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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

NO. 39202-0-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

CLIFFORD LEE STONE, JR.,

Appellant.

BRIEF OF APPELLANT

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 **ORIGINAL**

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	3
D. ARGUMENT	
I. THE CONVICTION FOR FELONY DRIVING WHILE INTOXICATED IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND VIOLATES THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT	7
<i>(1) The Evidence Fails to Prove That the Defendant Was the Person Convicted of Vehicular Assault in Lewis County Cause Number 90-1-00082-1</i>	<i>10</i>
<i>(2) The Information, Motion and Affidavit for Probable Cause, and Judgment from the 1990 Conviction Fail to Prove That the Defendant Was Convicted under the “Under the Influence” Alternative for Vehicular Assault</i>	<i>13</i>
II. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER	16
III. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM	20

E. CONCLUSION 25

F. APPENDIX

1. Washington Constitution, Article 1, § 3 25

2. Washington Constitution, Article 1, § 21 25

3. United States Constitution, Sixth Amendment 25

4. United States Constitution, Fourteenth Amendment 25

5. RCW 46.61.502 26

6. RCW 46.61.522 27

TABLE OF AUTHORITIES

Page

Federal Cases

<i>Blakely v. Washington</i> , 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004)	18
<i>Cheff v. Schnackenberg</i> , 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966)	16
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970)	7
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	8

State Cases

<i>Pasco v. Mace</i> , 98 Wn.2d 87, 653 P.2d 618 (1982)	16
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	7
<i>State v. Borboa</i> , 124 Wn.App. 779, 102 P.3d 183 (2004)	18, 19
<i>State v. Bugai</i> , 30 Wn.App. 156, 632 P.2d 917 (1981)	16
<i>State v. Crediford</i> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	15
<i>State v. Donahue</i> , 76 Wn.App. 695, 887 P.2d 485 (1995)	17
<i>State v. Gimarelli</i> , 105 Wn.App. 370, 20 P.3d 430 (2001)	19
<i>State v. Hunter</i> , 29 Wn.App. 218, 627 P.2d 1339 (1981)	11, 12
<i>State v. Johnson</i> , 12 Wn.App. 40, 527 P.2d 1324 (1974)	8
<i>State v. Klimes</i> , 117 Wn.App. 758, 73 P.3d 416 (2003)	19
<i>State v. Moore</i> , 7 Wn.App. 1, 499 P.2d 16 (1972)	7

<i>State v. Sloan</i> , 121 Wn.App. 220, 87 P.3d 1214 (2004)	21, 22
<i>State v. Taplin</i> , 9 Wn.App. 545, 513 P.2d 549 (1973)	8
<i>State v. Vanoli</i> , 86 Wn.App. 643, 937 P.2d 1166 (1997)	21
<i>State v. Vasquez</i> , 109 Wn.App. 310, 34 P.3d 1255 (2001)	17
<i>State v. Wicke</i> , 91 Wn.2d 638, 591 P.2d 452 (1979)	17
<i>State v. Williams</i> , 23 Wn.App. 694, 598 P.2d 731 (1979)	17, 18

Constitutional Provisions

Washington Constitution, Article 1, § 3	7
Washington Constitution, Article 1, § 21	16, 20
United States Constitution, Sixth Amendment	16
United States Constitution, Fourteenth Amendment	7

Statutes and Court Rules

RCW 9A.20.021	20
RCW 46.61.502	8, 9
RCW 46.61.522	14, 15

ASSIGNMENT OF ERROR

Assignment of Error

1. The conviction for felony driving while intoxicated is unsupported by substantial evidence and violates the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. CP 12-41.

2. The trial court violated the defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, when it accepted a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter. RP 4/16/09 2-3; CP 8.

3. The trial court exceeded its authority when it imposed a sentence in excess of the statutory maximum. CP 46-51.

Issues Pertaining to Assignment of Error

1. Does entry of judgment against a defendant for an offense unsupported by substantial evidence violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

2. Does a trial court violate a defendant's right to a jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment, if it accepts a jury waiver that the defendant did not knowingly, intelligently, and voluntarily enter?

