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No. 58336-1-I

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

CITY OF SEATTLE,

Appellant,

v.

JESUS QUEZADA,

Respondent.

REPLY BRIEF
AMICUS CURIAE

OF

WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
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I. REPLY

A. AMICUS HAS NOT FABRICATED CASE QUOTATIONS.

The City alleges that *Amicus* has fabricated two quotations attributed to *City of Bremerton v. Tucker*, 126 Wn.App. 26 (2005). This is not true. The City's misunderstanding of one of the instances is the result of an incorrect page reference. The passage in question is as follows:¹

In other words, RCW 46.61.5055 increases “the penalty for a second DUI where a defendant has previously [committed one of the designated prior offenses].” *Id.* at 30 (*emphasis added*).

The quote is actually found on page 34 of the case not page 30 as cited. *Bremerton* at 34.

The other instance involves the following passage:²

Combining these perspectives we see that where a “prior offense” occurred “within the previous seven years, [of] a new DUI...[the] penalty for the new DUI [will] be more severe than it would have been had the new DUI been [the] first offense.” *City of Bremerton v. Tucker*, 126 Wn.App. 26, 30-3 (2005)(*emphasis added*).

The City's misunderstanding here is likely the result of inartful drafting on the part of *Amicus*. The citation clearly indicates that the quote spans from page 30 to page 33. Unfortunately, the use of ellipses instead of a block quote or two separate quotes may have obfuscated this fact.

¹ WACDL brief at 4-5.

² WACDL brief at 4.

On page 30 the court states that “if a person convicted of DUI has had a ‘prior offense’ within the previous seven years, the trial court must impose a higher minimum sentence for a new DUI conviction than it would impose for a person with no prior DUI offenses.” *Bremerton* at 30 (underlined portions quoted). Then on page 33 the Court states that “if, he drove again while under the influence, his penalty for the new DUI would be more severe than it would have been had the new DUI been his first offense.” *Id.* at 33 (underlined portions quoted).

The quotes in question were joined because the sole focus of the argument at this point was the uni-directionality of the seven year period dictated by the statute.³ None of the omitted material contradicts *Amicus*’ argument. The term conviction in the original merely recognizes that an individual cannot be sentenced under RCW 46.61.5055 until he has first been convicted.

B. TO QUALIFY AS A “PRIOR OFFENSE” UNDER RCW 46.61.5055, THE ARREST FOR A PARTICULAR OFFENSE MUST PREDATE THE ARREST FOR THE OFFENSE BEING SENTENCED.

The question before the Court is one of first impression. *Amicus* has broken the issue down into two components. The first is whether the

³ According to the City, the seven year period established by the statute is bi-directional, stretching both seven years before and seven years after the arrest underlying the conviction being sentenced. *Amicus* argues that the statute is uni-directional in that it only extends seven years before the relevant event.

seven year period of the statute was meant to be bi-directional, reaching both seven years before and seven years after some specified event, or uni-directional, reaching solely the seven years preceding some specified event. The second is what the yardstick events for measuring the seven year period are (i.e., arrests, conviction, sentencing).

Beginning with the second component first, the City seems to argue that *Amicus* has selectively quoted dicta to establish that the enhanced sentencing scheme of RCW 46.61.5055 seeks to punish “new DUI arrests” and not “new DUI convictions.”⁴ This is a mischaracterization of *Amicus*’ argument. *Amicus* is not arguing that an individual should be punished for simply having been arrested without a subsequent judicially arrived at disposition. To the contrary, the statute is clear in establishing that it is the preexistence of certain convictions and/or deferred prosecutions (“DP”) that triggers enhanced penalties.⁵

What *Amicus* is arguing is that once a sentencing Court has found that any of the statutory dispositions exist, it is the time between the arrest dates of those offenses and the offense being sentenced that determines the “seven year” period.⁶ This is indisputable as the statute clearly states that “[w]ithin seven years’ means that the arrest for a prior offense occurred

⁴ City’s Response brief at 4.

⁵ WACDL brief at 3.

⁶ WACDL brief at 5-6.

within seven years of the arrest for the current offense.” RCW 46.61.5055(12)(b)(*emphasis added*); *State v. Bays*, 90 Wn.App. 731, 737 (1998).

The issue requiring the Court’s attention is actually quite narrow. It is this: is the seven year period under RCW 46.61.5055 bi-directional, reaching both seven years before and seven years after the arrest date for the offense being sentenced, or uni-directional, reaching only those offenses with arrest dates in the seven years preceding the arrest for the offense being sentenced.

