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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA
FILED

No. 58710-2-I

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

SCOTT WINEBRENNER,

Defendant/Petitioner,

v.

CITY OF SEATTLE,

Plaintiff/Respondent.

THE CITY'S **Respondents** REPLY BRIEF

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A. RESTATEMENT OF ISSUE.

1. Does a DUI sentencing court consider for mandatory sentencing Winebrenner's prior conviction for Reckless Driving/DUI and prior grant of a DP/DUI when those appear on the list of "prior offenses" in RCW 46.61.5055(13)(a) and when both offenses were "within seven years" of the arrest in this case?
2. In considering whether Winebrenner's prior offenses were "within seven years" of his arrest in this case, does the plain meaning of that term include any offense, whether before or after, so long as the arrest for the offense is "within" seven years?

B. STATEMENT OF THE CASE

Scott Winebrenner was charged with the crime of Driving Under the Influence (DUI) on July 27, 2001.¹ Winebrenner entered into a Deferred Prosecution ("DP") under Ch. 10.05 RCW for that DUI on October 2, 2001.² Winebrenner later pleaded guilty to a DUI amended to a Reckless Driving for a June 22, 2005 offense.³ On December 13, 2005, Winebrenner's DP was revoked based upon his admission to violating his DP agreement.⁴ Winebrenner was sentenced upon his revoked DP on December 13, 2005.

¹ CP 9.

² CP 9.

³ CP 9-10.

⁴ CP 10.

At his December 2005 sentencing, Winebrenner's criminal history established the 2001 grant of a DP for DUI and the 2005 Reckless Driving conviction (amended from DUI). Winebrenner had refused the breath test in this case, which also enhanced his mandatory sentence.⁵

The trial court concluded Winebrenner had no "prior offenses" and sentenced him as a first time offender with a refusal.⁶ The City appealed the sentence, alleging the court erred in its interpretation of RCW 46.61.5055.⁷ The Superior court agreed and reversed the trial court, concluding that the DUI sentencing statute requires a DUI sentencing court to consider for mandatory sentencing every "prior offense" that appears on the list in RCW 46.61.5055(13)(a) when that offense is within seven years.⁸

Winebrenner requested discretionary review of the Superior Court decision. The City agreed the court should grant review and join this matter with *Seattle v. Quezada*, COA No. 58336-1-I for argument. The court granted review and joined these two legally identical matters.

⁵ CP 10.

⁶ CP 10, 23-Line 6-9.

⁷ CP 10.

C. ARGUMENT.

Winebrenner's Opening brief is a-word-for-word copy of Quezada's Reply brief, the matter joined for argument with this case. Because we already replied to Quezada's brief, Winebrenner raises no new issues. Rather than simply refile the Reply brief in that joined matter, we incorporate under RAP 10.1(g) the Reply Brief in Quezada.

Because Winebrenner's Opening Brief is actually a "reply" brief, it fails to address basic legal issues. We address herein the basic legal analysis missing from Winebrenner's brief. We also note additional statutory and administrative authority supporting the City's interpretation of the DUI sentencing statute.

1. Construing the DUI sentencing statute is an issue of statutory construction, applying well established precepts to interpret the plain meaning of a statute with legislatively defined terms establishes that Winebrenner has two "prior offenses" on the date of his sentencing in this DUI.

The issue raised herein is the construction of a statute and its application to the facts in our case. Application of a statute to determine sentencing is a legal issue.⁹ The court of appeals

⁸ CP 40, Decision on RALJ Appeal.

⁹ *State v. Porter*, 133 Wn.2d 177, 942 P.2d 974 (1997).

reviews legal issues de novo.¹⁰ In interpreting a statute, the court's inquiry always begins with the plain language of the statute.¹¹ If the statutory language is unambiguous, the court relies solely upon the statutory language in construing the statute.¹²

RCW 46.61.5055(1) sets out the base penalty when the current offense is for driving under the influence¹³ or for being in actual physical control of a vehicle while under the influence¹⁴. RCW 46.61.5055(2) and (3) increase the base penalty if a person has had a conviction for one or more specific offenses in the last seven years.¹⁵ RCW 46.61.5055 requires the court to determine the guilt of the defendant and the existence of prior offenses before imposing sentence.¹⁶ A person with two or more "prior offenses within seven years" and a BAC of .15 or higher shall be punished by imprisonment for not less than one hundred twenty days and one hundred fifty days of electronic home monitoring.¹⁷ The

¹⁰ *City of Bellevue v. Jacke*, 96 Wn. App. 209, 211, 978 P.2d 1116 (1999).