3. Does a trial court exceed its authority when it imposes a sentence in excess of the statutory maximum?

STATEMENT OF THE CASE

By information filed February 20, 2009, the Lewis County Prosecutor charged the defendant Clifford Lee Stone, Jr. with one count of felony driving while intoxicated, alleging that he drove a motor vehicle while intoxicated, and that he has a prior conviction for vehicular assault while under the influence of intoxicating liquor. CP 1. The information stated as follows:

By this Information the Prosecuting Attorney for Lewis County accuses the defendant of the crime of DRIVING UNDER THE INFLUENCE, which is a violation of RCW 46.61.502(a)(6)(b)(ii), the maximum penalty for which is 5 years in prison and a \$10,000.00 fine, in that defendant on or about February 19, 2009, in Lewis County, Washington, then and there did drive a motor vehicle (a) and had, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor; contrary to Revised Code of Washington 46.61.502(1); and furthermore, the Defendant did have sufficient alcohol in his or her body as shown by an accurate and reliable analysis of the Defendant's breath and/or blood to have an alcohol concentration of 0.15 or higher, within two hours after driving; contrary to Revised Code of Washington 46.61.5055; and further, the defendant has previously been convicted of vehicular assault while under the influence of intoxicating liquor or any drug; against the peace and dignity of the State of Washington.

CP1.

On April 16, 2009, the defendant appeared before the court with his counsel, who filed a jury waiver on the defendant's behalf. RP 4/16/09.¹

¹The record in this case includes verbatim reports from hearings held on April 16th, 21st, and the 23rd of 2009. These are referred to herein as "RP [date][page number]."

The body of this waiver states as follows:

On motion of the Defendant
 By stipulation of the parties;

IT IS HEREBY ORDERED:

Defendant understands he has the right to a jury trial and hereby waives that right and consents to a stipulated bench trial.

CP 8.

The defendant, his attorney, the prosecutor, and the judge signed this document. CP 8. The court's colloquy with the defendant concerning his understanding of his constitutional right to a jury trial went as follows:

THE COURT: Mr. Stone, you understand you have a right to a jury trial and have this matter decided by a jury of 12 people? Do you understand that?

MR. STONE: Yes.

THE COURT: By signing a waiver you give that right up and that means that all of the decisions will be made by one person, it will be the Judge who will make all those decisions. Do you understand that?

MR. STONE: Yes, I do.

THE COURT: And you've discussed that completely with your attorney?

MR. STONE: Yes, I have.

THE COURT: And you're signing that waiver voluntarily?

MR. STONE: Yes.

THE COURT: I'll approve the waiver subject, of course, to final approval by the trial judge. Right that is Judge Brosey.

RP 4/16/09 2-3.

On April 21, 2009, the parties appeared before the court for entry of written stipulated facts and trial upon those facts. RP 4/21/09 2-7. At that time the defendant, his attorney, and the prosecutor signed a 28 page document entitled "STIPULATION TO FACTS FOR BENCH TRIAL" and submitted it to the court for consideration. CP 12-41. The first three pages of this document are the written stipulation in which the parties agree to the court's consideration of the following 9 attached documents:

(1) Department of Licensing Certificate with a copy of the defendant's license attached (2 pages);

(2) The narrative report of Officer J. Stamper concerning his arrest of the defendant on February 19, 2008 (2 pages);

(3) The narrative report of Washington State Patrol (WSP) Trooper C. R. Ecklund concerning his contact with the defendant on February 19, 2008 (5 pages);

(4) The standard WSP DUI arrest report that Trooper Ecklund filled out concerning his contact with the defendant on February 19, 2008 (4 pages);

(5) A BAC printout sheet Trooper Ecklund obtained after administering the breath test to the defendant (1page);

(6) A Lewis County Sheriff's Supplemental Report comparing the fingerprints from a fingerprint card for a "Clifford Lee Stone, Jr." with the fingerprints from a 1990 Lewis County Judgement and Sentence for Vehicular Assault for a "Clifford Lee Stone, Jr." (5 pages);

(7) A 1990 Lewis County Information in cause number 90-1-00082-1 charging a "Clifford L. Stone, Jr." with Vehicular Assault by

either (i) driving recklessly, and/or (ii) driving while intoxicated (1 page);

(8) A Motion and Affidavit for order determining probable cause in Lewis County cause number 90-1-00082-1 (3 pages);

(9) A Judgement and Sentence in *State of Washington v. Clifford L. Stone, Jr.*, Lewis County cause number “90-1-82-1” (4 pages).

