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NO. 58710-2-I

SUPREME COURT NO. \_\_\_\_\_

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SCOTT WINEBRENNER,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
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PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Scott Winebrenner asks this Court to review the decision of the court of appeals referred to in Section B. Under RAP 10(g), Petitioner joins and adopts by reference for purposes of the instant case, the petition for review filed by James Dixon, Attorney for Petitioner Jesus Quezada, no. 58336-1-I. Furthermore, Petitioner acknowledges the assistance of James Dixon in allowing the use of his Petition for Review.

B. COURT OF APPEALS DECISION

In a published decision filed on December 3, 2007, the court of appeals determined the superior court miscalculated the defendant's prior offenses, and reversed petitioner's sentence and remanded for re-sentencing.

C. ISSUES PRESENTED FOR REVIEW

1. The legislature created a sentencing scheme for defendants convicted of driving while intoxicated, under which there is an increasingly severe punishment for each new offense. Under the court of appeals' strained interpretation of this statute, a defendant will routinely be sentenced twice for a "second" DUI offense, instead of being punished once for a "first" and once for a "second" offense. Is review appropriate under RAP 13.4(b)(2), where the court of appeals' reading of RCW

46.61.5055 ignores the plain meaning of “prior offense”, and produces “unlikely, absurd, or strained consequences”?

2. In State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), this Court dealt with the same problem presented in this case—how to calculate “prior offenses” when sentencing a defendant on a revoked deferred sentence. Did the court of appeals err in rejecting the reasoning and holding of Whitaker?

D. STATEMENT OF FACTS

The Seattle Municipal Court granted Scott Winebrenner’s petition for deferred prosecution on October 2, 2001 concerning a 1<sup>st</sup> offense DUI arrest that occurred in the City of Seattle on July 27, 2001. Scott went through intensive outpatient treatment, and appeared to be on the road to recovery successfully completing the two year program. Unfortunately, on June 22, 2005, he once again drove after drinking and was charged in Snohomish County District Court Evergreen Division with a 2<sup>nd</sup> DUI offense. The prosecutor for the City of Snohomish, John Rodabaugh II eventually amended the DUI charge to reckless driving, and Scott entered a plea of guilty to the reckless driving charge on December 9, 2005.

Following the December 9, 2005 disposition hearing @ Snohomish County District Court Evergreen Division, Winebrenner appeared in Seattle Municipal Court on December 13, 2005 where he

acknowledged that the Snohomish County District Court Evergreen Division conviction for reckless driving (originally charged as DUII) constituted a violation of his deferred prosecution. Pro Tem Judge Elsa Durham revoked the deferred prosecution and proceeded to the imposition of sentence. Judge Durham agreed with defense counsel that the 2001 DUI arrest which predated the 2005 DUI arrest constituted a 1<sup>st</sup> offense for sentencing purposes under RCW 46.61.5055 not a second offense, and Mr. Winebrenner received the mandatory minimum 2 days in jail and other standard DUI sentencing conditions for a 1<sup>st</sup> offense DUI refusal.

City of Seattle went up on RALJ appeal, and on July 17, 2006, King County Superior Court Judge Joan Dubuque reversed the trial court decision, ruling Winebrenner's sentence for the revoked deferred prosecution arising out of the 2001 DUI arrest ought to have been treated as a 2<sup>nd</sup> offense subject to the 45 day mandatory minimum jail term and 90 day EHM requirement, since he had been sentenced on December 9, 2005 for Reckless Driving that was originally charged as DUI. (note that Winebrenner's plea deal was based on the risk of receiving a sentence under the DUI "grid" for a 2<sup>nd</sup> offense within 7 years in the event Scott proceeded to trial on the 2005 DUI charge and elected not to plead guilty to the amended reckless driving charge).

Winebrenner vehemently objected to Judge DuBuque's construction of RCW 46.61.5055 contending the recent 2005 reckless driving conviction should not be counted as a "prior offense," for purposes of sentencing on the revoked deferred prosecution arising out of the 2001 DUI arrest since inter alia, it predated the 2005 DUI case.

On RALJ appeal, the superior court disagreed with the trial court's reading of the DUI sentencing statute. The superior court erroneously recognized that RCW 46.61.5055 required the court to consider "all offenses" in determining the mandatory minimum. Notwithstanding Winebrenner's argument that the legislature required the court to include only "prior" offenses, Judge DuBuque ignored the legislature's use of the word "prior" to modify "offense." Looking at the plain meaning of "prior" in connection with the other statutory language, the RALJ court failed to understand that a prior offense within seven years must mean the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense.

