

No-28040-3-III

FILED

COURT OF APPEALS, DIVISION THREE
OF THE STATE OF WASHINGTON

DEC 04 2009

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DIVISION III
STATE OF WASHINGTON
By: _____

STATE OF WASHINGTON,
Respondent

vs.

ELON ALEX YALLUP,
Appellant

BRIEF OF APPELLANT

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I. INTRODUCTION

This case concerns Elon Alex Yallup's right, as an enrolled Yakama, to travel the roadways of the Yakama Reservation free of restrictions imposed by the State to regulate and control his exercise of that right. Moreover, even if the State has jurisdiction to use administrative licensing restrictions to regulate Yallup's driving, the trial court incorrectly calculated Yallup's offender score and sentenced him to a term of imprisonment that exceeds the statutory maximum under the Sentencing Reform Act. Lastly, the trial court was not permitted to impose a term of community custody for Yallup's felony DUI conviction. Both the convictions and the sentences should be vacated and the case remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

- A. The trial court erred in calculating Yallup's offender score.
- B. The trial court erred in imposing a sentence of 57 months, which exceeds the standard range for Yallup's correct offender score of six.
- C. The trial court erred in imposing a term of community custody for a felony DUI conviction.
- D. The trial court erred in refusing to suppress the results of Yallup's blood test when the State lacked jurisdiction to obtain a blood sample without Yallup's consent or a valid search warrant.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. The trial court miscalculated Yallup's offender score by including a 1990 conviction that was more than five years since his last release from confinement and does not constitute a prior offense within ten years as defined in RCW 46.61.5055.
- B. The trial court improperly imposed a sentence that exceeds the standard range for Yallup's correct offender score, when there was no finding of exceptional circumstances justifying an upward departure from the sentencing guidelines.
- C. Because former RCW 9.94A.545 (2007) does not permit community custody for a felony DUI conviction, the community custody portion of the sentence must be vacated.

D. Because the State lacks jurisdiction to regulate the driving privileges of enrolled tribal members within Indian country, the trial court should have suppressed the results of a blood test performed without Yallup's consent and without a search warrant.

IV. STATEMENT OF THE CASE

On September 8, 2007, a witness saw a blue car driving along McDonald Road in Toppenish when the car left the roadway and entered a canal on one side of the road. 2 Verbatim Report of Proceedings (RP) 200-04. When emergency responders arrived at the scene, they found an individual inside the vehicle with his feet and knees tangled in a seat belt. 2 RP 227-28. The individual was later identified as the Appellant, Elon Alex Yallup, an enrolled member of the Yakama Nation. 1 RP 1; 2 RP 261.

A Washington State Patrol trooper contacted Yallup at the Toppenish Hospital and smelled an odor of intoxicants on his breath. 2 RP 252-53, 266. Yallup did not respond to the Trooper's attempts to speak to him. 2 RP 266. Treating Yallup as though he were unconscious, the Trooper read Yallup special evidence warnings and withdrew his blood without obtaining his consent or a search warrant. 2 RP 274.

The State subsequently charged Yallup with felony driving under the influence (DUI), contrary to RCW 46.61.502(6); driving with a suspended license in the second degree, contrary to RCW 46.20.342(1)(b); and driving without an ignition interlock device, contrary to RCW 46.20.740. Clerk's Papers (CP) 57-58. Yallup argued that under the Treaty with the Yakama, 12 Stat. 951 (1859), and Public Law 280, 67 Stat. 589 (1953), the State lacked jurisdiction to prosecute him for felony DUI or to obtain his blood under the administratively-created and -enforced implied consent statute. CP 127-42. The trial court denied his motions to dismiss and suppress. CP 91-92.

A jury convicted Yallup on all counts and found that he had four or more prior convictions for DUI or Physical Control. CP 59-62. At sentencing, the trial court imposed a 57-month sentence, calculating Yallup's offender score as seven. CP 5-6. The trial court included a conviction for Physical Control from 1990 in its calculation. CP 5. The trial court also imposed a community custody sentence of nine to eighteen months. CP 6. Yallup timely appeals. CP 3.

