NO. 68413-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

KENNETH SANDHOLM,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES

1. Jurors need not be unanimous as to alternative means, as long as sufficient evidence supports each of the alternatives. The State charged Sandholm with two alternative means of driving under the influence (DUI): being "under the influence of or affected by any intoxicating liquor or drug" and being "under the combined influence of or affected by intoxicating liquor and any drug." The evidence established that Sandholm was under the influence of alcohol and had taken certain over-the-counter drugs; there was no evidence presented as to the effects of these drugs. Where both alternatives could be satisfied by alcohol, was the evidence sufficient to support Sandholm's conviction under each alternative?

2. The existence of prior offenses that elevate a crime from a misdemeanor to a felony is an essential element that the State must prove beyond a reasonable doubt, and it is not error to allow the jury to hear evidence of a prior conviction when it is an element of the crime charged. The State charged Sandholm with felony DUI based on multiple prior DUI convictions. Did the trial court properly admit Sandholm's stipulation to the prior convictions?

3. Prior felony convictions are properly included in an offender score if the offender has not spent five crime-free years in

the community since release from confinement or entry of a judgment and sentence. Sandholm's criminal history includes two prior felony drug convictions, following which Sandholm has never spent five crime-free years in the community. Did the trial court properly include the drug felonies in his offender score?

4. When a person is convicted of felony DUI, his offender score will also include prior DUI-related and serious traffic offenses committed within the preceding ten years. The trial court erroneously included in Sandholm's offender score two DUI convictions that were more than ten years old. Should this Court remand for resentencing?

5. An offender may not be sentenced to terms of confinement and community custody that together exceed the statutory maximum for the offense. The clarifying notation used here no longer complies with statutory requirements. Should this Court remand for resentencing?

B. STATEMENT OF THE CASE

On October 29, 2009, Kenneth Sandholm was driving a small pickup truck on Highway 18. State Trooper Christopher Poague noticed the truck drift over the right fog line and slowly correct back into the lane of travel. 1/31/12 RP 96-99. A short

distance later, Sandholm veered over the line in the other direction. 1/31/12 RP 107. This time, the truck was half in each lane and straddled the lane divider for about three seconds, or eight to ten car lengths. 1/31/12 RP 108-09. The truck slowly drifted back into the lane of travel. Id. A little farther up the roadway, Sandholm again drifted over the fog line to the right. 1/31/12 RP 110. Additionally, Sandholm was unable to maintain a constant speed, and dropped down below 50 miles per hour twice during Poague's observations. 1/31/12 RP 103. All of this activity occurred within one and a half to two minutes, and without lane change signals. 1/31/12 RP 110-11; 2/1/12 RP 112.

Trooper Poague stopped Sandholm based upon Sandholm's inability to keep within his lane and maintain a constant speed. 1/31/12 RP 118. Poague observed that Sandholm had watery, bloodshot eyes and smelled of alcohol. 1/31/12 RP 124-25. Sandholm's speech pattern was slow and his face was flushed. 1/31/12 RP 124-25, 155. When Poague asked Sandholm for his license, insurance, and registration, Sandholm immediately put a breath mint into his mouth. 1/31/12 RP 126-27. Sandholm's movements were slow and deliberate. Id. He denied having had anything to drink. Id.

Trooper Poague asked Sandholm to step out of the truck and to spit out his mint. 1/31/12 RP 128. Sandholm slowly complied, at which point Poague observed that the odor of intoxicants was "obvious" and his coordination was "poor." 1/31/12 RP 128, 154.

Sandholm declined to perform some of the field sobriety tests because of trouble with his knees, but agreed to do the horizontal gaze nystagmus (HGN) test. 1/31/12 RP 132-33, 149-50. Out of six possible "clues" on the HGN test, Sandholm exhibited all six. 1/31/12 RP 144, 146, 147-48. Based on his training and experience, Poague concluded that Sandholm had consumed intoxicants and was impaired. 1/31/12 RP 148, 157. Accordingly, Poague placed Sandholm under arrest. 1/31/12 RP 157. Following his arrest, Sandholm agreed to submit to a breath test. 2/1/12 RP 43. The samples, taken approximately two hours after Poague first observed Sandholm's erratic driving, provided results of 0.079 and 0.080. 2/1/12 RP 49, 56; 2/7/12 RP 31.

