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No. 58336-1-I

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

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STATE OF WASHINGTON
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CITY OF SEATTLE,

Plaintiff/Appellant,

v.

JESUS QUEZADA,

Defendant/Respondent.

Rehinger's

~~THE CITY'S RESPONSE BRIEF~~ *Reply Brief*

REPLY

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A. ARGUMENT IN REPLY.

Quezada insists the City's interpretation of RCW 46.61.5055 is "unfair", "novel" and "absurd". His arguments in support are contorted and unsupported.

Quezada argues DUI defendants should be sentenced to "promote proportional punishment" and that the City's interpretation of RCW 46.61.5055 herein defeats that goal. Quezada's argument of unfairness rests on his claim that he was already punished for a "second" prior offense during his earlier 2005 Reckless Driving sentencing and argues the City's interpretation would again subject him to a "second" prior offense punishment. RBR at 13. However, a Reckless Driving conviction does not trigger the mandatory sentencing provisions of RCW 46.61.5055. This statute only applies to sentencing for DUI convictions, not reductions from DUI. Since Quezada was never subject to a mandatory sentence for his Reckless Driving conviction, he could not have been previously punished for any "second" offense DUI conviction.

Unlike the circumstance in *State v. Whitaker*, 112 Wn.2d

341, 771 P.2d 332 (1989), ours is not a case with an unusual sentencing circumstance due to an overlap of two sentencing systems. Whitaker's dilemma was that he was governed by the former statute on probation, but also governed by the newly enacted SRA upon the minimum term at the revocation of his probation. *Id.*, 112 Wn.2d at 344. In enacting the SRA, the legislature recognized anomalies might arise and granted judges the authority to incorporate the SRA in a "reasonably consistent" manner with the former statute. *Id.*, Wn.2d at 346. Accordingly, the court concluded Whitaker's deferred sentence under the former probationary statute was a "sentence" and the revocation of that sentence limited the court to imposing the deferred sentence and not a resentencing that allowed consideration of new offenses. Nothing within Quezada's circumstance even vaguely resembles that in *Whitaker*.

Quezada's prior punishment for Reckless Driving was an entirely discretionary sentence not governed by the enhanced sentencing for DUI convictions in RCW 46.61.5055. Thus, whether Quezada's Reckless Driving sentence was higher, lower, or identical to his later DUI sentence is irrelevant. No unfairness or

statutory absurdity arises merely because Quezada concludes his Reckless Driving jail sentence is similar to the later mandatory sentence for his DUI conviction.¹ As a legal matter, Quezada's Reckless Driving *sentence* is irrelevant to calculating his mandatory DUI sentence. No unfairness arises between Quezada's discretionary sentence in his Reckless Driving conviction and the later mandatory sentence for DUI at issue herein.

Quezada also persists in labeling the City's interpretation of RCW 46.61.5055 "novel" by our proposal to adhere to the common practice of considering *all* the defendant's prior convictions at his sentencing. Oddly, Quezada fails to cite any sentencing context utilizing his proposed method of ignoring all events after arrest in that case. To the contrary, Quezada admits that Washington's Sentencing Reform Act is consistent with the City's argument and felony courts consider all convictions during sentencing. RBR at 11. Nor was this practice newly enacted with the adoption of the SRA—it merely perpetuated that longstanding

¹ Despite Quezada's claim that he was sentenced for a "second offense", the maximum probation term for a Reckless Driving conviction is two years and the license suspension period is 30 days. RCW 46.61.500. The minimum probation term for a DUI conviction where the court suspends

practice. In *State v. Blight*, 89 Wn.2d 38, 41, 569 P.2d 1129 (1977), prior to adoption of the SRA, our court elaborated upon the many and various purposes of sentencing and the broad sweep of the court's investigation at sentencing. In *State v. Buntain*, 11 Wn. App. 101, 106, 521 P.2d 752 (1974) the court notes that sentencing is intended to learn as much as is available about the circumstances of the crime, the defendant's past life, and the defendant's personal characteristics.² Based upon the longstanding sentencing practices of both state and federal courts, the City's interpretation of the DUI sentencing statute is the universal standard within our courts.

In light of our court's longstanding sentencing procedures, it is Quesada's attempt to create "free-crimes"—unconsidered criminal acts after his DUI arrest—that are the anomaly. For decades the Washington legislature adopted laws supporting increasingly harsh mandatory DUI sentences and procedures³. The

any jail is five years and the minimum license suspension period is two years. RCW 46.61.5055(9)(a); RCW 46.61.5055(6)(ii).

² *State v. Buntain*, 11 Wn. App. 101, 106, 521 P.2d 752 (1974) citing *Williams v. New York*, 337 U.S. 241, 93 L.Ed. 1337, 69 S. Ct. 1079 (1949); *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971).

³ Just since 1991, the Washington legislature increased DUI mandatory sentences on five separate occasions. Legislative harshness with DUI extended to limiting a DP to once in a lifetime, a lengthening of the wash-out period from 5 years to seven years, the lengthening of license

legislature is presumed to be aware of caselaw in those areas in which it is legislating.⁴ In construing a statute, the court should not assume the legislature intended to effect a significant change by implication. *Phillippides v. Bernard*, 151 Wn.2d 376, 88 P.3d 939 (2004). The legislature expressly amended DUI sentencing to add harsh mandatory penalties and was aware of the longstanding practice of considering all criminal history at such sentencing. Absent an express intent to alter the universal sentencing practice of considering all prior criminal history, we cannot infer the legislature intended for courts to ignore the most recent and relevant criminal behavior for mandatory sentencing.