As indicated above, this is an issue of first impression. By definition then, the Court has not yet addressed the issue in a binding manner. This does not mean, however, that the Court has never commented on or discussed the issue.

Dictum is defined as a “judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive).” *Pierce County v. State*, 150 Wn.2d 422, 435 n.8 (2003)(quoting, BLACK’S LAW DICTIONARY 1100 (7th ed.1999)). When considering an issue of first impression, Washington courts have long recognized that it is proper to consider dicta on closely related matters and adopt it if persuasive. *Broad v. Mannesmann Anlagenbau, A.G.*, 141

Wn.2d 670, 684 (2000); *U.S. Bank of Washington v. Hursey*, 116 Wn.2d 522, 526 (1991); *State ex rel. Lofgren v. Kramer*, 69 Wn.2d 219, 222 (1966); *Northern Sav. & Loan Ass'n v. Kneisley*, 193 Wn. 372, 386-7 (1938); *Klickitat County v. Beck*, 104 Wn.App. 453, 460 (2001); *State v. N.S.*, 98 Wash.App. 910, 914-5 (2000); *State v. Mierz*, 72 Wn.App. 783, 798 (1994); *Marine Power & Equipment Co. v. Washington State Human Rights Com'n Hearing Tribunal*, 39 Wn.App. 609, 614-5 (1985). This may be particularly true where the dicta is not inadvertent and/or is well developed by the court. *State v. Hartley*, 56 Wn.App. 562, 566 (1990).

State v. Holgren, 106 Wn.App. 477 (2001), concerned a sentencing for vehicular homicide. After stipulating to having prior DUIs Holgren argued that some of them could not be used to enhance his sentence:

...because he committed those offenses more than seven years before he committed his current offense. He relie[d] on the fact that the different penalties for a DUI conviction that are set out in RCW 46.61.5055 are based on whether or not the defendant committed certain alcohol-related offenses within the previous seven years.

However, Holgren misread[] the relevant statutes. The statute under which his sentence was enhanced refers to RCW 46.61.5055 only for the purpose of the definition of a "prior offense". RCW 9.94A.310(7). The definition is found in section 11(a) of the statute. While RCW 46.61.5055 also limits prior offenses to those within the last seven years for purposes of punishing a DUI offense, that limitation is irrelevant to the punishment of Holgren for Vehicular Homicide.

Holgren, 106 Wn.App. at 481-2 (*emphasis added*).

Although the emphasized language is dicta, it is certainly not inadvertent. In fact, it is twice repeated. Moreover, while also dicta, this conclusion is echoed in another vehicular homicide case where the Court stated that RCW 46.61.5055 increases the penalty for a DUI when an individual has a prior offense “within the last seven years.” *State v. Deman*, 107 Wn.App. 98, 103 (2001) (*emphasis added*).

In *City of Bremerton v. Tucker*, 126 Wn.App. 26 (2005), the defendant challenged RCW 46.61.5055 on due process grounds. In rejecting defendant’s argument, the Court first discussed “The Legislature’s Mandate” in enacting RCW 46.61.5055. *Tucker*, 126 Wn.App. at 30. It stated that:

Our Legislature has mandated that if a person convicted of DUI has had a “prior offense” within the previous seven years, the trial court must impose a higher minimum sentence for a new DUI conviction than it would impose for a person with no prior DUI offenses.

Tucker, 126 Wn.App. at 30 (*emphasis added*). Again, although the emphasized language is dicta, it is certainly not inadvertent. To the contrary, it comprises most of the lead off paragraph of a section explicitly labeled by the Courts as: “The Legislature’s Mandate”.

Nor are these the only indications given by Washington Courts. In *Bays*, the Court distinguished the “five years” requirement of former RCW

46.61.5053 (1994) and RCW 46.61.5055 (1995) from RCW 10.05.010. After explaining that RCW 46.61.5055 required that “the arrest for a prior offense occur[] within five years of the arrest for the current offense”, it commented that the statute it replaced, RCW 46.61.5053, “also based penalties for alcohol violators upon the number of prior offenses ‘committed within five years before the commission of the current violation.’” *Bays*, 90 Wn.App. at 737 n.4 (*emphasis added*)(quoting RCW 46.61.5053).