Here, Winebrenner's arrest for the DUI/Reckless of  
--fense occurred in 2005 and therefore did not precede in time  
the 2001 arrest on the current offense. Accordingly, the  
2005 DUI/Reckless offense was not a prior offense that oc-  
curred within seven years of the current offense from 2001

since it did not precede it in time. On RALJ appeal, Superior Court Judge Joan Dubuque failed to recognize

the trial court's reading of the statute. The District court recognized that RCW 46.61.5055 did not require the court to consider "all offenses" in determining the mandatory minimum. Rather, the legislature required the court to include only "prior" offenses. This, explained the lower court, was the flaw in the City's argument—the City ignored the legislature's use of the word "prior" to modify "offense." Looking at the plain meaning of "prior" in connection with the other statutory language, the court concluded:

Thus, a prior offense within seven years must mean that the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense.

The court of appeals granted Scott Winebrenner' motion for discretionary review, and also granted the Washington Association of Criminal Defense Lawyers an opportunity to file an Amicus Brief. (Ted Vosk's Amicus Brief is part of the court of appeals' record and more fully develops arguments presented in this petition.) In a published decision, the court of appeals concluded that the trial court was required to consider all offenses which had occurred within a seven year period, regardless of

whether those offenses had been committed prior to or after the current offense for which the defendant is being sentenced. Slip Op. at 8-9.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

**The court of appeals' interpretation of RCW 46.61.5055, which ignores the statute's plain language and produces an absurd result, should be rejected.**

1. Overview

The Washington legislature has created a sentencing scheme for defendants convicted of DUI, whereby each successive conviction results in a more severe mandatory penalty. For instance, a defendant convicted of a first DUI with a BAC of 1.5 or greater will face a minimum two days in jail for a first offense, 45 days for a second offense, and 120 days for a third. RCW 46.61.5055(1)-(3). Although the sentencing court may go above the mandatory minimum whenever the court believes it appropriate to do so, the court may not go below that minimum, except in very limited circumstances involving "extraordinary medical" necessity. RCW 46.61.5055(11).

In order to determine the mandatory minimum, the sentencing court must determine the number of qualifying convictions. RCW 46.61.5055(12)(a). In addition to actual convictions, that list includes previously granted deferred prosecutions, with the date on which the deferred prosecution was granted serving as the "conviction" date. Id.

Kent v. Jenkins, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000).

This case raises an issue as to how the prior offenses are to be counted when a defendant is revoked on a deferred prosecution based upon a new conviction. Under the court of appeals' strained interpretation of the sentencing statutes, instead of a first and second offense, as the law dictates, the court is *required* to impose much harsher penalties by treating both offenses as a second offense.

This becomes easier to understand when a typical scenario is considered. Assume a defendant is arrested and charged with his first DUI in 2000. He enters into a deferred prosecution. Four years later, in 2004, he is charged and convicted of the same offense. Under the applicable sentencing statute, the court must treat the earlier deferred prosecution as a "prior offense" for purposes of the mandatory minimum. This means that the 2004 offense is punished as a second offense, rather than a first. See RCW 46.61.5055(12)(a); Jenkins, *supra*, at 290.

The defendant is then revoked on his earlier 2000 deferred prosecution based on the new 2004 conviction. Under the superior court's understanding of the statute, this revoked deferred prosecution should be treated as his first offense, as the defendant has already been more harshly punished for a "second" DUI, the one which occurred in 2004. Because the 2004 offense was not committed prior to the 2000 DUI, it is not a prior

offense. The result is the defendant is properly punished for a first and second offense.

Under the court of appeals' interpretation of the statute, however, there is no first offense in this scenario. Instead, the court is required to punish the defendant as if he committed two independent second offenses: the 2000 deferred prosecution is a "prior offense" for the 2004 DUI, and the 2004 DUI is then treated as prior offense for the 2000 DUI.

As set forth below, this novel interpretation is an unfair and strained reading of the statute, which ignores the plain language of the statute, and is contrary to the obvious intent of the legislature to promote proportional punishment. It is also inconsistent with this Court's holding in State v. Whitaker. Finally, to the extent that the court of appeals' interpretation could be characterized as reasonable, it must be rejected under the rule of lenity.

2. Both the plain language and rules of statutory construction support the lower courts' rulings

The question presented by this case is a simple one: when the court sentences a defendant on a revoked deferred prosecution, must the court include all offenses or just prior offenses in determining the mandatory minimum? The court of appeals does not perceive a temporal limitation on which offenses must be counted, believing that all

convictions of the specified type—no matter when they occurred—must be included in the mandatory minimum. The trial court and superior court both rejected the City’s argument, recognizing that the legislature intended the word “prior” to modify “offenses.”