CP 12-41.

Following entry of this stipulation, the court considered the documents contained therein, and found the defendant guilty of felony driving while intoxicated. RP 4/21/09 4-7; CP 11. At a later sentencing hearing, the defense agreed that the defendant’s offender score was nine points, and that his standard range was 60 months, the statutory maximum for offense. RP 4/23/09 2-4. The court then sentenced the defendant to 60 months in prison plus 9 to 18 months community custody. CP 46-51. The defendant thereafter filed timely notice of appeal. CP 57-67.

ARGUMENT

I. THE CONVICTION FOR FELONY DRIVING WHILE INTOXICATED IS UNSUPPORTED BY SUBSTANTIAL EVIDENCE AND VIOLATES THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence “that the defendant was the one who perpetrated the crime.” *State v. Johnson*, 12 Wn.App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In the case at bar, the state charged the defendant with felony driving while intoxicated under RCW 46.61.502(1)&(6)(b)(ii). Sections (1) and (6) of this statute state:

(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.

(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.

RCW 46.61.502(1)&(6)(b)(ii).

Under the sections of this statute charged in the information, the state had the burden of proving the following elements of the crime charged beyond a reasonable doubt in order to sustain a conviction for felony driving while intoxicated:

(1) That the defendant drove a motor vehicle with a breath alcohol level of at least .08% or while under the influence of alcohol, and

(2) That the defendant has a prior conviction for “vehicular assault while under the influence of intoxicating liquor or any drug.”

As the following points out, a review of the stipulated evidence in this case reveals that the state failed to prove the second element that the defendant has a prior conviction for vehicular assault “while under the influence of intoxicating liquor.” Specifically, the stipulated evidence fails to prove that (1) the defendant was the person whose fingerprint card was

compared to the 1990 judgment and sentence for vehicular assault, and (2) the information and judgment from the 1990 conviction fail to prove that the defendant was convicted under the “under the influence” alternative for vehicular assault. The following sets out these arguments.

(1) The Evidence Fails to Prove That the Defendant Was the Person Convicted of Vehicular Assault in Lewis County Cause Number 90-1-00082-1.

As was just mentioned, in order to sustain a conviction for felony driving while intoxicated in this case, the state had the burden of proving that the defendant has a prior conviction for vehicular assault “while under the influence of intoxicating liquor or any drug.” In an attempt to meet this burden, the state included following documents in the stipulated evidence upon which the case was tried:

(6) A Lewis County Sheriff’s Supplemental Report comparing the fingerprints from a fingerprint card for a “Clifford Lee Stone, Jr.” with the fingerprints from a 1990 Lewis County Judgement and Sentence for Vehicular Assault for a “Clifford Lee Stone, Jr.” (5 pages);

(7) A 1990 Lewis County Information in cause number 90-1-00082-1 charging a “Clifford L. Stone, Jr.” with Vehicular Assault by either (i) driving recklessly, and/or (ii) driving while intoxicated (1 page);

(8) A Motion and Affidavit for order determining probable cause in Lewis County cause number 90-1-00082-1 (3 pages);

(9) A Judgement and Sentence in *State of Washington v. Clifford L. Stone, Jr.*, Lewis County cause number “90-1-82-1” (4 pages).

This evidence did prove that a recent Lewis County booking card had the fingerprints of “Clifford L. Stone, Jr.” on them, and that these fingerprints matched those for the judgement and sentence for vehicular assault for a “Clifford L. Stone, Jr.” However, these stipulated documents do not prove that the defendant is the “Clifford L. Stone, Jr.” identified in them. As the decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), explains, absent some evidence that the defendant was the person named in the documents, there is insufficient evidence on identity to sustain a conviction.