V. ARGUMENT

A. The case must be remanded to correct Yallup's offender score

The trial court incorrectly calculated Yallup's offender score as seven by including a 1990 conviction for Physical Control that does not qualify as a scorable offense under the scoring provisions of RCW 9.94A.525(2)(e). The case should be remanded to correct the scoring error.

The court of appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn.App. 500, 513, 878 P.2d 497 (1994). Remand is required when the offender score has been miscalculated. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Felony DUI offenders are scored under RCW 9.94A.525(2)(e), which requires any serious traffic offense to 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. A “serious traffic offense” includes prior misdemeanor convictions for DUI or physical control. RCW 9.94A.030(40)(a).

Here, the 1990 physical control conviction does not meet either requirement to be included in Yallup’s offender score. According to the information submitted to the trial court, Yallup was last sentenced for a physical control conviction on May 25, 2006. The 1990 conviction stemmed from an arrest occurring on October 7, 1990, approximately sixteen years earlier than the latest entry of judgment and sentence. CP 4-5. Therefore, 1990 offense was not committed within five years since the last date of release from confinement or entry of judgment and sentence. Moreover, Yallup was arrested and sentenced for the 1990 offense more than seventeen years before he was arrested for the current offense. CP 4-5. Thus, the 1990 conviction is not a prior offense within ten years as defined by RCW 46.61.5055(14)(c). Because the 1990 conviction does not qualify as a scorable offense under RCW 9.94A.525(2)(e), the trial court erred in including it in calculating Yallup’s offender score.

When a court imposes a sentence based on a miscalculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). The sentence must be vacated and the case remanded to correct Yallup's offender score.

B. The case must be remanded to impose a sentence within the standard range for Yallup's offender score

The trial court sentenced Yallup to 57 months in prison, applying a standard range of 51-60 months to his miscalculated offender score. CP 5. However, omitting the unqualified 1990 conviction results in an offender score of six and a standard range sentence of 41-54 months. Because the trial court imposed a sentence that exceeds the statutory maximum, the sentence must be vacated and the case remanded for correction.

Felony DUI is ranked at seriousness level V. RCW 9.94A.515. The standard range sentence for a crime of seriousness level V for an offender with a score of six is 41-54 months. RCW 9.94A.510. Yallup's sentence exceeds the high end of the standard range by three months, even though the court found that there were no facts justifying an exceptional sentence. CP 5.

Absent exceptional circumstances, a sentencing court must impose a sentence within the standard range. RCW 9.94A.505. Yallup's 57-month sentence exceeds the statutory maximum of 54 months for his offender score. The sentence must be vacated and the case remanded for resentencing within the standard range.

C. The community custody portion of the sentence must be vacated

In addition to the prison sentence, the trial court imposed a term of community custody of nine to eighteen months. CP 6. However, the Sentencing Reform Act does not authorize the imposition of community custody for a felony DUI conviction. Because the trial court lacked authority to impose community custody, the sentence should be vacated and the case remanded.

Whether Yallup can be sentenced to a community custody term is governed by former RCW 9.94A.545 (2007).¹ That statute specifically defined which offenses require a community custody sentence. Felony DUI is not one of the enumerated offenses.

¹ Since Yallup's arrest, the legislature has amended the SRA and the sections applicable to community custody sentences are now codified in RCW 9.94A.701. Notably, neither the former nor the amended version permits community custody for a felony DUI conviction.

Former RCW 9.94A.545 further gave the court discretion to impose community custody for certain offenses when the sentence was for twelve months or less. Because Yallup's sentence far exceeds twelve months, the discretionary provisions of the statute do not apply.