¹¹ *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789 (2004)(recon. denied).

¹² *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

¹³ RCW 46.61.502 (elements of DUI).

¹⁴ RCW 46.61.504 (elements of Physical Control DUI).

¹⁵ *State v. Deman*, 107 Wn.App. 98, 26 P.3d 296 (2001).

¹⁶ *City of Richland v. Michel*, 89 Wn. App. 764, 950 P.2d 10 (1998).

¹⁷ RCW 46.61.5055(3)(b) (2005-06 Supp.)

statute defines both “prior offense”¹⁸ and “within seven years”¹⁹.

A “prior offense” is defined as one of the specific offenses listed in the statute.²⁰ The list includes the prior grant of a Deferred Prosecution for DUI and conviction for Reckless Driving when amended from DUI.²¹ Winebrenner had both these “prior offenses” on the date of his sentencing in this case.

In order for a prior offense to count as a sentencing enhancement, it must also be “within seven years”. The statute defines “within seven years” to mean that the arrest for each “prior offense” occurred within seven years of the arrest for the offense for which he is being sentenced.²² In other words, prior offenses “wash-out” seven years after the arrest, for purposes of mandatory sentencing.²³ The wash-out concept in sentencing is not novel. Our courts have consistently interpreted “wash-out” provisions

¹⁸ RCW 46.61.5055(12)(a) (2005-06 Supp.).

¹⁹ RCW 46.61.5055(12)(b) (2005-06 Supp.).

²⁰ RCW 46.61.5055(12)(a, b) (2005-06 Supp.).

²¹ *City of Kent v. Jenkins*, 99 Wn. App. 287, 290, 992 P.2d 1045 (2000) (grant of deferred prosecution triggers its treatment as “prior offense” under RCW 46.61.5055).

²² RCW 46.61.5055(12)(b) (2005-06 Supp.)

²³ Unlike the SRA, “prior offenses” may still be considered for discretionary sentencing after the wash-out period. *Kent v. Jenkins*, 99 Wn. App. 287, 992 P.2d 1045 (2000).

plainly and in accord with the purpose of the statute.²⁴

Applied herein, a sentencing court must consider every grant of a DP and every Reckless Driving conviction to determine whether Winebrenner's offenses match those listed as "prior offenses". Winebrenner's prior offenses are the October 2001 grant of a DP for DUI,²⁵ and a June 25, 2005 Reckless Driving conviction, amended from a charge of DUI. These "prior offenses" were both "within seven years" of his arrest for the July 2001 DUI upon which he was sentenced. Winebrenner's 2001 grant of a DP washes-out seven years after it was granted, in 2010. His 2005 Reckless Driving conviction washes-out seven years after the arrest, in 2012. Accordingly, these "prior offenses within seven years" should have been considered in calculating Winebrenner's mandatory sentence. Accordingly, he should have been sentenced as a person with "two or more prior offenses".²⁶

2. Winebrenner may not ignore the definitions provided in the statute to cobble together a more agreeable interpretation of the DUI statute.

²⁴ *State v. Deman*, 107 Wn. App. 98, 102, 26 P.3d 296 (2001) (Court assumes the legislature means exactly what it says).

²⁵ *City of Kent v. Jenkins*, 99 Wn. App. 287, 291, 992 P.2d 1045 (2000)(Grant of DP triggers its treatment as "prior offense" under RCW 46.61.5055.

²⁶ RCW 46.61.5055(12)(v)(2005-06 Supp.).

Contrary to the definition imposed by the legislature, Winebrenner simply ignores the statutory definitions. Our court has consistently held that statutory definitions are controlling.²⁷ A term whose statutory definition declares its meaning necessarily excludes any meaning that is not stated.²⁸ Where the legislature lists the conditions that apply, it implies the exclusion of those not listed.²⁹

By adding a time restriction into the meaning of “prior offense”, Winebrenner’s interpretation also contradicts the legislative definition of “within seven years”. Under the legislative definition, the only legislative requirement was that arrests/DP-grants for prior offenses be “within seven years” of the arrest for the current case. A dictionary definition of “within” means “inside the limits or extent in time, degree, or distance”.³⁰ “Within” means

²⁷ *Fraternal Order of Eagles, Tenino Aeirie No. 564 v. Grand Aeirie of Fraternal Order of Eagles*, 148 Wn.2d 224, 59 P.3d 655 (2002) *cert. denied* 123 S.Ct. 2221, 538 U.S. 1057, 155 L.Ed.2d 1107.