By amended information, the State charged Sandholm with felony DUI and alleged that he had at least four prior offenses within ten years of the arrest for the current offense.[1] CP 329-30.

[1] The State also charged Sandholm with Driving While License Suspended/ Revoked in the First Degree. CP 329-30. Sandholm pleaded guilty to that offense before trial. CP 963-79.

Sandholm stipulated to the existence of four or more prior DUI convictions within ten years, but objected to reading the stipulation to the jury. 11/3/10 84-86. Instead, Sandholm moved to bifurcate the proceedings such that the jury would determine whether he was guilty of DUI, and, if so, the court would consider the stipulation to determine whether he was guilty of felony DUI. Id. The trial court (Hon. Wesley Saint Clair) denied the motion, concluding that the existence of the prior convictions was an element of the offense that must be proven to the jury beyond a reasonable doubt. Id. The first trial ended in a hung jury.

After two more false starts, a new trial commenced before the Honorable Michael Heavey. 1/10/12 RP 2-4; 1/23/12 RP 19. Sandholm signed a new stipulation concerning his prior DUI convictions, and renewed his motion to bifurcate. 1/24/12 RP 2-20. The court denied the motion, again concluding that the existence of the prior offenses is an element of felony DUI and must be proven to the jury. 1/24/10 AM RP 10; 1/24/10 PM RP 75. To minimize prejudice, however, the court agreed to give "bifurcated instructions" that would have the jurors decide whether the State had proven DUI first, and only if so, consider whether the stipulation proved the additional element to make the offense a felony.

1/30/12 RP 22-24. The court read the stipulation to the jury at the close of the State's case. 2/7/12 RP 73.

The jury found Sandholm guilty as charged. 2/13/12 RP 3; CP 1441. By special verdict, the jury also found that Sandholm had the requisite four or more prior convictions within ten years. 2/13/12 RP 3; CP 1440.

At sentencing, the court calculated an offender score of eight, resulting in a standard range of 60 months, the statutory maximum for the offense. 3/2/12 RP 7, 17. The court imposed 60 months of confinement and 12 months of community custody. 3/2/12 RP 17; CP 1660-69. On the judgment and sentence, the court included the notation, "The term of community custody shall be reduced by the Department of Corrections if necessary so that the total amount of incarceration and community custody does not exceed the maximum term of sentence for any offense ..." CP 1664. The court interlineated, "60 months maximum." Id.

C. ARGUMENT

1. UNANIMITY AS TO ALTERNATIVE MEANS WAS NOT REQUIRED BECAUSE THERE IS SUFFICIENT EVIDENCE TO SUPPORT BOTH ALTERNATIVES.

Sandholm contends that the court violated his constitutional right to a unanimous jury verdict because insufficient evidence

supported one of the alternative means considered by the jury and the court did not give a unanimity instruction. Because the same evidence proved both alternatives in this case, the argument should be rejected.

Criminal defendants have a right to an expressly unanimous verdict. Wash. Const. art. I, § 21; State v. Ortega-Martinez, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). When the charged crime can be committed by more than one means, however, unanimity is not required as to the means by which the crime was committed, so long as substantial evidence supports each alternative means. State v. Kitchen, 110 Wn.2d 403, 410, 756 P.2d 105 (1988). "The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury." Ortega-Martinez, 124 Wn.2d at 707-08; State v. Ortiz, 80 Wn. App. 746, 749-50, 911 P.2d 411 (1996). If there is substantial evidence of each alternative, the conviction will stand. Id.

The State charged Sandholm with DUI under two alternatives: that he drove a vehicle while he was (1) "under the influence of or affected by intoxicating liquor or any drug," and (2) "under the combined influence of or affected by intoxicating liquor and any drug."

CP 329. The court instructed the jury on both alternatives. CP 1430-32. The "to convict" instruction provided that the jury need not be unanimous as to which of the alternative means 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." CP 1431.