In *State v. Hunter, supra*, the court addressed the issue of what constitutes substantial evidence on this issue of identity. In this case the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held “pursuant to a felony conviction,” as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named “Dallas E. Hunter” as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of

a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction. The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer from the Department of Corrections who had revoked the defendant from his work release program and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this "independent" evidence to prove that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the judgments. The court stated:

We hold that [the Probation Officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra*.

State v. Hunter, 29 Wn.App. At 221-222.

In the case at bar, the state bore the burden of proving that the defendant was the person whose 1990 judgment and sentence was included in the stipulated evidence. The defendant's stipulation was that the court could consider this document, along with the others, not that the document was correct and not that he was the person mentioned in the documents. Since no other evidence in the stipulation presents any evidence that he was the person named in 1990 judgment and sentence, the stipulated evidence fails to prove beyond a reasonable doubt that the defendant was that person. Thus, the trial court erred when it found him guilty of felony driving while intoxicated as opposed to misdemeanor driving while intoxicated.

(2) The Information, Motion and Affidavit for Probable Cause, and Judgment from the 1990 Conviction Fail to Prove That the Defendant Was Convicted under the "Under the Influence" Alternative for Vehicular Assault.

As was pointed out previously, in order to sustain a conviction for felony driving while intoxicated as was charged in this case, the record at trial must contain substantial evidence that the defendant has a prior conviction for vehicular assault under the "under the influence" alternative for that crime. Just proving that the defendant had a conviction for "vehicular assault" is insufficient because in 1990 there were two alternative methods for committing that offense. The first required proof that the defendant was

driving while intoxicated; the second required proof that the defendant was driving recklessly. *See* former RCW 46.61.522. In fact, as the information from the 1990 case reveals, the state charged the defendant under both alternatives. This information alleged as follows:

By this Information the Prosecuting Attorney for Lewis County accuses the defendant(s) of the crime of: Vehicular Assault which is a violation of RCW 46.61.522 the maximum penalty for which is 5 years and/or \$10,000 in that the defendant(s) on or about March 19, 1990 in Lewis County, Washington, then and there did operate and drive a vehicle in a reckless manner and while under the influence of intoxicating liquor and thereby proximately caused serious bodily injury to another.

CP 34.

While this document proves that the person named was charged with vehicular assault under both possible alternatives, it certainly does not prove that the named individual was convicted of that offense, much less that he was convicted under the driving while intoxicated alternative. Any number of other documents or witnesses might well be able to prove this latter fact. In an attempt to meet this requirement, the state in this case included a copy of the motion and affidavit for probable cause for the case with a copy of the judgment and sentence. The former document did not prove this element because, as with the information, it is simply a claim of fact, not a finding by the court. The latter document also did not prove that the defendant's prior conviction was under the driving while intoxicated alternative because it fails

to state which alternative supported the defendant's conviction.

In fact, finding 2.1 from this sentence states that "the defendant was found guilty on 4/24/90 by plea" of the crime of Vehicular Assault under RCW 46.61.522. It fails to state whether or not the defendant pled under one or both alternatives. Thus, the defendant might well have pled under the "reckless driving" alternative only. The document is silent on this question. In addition, the standard range sentence for the offense also offers no clarification because in 1990, the standard range was the same for vehicular assault under both alternatives. The fact that the judgment and sentence prohibits the defendant from alcohol use also fails to clarify the alternative under which he pled because it was well within the court's authority to impose this requirement even if the defendant solely pled under the "reckless driving" alternative.

In this case, the state may attempt to present this court with additional evidence, such as the statement of defendant on plea of guilty, which might show the alternative under which the defendant pled in the 1990 case. At present, appellate counsel does not know under which alternative the named defendant in the 1990 case pled, if not both. However, what is certain, is that the case at bar has been tried to the trial court, and any attempt to supplement the record with further evidence would violate both the agreement to try the

case upon stipulated evidence, as well as the defendant's right to be free from double jeopardy. *State v. Crediford*, 130 Wn.2d 747, 927 P.2d 1129 (1996). Thus, the evidence presented at trial failed to prove the element of a prior conviction for vehicular assault under the driving while intoxicated alternative. As a result, this court should vacate the defendant's conviction and remand for entry of judgment against him for misdemeanor driving while intoxicated.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A JURY TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 21, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT, WHEN IT ACCEPTED A JURY WAIVER THAT THE DEFENDANT DID NOT KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY ENTER.