The superior court’s holding is well supported by the law. The legislature’s use of the word “prior” cannot be ignored, as “each word of a statute is to be accorded meaning.” State ex rel. Schillberg v. Barnett, 79 Wn.2d 578, 584, 488 P.2d 255 (1971). Under the City’s interpretation, the legislature could have completely omitted the word “prior”, and the statute would still have the same meaning. As such, the City’s interpretation ignores one of the fundamental rules of statutory construction—that the legislature is “presumed to have used no superfluous words and [the court] must accord meaning, if possible, to every word in a statute.” In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000); see also, State v. Williams, 128 Wn.2d 341, 349, 908 P.2d 359 (1995) (“We are duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.”)

In the present case, the district court relied upon the common understanding of the word “prior,” read in context with the rest of the statute, to conclude that the 2005 incident was not a prior offense to the 2001 deferred prosecution. See State v. Olson, 47 WA. App. 514, 516-17,

735 P.2d 1362 (1987) (statutory term may be given its dictionary meaning).

The court of appeals found that the trial court improperly relied upon the common meaning of “prior” rather than the statutory definition contained in RCW 46.61.5055(12). This position has some surface appeal, particularly given that this definitional section of the statute does refer to “prior offense.” But upon closer examination, it is apparent that the statute does not attempt to define “prior.” Instead, when read in context, the provision simply provides a laundry list of the various types of convictions and court proceedings that can constitute a prior offense for purposes of establishing the mandatory minimum.:

For purposes of this section:

- (a) A "prior offense" means any of the following:
  - (i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;
  - (ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;
  - (iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;
  - (iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;
  - (v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;
  - (vi) An out-of-state conviction for a violation that would

have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;

(vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or

(viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522; and

(b) "Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense.

RCW 46.61.5055(12). The subsection does not seek to define "prior;" nor does it purport to remove the requirement that the offense occurred prior to the crime for which the defendant is being sentenced. It simply delineates what type of offenses should be considered by the court in determining the mandatory minimum.

The court of appeals accepted the City's claim that the superior court failed to consider "prior offense" in context with other related statutes. According to the City, when read in context, "a 'prior offense' must occur prior to sentencing—not other offenses." AOB at 8. In other words, according to the the court of appeals, the word "prior" serves to notify the sentencing court that it should not consider any offenses that occurred after the sentencing hearing. But this interpretation makes little sense, as the sentencing court could not possibly include an offense that

occurred *after* the current sentencing. Under the City's reading, the word "prior" would not in any way restrict or modify "offense," so there would be no difference between "offense and "prior offense." As previously noted, a definition that renders a term meaningless violates the rules of statutory construction.

It is interesting to note that under the SRA, a "prior offense" does have the meaning suggested by the City. Within the context of the SRA, however, such an interpretation makes sense. Because the SRA differentiates between current and prior offenses, the term "prior offense" distinguishes those prior offenses from others. Outside the SRA, however, there is no such distinction. It is also significant to note that because the legislature employed a less common meaning to the word "prior" for purposes of the SRA, the legislature specifically defined that term. See RCW 9.94A.360(1) ("A prior conviction is a conviction which exists *before the date of sentencing* for the offense for which the offender score is being computed.") The specific definition in the SRA stands in sharp contrast to the lack of any such definition in the DUI sentencing scheme.

The terms in a statute should be read in context with related provisions. See State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005) ("The 'plain meaning' of a statutory provision is to be discerned from the

ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.)

Here, reading the statutes in context, such a reading further supports the superior court's conclusion that the focus is upon the date of the arrest in determining what constitutes a prior offense. For instance, in determining whether a prior offense has washed-out, the court is directed to look at the time that has passed between the *date of the arrest* for the prior offense and *the date of arrest* for the current offense. See RCW 46.61.5055(12)(b) ("Within seven years" means that the arrest for a prior offense occurred within seven years of the arrest for the current offense."). It is significant that the focus is not upon the date of the conviction or sentencing, but upon the date of arrest. This supports the trial court's determination that when determining legislative intent behind the word "prior", the unit of measurement employed by the legislature is the arrest date.

One of the primary tenets of statutory construction is that courts should "avoid readings of statutes that result in unlikely, absurd, or strained consequences." Advanced Silicon Materials v. Grant County, 156 Wn.2d 84, 90, 124 P.3d 294 (2005). The City's reading of the statute, where a defendant is punished twice for second offenses rather than a first

and a second, produces exactly that—an unlikely, absurd, and strained consequence.

