No. 68413-2-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

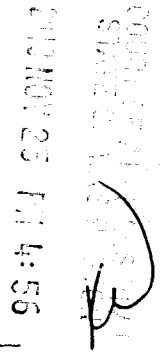
STATE OF WASHINGTON,

Respondent,

v.

KENNETH SANDHOLM,

Appellant.



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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. ARGUMENT

The trial court miscalculated Mr. Sandholm's Offender score.

On appeal, Mr. Sandholm has argued his offender score was miscalculated under former RCW 9.94A.525(2)(e). Specifically he contended the trial court could not include his two prior felonies nor two driving under the influence (DUI) convictions. The State filed a response conceding that under this Court's decision in *State v. Morales*, 168 Wn. App. 489, 278 P.3d 668 (2012), the trial court erred in including the two DUI convictions at issue. The State maintained, however, the two prior felonies were properly included.

Less than one week prior to oral argument in this matter the State withdrew its concession. But the State went further. Without seeking leave of this Court to do so, the State submitted what amounts to a supplemental response brief, several pages of additional briefing raising new arguments. In that new argument, the State contends for the first time that because RCW 9.94A.525(11) requires a court count as one point prior "serious traffic offenses" in the score of a current "felony traffic

offense" the two contested DUI in this case could not wash out. Motion to Withdraw Concession of Error at 2-3.

The State's reliance on RCW 9.94A.525(11) is misplaced. The Supreme Court has made clear, that the provisions of RCW 9.94A.525 must be applied serially.

> The legislature intended the rules for calculating offender scores [in RCW 9.94A.525] to be applied in the order in which they appear. In that regard, subsection (1) defines a "prior conviction," and subsection (2) explains how to sift through the prior convictions in order to eliminate those that wash out. Subsections (7) through (18) then provide specific rules regarding the actual calculation of offender scores, instructing courts to "count" the prior offenses by assigning different numerical values to the prior offenses.

State v. Moeurn, 170 Wn.2d 169, 175, 240 P.3d 1158 (2010). Thus, one does not reach subsection (11) regarding how priors offense are scored, until resolving which offenses are to be included under subsection (2). Because former 9.94A.525(2)(e) did not permit their inclusion in the calculation, the two prior DUI are not among the prior offenses scored under subsection (11).

A recent legislative enactment resolves much of the State's remaining contentions. Engrossed Second Substitute Senate Bill (ESSSB) 5912 provided:

RCW 9.94A.525 and 2011 c 166 § 3 are each amended to read as follows:

. . . .

(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~~)) all predicate crimes for the offense as defined by RCW 46.61.5055(14) shall be included in the offender score, and prior convictions for 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)) shall always be included in the offender score. All other convictions of the defendant shall be scored according to this section.

. . . .

Laws 2013 2nd sp.s. ch. 35 § 8, p2899.

The new language of the statue plainly broadens the offenses which can be included in the offender score. The new statute does not contain a specific list of prior convictions which can be included. It was the prior statue's specific list of prior offense that *Morales* relied upon

to narrow the class of offenses which could be included in the offender score. This court said:

> Subsection [former] (2)(e)(i) states "***the*** prior convictions [,]" indicating that only the specific classes of prior offenses stated immediately before this provision shall be counted in an offender's score for a DUI-related felony conviction.

Morales, 168 Wn. App. at 498 (Emphasis in original). Instead, the amended statute now provides "All other convictions of the defendant shall be scored according to this section." Rather than employ a separate "wash-out" standard as did the old statute, the new statute simply references the other, i.e., non-DUI, provisions, of the statute. In essence the new amendment adopts the argument the State has made in this case as well as in *Morales*.

"Every amendment is made to effect some material purpose." *Vita Food Prods., Inc. v. State,* 91 Wn.2d 132, 134, 587 P.2d 535 (1978). If the former statute already permitted inclusion of prior non-driving offenses or permitted the use of the wash-out rules in other portions of the statute, as the State argues, the present amendment would serve no material purpose. Thus, the new amendment demonstrates the former statute did not permit this.

RCW 9.94A.345 requires "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." In only narrow circumstances will an amendment apply retrospectively. An amendment may be given retroactive application where the Legislature indicates its intent to clarify an ambiguous statute. *State v. Dunaway*, 109 Wn.2d 207, 216, 743 P.2d 1237 (1987). However, once a statute has been subject to judicial construction, subsequent "clarifying" legislation cannot apply retrospectively, otherwise the Legislature would be given "license to overrule [the judiciary], raising separation of powers issues." *Johnson v. Morris*, 87 Wn.2d 922, 925-26, 557 P.2d 1299 (1976); *see also*, *Dunaway*, 109 Wn.2d at 216 n.6.

During oral argument in this case the deputy prosecutor claimed the Legislature stated its intent that the amendments of RCW 9.94A.525(2)(e) were intended to clarify and not change the provisions at issue here. Counsel, however, has been unable to find any such statement in the 46 sections of Laws 2013 2nd sp.s. ch. 35. To be sure there is nothing in section 8 which says as much.

Counsel contacted the deputy prosecutor requesting a citation to that portion of the bill which contained the claimed statement of

legislative intent. The deputy prosecutor replied that she was relying on a statement in the Senate Bill Report for Senate Bill (SB) 5902 p.4 which states "the scoring provisions under the SRA are clarified."

SB 5902 was not enacted into law. However, many of its provisions, including its proposal to amend RCW 9.94A.525(2)(e) were included in ESSSB 5912. But in any event, the following language appears on the first page of the bill report on which the deputy prosecutor relied:

> *This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations.* ***This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.***

(Italics in original, bold added). Thus, whatever is contained in the report it is not a statement of legislative intent.

There is no statement of legislative intent to merely clarify the provisions of former RCW 9.94A.525(2)(e). Moreover, even if there were, because former RCW 9.94A.525(2)(e) has been judicially construed to mean something else, the amendment could not apply retroactively. *Johnson*, 87 Wn.2d at 925-26.

For the reasons above and as argued previously, pursuant to former RCW 9.94A.525(2)(e)(ii), the only relevant criminal history for

purposes of Mr. Sandholm's offender score are the four prior DUI convictions committed within ten years of the current offense. *Morales*, 168 Wn. App. at 498. RCW 9.94A.525(11) instructs those each count as a single point, yielding a score of 4. The trial court's calculation of Mr. Sandholm's offender score as 8 is incorrect.

B. CONCLUSION

This Court must reverse Mr. Sandholm's sentence.

Respectfully submitted this 22nd day of November, 2013.

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Attorneys for Appellant

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

STATE OF WASHINGTON, Respondent, v. KENNETH SANDHOLM, Appellant.	)))))))))	NO. 68413-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 25TH DAY OF NOVEMBER, 2013, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] JENNIFER JOSEPH, DPA KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
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SIGNED IN SEATTLE, WASHINGTON THIS 25TH DAY OF NOVEMBER, 2013.

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