Sandholm first contends that the pattern "to convict" instruction misstated the law by informing the jury that it need not be unanimous as to which alternative means had been proven.[2] This Court should reject the argument, which is reviewed de novo. State v. Besabe, 166 Wn. App. 872, 881, 271 P.3d 387 (2012).

Sandholm argues that Ortega-Martinez did not hold that a jury need not be unanimous as to the means, but only that a conviction would not be reversed on that basis as long as sufficient evidence supports each alternative. Brief of Appellant at 7. Thus, he argues, the trial court erred by affirmatively instructing the jury that it need not be unanimous. He fails to support his reading of Ortega-Martinez with any authority, and his position is belied by caselaw both predating and postdating Ortega-Martinez.

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[2] WPIC 92.02.

Washington courts have consistently re-affirmed that jury unanimity is not required if sufficient evidence supports each of the alternative means. See, e.g., State v. Fortune, 128 Wn.2d 464, 909 P.2d 930 (1996); State v. Klimes, 117 Wn. App. 758, 73 P.3d 416 (2003), disapproved of on other grounds by State v. Allen, 127 Wn. App. 125, 110 P.3d 849 (2005). Additionally, Kitchen, on which Ortega-Martinez relied, held that unanimity in alternative means cases is required only as to the overall offense, rather than for each of the alternative means, so long as sufficient evidence supports each of the alternatives. 110 Wn.2d at 410. Because the instruction given here accurately conveyed the law, there was no error. Besabe, 166 Wn. App. at 881.

Sandholm next contends that his conviction must be reversed because the State failed to prove each alternative beyond a reasonable doubt. Specifically, Sandholm argues that the State failed to prove that he was impaired by the combined influence of drugs and alcohol. While Sandholm correctly observes that the State presented no evidence of drug impairment, reversal is not required because the trial record and jury instructions demonstrate that the jury must have relied on the alcohol-impairment theory alone and

because the substantial evidence of alcohol impairment supports both alternatives.

The trial court instructed the jury to base its decision only on the evidence contained in the testimony and exhibits. CP 1423-23. There was no evidence that Sandholm's use of Advil, Orajel, and an asthma inhaler contributed to his impairment. The prosecutors made no reference to the over-the-counter drugs or to the "combined influence" alternative in closing argument, except in quoting the jury instructions. Instead, the prosecutor's closing argument and the evidence she adduced at trial made clear that the State was relying exclusively on the "under the influence of or affected by intoxicating liquor" theory. Thus, in order to find Sandholm guilty of DUI, the jury could not have relied on the "combined influence" alternative and must have relied on the alcohol impairment alone. See State v. Rivas, 97 Wn. App. 349, 352-53, 984 P.2d 432 (1999) (holding evidence was sufficient to support assault conviction, even though there was no evidence as to two of the three charged alternative means, where trial record and information made clear that the State was relying on the third alternative means, for which evidence was sufficient), disapproved on other grounds by State v. Smith, 159 Wn.2d 778, 154 P.3d 873 (2007).

Moreover, the substantial evidence that Sandholm was driving under the influence of alcohol is also logically sufficient to prove that he was under the "combined influence of or affected by intoxicating liquor and any drug." Even if Sandholm's impairment was caused entirely by the alcohol, with the drugs contributing nothing, he was still affected by the combination of the alcohol and non-impairing drugs. Thus, in this unique situation, the same evidence proves both alternatives. Reversal is not required.

2. EVIDENCE OF PRIOR DUI CONVICTIONS IS ADMISSIBLE IN A FELONY DUI PROSECUTION TO PROVE AN ESSENTIAL ELEMENT OF THE OFFENSE.

Sandholm contends that the trial court erred by admitting evidence of his prior convictions because the fact that he is a DUI recidivist is not an essential element of the charged offense and evidence of the prior convictions was both irrelevant and unduly prejudicial. He is mistaken.