Trial courts do not have discretion to impose community custody provisions in the absence of legislative permission to do so. In *In re Sentences of Jones, Jordan & Konshuk*, this court considered the previous version of the community custody statute and concluded that it "unambiguously limits the court's authority to impose community custody . . . to the offenses listed in the statute." 129 Wn. App. 626, 630, 120 P.3d 84 (2005). In *Jones*, the court declined to authorize the imposition of community custody for any offense when the offender is found to be chemically dependent, ruling that treatment-related conditions can only be imposed when the offense independently qualifies for a community custody sentence. *Id.* at 631. Because former RCW 9.94A.545 did not specifically enumerate the offenses at issue in *Jones* as eligible for community custody terms, the court remanded the cases for resentencing without provision for community custody. *Id.* at 631.

Similarly here, nothing in either the former or the amended version of the community custody statute permits the imposition of community custody on a felony DUI conviction. It must be presumed that the legislature has intended to limit the use of community custody supervision “to more serious offenders.” *Jones*, 129 Wn. App. at 631. Because the trial court had no legislative authority to sentence Yallup to a term of community custody, the sentence should be vacated and the case remanded.

D. The conviction should be reversed due to the trial court’s admission of improperly obtained evidence

This offense involved an enrolled tribal member within a recognized Indian reservation. Because both Public Law 280 and the 1855 Treaty with the Yakamas protect Yallup’s right to drive on roadways within the Yakama Reservation without interference by the State, the State lacks authority to subject Yallup to an administrative blood collection requirement.

Furthermore, because the State lacks jurisdiction to regulate Yallup’s driving privilege, the implied consent warnings are misleading and the results of the test should have been suppressed. Accordingly, Yallup’s convictions should be vacated

and the case should be remanded for a new trial *without* the improperly obtained blood evidence.

1. Under Public Law 280, the implied consent statute is a “regulatory” scheme that may not be applied to enrolled tribal members inside Indian Country.

At common law, criminal offenses by or between Indians are subject only to federal or tribal jurisdiction. *Washington v. Confederated Bands and Tribes of Yakima Indian Nation*, 439 U.S. 463, 470-71, 99 S. Ct. 740, 58 L. Ed. 2d. 740 (1979). But Congress may expressly provide for application of state law. *Id.* at 470-71.

In 1953, Congress enacted Pub. L. 280, 67 Stat. 589, which authorized states to assume civil and criminal jurisdiction over Indians within Indian country.² *Washington v. Yakima*, 439 U.S. at 473-74. Congress’s purpose in adopting Pub. L. 280 was to provide systems of law and enforcement to tribes who were lacking

² “Indian country” consists of “all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation.” 18 U.S.C. 1151. The Yakama Reservation consists of a patchwork of fee, trust, and allotted lands and includes the cities of Harrah, Wapato and Toppenish. *Washington v. Yakima*, 439 U.S. at 469-70.

legal systems of their own. *Bryan v. Itasca County*, 426 U.S. 373, 379-80, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976).

Under the Congressional authority of Pub. L. 280, Washington enacted RCW 37.12.010, extending its jurisdiction over Indians within the reservation boundaries. But Pub. L. 280 did not authorize the wholesale application of the entire Washington code to on-reservation activities. Application of all state laws to on-reservation activities would effectively terminate tribal independence by assimilation. See *Bryan*, 426 U.S. at 387-89. And Congress did not intend to terminate tribal self-determination. See *Bryan*, 426 U.S. at 387 (“Pub. L. 280 was plainly not meant to effect total assimilation.”).

To protect tribal self-determination, state jurisdiction in Indian country is limited to specific grants of civil and criminal authority. The state may exercise criminal jurisdiction to enforce only those statutes that generally prohibit conduct. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 208, 107 S.Ct. 1083, 94 L.Ed.2d 244 (1987). Statutes that merely implement a state’s regulatory or administrative interests are inapplicable. *Id.* at 207-

08. Under *Cabazon*, only laws that are truly prohibitory can be applied within reservation boundaries.

Restrictions on driving are closely scrutinized because driving, in general, is permitted. In *Confederated Tribes of the Colville Reservation v. Washington*, 938 F.2d 146 (9th Cir. 1991), cert. denied, 503 U.S. 997 (1992), the Ninth Circuit court held that Washington lacked authority to enforce its speed limits against Indian drivers on roadways within the reservation. Relying on *Cabazon*, the *Colville* court reasoned that driving is a generally permitted activity; thus, speed regulations are incident to an activity that the State generally allows. 938 F.2d at 148-49. As such, speed restrictions are regulatory in nature and unenforceable against Indians. *Colville*, 938 F.2d at 149.

