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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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NO. 67664-4-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER I. McCORMACK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Whether the trial court properly imposed an ignition interlock device as a condition of probation for a conviction of driving while under the influence.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The appellant, Alexander McCormack, was charged by amended information with attempting to elude a pursuing police vehicle and driving while under the influence (hereinafter "DUI"). CP 8-9.¹ A jury found McCormack guilty of both counts. CP 10-11.

At sentencing, the trial court imposed thirty days of King County Supervised Community Option along with all other mandatory minimum conditions required under statute on the DUI count. CP 29-32; 6RP 21-22. The trial court ordered the defendant to comply with the statutory requirements attached in Appendix A. CP 32; 6RP 22. McCormack was granted a first time offender waiver on the attempting to elude on the condition that he complete thirty days on the Community Option and twelve months of probation to run concurrent with the DUI. CP 31, 32.

¹ The Verbatim Report of Proceedings consists of six volumes and will be referred to as follows: 1RP (7/25/11); 2RP (7/26/11); 3RP (7/27/11); 4RP (8/1/11); 5RP (8/2/11); and 6RP (8/12/11).

2. SUBSTANTIVE FACTS

On September 24, 2010 at approximately 11:26pm, Bellevue Police Officers Childers and Keene were in an unmarked police vehicle equipped with lights and sirens. 2RP 77-78. They were traveling east on Northrup Way when they saw a very fast moving car take a left turn ahead of them and head in westbound. 2RP 77-79. The car was going at such a high rate of speed that the rear tires lost traction and the vehicle slid to the right. 2RP 78. The driver then over corrected and began swerving and fishtailing across the westbound lanes. 2RP 78. Childers turned his vehicle around to catch up with the vehicle. 2RP 79. Childers followed the vehicle for a long distance and witness it make several traffic violations. 2RP 80-84. Childers activated his lights to signal the driver to stop. 2RP 84.

Washington State Trooper Seaburg was finishing a traffic stop on west SR-520 and 108th when he heard sirens approaching his location and looked up to see a Bellevue Police unit behind a car that appeared to be failing to yield. 2RP 87, 109-10. Seaburg got into his patrol vehicle and took over as primary pursuing officer. 2RP 8-89, 110. Seaburg's vehicle was equipped with an in-car video that filmed the entire pursuit. 2RP 100-11; Ex. 4. Seaburg

activated lights and sirens and commanded the driver to stop but he continued across SR-520. 2RP 110-13. As they pursued, officers could see the defendant dancing around in the vehicle and swerving within his lane of travel at times crossing over the skip line and nearly striking the barrier. 2RP 113-15.

Additional troopers responded to the call of the eluding vehicle. 2RP 66. As the defendant drove onto the I-5 ramp heading north, a trooper deployed a spike strip, successfully flattened both driver side tires and finally stopped the car. 2RP 117. Trooper Seaburg placed the defendant under arrest. 2RP 117-18, 124. McCormack was handcuffed, patted down and advised of his rights. 2RP 118-19. During Seaburg's contact, he smelled an odor of marijuana emanating from McCormack. 2RP 118-19. Seaburg escorted McCormack to the back of his patrol car and sat behind the driver's wheel to fill out paperwork and wait for a tow truck. 2RP 120-22. McCormack made several odd spontaneous statements as the two were in the patrol car. 2RP 122-26. Seaburg did not smell alcohol on the defendant and therefore did not believe McCormack was under the influence of alcohol. 2RP 126-28. Seaburg decided to take McCormack to Harborview Medical Center for a blood draw to determine if he was

under the influence of any drug. 2RP 126, 128. As they were heading to the hospital, McCormack continued to display unusual behavior by screaming, grunting and moaning. 2RP 125.

When Seaburg arrived at Harborview, he requested assistance for the blood draw. 2RP 128. Medical staff responded with a gurney. 2RP 128-29. McCormack refused to be strapped down on the gurney and became combative. 2RP 128-29. Given McCormack's behavior, he was admitted into the mental health unit at the hospital. 2RP 129.

C. ARGUMENT

THE TRIAL COURT HAS AUTHORITY TO IMPOSE AN IGNITION INTERLOCK DEVICE AS A CONDITION OF PROBATION WHEN A DEFENDANT IS CONVICTED OF DUI EVEN IF ALCOHOL DID NOT CONTRIBUTE TO THE OFFENSE.