As the Washington Supreme Court has explained, “In undertaking this plain language analysis, the court must remain careful to avoid ‘unlikely, absurd or strained’ results.” Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) (citations omitted). Accordingly, “[w]e give words used in the statute their plain meaning, but we construe the statute to effect its purpose and avoid ‘[u]nlikely, absurd or strained consequences resulting from a literal reading.’” State v. Mannering, 112 Wn. App. 268, 272, 48 P.3d 367 (2002) (citations omitted).

Here, the purpose of the statute is to provide a proportionate sentence, with a first offense receiving less than a second offense, and a second offense receiving less than a third. The City’s interpretation of the statute, in addition to producing a strained and unlikely result, fails completely in this goal of proportionality. Under the City’s reading of the statute, a judge would be required to punish a defendant twice for second offenses, without ever punishing a defendant for a first offense. Because this is contrary to the legislative intent of proportionality, it must be rejected. Pacific Sound Resources v. Burlington Northern Santa Fe 130 Wn. App. 926, 935, 125 P.3d 981(2005) (“We interpret statutes to effectuate legislative intent.”)

Furthermore, under the court of appeals' interpretation of this statute, the legislature has created a sentencing scheme that will be impossible to effectuate. As revised, RCW 46.61.5055(4) requires the imposition of a felony sentence if the defendant has four prior offenses. But this is completely unworkable if the defendant enters into a deferred prosecution in a municipal court. For instance, assume a defendant has the following convictions:

- 1998: DUI in Municipal Court
- 2000: DUI in Municipal Court
- 2002: DUI in Municipal Court
- 2004: Deferred Prosecution in Municipal Court
- 2007: DUI charged as a felony in Superior Court

The defendant's 2004 deferred prosecution is revoked based on the 2007 DUI. Under the court of appeals decision, the 2007 DUI counts as a "prior offense" to the 2004 deferred prosecution. This means that the Municipal Court is now required to impose a felony sentence on the 2004 deferred prosecution. But of course, the municipal court has no jurisdiction to impose that sentence. Thus, the court of appeals' interpretation of this statute is not only inequitable and illogical, in many cases, it will be impossible to effectuate. This is additional evidence that the legislature could not possibly have intended for "prior offenses" to be counted in this fashion.

As noted above, punishing a defendant two times for a third offense

rather than a second and third offense is contrary to the legislative intent. In its opinion, however, the court of appeals turned this argument on its head by concluding that its decision “minimizes the ability of a party to circumvent the Legislature’s intent by manipulating sentencing dates for multiple offenses based on the date of arrest.” Slip Op. at 7. As a practical matter, it is doubtful there are many cases in which a defendant has multiple pending DUIs and is allowed to pick and choose what order he will plead guilty and be sentenced. Far more common is the situation where a defendant will face a revocation hearing on a deferred prosecution based on a new conviction.

But putting aside the improbability of the concern expressed by the court of appeals, there is a mechanism for correcting any unfairness resulting from a defendant pleading guilty to multiple offenses in reverse order. If the statute produces a mandatory minimum that is too lenient, the court can always impose a higher sentence. By contrast, under the court of appeals' interpretation, if the statute requires both convictions to be treated as second offenses, the sentencing court has no mechanism to correct that inequitable result. Because this is a strained and illogical result that flies in the face of the legislative goal of proportionality, it must be rejected.

In State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), this Court was confronted with a similarly strained result as that presented by the court of appeals in the current case. This Court in Whitaker addressed a situation where sentencing had been deferred on a vehicular manslaughter and Whitaker placed on probation in 1981. The State subsequently moved to revoke the deferred sentence. In the interim, Whitaker had been convicted of a 1986 offense. The State argued the 1986 offense would count in the 1981 offender score. Whitaker, at 342-43. The State made this argument based on the new SRA language that specifically required the court to count all offenses existing on the date of sentencing. RCW 9.94A.360(1).

The question presented in Whitaker was whether the sentencing court could turn back the clock and consider the 1986 conviction a "prior conviction" in determining the appropriate sentence for the 1981 offense.

The Supreme Court rejected the State's position, reasoning:

To hold otherwise would be illogical, because the 1981 offense had already been counted as a prior conviction served, for purposes of fixing the 1986 minimum term, and then later, the 1986 offense would be counted as a prior conviction, for purposes of fixing the 1981 minimum term. That is, each offense would be treated as a prior conviction to the other.

Whitaker, at 346.