²⁸ *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 *rev. den.* 94 Wn.2d 1022 (1980).

²⁹ *In re Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999)(where a statute specifically designates the things upon which it operates, there is an inference that the legislature intended all omissions).

³⁰ The American Heritage Dictionary of the English Language (4th ed. 2004).

anytime before, during, or after a specified time period.³¹ In construing statutes, courts refrains from adding to or subtracting from the language of a statute.³² Contrary to well established Washington law, the lower court rewrote the DUI sentencing statute.

3. The City's interpretation of the DUI statute is consistent with statewide sentencing practices and consistent with related statutes.

In interpreting a statutory term the court should take into consideration the meaning naturally attaching to them from the context, and adopt the sense of the words which best harmonizes with the context.³³ Herein, the legislature defined "prior offense" in the context of sentencing. The precursor to applying the mandatory provisions of the DUI sentencing statute is that the defendant must be convicted of DUI. That is the only statutory precursor.

Winebrenner's interpretation also fails to consider the effect of RCW 46.61.513, prescribing procedures in DUI

³¹ *Glenn v. Garrett*, 84 S.W.2d 515, 516 (Tex. Civ. App. 1935).

³² *Millay v. Cam*, 135 Wn.2d 193, 955 P.2d 791 (1998).

³³ *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196 (2005).

sentencing.³⁴ Statutes are to be construed as a whole, considering all provisions in relation to each other and giving effect to each provision.³⁵ RCW 46.61.513 provides the sentencing court with explicit DUI sentencing instructions. The court is required to verify the defendant's criminal records immediately before the court orders a sentence for any DUI and enter findings based upon this history.³⁶ The history the court must review "shall include all previous convictions and orders of deferred prosecution, as reported through the judicial information system or otherwise available to the court or prosecutor," and records from the department of licensing. The court is directed to review the most recent criminal history available at sentencing, requiring history generated not more than one-working-day before sentencing but allowing history generated not more than seven-calendar-days for previous acts of those courts not operating fully within the court's judicial information system.³⁷ Unlike sentencing for other misdemeanor crimes, the legislature imposed mandatory

³⁴ *Hunter v. Dept. of Labor & Industries*, 19 Wn. App. 473, 576 P.2d 69, rev. denied 90 Wn.2d 1022 (1978)(trial court under duty to notice and consider all applicable statutes).

³⁵ *State v. Merritt*, 91 Wn. App. 969, 961 P.2d 958 (1998).

³⁶ RCW 46.61.513 (1)

sentencing for DUI offenses and imposed mandatory procedures to effect that sentencing scheme. In considering the prior grant of a DP, the sentencing court is specifically instructed the DP is available for use after a conviction to determine a sentence.³⁸ We presume the legislature did not engage in an unnecessary or meaningless act.³⁹

Likewise, it is not only the criminal courts that are required to apply the language of RCW 46.61.5055. Distinct from the courts, the Department of Licensing is ordered to enforce license suspensions based upon “prior offenses within seven years”.⁴⁰ While recent statutory changes now uniformly place suspension authority within the DUI sentencing statute, former RCW 46.20.285 previously addressed this issue. It specified that “upon a showing by the department’s records that the conviction is the first such conviction under RCW 46.20.5055(1) (b) or a second conviction under RCW 46.61.5055 for the driver within a period of five years...” Former RCW 46.20.285(7) also specified that a driver would be suspended “upon a showing by the department’s

³⁷ RCW 46.61.513 (3)

³⁸ RCW 10.05.080

³⁹ *State v. McCullum*, 98 Wn.2d 484, 494, 656 P.2d 1064 (1983).

records that the conviction is the third such conviction for the driver within a period of two years.” Implementing these statutes is WAC 308-104-056, which orders suspension upon conviction. These former versions of these statutes and the current WAC highlight the language within current RCW 46.61.5055 emphasizing the fact of *conviction* as the criterion for counting an offense as a “prior offense”. On the date of Winebrenner’s sentencing, he had a prior conviction and had a prior grant of a DP⁴¹. His attempt to insert an additional requirement that the *arrest* arise before the current case is without any authority.

4. Winebrenner’s interpretation contradicts the stated intent of mandatory sentencing and results in absurd sentencing consequences.

The court of appeals assumes the legislature did not intend an absurd result and will construe statutes accordingly to effect legislative intent.⁴² Offenders with prior serious traffic offenses are consistently targeted for enhanced punishment by our legislature

⁴⁰ RCW 46.61.5055(8)

⁴¹ Pursuant to RCW 46.20.308(10), DOL does not suspend licensing for grant of a Deferred Prosecution.