Under the United States Constitution, Sixth Amendment every person charged with an offense that could result in over six months imprisonment is entitled to a trial by jury. *Cheff v. Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966). By contrast, Washington Constitution, Article 1, § 21, affords the citizens of this state the right to trial by jury for any offense that is defined as a "crime," conviction of which could result in any imprisonment. *Pasco v. Mace*, 98 Wn.2d 87, 653 P.2d 618 (1982). Since all persons charged with a crime have a fundamental right to trial by jury, the waiver of this right may only be sustained if "knowingly, intelligently and voluntarily made." *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917

(1981).

The waiver of the right to jury trial must either be made in writing or made orally on the record. *State v. Wicke*, 91 Wn.2d 638, 591 P.2d 452 (1979). If the defendant challenges the validity of the jury waiver on appeal, the State bears the burden of proving that the waiver was knowingly, intelligently and voluntarily made. *State v. Donahue*, 76 Wn.App. 695, 697, 887 P.2d 485 (1995). Because it implicates the waiver of an important constitutional right, the appellate court reviews the waiver de novo. *State v. Vasquez*, 109 Wn.App. 310, 34 P.3d 1255 (2001). Finally, in examining an oral waiver of the right to jury made in violation of the requirement under CrR 6.1, “every reasonable presumption should be indulged against the waiver of such a right, absent an adequate record to the contrary.” *State v. Wicke, supra*.

For example, in *State v. Williams*, 23 Wn.App. 694, 598 P.2d 731 (1979) the defendant’s were convicted in a superior court bench trial de novo of illegally taking shellfish. The record contained no written waiver of jury trial and no colloquy between the defendant and the court. The defendants thereafter appealed, arguing that the state had failed to meet its burden of showing that they had knowingly, intelligently, and voluntarily waived their rights to a jury trial. The Court of Appeals agreed, holding as follows:

State v. Jones, 17 Wn.App. 261, 562 P.2d 283 (1977), held that a

criminal defendant's right to trial by jury is not waived unless a written waiver is filed by defendant himself. *In re Reese*, 20 Wn.App. 441, 580 P.2d 272 (1978), softened the rule in holding that an express and open waiver of jury trial in open court and appearing in the record constitutes substantial compliance with CrR 6.1(a). This interpretation was upheld by our Supreme Court following a consolidated appeal in *State v. Wicke*, *supra*. Under the present state of the law, where there is no written waiver of a jury trial, substantial compliance with CrR 6.1(a) requires some colloquy between the court and the defendant personally. The absence of such a colloquy in the record of the present case dictates reversal of the convictions.

State v. Williams, 23 Wn.App. at 697-698.

In a recent case, *State v. Borboa*, 124 Wn.App. 779, 102 P.3d 183 (2004), the defendant appealed his exceptional sentence, arguing that under the decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), the trial court had denied him his right to jury trial when it imposed a sentence in excess of the standard range based upon judicially determined aggravating facts. In this case, a jury convicted the defendant of first degree kidnaping, second degree assault of a child, and first degree rape of a child. The jury had also returned a special finding that the defendant had committed the kidnaping with sexual motivation. Under RCW 9.94A.712, the court imposed sentences of life in prison, and then declared a minimum mandatory term in excess of the applicable range based upon deliberate cruelty and particular vulnerability because of age.

While the defendant's case was on appeal, the Supreme Court issued the decision in *Blakely* and the defendant then argued that the minimum

mandatory sentence in excess of the applicable range violated his right to jury trial. The state responded by arguing that even if *Blakely* applied, the defendant had waived his right to a jury determination on the aggravating factors when he admitted one of the factors in his initial brief. However, the Court of Appeals rejected this argument, holding as follows:

Although a defendant can waive his Sixth Amendment right to jury trial, he or she must do so knowingly, voluntarily, and intelligently. *Borboa* was tried by a jury and sentenced before *Blakely* was decided. He did not know of or agree to forgo his right to have a jury find the facts needed to support a sentence above the standard range. Thus, he did not knowingly, voluntarily, or intelligently waive his Sixth Amendment right to have a jury find such facts.