Former RCW 46.61.502 (2009) provides, in relevant part, as follows:

> (1) A person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives a vehicle within this state:
>
> (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by

analysis of the person's breath or blood made under RCW 46.61.506; or

(b) While the person is under the influence of or affected by intoxicating liquor or any drug; or

(c) While the person is under the combined influence of or affected by intoxicating liquor and any drug.

***

(5) Except as provided in subsection (6) of this section, a violation of this section is a gross misdemeanor.

(6) It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055; or (b) the person has ever previously been convicted of (i) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or (iii) an out-of-state offense comparable to the offense specified in (b)(i) or (ii) of this subsection.

Sandholm argues that subsection (6), which requires proof of prior convictions, does not constitute an "element" of the crime of DUI, but merely provides for enhanced punishment for DUI recidivists. But that position is contradicted by this Court's express observation that a "plain reading of ... subsection (6) adds an additional element to the list of elements stated in subsection (1) to define the offense of felony driving under the influence." State v. Castle, 156 Wn. App. 539, 543, 234 P.3d 260 (2010). Accord, State

v. Chambers, 157 Wn. App. 465, 468, 237 P.3d 352 (2010), rev. denied, 170 Wn.2d 1031 (2011) ("the fact that a person has four prior DUI offenses is an essential element of the crime of felony DUI under former RCW 46.61.502(6), that must be proved to the jury beyond a reasonable doubt"). See also State v. Roswell, 165 Wn.2d 186, 189, 196 P.3d 705 (2008) (holding that when prior convictions raise the level of a crime from a misdemeanor to a felony, "the prior convictions are elements of the charged crime that the State must prove beyond a reasonable doubt"). Indeed, this Court has held that the failure to allege in the information "the essential statutory element that [the defendant] has four prior DUI offenses 'within ten years'" is a fatal error requiring dismissal without prejudice. State v. Cochrane, 160 Wn. App. 18, 20, 253 P.3d 95 (2011).

The legislature is presumably aware of this Court's decisions interpreting the DUI statute, yet has declined to change the statute to indicate a contrary intent (despite having amended the statute in other ways since this Court's decision in Chambers). Thus, the legislature is deemed to have acquiesced to the decisions. See City of Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

Sandholm's argument that evidence of the prior convictions was irrelevant and unfairly prejudicial also fails. "If a prior conviction is an element of the crime charged, evidence of its existence will never be irrelevant." Roswell, 165 Wn.2d at 198. Although evidence that the accused has been convicted of the same offense in the past is certainly prejudicial, "[o]ne can always argue that evidence that tends to prove any element of a crime will have some prejudicial impact on the defendant." Id.

Trial courts may reduce unnecessary prejudice by giving a limiting instruction or by bifurcating the jury instructions so that the jury considers whether the prior convictions have been proven beyond a reasonable doubt only after it finds the defendant guilty of the misdemeanor version of the crime. Roswell, 165 Wn.2d at 198 (citing with approval State v. Oster, 147 Wn.2d 141, 52 P.3d 26 (2002)). In this case, the trial court took both of these actions, bifurcating the instructions and instructing the jury not to consider the evidence concerning the existence of prior offenses to determine whether Sandholm was guilty of DUI on this occasion. CP 1431-32, 1437-39.

Further, the evidence of Sandholm's prior convictions was limited to this stipulation: "At the time of the arrest in this case, the

defendant, KENNETH SANDHOLM, had been previously convicted of four or more prior offenses within ten years as defined by RCW 46.61.5055 (14)." CP 1332. The trial court also ruled that the parties must refrain from using the word "felony" to identify Sandholm's current offense.[3] 5/11/11 RP 64-65; 1/23/12 RP 12-19 (dismissing jury panel after inadvertently using the word "felony" during voir dire). Thus, the jury was not informed of the nature or details of Sandholm's previous offenses or the fact that their existence raised the current offense to a felony.

Under clearly established case law and the plain language of RCW 46.61.502, the trial court properly admitted evidence of Sandholm's prior DUI convictions and properly exercised its discretion to avoid unnecessary prejudice. Sandholm's argument to the contrary is without merit and must be rejected.