⁴² *State v. J.P.*, 149 Wn.2d 444, 69 P.3d 318 (2003).

because such offenses are a logical measure of culpability.⁴³ Over the years the legislature expanded the scope and effect of “prior offenses” in DUI sentencing on numerous occasions.⁴⁴ Under the newest sentencing amendments, effective July 2007, DUI offenders with four or more “prior offenses within ten years” become felony level offenses.⁴⁵ Contrary to the stated intent of these statutes and the purpose of sentence enhancements in general, Winebrenner asks the court to ignore any conviction or deferred prosecution since his arrest herein. Despite the command to punish Winebrenner for every prior DUI offense, Winebrenner asks the court to defer any punishment upon his most recent convictions until Winebrenner commits yet another DUI offense sometime in the future.

But Winebrenner’s argument fails to address the actual language of the statute. What Winebrenner would like the statute to mean is irrelevant in light of what it actually states. The DUI

⁴³ *In re Williams*, 111 Wn.2d 353, 358, 759 P.2d 436 (1988) citing Sentencing Guidelines Commission, Report to the Legislature 12 (Jan. 1983); D. Boerner §5.6(a), at 5-7 to 5-8.

⁴⁴ E.g. Laws 1997, ch. 229 §11 (extending length of license revocation); Laws 1998, ch. 206, §1 (requiring defendant pay for EHM monitoring and extending lengths of mandatory EHM); Laws 1999, ch. 274, §6 (extending from 5 years to 7 years the wash-out for prior offenses).

sentencing statute requires only a conviction or a grant of DP before those acts are considered “prior offenses”. Winebrenner seeks to change that definition to also require a prior arrest. Winebrenner cannot substitute what he would like the statute to say in place of what it plainly states. Once an offense meets the requirement for a prior offense, the only remaining requirement is that the arrest for the current offense be within seven years of the “prior offense”. Having shown Winebrenner’s two “prior offenses” are both also “within seven years”, his sentence should have been enhanced with both priors.

Winebrenner’s specific circumstance illuminates the absurd consequence of his interpretation. RCW 10.05.100 requires revocation of a DP upon subsequent conviction for any “similar offense”. Winebrenner agreed revocation of the DP was mandatory based upon the new conviction.⁴⁶ Under RCW 10.05.100, the trial court was forced to revoke Winebrenner’s DP based upon his new 2005 DUI reduced to a Reckless Driving conviction. Despite the fact Winebrenner’s 2005 Reckless Driving offense compelled this DUI sentencing, Winebrenner’s scheme

⁴⁵ Laws 2006, Ch. 73. Effective July 1, 2007.

excludes his 2005 Reckless Driving conviction from the mandatory sentencing it forced. Instructed by one provision that Winebrenner's Reckless Driving conviction warrants enhancement and compelled by another provision to revoke Winebrenner's DP based upon that new Reckless conviction, it follows that the Reckless Driving conviction must be considered for mandatory sentencing purposes. Ignoring Winebrenner's Reckless Driving conviction at sentencing after being forced to conduct the DUI sentencing because of the Reckless Driving conviction is an absurd reading of the DUI sentencing statute.

Winebrenner's interpretation is contrary to the plain words of the relevant statutes and the stated intent of the legislature. By sentencing defendants consistent with the plain terms of RCW 46.61.5055 and related statutes, the express purpose of the legislation is honored and we avoid irrational sentencing anomalies.

D. CONCLUSION

We respectfully request the Court of Appeals affirm the decision of the Superior Court and remand for resentencing

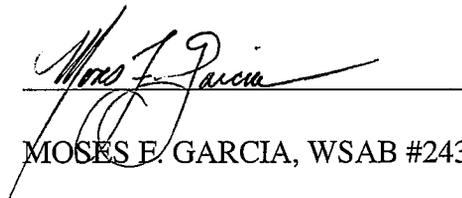
⁴⁶ CP at 15.

consistent with a DUI offender with two or more prior offenses
under RCW 46.61.5055(3)(b).

DATED THIS 20th day of May, 2007.

SEATTLE CITY ATTORNEY'S OFFICE
THOMAS A. CARR, CITY ATTORNEY

Respectfully,



MOSES F. GARCIA, WSAB #24322

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury according to the laws of the United States and the State of Washington that on this date I caused to be served in the manner noted below a copy of this document entitled THE CITY'S REPLY BRIEF on the following individual(s):

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