the defendant requested he be allowed to stipulate to the existence of the prior sexual offense convictions and waive his right to a jury on the issue, to prevent the jury from hearing about the prior convictions. *Id.* The defendant further argued that even if the prior conviction was an element of the charged crime, the trial should be bifurcated, with the jury deciding whether there had been communications with a minor for immoral purposes, and the judge deciding the prior conviction element. *Id.* The trial court declined to bifurcate the trial as requested by the defendant, but instead limited the information presented to the jury to the fact that the defendant had a prior sexual offense. *Id.* at 191.

On appeal, the defendant argued the evidence of a prior sexual offense “may prejudice the jury and deprive him of his constitutional right to a fair trial.” *Id.* at 194. The Court rejected this argument, stating “[i]t is well established that admission of prior convictions, while prejudicial, does not necessarily deprive a defendant of a fair trial.” *Id.* at 195.

In holding that the defendant was not entitled to a bifurcated trial as requested, the Court reasoned that “[c]ourts have long held that when a prior conviction is an element of the crime charged, it is not error to allow the jury to hear evidence on that issue.” *Id.* at 197 (citing *Pettus v. Cranor*, 41 Wn.2d 567, 568, 250 P.2d 542 (1952)). The Court further

reasoned that “[a]ny prejudice created by evidence of the prior conviction may be countered with a limiting instruction from the trial court.” *Id.* at 198 (citing *Spencer v. Texas*, 385 U.S. 554, 561, 87 S. Ct. 648, 17 L. Ed. 2d 606 (1967)).

The Court acknowledged “if an element of the crime is a prior conviction of the very same type of crime, there is a particular danger that a jury may believe that the defendant has some propensity to commit that type of crime.” *Id.* The Court recognized that such evidence may be highly prejudicial. *Id.*

The Court endorsed the trial court’s ability to reduce unnecessary prejudice from prior convictions, where practical to do so, by either bifurcated jury instructions or giving a limiting instruction. *Id.* at 198, 198 n.6. Such a limiting instruction could include the following language: “[t]he stipulation is evidence only of the prior conviction element . . . [t]he jury is not to speculate as to the nature of the prior convictions; and [t]he jury must not consider the defendant’s stipulation for any other purpose.” *Id.* at 198 n.6.

Here, the jury heard evidence regarding the prior conviction element of the felony DUI charge. (CP 210, 212; 2 RP 341, 361-363). Defense counsel did not request, and the trial court did not give, a limiting instruction regarding this evidence. (CP 165-167, 198-223; 2 RP 248-256,

310-312, 332-333). Defense counsel's failure to request such limiting instruction violated Mr. Orozco's Sixth Amendment right to effective assistance of counsel. *See Strickland*, 466 U.S.at 685-86.

Defense counsel's failure to request a limiting instruction regarding the prior conviction element of the felony DUI charge was deficient performance, falling outside the range of reasonable representation. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). Defense counsel should have requested a limiting instruction in order to reduce the unnecessary prejudice stemming from the fact that Mr. Orozco has prior convictions. *See Roswell*, 165 Wn.2d at 198, 198 n.6. The jury was not instructed on the purposes for which it could consider the prior convictions, and therefore, the jury could have considered the evidence of prior convictions in determining whether Mr. Orozco committed the crime of driving under the influence on the date in question, and also whether he committed the other crimes at issue.

Defense counsel's failure to request a limiting instruction regarding the prior conviction element of the felony DUI charge prejudiced Mr. Orozco. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that, absent this error, the results of the trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

Under the jury instructions given at trial, the jury was not limited to using the stipulation only as evidence of the prior conviction element, and the jury could have speculated as to the nature of the prior convictions, as well as considering the stipulation for other purposes, such as his propensity to commit crimes, including all three of the crimes at issue in the trial. *See Roswell*, 165 Wn.2d at 198 n. 6.

Defense counsel's failure to request a limiting instruction regarding the prior conviction element of the felony DUI charge was not a tactical decision. *See Grier*, 171 Wn.2d at 33. If the jury was instructed on the proper use of this evidence, it would have eliminated the option of using it for improper purposes, including evidence of elements other than the prior conviction element, and as evidence of Mr. Orozco's propensity to commit crimes. *See Roswell*, 165 Wn.2d at 198, 198 n.6.

Defense counsel's failure to request a limiting instruction regarding the prior conviction element of the felony DUI charge was deficient performance, and Mr. Orozco was prejudiced thereby. Therefore, this court should reverse his convictions and remand the case for a new trial.

**Issue 2: Whether the trial court erred in imposing a total term of confinement and community custody that exceeds the statutory maximum.**

Sentencing errors may be raised for the first time on appeal. *See State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008) (stating that “[i]n the context of sentencing, established case law holds that illegal or erroneous sentences may be challenged for the first time on appeal.”). “The interpretation of provisions of the SRA [Sentencing Reform Act] involves questions of law that we review de novo.” *State v. Winborne*, 167 Wn. App. 320, 326, 273 P.3d 454 (2012) (citing *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005)).

In *In re Personal Restraint of Brooks*, our Supreme Court held that “when the trial court imposes an aggregate term of confinement and community custody that potentially exceeds the statutory maximum, it must include a notation clarifying that the total term of confinement and community custody actually served may not exceed the statutory maximum.” *State v. Boyd*, 174 Wn.2d 470, 472, 275 P.3d 321 (2012) (citing *In re Personal Restraint of Brooks*, 166 Wn.2d 664, 674, 211 P.3d 1023 (2009)). Subsequent to *Brooks*, the following amendment to the SRA became effective:

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); *see also* Laws of 2009, ch. 375, § 5.