State v. Borboa, 124 Wn.App. at 792 (footnotes omitted).

In the case at bar, the defendant was at least aware that he did have the right to trial by jury, since the written waiver so states. However, both the shortness of the colloquy and the failure of the trial court to adequately inform the defendant of the nature of the jury waiver show that the waiver in this case was no more effective than that in *Borboa*. In fact, the colloquy in this case does not reveal whether or not the defendant understood that under the Washington constitution, there had to be complete jury unanimity in order to enter a guilty verdict. This state constitutional right varies significantly from the United States Constitution and many other state constitutions, which do not require complete jury unanimity in order to sustain a guilty verdict.

See State v. Gimarelli, 105 Wn.App. 370, 20 P.3d 430 (2001); *State v. Klimes*, 117 Wn.App. 758, 73 P.3d 416 (2003). Absent advice on this important component of the right to jury trial under Washington Constitution, Article 1, § 21, the state in this case cannot meet its burden of proving that the jury waiver was knowingly, intelligently, and voluntarily made. As a result, this court should reverse the conviction and remand for a new trial before a jury.

III. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED A SENTENCE IN EXCESS OF THE STATUTORY MAXIMUM.

Under RCW 9A.20.021, the legislature has set statutory maximums for felonies in Washington State. This statute provides:

(1) Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

(a) For a class A felony, by confinement in a state correctional institution for a term of life imprisonment, or by a fine in an amount fixed by the court of fifty thousand dollars, or by both such confinement and fine;

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine;

(c) For a class C felony, by confinement in a state correctional institution for five years, or by a fine in an amount fixed by the court of ten thousand dollars, or by both such confinement and fine.

RCW 9A.20.021.

In the case at bar, the trial court sentenced the defendant to the statutory maximum of 60 months in prison for a single class C felony, and also ordered the defendant to serve 9 to 18 months in community custody. Depending upon the amount of earned early release time the defendant accrues, if any, he may well leave prison with less than 9 to 18 months left on his 60 months statutory maximum. As the decision in *State v. Sloan*, 121 Wn.App. 220, 87 P.3d. 1214 (2004), explains, the court's order that he serve from 9 to 18 months of community custody would then exceed the statutory maximum for the offense. The following examines *Sloan*.

In *State v. Sloan, supra*, the defendant pled guilty to three counts of third degree rape and one count of third degree child molestation. All of the offenses are Class C felonies with a statutory maximum of five years in prison each. The trial court imposed sentences of 60 months in prison plus 36 to 48 months community custody on each count concurrent. The defendant then appealed arguing that the terms of community custody exceeded the statutory maximum on each count. However, citing to its decision in *State v. Vanoli*, 86 Wn.App. 643, 937 P.2d 1166 (1997), the court rejected this argument. In *Vanoli* the court addressed the same argument and noted that given the realities of good time and early release a person sentenced to the statutory maximum confinement would probably be released

prior to serving the statutory maximum. Thus, time would still be available within the statutory maximum for serving community custody.

While the court in *Sloan* rejected the defendant's argument that the trial court had exceeded the statutory maximum at sentencing it did not deny the defendant any relief at all. Rather the court recognized that the statutory maximum would be exceeded if a defendant did serve the entire sentence in custody or if the amount of earned early release was less than the term of community custody. Given this possibility the court remanded the case for the trial court to include specific instructions in the judgment and sentence that the combined term of imprisonment and community custody could not exceed the statutory maximum. The court held:

Sloan argues *Vanoli* was wrongly decided. She contends an individual who has served the statutory maximum may be nevertheless forced to comply with conditions of community custody, and may be jailed for non-compliance if her community corrections officer fails to appreciate the situation. While we are inclined to give CCOs more credit than this, we recognize that sentences like Vanoli's and Sloan's may generate uncertainty in some circumstances. To avoid confusion, therefore, when a court imposes community custody that could theoretically exceed the statutory maximum sentence for that offense, the court should set forth the maximum sentence and state that the total of incarceration and community custody cannot exceed that maximum.

