

66239-2

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NO. 66239-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

FLORENCIO MORALES,

Appellant.

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DIVISION I
COURT OF APPEALS
STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY SAINT CLAIR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court properly included all of Morales's prior serious traffic offenses in his offender score when Morales has never remained crime free for at least five years?

2. Whether Morales can show ineffective assistance of counsel when the trial court did not adopt defense counsel's incorrect calculation of Morales's offender score?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On October 19, 2010, a jury found defendant Florencio Morales guilty of felony driving under the influence ("DUI"), driving while license suspended in the first degree ("DWLS 1"), and attempting to elude a pursuing police vehicle. CP 65-67. Before sentencing, the trial court dismissed the DWLS 1 conviction, finding that there was insufficient evidence to support a finding of guilt. RP¹ 306-07. The State is withdrawing its cross-appeal of the dismissal of the DWLS 1 conviction.

¹ The verbatim report of proceedings is consecutively paginated and will be referred to as "RP."

The court determined that Morales's offender score for each felony was 8, giving him a standard range of 60 months for the felony DUI² and 17 to 22 months for the attempting to elude. CP 120. The court imposed 60 months on the felony DUI and 17 months on the attempting to elude, with both counts running concurrently. CP 122.

2. SUBSTANTIVE FACTS.

Federal Way Police Officer Michael Sant was dispatched to a call shortly after midnight on December 7, 2009. RP 189-91. As Sant neared the intersection of 22nd Avenue and South 298th Street, he saw Officer Brian Walsh's patrol car pursuing Morales's white van down 22nd Avenue. RP 192. Morales did not pull over, despite the fact that Walsh's overhead lights were on.³ RP 193. Sant turned on his overhead lights and positioned his patrol car perpendicular to the flow of traffic, in order to cut off Morales's van. RP 194. Instead of stopping, Morales drove off the road, nearly

² Ordinarily the standard range for a defendant with an offender score of 8 on a level V offense would be 62-82 months. RCW 9.94A.510. Because the statutory maximum for felony DUI is 5 years, Morales's standard range was 60 months.

³ Because Officer Walsh passed away in March of 2010, there was no testimony regarding why Walsh attempted to pull over Morales.

colliding with Sant's car. RP 196. Walsh and Sant followed Morales for several blocks until he pulled into a driveway. RP 199.

Morales exited the van, but did not follow Walsh's verbal commands. RP 200. As he was arresting Morales for attempting to elude, Sant noticed the odor of alcohol on his breath. RP 201. Morales's eyes were bloodshot and watery and he had a difficult time maintaining his balance. RP 202. After being advised of his constitutional rights, Morales admitted to drinking two beers. RP 204. Based on Sant's experience, Morales's level of impairment was not consistent with just two beers. RP 204.

Given that Morales was somewhat uncooperative and had failed to stop, the officers opted not to conduct field sobriety tests. RP 228. Once back at the station, Morales refused to take a breath test. RP 204-05. Morales denied having any medical conditions or vehicle problems that could have explained his driving. RP 207-08. He also changed his original answer and claimed that he had not been drinking. RP 210. His coordination was poor and he seemed obviously impaired. RP 210-11.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY INCLUDED ALL OF MORALES'S PRIOR SERIOUS TRAFFIC OFFENSES IN HIS FELONY DUI OFFENDER SCORE.

Morales challenges his felony DUI sentence and argues that several of his prior "serious traffic offenses" wash because they occurred more than 10 years before his current offense. This is incorrect, as Morales misinterprets the applicable washout rule.

When scoring a felony DUI, courts first look to RCW 9.94A.525(2)(e) to determine whether a prior serious traffic offense must be included in an offender score. If subsection (2)(e) does not require inclusion of the prior serious traffic offense, courts look to the general washout provisions outlined in RCW 9.94A.525(2)(d).

The Appendix B of Morales's judgment and sentence lists the following relevant offenses:

Date	Crime	Cause Number	Serious Traffic Offense
8/11/07	DUI	CA0045350	Yes
10/12/03	DUI	CA0030989	Yes
4/20/01	DUI	CA00409462	Yes
9/22/96	DV Assault 4 th	CM0003400 MA	No
4/11/92	Physical Control	4371 ZP	Yes
11/5/91	DUI	6688697 WS	Yes
7/12/90	DUI	908741 RC	Yes
3/10/90	DUI	902602 MA	Yes

CP 125-27. Based on Morales's seven prior "serious traffic offenses"⁴ and an additional point for an "other current offense,"⁵ the trial court determined that Morales's offender score was eight for both the felony DUI and the attempting to elude convictions.