In *Winborne*, the defendant was sentenced to 60 months of confinement and 12 months of community custody following his conviction of felony violation of a domestic violence no-contact order under RCW 26.50.110(5). *Winborne*, 167 Wn. App. at 322. The judgment and sentence included a *Brooks* notation: “the total terms of confinement and community custody must not exceed the statutory maximum sentence of 60 months.” *Id.* at 322-23; *see also Brooks*, 166 Wn.2d at 674.

On appeal, the defendant argued that because he was sentenced to the statutory maximum term of confinement of five years, RCW 9.94A.701(9) required the trial court to reduce his term of community custody to zero. *Id.* at 326. This Court agreed, holding that RCW 9.94A.701(9) no longer permits a sentencing court to make a *Brooks* notation to ensure the validity of a sentence. *Id.* at 322, 327-31. This Court found that RCW 9.94A.701(9) plainly presents a three-step process for the sentencing court to follow: “impose the term of confinement, impose the term of community custody, then reduce the term of community custody if necessary[.]” *Id.* at 329. This Court then remanded the case for resentencing. *Id.* at 331.

Subsequently, in *Boyd*, our Supreme Court reached the same result when interpreting RCW 9.94A.701(9). *See Boyd*, 174 Wn.2d at 471-73. There, the defendant was sentenced to a term of confinement and a term of community custody that together exceeded the statutory maximum sentence for the crime. *Id.* at 471-72. The judgment and sentence included a *Brooks* notation. *Id.* at 471; *see also Brooks*, 166 Wn.2d at 674.

In reversing and remanding the case for resentencing, the Court held “[t]he trial court here erred in imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the *Brooks* notation.” *Id.* at 473. The Court reasoned that RCW 9.94A.701(9) required “the trial court . . . to reduce [the defendant’s] term of community custody to avoid a sentence in excess of the statutory maximum.” *Id.*

Here, Mr. Orozco was convicted of felony DUI and possession of a controlled substance (methamphetamine). (CP 226-228, 279, 283-284; 1 RP 249; 2 RP 430-437). Both crimes are class C felonies. RCW 46.61.502(6) (felony DUI); RCW 69.50.4013(2) (possession of a controlled substance). The statutory maximum for a class C felony is five years, or 60 months. RCW 9A.20.021(1)(c). A community custody term of 12 months is authorized for the possession of a controlled substance

(methamphetamine) count.<sup>4</sup> *See* RCW 9.94A.701(3)(c) (authorizing one year of community custody for a felony offense under RCW chapter 69.50).

The trial court sentenced Mr. Orozco to 60 months confinement for the felony DUI count and 12 months plus one day confinement for the possession of a controlled substance (methamphetamine) count, to run concurrently. (CP 279, 283-284; 1 RP 249). The trial court then imposed 12 months community custody on the possession of a controlled substance (methamphetamine) count. (CP 284-285; 1 RP 249-250).

The sentence of 60 months confinement plus the 12 months of community custody totals 72 months. Thus, the term of confinement and the term of community custody together exceeds the 60 month statutory maximum for both crimes. *See* RCW 46.61.502(6) (felony DUI is a class C felony); RCW 69.50.4013(2) (possession of a controlled substance is a class C felony); RCW 9A.20.021(1)(c) (statutory maximum for a class C felony). Therefore, pursuant to RCW 9.94A.701(9), this Court should remand the case for resentencing to reduce the 12 month term of

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<sup>4</sup> A community custody term of 12 months is also authorized for the felony DUI count, but was not imposed. (CP 284-285; 1 RP 249-250); *see also* RCW 9.94A.701(3)(a) (authorizing one year of community custody for an offender sentenced to a crime against persons); RCW 9.94A.411(2) (listing felony DUI as a crime against persons).

community custody to zero. *See* RCW 9.94A.701(9); *Winborne*, 167 Wn. App. at 322, 327-31; *Boyd*, 174 Wn.2d at 471-73.

**F. CONCLUSION**

Mr. Orozco was denied his Sixth Amendment right to effective assistance of counsel when defense counsel failed to request a limiting instruction regarding the prior conviction element of the felony DUI charge. This court should reverse his convictions and remand the case for a new trial.

In addition, because the total term of confinement and community custody for the felony DUI and possession of a controlled substance (methamphetamine) counts exceeds the five year statutory maximum for Class C felonies, this Court should remand the case for resentencing to reduce the 12 month term of community custody to zero.

Respectfully submitted this 12th day of October, 2015.

  
\_\_\_\_\_  
Jill S. Reuter, WSBA #38374

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 33096-6-III  
vs. )  
JAVIER OROZCO )  
Defendant/Appellant )  
PROOF OF SERVICE )  
\_\_\_\_\_ )

I, Jill S. Reuter, of counsel for Nichols Law Firm, PLLC, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 12, 2015, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Javier Orozco, DOC No. #330827  
Washington State Penitentiary  
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Having obtained prior permission from the Grant County Prosecutor's Office, I also served the Respondent State of Washington by e-mail at [kburns@grantcountywa.gov](mailto:kburns@grantcountywa.gov) using Division III's e-service feature.

Dated this 12th day of October, 2015.



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