"Where a sentence is insufficiently specific about the period of community placement required by law, remand for amendment of the judgment and sentence to expressly provide for the correct period of community placement is the proper course." *State v. Broadaway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). Accordingly, we remand for clarification of Sloan's judgment and sentence.

State v. Sloan, 121 Wn.App. at 223-224.

In the case at bar, just as in *Sloan*, the trial court imposed an incarceration term at the statutory maximum. The court also imposed a term of community custody that could possibly exceed the statutory maximum when combined with the actual term of incarceration the defendant serves. It is true that the judgment and sentence in this case includes the following statement:

The combined term of community confinement and community custody shall not exceed the maximum statutory sentence.

CP 50.

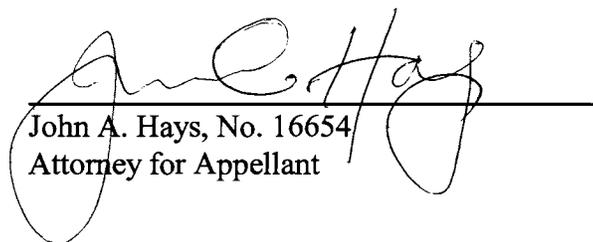
The problem with this sentence is that the term “community confinement” is not a term of art under the sentencing reform act, and a reasonable interpretation of the term would not include time spent in prison, since this is not time spent in the “community” although it is time spent in confinement. Thus, this sentence fails to inform the Department of Corrections that the term of imprisonment plus the term of community custody or confinement may not exceed 60 months. Thus, the judgment and sentence in the case at bar suffers from the same infirmity as the judgment and sentence in *Sloan*.

CONCLUSION

Since substantial evidence does not support a conclusion that the defendant has a prior conviction for vehicular assault while intoxicated, this court should reverse the defendant's conviction for felony driving while intoxicated and remand with instructions to enter judgment for misdemeanor driving while intoxicated. In the alternative, this court should grant a new trial before a jury based upon the failure of the court to assure that the defendant knowingly, voluntarily, and intelligently entered his jury waiver. In the second alternative, this court should remand with instructions to clarify that the defendant's combined term of prison and community custody may not exceed 60 months.

DATED this ____ day of September, 2009.

Respectfully submitted,



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APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 21**

The right to trial by jury shall remain inviolate, but the legislature may provide for a jury of any number less than twelve in courts not of record, and for a verdict by nine or more jurors in civil cases where the consent of the parties interested is given thereto.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law:

RCW 46.61.502

(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.

(2) The fact that a person charged with a violation of this section is or has been entitled to use a drug under the laws of this state shall not constitute a defense against a charge of violating this section.

(3) It is an affirmative defense to a violation of subsection (1)(a) of this section which the defendant must prove by a preponderance of the evidence that the defendant consumed a sufficient quantity of alcohol after the time of driving and before the administration of an analysis of the person's breath or blood to cause the defendant's alcohol concentration to be 0.08 or more within two hours after driving. The court shall not admit evidence of this defense unless the defendant notifies the prosecution prior to the omnibus or pretrial hearing in the case of the defendant's intent to assert the affirmative defense.

(4) Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section, and in any case in which the analysis shows an alcohol concentration above 0.00 may be used as evidence that a person was under the influence of or affected by intoxicating liquor or any drug in violation of subsection (1)(b) or (c) of this section.

(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.

RCW 46.61.522

(1) A person is guilty of vehicular assault if he or she operates or drives any vehicle:

(a) In a reckless manner and causes substantial bodily harm to another; or

(b) While under the influence of intoxicating liquor or any drug, as defined by RCW 46.61.502, and causes substantial bodily harm to another; or

(c) With disregard for the safety of others and causes substantial bodily harm to another.

(2) Vehicular assault is a class B felony punishable under chapter 9A.20 RCW.

(3) As used in this section, "substantial bodily harm" has the same meaning as in RCW 9A.04.110.