Here, the State prosecutes Yallup for violating various restrictions on his driver's license and uses threats to restrict his driving privilege to obtain evidence that would ordinarily require consent or a warrant. But it is not up to the State to decide whether Yallup is allowed to drive, or regulate his driving with administrative licensing requirements. Driving is a generally permitted activity. *Colville*, 938 F.2d at 149. And a regulatory law does not become

prohibitory simply because it is characterized as criminal and carries criminal penalties:

But that an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it into a criminal law within the meaning of Pub. L. 280. Otherwise, the distinction between [regulatory and prohibitory laws] could easily be avoided and total assimilation permitted.

Cabazon, 480 U.S. at 211.

The offenses of driving with a suspended license in the second degree and driving without an ignition interlock device are simply not the kinds of broad, general prohibitions that the State can enforce in Indian country. To the contrary, they are violations of rules enacted to regulate and administratively micromanage generally permitted driving behavior. The State's jurisdiction in Indian country does not extend to issuing licenses to Indian drivers, then requiring Indian drivers to comply with various administrative restrictions to maintain permission to drive. That both offenses carry criminal penalties do not change their character as tools to regulate driving behavior. Because the State lacks jurisdiction to prosecute Yallup for driver's license violations, the convictions on counts two and three should be reversed and the charges dismissed.

Similarly, the State may not threaten to employ its administrative licensing procedures against Yallup to obtain evidence with which to prosecute him. The implied consent statutes, RCW 46.20.308 and 46.20.3101, require drivers to submit to blood or breath testing for alcohol or risk administrative suspension of their drivers' licenses. Again, Pub. Law 280 does not authorize States to employ administrative mechanisms to control Indian drivers. If the State wants to sample Yallup's blood, it needs to do so the traditional way – upon showing probable cause to a court of law and obtaining a search warrant, or applying a valid exception to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 259, 207 P.3d 1266 (2009). Absent a non-regulatory exception, the trial court should have granted Yallup's motion to dismiss the results of his blood test. CP 91-92.

2. The 1855 Treaty with the Yakamas prohibits the State from imposing restrictions, such as implied consent requirements, on the driving privileges of enrolled Yakamas.

The 1855 Treaty with the Yakamas expressly preserves the right of tribal members to travel freely without preconditions from the State. The treaty provides,

[I]f necessary for the public convenience, roads may be run through said reservation; and on the other hand, the right of way, with free access from the same to the nearest public highway, is secured to them; as also the right, in common with all citizens of the United States, to travel upon all public highways.

Treaty with the Yakamas, Article III, at 12 Stat. 952-53. As this language has been interpreted by various courts, it grants to Yakama tribal members an unconditional right to travel on public roads. Because state licensing requirements cannot be reconciled with the treaty's guarantee that the Yakamas' right to travel would be unrestricted, penalties that serve to enforce restrictions on driving behavior are inapplicable against Yakama tribal members like Yallup.

In *Yakama Indian Nation v. Flores*, 955 F. Supp. 1229, 1233 (E.D. Wash. 1997), the court construed Article III of the Treaty with the Yakamas to conclude that the State could not enforce licensing and registration fees on logging trucks owned by the Yakama Nation or its members. The *Flores* court held:

The record clearly demonstrates that the Yakamas understood the Treaty to preserve their right to travel, much as it secured their right to fish in usual and accustomed places. This right was secured unconditionally and without restriction. Accordingly, the treaty precludes the state from imposing licensing and permitting fees and registration requirements

indirectly exacting such fees on Indian-owned trucks when hauling tribal goods to market.