The discussion in these cases, and the statements by other Washington Courts consistent therewith cited in *Amicus*’ opening brief, all point to one conclusion: the “within seven years” requirement of RCW 46.61.5055 is uni-directional. That is, it applies only to dispositions whose arrest dates fall within the previous seven years of the arrest date for the offense being sentenced. Although these passages may be dicta, they are uncontradicted and span nine years of jurisprudence.

C. THE CITY’S ARBITRARY AND ABSURD RESULT.

The City correctly points out that when an individual’s DP is revoked based upon a subsequent conviction, the DP is counted as a prior offense for purposes of sentencing the subsequent offense. It then argues, however, that when the revoked DP is sentenced, both the original grant of DP and the conviction resulting in its revocation are counted as prior

offenses. This means that the revoked DP is sentenced as a third offense even though the individual has actually committed only two offenses.⁷

Such reasoning has already been rejected as illogical by this State's highest Court. *State v. Whitaker*, 112 Wn.2d 341, 346 (1989). The fact that the SRA does not permit or anticipate dispositions such as DPs is why its application to the case before the Court "is of very limited utility." *Wahleithner v. Thompson*, 134 Wn.App. 931, 941 (2006).

In the context of a revoked DP, interpreting the seven year requirement as advocated by the City would lead to arbitrary and absurd results. As an example, consider that beginning in July, it will be a felony if an individual is convicted of a DUI and "has four or more prior offenses within ten years as defined in RCW 46.61.5055." RCW 46.61.502(6) (effective July 1, 2007); RCW 46.61.5055(4) (effective July 1, 2007).

Now, assume that the new statutory framework is in effect and that: (1) an individual has two prior DUI convictions with arrest dates in years one and two; (2) he is on a DP arising out of an arrest in year four; (3) he is subsequently arrested for another DUI in year five and convicted; and (4) his DP is revoked as a result and a judgment of guilty entered.

The discussion and statements in the cases relied upon by *Amicus* lead to the following result: (1) the DUI arising out of the arrest in year

⁷ City's Response brief at 9.

five is sentenced as a fourth offense non-felony; and (2) the conviction from the revoked DP with an arrest date of year four is sentenced as a third offense non-felony. This is in keeping with the amended statute which anticipates at least four violations BEFORE a subsequent DUI can be deemed a felony.

Using the City's approach we get a different result. The DUI arising out of the arrest in year five is still sentenced as a fourth offense non-felony. The conviction from the revoked DP, however, would now be sentenced as a fifth offense felony. Thus, under the City's approach, an individual need only commit four DUIs to be labeled a felon as opposed to the five anticipated by the amended statute. This is clearly contrary to the Legislature's intent.

Applying the City's approach, an individual found guilty of DUI at trial four times will not be deemed to have committed a felony. On the other hand, the hypothetical individual above who entered a DP would be deemed a felon. Both individuals have engaged in the same conduct an equal number of times, however. The only difference is that the individual who entered the DP has at least attempted to take responsibility for his actions and overcome the grip of alcoholism by entering a DP/treatment program. Nonetheless, he would be labeled a felon while the individual who has never acknowledged culpability or made a voluntary attempt to

address his conduct is not. This is arbitrary and absurd.

II. CONCLUSION

To qualify as a "prior offense" under RCW 46.61.5055, the arrest for a particular offense must have occurred before the arrest for the offense being sentenced. In particular, to qualify as a "prior offense" for purposes of sentencing a revoked DP, the arrest for a particular disposition must have occurred before the arrest resulting in the DP. Accordingly, the only "prior offense" for purposes of sentencing Mr. Quezada's revoked DP was the DUI resulting from the 2001 arrest. The decisions of the Municipal and Superior Courts to this effect should be upheld.

DATED this 4th day of May, 2007.

Respectfully Submitted,



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CERTIFICATE OF SERVICE

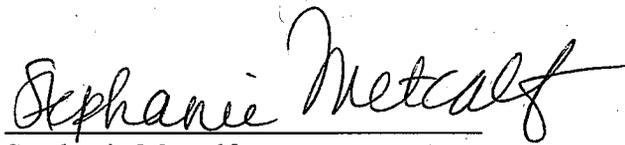
I certify that on the 4th day of May, 2007, a true and correct copy of the foregoing BRIEF *AMICUS CURIAE* was delivered to ABC Courier Services to be served by such upon the following individuals:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT. (RCW 9A.72.085)

Signed in Bellevue, Washington, and dated this 4th day of May, 2007.


Stephanie Metcalf

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