What is notable in Whitaker is that this Court was confronted with statutory language in the SRA that specifically required the court to consider all convictions that existed as of the date of sentencing. Whitaker, at 344; RCW 9.9A.360(1). But even then, the Court was unwilling to interpret the interplay of statutes in a way that would permit this illogical result. The Whitaker court determined that the appropriate solution for cases involving revoked deferred sentences and mandatory minimums under the SRA, was to treat the date the conditions of probation were initially imposed (which is the day the deferred was granted) as the "date of sentencing" for purposes of determining the mandatory minimum. In that way, offenses that were committed after the defendant entered into the deferred, would not be included in the

mandatory minimum if the deferred sentence was later revoked. Whitaker, at 345-47. See also State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992) (the “spirit or purpose of an enactment should prevail over the express but inept wording.”)

The concerns presented by a deferred sentence apply with equal force to deferred prosecutions. For purposes of subsequent convictions, the day the court granted the deferred prosecution is considered the conviction date. But the sentencing date on a revoked deferred prosecution usually occurs at a much later time after new offenses have occurred. Thus, if the court of appeals was correct that “prior offenses” included all offenses existing as of the date of sentencing, then both the revoked deferred prosecution and the new offense would each count against each other as a “prior offense.” This would produce the “illogical” result that the Whitaker court refused to permit.

The court of appeals dismissed this Court’s reasoning in Whitaker by noting that Whitaker described its analysis as a short term problem arising from “the overlap of two sentencing systems.” Slip Op. at 8, citing to Whitaker, at 344. But all that Whitaker referred to was the fact that because the SRA had eliminated deferred sentences, this was a transitory problem. This is evidenced by subsequent decisions from this Court limiting the holding in Whitaker to revocation matters. For instance, in

State v. Collicott, this Court distinguished Whitaker on the basis that, “We are not here concerned with probation and revocation.” 118 Wn.2d 649, 665, 827 P.2d 263 (1992). By contrast, in the current case, we are concerned with with probation and revocation. Whitaker is directly on point, and the court of appeals’ attempt to distinguish it is completely unpersuasive.

Our case presents an even stronger argument than what was presented in Whitaker. Unlike that case, this Court is not presented with a statute that specifically requires the lower court to include all offenses existing at the time of sentencing. Accordingly, this Court need not craft a special rule for deferred prosecutions, such as what the Whitaker court did for deferred sentences. Instead, this Court can avoid that same illogical and strained result by interpreting RCW 46.61.5055 in the commonsense manner employed by the trial court and the superior court.

As discussed above, the court of appeals’ interpretation of the statute should be rejected as it ignores the word “prior” and produces absurd, strained or unlikely consequences. But even if there was a legitimate question as to the meaning of “prior”, the court of appeals’ interpretation could not overcome the rule of lenity.

Where more than one interpretation of a statute is possible, the rule of lenity requires the statute to be interpreted most favorably to the

defendant. State v. Gore, 101 Wn.2d 481, 485-86, 681 P.2d 227 (1984). (“Where two possible constructions are permissible, the rule of lenity requires us to construe the statute strictly against the State in favor of the accused.”) The rule of lenity applies with equal force to sentencing statutes. See State v. Jacobs, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

In Jacobs, the trial court believed that the applicable statute required the defendant’s sentencing enhancements to run consecutive to each other. The court of appeals reached the same conclusion, and affirmed the consecutive enhancements. This Court accepted review. The defense argued that the statute was not clear, and that the rule of lenity applied, while the State argued that allowing the sentences to run concurrently would “render meaningless the purposes the legislature intended for one of the enhancements.” Id. at 602. While cognizant of the State’s concern, this Court held that because evidence of the legislature’s intent did “not conclusively resolve the issue,” the rule of lenity required the sentences to run concurrent. Id. at 603-04.

In the present case, the legislative intent should be clear: the legislature did not intend the strained result adopted by the court of appeals. As such, it is plain that the statute must be interpreted to look at the timing of the offenses. But even assuming there was some ambiguity as to this plain reading of the statute and as to the legislative intent, the

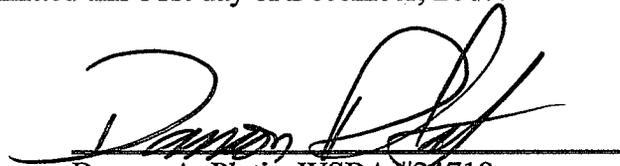
rule of lenity would require this Court to reject Division One's interpretation and affirm the trial court.