955 F. Supp. at 1249.³

Requiring tribal members to obtain and maintain licenses from the state in order to travel on reservation roadways is inconsistent with their understanding in 1855 that the treaty would not interfere with their accustomed practices. Indeed, the ability to travel freely both inside and outside the reservation boundaries was an essential benefit of the bargain for the Yakamas; it is difficult to imagine that tribes determined to preserve their traditional ways of life would agree to allow a foreign government to restrict their movement.

Likewise, in *U.S. v. Smiskin*, 487 F.3d 1260 (9th Cir. 2007), the Ninth Circuit court held that the right to travel protected the right of Yakama tribal members to transport unstamped cigarettes on roadways outside the reservation without providing prior notice as required by state regulations. Thus, both *Smiskin* and *Flores* establish that the State may impose restrictions on travel that would require prior approval from the State. For example, the *Smiskin*

³ The Ninth Circuit court affirmed the holding in *Cree v. Flores*, 157 F.3d 762 (9th Cir. 1998).

court held that “the pre-notification requirement is a ‘restriction’ and ‘condition’ on the right to travel that violates the Yakama Treaty.” 487 F.3d at 1266. Both cases provide that Yakama drivers need not seek permission from the State to travel on the roadways.

For the State to punish Yallup for not complying with the State’s conditions for maintaining permission to drive on the public roads is inconsistent with the guarantee of the 1855 treaty that the State cannot restrict Yallup’s right to use the roads. Unlike non-Yakama citizens of Washington, Yallup has more than a “privilege” to use the roads; he has a legally enforceable treaty right. Yallup’s misdemeanor convictions for licensing violations cannot be reconciled with his freedom to drive unrestricted. Similarly, the treaty allows Yallup to drive without first compelling him to hand over his body and its contents to the State. Because the imposition of conditions on Yallup’s right to drive violates his rights under the 1855 treaty, this court should reverse his misdemeanor convictions for licensing violations and remand the case for a new trial on the DUI charge without the evidence the State obtained under the implied consent driving restrictions.

3. Because the State cannot limit Yallup's driving privilege under federal law, the implied consent warnings are misleading and should result in the suppression of his blood test results.

This court reviews de novo whether implied consent warnings are legally sufficient. *Jury v. Dep't of Licensing*, 114 Wn. App. 726, 731, 60 P.3d 615 (2002). Use of a misleading implied consent warning requires suppression of the test results. *State v. Trevino*, 127 Wn.2d 735, 747, 903 P.2d 447 (1995). The implied consent warning must accurately state the law so as to afford the accused an opportunity to make a knowing and intelligent decision, considering the consequences. *Gonzales v. Dep't of Licensing*, 112 Wn.2d 890, 897-98, 774 P.2d 1187 (1989).

The warnings required to be given state that if the driver refuses the test of blood or breath, the driver's license will be suspended. *Gonzales*, 112 Wn.2d at 895 (citing RCW 46.20.308). But, as discussed above, under Pub. Law 280 and the 1855 Treaty with the Yakamas, the State cannot restrict the Yakamas' use of the roads, nor impose conditions on their right to travel freely. Informing Yallup, an enrolled Yakama, that he could lose his right to drive if he refused a blood test is legally inaccurate, misleading, and

deprives him of the opportunity to make a knowing and intelligent decision to refuse the test. *Id.* at 897. Accordingly, the result of Yallup's blood test should have been suppressed.

VI. CONCLUSION

Multiple errors require that Yallup's convictions and sentences be reversed and the case remanded. Because Yallup is an enrolled Yakama, the State's interest in controlling and regulating his behavior is limited under federal law. Furthermore, even if the State had jurisdiction to prosecute Yallup for licensing violations and to obtain evidence against him through administrative licensing procedures, the sentence in this case is clearly erroneous and must be corrected. Yallup respectfully requests that this court vacate his sentence and his convictions, and remand the case to the trial court for further proceedings.

Respectfully submitted this 3rd day of December, 2009.



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CERTIFICATE OF MAILING

I certify that on December 3, 2009, I mailed a true and correct copy of the foregoing Brief of Appellant by depositing the same in the United States mail, postage prepaid, addressed as follows:

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