3. THE STATE AGREES THAT SANDHOLM'S OFFENDER SCORE WAS MISCALCULATED.

Sandholm alleges that two of his prior DUI convictions and two felony drug convictions should not have been included in his offender score because they washed out under RCW 9.94A.525(e). With

[3] On appeal, Sandholm claims that he moved to exclude evidence of his prior convictions as irrelevant under ER 403 and inadmissible under ER 404. Brief of Appellant at 8. In fact, it appears that Sandholm's pro se motion was merely "to exclude the word 'felony' from any and all reference in front of the jury." 11/3/10 RP 84-85.

respect to the 1998 and 1999 DUI convictions, the State agrees. But because the felony drug offenses do not wash under RCW 9.94A.525(c), the trial court properly included them in his score. This Court should remand for resentencing.

A sentencing court's offender score calculation is reviewed de novo. State v. Wilson, 113 Wn. App. 122, 136, 52 P.3d 545 (2002), rev. denied, 149 Wn.2d 1006 (2003). An erroneously scored prior conviction is a legal error. In re Personal Restraint of Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). A sentence based on an improperly calculated score lacks statutory authority. Id. "A sentence in excess of statutory authority is subject to challenge, and the defendant is entitled to be resentenced." Id. at 869.

RCW 9.94A.525 governs offender score calculation. The pertinent portions of the statute are as follows:

> The offender score is the sum of points accrued under this section rounded down to the nearest whole number.
>
> ***
>
> (2)(c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and

sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

(d) Except as provided in (e) of this subsection, serious traffic convictions shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender spent five years in the community without committing any crime that subsequently results in a conviction.

(e) If the present conviction is felony driving while under the influence of intoxicating liquor or any drug (RCW 46.61.502(6)) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug (RCW 46.61.504(6)), prior convictions of felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug, and 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 (including full-time residential treatment) 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 (2009).

In State v. Morales, 168 Wn. App. 489, 278 P.3d 668 (2012), this Court concluded that "the plain language of RCW 9.94A.525 indicates that arrests occurring more than 10 years before [the defendant's arrest in the pending case] shall not be included under subsection (2)(e)(ii)." Id. at 495. In this case, the trial court counted

two DUI convictions from 1998 and 1999 that were based on arrests occurring more than ten years before Sandholm's arrest on the instant charge. This was error. Sandholm is entitled to be resentenced with an offender score of six, rather than eight.

Sandholm's offender score also included two convictions for Violation of the Uniform Controlled Substances Act (VUCSA). Relying on Morales, Sandholm contends that this was error because the only offenses that count when an offender is sentenced for felony DUI are those that are listed in RCW 9.94A.525(e). Sandholm misinterprets Morales.

Morales was convicted of felony DUI. 168 Wn. App. at 491. The trial court calculated an offender score of eight in part by counting four "serious traffic offense" convictions that were more than 10 years old. Id. at 493-94. The State argued that these convictions counted under RCW 9.94A.525(2)(e)(i), which provides that prior convictions for DUI-related or serious traffic offenses are included if "committed within five years since the last date of release from confinement ... or entry of judgment and sentence." Though nine years had passed between Morales's 1992 conviction for physical control of a motor vehicle and his next DUI conviction, the

State argued that an intervening misdemeanor assault conviction prevented the earlier offenses from washing out. Id. at 496-97.

This Court disagreed, holding that "'the prior convictions' to which subsection (2)(e)(i) refers are the specific convictions outlined in the immediately preceding provision of the statute." Id. at 497-98. Since the misdemeanor assault was not a conviction for "felony driving while under the influence of intoxicating liquor or any drug, felony physical control of a vehicle while under the influence of intoxicating liquor or any drug and serious traffic offenses," it neither counted in his offender score nor prevented the earlier convictions from washing out. Id.

Morales does not support the assertion that the *only* prior convictions that count in calculating an offender score for one convicted of felony DUI are for those offenses listed in subsection (2)(e)(i). Rather, Morales is properly understood as holding that *for the purposes of subsection (2)(e)(i),* the only offenses to be counted are those specifically listed in subsection (2)(e) that have occurred within five years of the current offense. 168 Wn. App. at 497 ("the use of Morales's fourth degree assault conviction in his offender score is contrary to the provisions of subsection (2)(e)(i)").