Review is appropriate. First, as discussed above, review is appropriate under RAP 13.4(2), as the court of appeals has misread RCW 46.61.5055. Review is also called for under RAP 13.4(4), as this is a decision that will have a tremendous impact in the municipal and district courts across the state.

F. CONCLUSION

The court of appeals has created a rule that ignores the plain language of the statute, is contrary to the legislative intent, and produces a strained and inequitable result. The decision also ignores the holding and reasoning of State v. Whitaker, a case that deals with the same issue of counting "prior offenses" when a deferred is revoked. This is a case that needs to be reviewed by this Court.

Respectfully submitted this 31st day of December, 2007.

  
Damon A. Platis, WSBA #24719  
Attorney for Petitioner Scott Winebrenner

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

CITY OF SEATTLE,	)	
	)	No. 58336-1-I
Petitioner,	)	
	)	
v.	)	DIVISION ONE
	)	
JESUS QUEZADA,	)	
	)	
Respondent.	)	
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CITY OF SEATTLE,	)	No. 58710-2-I
	)	
Respondent,	)	
	)	
v.	)	PUBLISHED OPINION
	)	
SCOTT WINEBRENNER,	)	
	)	
Petitioner.	)	FILED: December 3, 2007

BECKER, J. -- In unrelated prosecutions, the trial court found Jesus Quezada and Scott Winebrenner guilty of driving under the influence (DUI) after revoking their deferred prosecutions. Under RCW 46.61.5055, the court is required to impose an enhanced sentence for DUI based on the number of statutorily designated "prior offenses" occurring "within seven years" of the defendant's arrest for the current offense. We conclude that under the plain meaning of the term, "within seven years" designates the period both before and after the arrest for the current offense. We further conclude that the revoked deferred prosecution for the current offense does not count as a prior offense for sentencing purposes. Because the superior court miscalculated the defendant's prior offenses in each of these cases, we reverse both decisions and remand for resentencing.

## FACTS

### Jesus Quezada

Jesus Quezada was convicted of DUI in 2001. In 2003, following a second charge of DUI arising from an arrest in 2002, he entered into a deferred prosecution in Seattle Municipal Court. See RCW 10.05.010. In 2005, after a third charge of DUI, Quezada pleaded guilty to reckless driving.

Based on the reckless driving conviction, the trial court revoked Quezada's 2003 deferred prosecution and found him guilty of DUI. At sentencing, the City of Seattle argued that because Quezada had an alcohol concentration of at least 0.15 and "two or more" prior DUI offenses, the court was required to impose an enhanced minimum sentence that included 120 days in jail and 150 days of home monitoring. See RCW 46.61.5055(3)(b). The trial court rejected this argument, concluding that the 2001 DUI was Quezada's sole prior offense, which mandated an enhanced minimum sentence including 45 days in jail and 90 days of electronic home monitoring. See RCW 46.61.5055(2)(b).

On RALJ appeal, the superior court affirmed the determination that Quezada had only one prior offense.<sup>1</sup> We granted the City's motion for discretionary review.

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<sup>1</sup> The RALJ court reversed the trial court's conversion of mandatory jail time into electronic home monitoring, a decision not at issue in this appeal.

Scott Winebrenner

Scott Winebrenner was charged with DUI in 2001 and entered into a deferred prosecution. In 2005, after being charged with a second DUI, Winebrenner pleaded guilty to reckless driving. In December 2005, based on the reckless driving conviction, the trial court revoked Winebrenner's 2001 deferred prosecution and found him guilty of DUI. At sentencing, the City of Seattle argued that both the 2001 deferred prosecution and the 2005 reckless driving conviction constituted prior offenses for purposes of mandatory minimum sentencing provisions. The trial court concluded that Winebrenner had no prior offenses.

On RALJ appeal, the superior court reversed, agreeing with the City that RCW 46.61.5055 required the inclusion of both the 2001 deferred prosecution and the 2005 reckless driving conviction as prior offenses for purposes of sentence enhancement. We granted Winebrenner's motion for discretionary review and linked Winebrenner's and Quezada's appeals for disposition.