2. Neither plain meaning analysis nor statutory construction supports Quezada's interpretation of the DUI sentencing statute.

Under the plain meaning of the DUI sentencing statute, "A person who is convicted of ...[DUI] ...and who has two or more prior offenses within seven years shall be punished as follows:" RCW 46.61.5055(3). Under the statute, the triggering event is "conviction" for DUI. Upon conviction, the court engages the two

suspension periods, and addition in 2005 of a felony level DUI offense based on prior DUI offenses.

⁴ *Price v. Kitsap County*, 125 Wn.2d 456, 886 P.2d 556 (1994).

inquiries indicated by the definitions of “prior offenses” and “within seven years”. Under the definition for “prior offenses” the legislature lists conviction for DUI, grant of a DP for DUI, and conviction for Reckless Driving when the conviction was originally charged as a DUI. RCW 46.61.5055(12)(a). Quezada’s history includes these three acts.

Quezada’s attempt to redefine “prior offenses” to imply a time restriction is wholly without authority. RRB at 8-9. While he agrees the statute defines “prior offenses”, he asserts the statute does not define the word “prior”. However, the statute relies upon the phrase “prior offense” and never utilizes the term “prior” separately. Since the word “prior” never arises separately, we fail to see the value of such a definition in statute or in this debate.⁵

Whether we examine RCW 46.61.5055 subsection (1), (2), or (3), the focus is the same. Upon conviction for DUI the statute mandates the court examine the defendant’s criminal history and identify every “prior offense” in order to calculate the mandatory

⁵ See e.g. *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005)(When legislature uses different terms in statute we presume they intended different meaning).

sentence.⁶ The phrase “prior offense” is defined because that is the first use of that term-of-art. As our court recently stated in *City of Walla Walla v. Greene*⁷, RCW 46.61.5055(12)(a)(v) lists the acts that constitute a “prior offense” under the statute. That phrase is specifically *not* limited by any time restriction. *State v. Holmgren*, 106 Wn. App. 477, 482, 23 P.3d 1132 *rev. denied* 145 Wn.2d 1013 (2001). Thus, DUI is a “prior offense” upon conviction, a DP is a “prior offense” if granted, and Reckless Driving reduction from DUI is a “prior offense” upon conviction. No other limitation arises under the term “prior offense”.

Quezada argues “the focus is upon the date of arrest in determining what constitutes a prior offense.” RBR at 12. As stated in *Walla Walla v. Green* a “prior offense” is merely one of the acts listed in the statute. Likewise, *State v. Holmgren* plainly states that the definition of “prior offense” specifically does not incorporate the separate time limitations imposed by the definition for “within seven years”.⁸ Once the court compiles the “prior

⁶ Under RCW 46.61.5055(7)(c) the Department of Licensing examines the driver’s record to determine “prior offenses” for suspension purposes.

⁷ *City of Walla Walla v. Greene*, 154 Wn.2d 722, 727, 116 P.3d 1008 (2005).

⁸ *Holmgren*, 106 Wn. App at 482.

offense” listing applicable to the defendant, the court has a separate obligation to determine if these prior offenses are “within seven years”. Each definition is its own procedural step requiring separate deliberation by following the exact process dictated by each definition. No authority supports Quezada’s attempt to graft the two definitions together to create a nonsense hybrid.

Contrary to Quezada’s argument, the “unit of measurement” employed by the legislature is not the arrest date. RBR at 12. The unit of measurement in the term “within seven years” is plainly “years”. The measurement calculation begins with the arrest date for the “prior offense” and ends with the arrest date for the instant DUI. If the elapsed “years” is less than seven, then that “prior offense” is included for the determination of the mandatory sentence. Because each of Quezada’s “prior offense” arrest dates are all “within seven years”, he had two or more such offenses at sentencing in this case.

Legislative history for the DUI sentencing statute also supports the City’s argument. Our DUI sentencing statute previously stated, “A person...who has not been convicted of a violation of [DUI or Physical Control] that was committed within

five years before the commission of the current violation...". Laws of 1994 Ch. 275, §3. This language expressly required a DUI/Physical Control conviction that must have been committed *before* the commission of the current crime of DUI. That limiting language survived only briefly and is conspicuously absent a year later in the Laws of 1995, 1st Special Session Ch. 17, §1. That 1995 amendment states "A person who is convicted of [DUI or Physical Control] and who has no prior offense within five years shall be punished...". The 1995 legislature dropped the "*before the commission of the current crime*" language and also expanded the list of acts triggering sentencing enhancements beyond only DUI convictions. If the legislature intended to retain the limitations of the 1994 language, they need only have perpetuated those unambiguous terms. When the legislature changes the language of an unambiguous statute, the legislature is presumed to intend to change the law. *State v. Carlson*, 65 Wn. App. 153, 828 P.2d 30, *rev. denied* 119 Wn.2d 1022 (1992); *Dando v. King County*, 75 Wn.2d 598, 452 P.2d 955 (1969). By eliminating the requirement for commission of the prior offense *before* the current crime, the legislature explicitly expanded mandatory sentencing to

include convictions arising after the current crime. If they applied, the rules governing statutory construction do not aid Quezada.

B. CONCLUSION

We request the court vacate Quesada's DUI sentence and remand for resentencing under RCW 46.61.5055(3) governing sentencing for DUI convicts with two or more prior offenses and consistent with the Order of the Superior Court reversing the trial court's grant of EHM in lieu of mandatory jail.

DATED THIS 20th day of March, 2007.

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Respectfully,



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