

65125-1

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NO. 65125-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

JASON O'GRADY,

Appellant.

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

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE INFORMATION WAS CONSTITUTIONALLY DEFICIENT.

Appellant Jason O'Grady asserts the information did not include all necessary elements for felony DUI because it did not allege he had four prior qualifying offenses occurring within the last ten years.¹ Brief of Appellant (BOA) at 6-9. In response, the State cites this Court's recent decision in State v. Chambers, 157 Wn. App. 465, 237 P.3d 352 (2010), arguing the fact that a prior occurred within the last ten years is not an essential element of the crime and, therefore, need not be included in the information. Brief of Respondent 7-11. The State misreads Chambers.

¹ RCW 46.61.502(1) provides "[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. A list of qualifying prior offenses is found in RCW 46.61.5055(14).

RCW 46.61.502(6) provides in relevant part: It is a class C felony punishable under chapter 9.94A RCW... if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055....

Contrary to the State's position, Chambers held "the State must prove beyond a reasonable doubt the existence of four or more prior DUI offenses within ten years in order to convict a defendant of felony DUI in violation of RCW 46.61.502(6)." Id. at 468, 481 (emphasis added). In Chambers, the issue was whether the jury had to determine the defendant's prior California conviction qualified as a prior offense under RCW 46.61.5055, or whether the question of comparability was a legal question to be decided by a judge. Id. at 467-68. To answer that question, this Court had to decide whether qualification of the prior offenses was a necessary element of felony DUI.

Chambers held the question of whether a prior foreign offenses qualifies under RCW 46.61.5055 was a threshold legal question for a judge to determine and, therefore, was not an essential element for the jury to decide. Id. at 475-80. However, it also held that State had to prove -- as an essential element -- the defendant had four or more prior offenses within ten years. Id. 463, 481. Hence, Chambers can be read as concluding that the legal qualification of a particular prior is not an essential element, but the factual question of whether a prior occurred within the last ten years

is. As such, Chambers does not support the proposition for which the State cites it.

Alternatively, the State claims, the missing element in the information is “implied,” citing State v. Brosius, 154 Wn. App. 714, 225 P.3d 1049 (2010). BOR at 11-13. Brosius is distinguishable, however.

Brosius was charged failure to register as a sex offender. The information charged he had failed to register “by failing to report on the required days for the 90 day reporting requirement as required by RCW 9A.44.130(7).” Id. at 718. RCW 9A.44.130(7) requires only that sex offenders with a risk level classification of II or III register in person every 90 days. The information also charged that Brosius was “a person required to register as a sex offender.” Id.

On appeal, Brosius argued the information was constitutionally deficient because it failed to include his classification as a level II or III sex offender. Id. at 721. Division II of the Court of Appeals concluded, although the information did not expressly state Brosius was a level II or III sex offender, that element appeared by fair construction because only level II or III sex offenders are required to register every 90 days and the

information charged that Brosius was required to register. Id. Thus, Brosius held the information fairly implied that Brosius was a level II or III offender because RCW 9A.44.130(7) applies to no others. Id.

Unlike in Brosius, here there is no statutory reference in the charging language from which one might have implied the prior convictions occurred within the last ten years. In its brief, the State references only the fact that its office charged appellant with felony DUI:

... the fact that all four DUIs had all occurred within the preceding 10 years is implied [in the charging document], because only those convictions that occurred within the preceding 10 years can serve as the basis for alleging the charge.

BOR at 13. The State's logic is patently circular. Essentially, the State is saying that appellant could infer that his prior offense occurred within ten years because they decided to charge him with felony DUI. This is not what Brosius stands for and this does not meet constitutional standards. See, BOA at 6-8.

For the reasons stated above and those set forth in appellant's opening brief, this Court should find the information was constitutionally deficient and reverse appellant's felony DUI conviction.

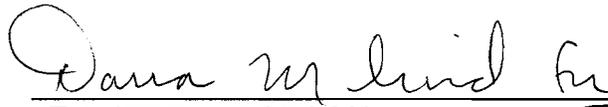
B. CONCLUSION

Appellant respectfully asks this Court to reverse his felony
DUI conviction.

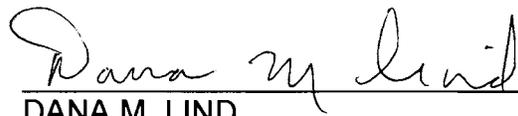
DATED this 9th day of January, 2011

Respectfully submitted,

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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 19TH DAY OF JANUARY 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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SUITE 201
BELLINGHAM, WA 98227

[X] JASON O'GRADY
DOC NO. 950999
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 19TH DAY OF JANUARY 2011.

x *Patrick Mayovsky*