**DECISION**

City of Seattle v. Quezada

The City contends the sentencing court erred when it determined that Quezada's 2001 DUI conviction was his sole prior offense at the time of the 2005 DUI. We agree that under RCW 46.61.5055, the court was required to count both the 2001 DUI and the 2005 reckless driving convictions as prior offenses. But we

reject the City's claim that the revoked 2003 deferred prosecution for the current offense constituted a third prior offense.<sup>2</sup>

In order to address the issues raised in these appeals, we must construe the terms "prior offense" and "within seven years" as used throughout RCW 46.61.5055. We review issues of statutory construction de novo. State v. Hahn, 83 Wn. App. 825, 831, 924 P.2d 392 (1996). Our duty is "to ascertain and give effect to the intent and purpose of the Legislature." Hahn, 83 Wn. App. at 831. But when statutory language is plain and unambiguous, the legislative intent is clear and no further construction is permitted. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). A statute is not ambiguous merely because different interpretations are conceivable. State v. Leyda, 157 Wn.2d 335, 352, 138 P.3d 610 (2006). Over the years, the Legislature has provided increasingly detailed instructions to implement its intent for sentencing those who commit DUI offenses.

Immediately before imposing sentence for a DUI conviction, the sentencing court must verify the defendant's current criminal history and driving record, including all previous convictions and orders of deferred prosecution. RCW 46.61.513(1), (3). RCW 46.61.5055 then directs the court to impose increasingly severe minimum penalties for the DUI conviction based on the number of the defendant's "prior

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<sup>2</sup> The Legislature amended RCW 46.61.5055 effective July 1, 2007. Those changes do not affect the provisions that we analyze here.

offenses” that occurred “within seven years.” Significantly, the Legislature has defined both of these terms.

A “prior offense” for purposes of DUI sentencing is one of the convictions specified in RCW 46.61.5055(12)(a),<sup>3</sup> including DUI convictions and certain convictions resulting from an initial charge of DUI, such as Quezada’s 2005 reckless driving conviction. See RCW 46.61.5055(12)(a)(v). Under the circumstances, the Legislature’s definition of “prior offense” could not be clearer, and its application to the issues raised in these appeals leaves no room for further construction.

The Legislature’s definition of “within seven years” is equally clear. “Within seven years” means that “the arrest for a prior offense occurred within seven years

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<sup>3</sup> RCW 46.61.5055(12)(a) defines a “prior offense” as any of the following:

- (i) A conviction for a violation of RCW 46.61.502 or an equivalent local ordinance;
- (ii) A conviction for a violation of RCW 46.61.504 or an equivalent local ordinance;
- (iii) A conviction for a violation of RCW 46.61.520 committed while under the influence of intoxicating liquor or any drug;
- (iv) A conviction for a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;
- (v) A conviction for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;
- (vi) An out-of-state conviction for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;
- (vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance; or
- (viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522.

of the arrest for the current offense.” RCW 46.61.5055(12)(b). Because the court applies this definition at the time of sentencing, the plain meaning of the term “within seven years” encompasses the period both before and after the arrest date for the current offense.

Because the arrest dates for Quezada’s 2001 DUI and 2005 reckless driving convictions occurred within seven years of the 2002 arrest for his current DUI, he had two prior offenses.

Quezada and Amicus curiae Washington Association of Criminal Defense Lawyers argue at great length that because the term “prior” is not defined in RCW 46.61.5055, it must be construed to have its general meaning of “preceding in time” when modifying “offense” and that the arrest for a “prior offense” must therefore precede the arrest for the current offense. Because Quezada’s arrest for the 2001 DUI conviction was the sole arrest preceding the arrest for his 2003 DUI deferred prosecution, they maintain the sentencing court correctly determined he had only one prior offense.

But Quezada’s arguments ignore the statutory definition of “within seven years.” Moreover, they require removal of the word “prior” from its context in RCW 46.61.5055, where it is used solely in the term “prior offense.” Such an analysis is ultimately irrelevant because the Legislature has the power to define crimes and set punishment. See State v. Freeman, 153 Wn.2d 765, 771, 108 P.3d 753 (2005). Here, the Legislature has exercised its prerogative to define the term “prior offense”

precisely as it intended: the specific events listed in RCW 46.61.5055(12)(a). This definition is unambiguous and permits no further judicial construction. Consequently, the omission of a definition for the word "prior" is of no moment, and we need not speculate about its meaning in another context.

Quezada and Amicus contend that when a defendant's deferred prosecution for a DUI is revoked following commission of a second DUI, our construction leads to the "absurd" result of both offenses being sentenced with enhanced penalties, in effect, as second offenses under RCW 46.61.5055. Quezada also maintains that such an approach violates the Legislature's intent to "promote proportionate punishment."