The State agrees that Sandholm's VUCSA convictions do not count under subsection (2)(e)(i). But they do count under subsection (2)(c), which provides:

> (c) Except as provided in (e) of this subsection, class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

In other words, convictions that would wash out under subsection (2)(c)'s five-year crime-free standard may still be counted if they meet subsection (2)(e)'s standards. For example, under subsection (2)(c), the court could not count a felony DUI conviction if the offender had been in the community for five crime-free years since release. But that conviction *would* count under subsection (2)(e), if the offender were convicted of a felony DUI-related offense and the prior DUI was a "prior offense[] within ten years" as defined by RCW 46.61.5055. Thus, subsection (2)(e) does not trump subsection (2)(c) – it merely presents an exception designed to increase the punishment for DUI recidivists. Here, because Sandholm's VUCSA convictions were

never followed by a five-year crime-free period in the community,[4] they were properly counted in his offender score.

Nevertheless, because the trial court erred by including in Sandholm's offender score two misdemeanor DUIs that washed out under subsection (2)(e)(ii), this Court must remand for resentencing.

4. THE STATE AGREES THAT THE COMBINED TERM OF INCARCERATION AND COMMUNITY CUSTODY EXCEEDS THE STATUTORY MAXIMUM.

Sandholm contends that the trial court erred by sentencing him to a combined term of incarceration and community custody that exceeds the statutory maximum. The State agrees. But because the offender score miscalculation will result in a shorter term of incarceration on resentencing, the remedy is not to strike the term of community custody but to impose a term that that is consistent with RCW 9.94A.701(9).

Based on an offender score of eight, the trial court sentenced Sandholm to 60 months of confinement and 12 months of community custody. These terms together exceeded the 60-month statutory maximum for the offense. RCW 9A.20.020(10(c); RCW 46.61.502(6). Although the court included a notation on the judgment

[4] Sandholm was sentenced for one VUCSA conviction in March 1998, and another in December 2000. CP 1470-77, 1539-48, 1666. Both offenses were treated as class C felonies. He committed his next felony offense less than five years later, in February 2005. CP 1599-1602,1666.

and sentence stating that the total term of confinement and community custody could not exceed the statutory maximum, this so-called "Brooks notation"[5] no longer complies with statutory requirements in light of RCW 9.94A.701(9). State v. Boyd, 174 Wn.2d 470, 471, 275 P.3d 321 (2012). Under RCW 9.94A.701(9), the term of community custody "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." Since Sandholm was sentenced after RCW 9.94A.701(9) became effective, the trial court erred by imposing a total term of confinement and community custody in excess of the statutory maximum, notwithstanding the Brooks notation. Boyd, 174 Wn.2d at 473.

Because the court also erred in calculating Sandholm's offender score, the remedy for this error is not to strike the term of community custody. Rather, since Sandholm's properly-calculated offender score of six yields a standard range of 41-54 months,[6] the sentencing court may still impose a term of community custody. This Court should remand for resentencing with instructions to impose a

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[5] In re Personal Restraint of Brooks, 166 Wn.2d 664, 211 P.3d 1023 (2009).

[6] Former RCW 9.94A.510 (2009); former RCW 9.94A.515 (2009) (DUI carries seriousness level of V).

community custody term consistent with RCW 9.94A.701(9). Boyd, 174 Wn.2d at 473 (remanding to the trial court to either amend the community custody term or resentence consistent with RCW 9.94A.701(9)).

D. CONCLUSION

Because the trial court sentenced Sandholm based on a miscalculated offender score, this Court should remand for resentencing. For the reasons expressed above, the State respectfully requests that the Court otherwise affirm Sandholm's conviction for felony DUI.

DATED this 17th day of June, 2013.

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 Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. KENNETH WAYNE SANDHOLM, Cause No. 68413-2 -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.

Dated this 17th day of June, 2013

Name
Done in Seattle, Washington