Morales believes that his four serious traffic offense convictions from 1990 to 1992 wash because more than five years have passed since these convictions occurred. Morales's understanding of the applicable washout provision is incorrect.

If the current conviction is for felony DUI, prior 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 ... 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)(e)(emphasis added).

⁴ Under RCW 9.94A.030(43), serious traffic offenses include (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 an attended vehicle (RCW 46.52.020(5)).

⁵ For Morales's felony DUI, the "other current offense" was the attempting to elude conviction. For the attempting to elude, the felony DUI was the "other current offense."

Morales argues that subsection (2)(e)(i) means that prior offenses must have been committed less than five years before the commission of the current offense. The plain language of the statute does not support such a reading.

Courts review issues of statutory construction de novo. State v. Lilyblad, 163 Wn.2d 1, 6, 177 P.3d 686 (2008). The goal in interpreting a statute is to carry out the legislature's intent and the first step is to examine the plain language of the statute. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). A statute is ambiguous only when it is susceptible to two reasonable interpretations. Id. If the plain language of a statute is unambiguous, no further inquiry is required. Id.

Subsection (2)(e)(i) plainly requires that prior serious traffic offenses shall be included in an offender score if they were committed within five years of prior confinement or entry of judgment and sentence. This is not a normal washout provision. Rather, the statute provides for increased punishment for DUI recidivists.

The detailed Appendix B shows a conviction for fourth degree assault from 1988 (Cause Number 24888 TO). CP 127. Thus, Morales's prior serious traffic offense convictions from 1990

to 1992 were committed within five years of a prior conviction. Under subsection (2)(e), these prior serious traffic offenses must be included in Morales's offender score. See State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)(the word "shall" in a statute imposes a mandatory requirement).

Additionally, under Morales's interpretation of subsection (2)(e), Morales's prior serious traffic offenses would be included in his offender score for his attempting to elude,⁶ but not his felony DUI. In other words, his prior DUI-type offenses would increase his standard range for his attempting to elude conviction, but not for his felony DUI. Such a result would be inconsistent with the legislature's intention of penalizing repeat DUI offenders. This Court should avoid any interpretation that leads to an absurd result. See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Because subsection (2)(e) requires Morales's prior serious traffic offenses to be included in his offender score, this Court does not need to look to the general washout provisions under subsection (2)(d). However, Morales's prior serious traffic offenses do not wash under subsection (2)(d), either. Under subsection

⁶ Morales acknowledges that the serious traffic offenses from the early 1990s were properly included in his offender score for attempting to elude.

(2)(d), serious traffic offenses shall be included unless the offender has spent five consecutive years in the community without committing any crime that resulted in a conviction. Here, Morales was convicted of domestic violence assault in the fourth degree on September 22, 1996 (Cause Number CM0003400 MA). CP 126. Thus, with his subsequent conviction for DUI on April 20, 2001, Morales has never spent five years crime free. Under the general washout provisions outlined in RCW 9.94A.525(2)(d), Morales's older serious traffic offenses were properly included in his offender score for each crime.

2. MORALES RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Morales also argues that he received ineffective assistance of counsel because trial counsel included his conviction for negligent driving in the first degree in his calculation of Morales's offender score. Morales's argument is premised upon his incorrect belief that the trial court included the negligent driving conviction in his offender score. Because the trial court did not include the negligent driving conviction in Morales's offender score, he cannot show any prejudice resulting from counsel's error.

To prevail on a claim of ineffective assistance of counsel, Morales must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Morales is correct that negligent driving is not a "serious traffic offense" under the SRA. Trial counsel improperly included the negligent driving conviction in his calculation of Morales's offender score. However, Morales is incorrect when he claims that the trial court included the negligent driving conviction in his offender score.

The State advised the court that the negligent driving conviction should not be included in the offender score. CP 143-47; RP 315. The trial court adopted the State's calculation and did not include the negligent driving conviction in Morales's offender score. CP 120; RP 325-26. Therefore, Morales cannot show any prejudice arising from trial counsel's error.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Morales's sentence.

DATED this 10 day of August, 2011.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. FLORENCIO MORALES, Cause No. 66239-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

08/10/10
Date

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