But our reading is fully consistent with the Legislature's DUI sentencing scheme, which directs the sentencing court to impose enhanced penalties for multiple offenses based on the defendant's complete criminal history at the time of sentencing. Such an approach also minimizes the ability of a party to circumvent the Legislature's intent by manipulating sentencing dates for multiple offenses based on the date of arrest. Quezada has not cited any relevant authority suggesting that a defendant who commits multiple DUI offenses has a vested interest in having one of the offenses punished as though the other did not exist. The unambiguous statutory definitions of "prior offense" and "within seven years" in RCW 46.61.5055 further the Legislature's goal of protecting the public "from the grave danger of repeated

drunken driving.” City of Bremerton v. Tucker, 126 Wn. App. 26, 34, 103 P.3d 1285 (2005).

We note that the Legislature is well aware of how to specify DUI mandatory penalties based on a strictly chronological sequence of events. Former RCW 46.61.5051, a predecessor to the current DUI sentencing provisions, specified certain mandatory minimum penalties based on prior convictions “committed within five years before commission of the current violation.” See Laws of 1994, ch. 275, § 4. The Legislature later replaced this language with the current wording. We must presume that such material changes of wording in the reenactment of a statute reflect a change of legislative intent. See Dando v. King County, 75 Wn.2d 598, 601, 452 P.2d 955 (1969).

Quezada’s reliance on State v. Whitaker, 112 Wn.2d 341, 771 P.2d 332 (1989), is misplaced. In Whitaker, our supreme court addressed the sentencing consequences, under the SRA, of the revocation of a pre-SRA deferred sentence. The court concluded that an intervening conviction, subsequent to the original pre-SRA offense, did not constitute a prior conviction for purposes of fixing a minimum term. Whitaker, 112 Wn.2d at 343. But the court expressly noted that its statutory analysis involved a unique and short-term problem arising from “the overlap of two sentencing systems.” Whitaker, 112 Wn.2d at 344. Consequently, Whitaker provides no meaningful guidance for our analysis of RCW 46.61.5055.

In summary, the terms “prior offense” and “within seven years” as used in RCW 46.61.5055 are clear and unambiguous. The rule of lenity therefore does not apply. See State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005).

The City asserts that under the plain language of RCW 46.61.5055, a deferred prosecution also constitutes a prior offense for the DUI conviction entered when that deferred prosecution is revoked. The City maintains that Quezada’s 2003 deferred prosecution was therefore a third prior offense for purposes of sentencing him on the conviction that resulted in 2005 from the deferred 2003 charge.

The Legislature has specified that DUI deferred prosecutions generally constitute prior offenses for purposes of RCW 46.61.5055, regardless of whether they are successfully completed. RCW 46.61.5055(12)(a)(vii); see City of Kent v. Jenkins, 99 Wn. App. 287, 992 P.2d 1045 (2000); see also City of Bremerton v. Tucker, 126 Wn. App. at 33 (use of successfully completed deferred prosecution as prior offense does not violate due process). But in determining the number of prior offenses, the sentencing court must also ascertain whether “the arrest for a prior offense occurred within seven years of the arrest for the current offense.” (emphasis added) RCW 46.61.5055(12)(b). The Legislature’s definition of “within seven years” clearly contemplates separate and distinct arrest dates for the prior and current offenses. The City’s construction requires the prior offense and the current offense to be the same act, rendering the calculation specified in RCW 46.61.5055(12)(b) meaningless. See State v. Stannard, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)

(when ascertaining legislative intent, a court should avoid unlikely, absurd, or strained results).

Quezada's "current offense" is the 2005 DUI conviction resulting from the deferred prosecution of his 2002 arrest for DUI. When he came before the court for sentencing on this conviction, he had two prior offenses: the 2001 conviction for DUI and the 2005 conviction for reckless driving.

Because the superior court miscalculated the number of Quezada's prior offenses, we reverse and remand for further proceedings.

City of Seattle v. Winebrenner

Winebrenner, whose arguments mirror Quezada's, contends the superior court erred in determining that he had two prior offenses. He maintains that the sentencing court correctly found that he had no prior offenses for purposes of RCW 46.61.5055.

In 2005, when Winebrenner came before the court for sentencing, his criminal history consisted of the 2001 DUI deferred prosecution and the 2005 reckless driving conviction. The reckless driving conviction was a prior offense under RCW 46.61.5055(12)(a)(v). Because the arrest for the reckless driving conviction occurred within seven years of his DUI arrest, the sentencing court should have counted it as a prior offense. But the 2001 deferred prosecution was not a prior offense for the DUI conviction entered upon revocation; it was the current offense upon which he was being sentenced. Accordingly, Winebrenner had one prior offense for purposes

of RCW 46.61.5055. The superior court decision must be reversed and the matter remanded for further proceedings.

Reversed and remanded.

WE CONCUR:

Asid, J.

Becker, J.  
Conrad