McCormack mistakenly argues that the trial court exceeded its statutory sentencing authority by ordering an ignition interlock device (hereinafter "IID") as a condition of the DUI probation. A trial court not only has the statutory authority but also the discretionary authority to impose an IID as a condition of probation even if alcohol was not involved in the offense. Accordingly, this Court should affirm.

The SRA provides that if conditions of community supervision are imposed, they must relate directly to the crime for which the offender was convicted. State v. Parramore, 53 Wn. App. 527, 529, 768 P.2d 530 (1989). Persons may be punished for their crimes and they may be prohibited from doing things which are directly related to their crimes, but they may not be coerced into doing things which are believed will rehabilitate them. Parramore, at 530. But the SRA rule discussed applies only to "the sentencing of felony offenders." See RCW 9.94A.010. The SRA does not control the imposition of probationary conditions upon misdemeanor offenders. State v. Anderson, 151 Wn. App. 396, 402, 212 P. 3d 591 (2009). Trial courts have great discretion in imposing sentences within the statutory limits for misdemeanors and gross misdemeanors. Id. This discretion is consistent with the American criminal jurisprudence affording wide latitude to sentencing judges on the grounds that "the punishment should fit the offender and not merely the crime." State v. Herzog, 112 Wn.2d 419, 423-24, 771 P.2d 739 (1989) (quoting Williams v. New York, 337 U.S. 241, 247, 69 S. Ct. 1079, 93 L. Ed. 1337 (1949)).

Unlike felony sentences that fall under the SRA, a court can order a condition which may not be related to the crime but will tend

to prevent future crimes. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), *review denied*, 140 Wn.2d 1006 (2000) (defendant who committed string of non-alcohol related crimes may be ordered to abstain from alcohol and enroll in substance abuse treatment program because those conditions will assist him in abiding by the law). Probation outside the SRA is not a matter of right but a matter of grace, privilege, or clemency “granted to the deserving, and withheld from the undeserving, as sound official discretion may dictate.” State v. Farmer, 39 Wn.2d 675, 679, 237 P.2d 734 (1951). In this older version of probation, which remains applicable to misdemeanants, a court may impose probationary conditions that bear a reasonable relation to the defendant's duty to make restitution or that tend to prevent the future commission of crimes. State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962).

The trial court did not abuse its discretion in imposing an IID for a DUI conviction. The IID would deter the defendant from driving after having consumed alcohol, therefore, the trial court used its discretion in imposing conditions which would tend to prevent future commissions of DUI.

McCormack committed his crimes September 24, 2010.

CP 8-9. McCormack cites to former RCW 46.61.5055(5)(a) which was in effect on that date and provided in part:

The court shall require any person convicted of an alcohol-related violation of RCW 46.61.502 or 46.61.504 to apply for an ignition interlock driver's license from the department under section 9 of this act and to have a functioning ignition interlock device installed on all motor vehicles operated by the person.

Former RCW 46.61.5055(5)(a).

McCormack argues because the provision was amended effective January 1, 2011 and struck the "alcohol-related" language, the version of the statute in effect when he committed the DUI did not require use of an IID because there was no evidence of alcohol related to his DUI conviction. Laws of 2010, ch. 269, § 4.

McCormack then tangentially concludes that the trial court exceeded its statutory sentencing authority by ordering the IID. McCormack cites to no authority which supports his claim. To the contrary, if McCormack read further down the same statute, it did authorize the court to order an IID during a period of probation as follows:

In addition to any nonsuspendable and nondeferrable jail sentence required by this section, whenever the court imposes less than one year in jail, the court shall also suspend but shall not defer a period of

confinement for a period not exceeding five years...The court **may impose** conditions of probation that include nonrepetition, installation of an ignition interlock device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period.

Former RCW 46.61.5055(11)(a) (emphasis added).

Thus, the statute at the time McCormack committed the crime clearly gives the court authority to order the IID.

McCormack's claim is meritless.

D. CONCLUSION

The trial court had both discretionary and statutory authority to order an ignition interlock device as a condition of probation on a driving while under the influence conviction. This court should affirm the judgment and sentence.

DATED this 21st day of June, 2012.

Respectfully submitted,

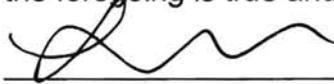
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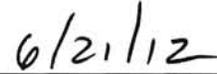
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Andrew P. Zinner, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of Respondent's Brief, in STATE V. ALEXANDER MCCORMACK, Cause No. 67664-4-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 Tuyen Lam
Done in Kent, Washington



Date 6/21/2012