

FILED
SUPREME COURT
STATE OF WASHINGTON
5/3/2019 1:51 PM
BY SUSAN L. CARLSON
CLERK

NO. 96747-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEN V. WU,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Ken Schubert, Judge

SUPPLEMENTAL BRIEF OF PETITIONER KEN WU

CASEY GRANNIS
Attorney for Petitioner

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ISSUES</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	1
1. THE STATE MUST PROVE A "PRIOR OFFENSE" INVOLVED DRUGS OR ALCOHOL TO ELEVATE A DUI TO A FELONY AND THE STATE DOES NOT MEET ITS BURDEN SIMPLY BY SHOWING THE ORIGINAL CHARGE WAS FOR DUI	1
2. BECAUSE INVOLVEMENT OF DRUGS OR ALCOHOL IN THE PRIOR OFFENSE OF RECKLESS DRIVING IS A FACTUAL FINDING THAT ELEVATES THE DUI TO A FELONY, THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL MANDATES THAT THE JURY, NOT THE COURT, MAKE THAT FINDING.....	9
3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE PRIOR RECKLESS DRIVING OFFENSES INVOLVED DRUGS OR ALCOHOL	18
4. ALTERNATIVELY, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY THAT IT MUST FIND THE PRIOR RECKLESS DRIVING CONVICTIONS INVOLVED DRUGS OR ALCOHOL.....	20
D. <u>CONCLUSION</u>	20

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Walla Walla v. Greene,
154 Wn.2d 722, 116 P.3d 1008 (2005),
cert. denied, 546 U.S. 1174, 126 S. Ct. 1339, 164 L. Ed. 2d 54 (2006).....
.....3-6, 8, 10, 18-19

State v. Allen,
192 Wn.2d 526, 431 P.3d 117 (2018)..... 13

State v. Allen,
5 Wn. App. 2d 32, 425 P.3d 529 (2018)..... 12

State v. Barbee,
187 Wn.2d 375, 386 P.3d 729 (2017)..... 8

State v. Bird,
187 Wn. App. 942, 352 P.3d 215,
review denied, 184 Wn.2d 1013, 360 P.3d 818 (2015) 14

State v. Boss,
167 Wn.2d 710, 223 P.3d 506 (2009)..... 13

State v. Carmen,
118 Wn. App. 655, 77 P.3d 368 (2003),
review denied, 151 Wn.2d 1039, 95 P.3d 352 (2004). 13

State v. Case,
187 Wn.2d 85, 384 P.3d 1140 (2016)..... 13

State v. Chambers,
157 Wn. App. 465, 237 P.3d 352 (2010),
review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011) 14

State v. Chester,
133 Wn.2d 15, 940 P.2d 1374 (1997)..... 8

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Cochrane,
160 Wn. App. 18, 253 P.3d 95 (2011) 13

State v. Crowder,
196 Wn. App. 861, 385 P.3d 275 (2016),
review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017) 19

State v. Gray,
134 Wn. App. 547, 556, 138 P.3d 1123 (2006),
review denied, 160 Wn.2d 1008, 158 P.3d 615 (2007) 13

State v. Miller,
156 Wn.2d 23, 123 P.3d 827 (2005)..... 14-15

State v. Mullen,
186 Wn. App. 321, 345 P.3d 26 (2015)..... 3-6, 9-12, 19-20

State v. Olsen,
180 Wn.2d 468, 325 P.3d 187,
cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014) 12

State v. Roswell,
165 Wn.2d 186, 196 P.3d 705 (2008)..... 2

State v. Shaffer,
113 Wn. App. 812, 55 P.3d 668 (2002),
overruled by
City of Walla Walla v. Greene,
154 Wn.2d 722, 116 P.3d 1008 (2005)..... 4

State v. Watt,
160 Wn.2d 626, 160 P.3d 640 (2007)..... 17

State v. Williams-Walker,
167 Wn.2d 889, 225 P.3d 913 (2010)..... 17

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Wu,
6 Wn. App. 2d 679, 431 P.3d 1070 (2018),
review granted, 438 P.3d 120 (2019).....4, 8-10, 13, 15, 18-19

FEDERAL CASES

Alleyne v. United States,
570 U.S. 99, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013)..... 13

Apprendi v. New Jersey,
530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000)..... 16

Blakely v. Washington,
542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)..... 9, 15

In re Winship,
397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)..... 3

Mathis v. United States,
___ U.S. ___, 136 S. Ct. 2243, 195 L. Ed. 2d 604 (2016)..... 12

McFarland v. American Sugar Rfg. Co.,
241 U.S. 79, 36 S. Ct. 498, 60 L. Ed. 899 (1916)..... 5

Neder v. United States,
527 U.S. 1, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)..... 17

Patterson v. New York,
432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977)..... 5

Ring v. Arizona,
536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002)..... 16

Tot v. United States,
319 U.S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943)..... 18

TABLE OF AUTHORITIES

Page

FEDERAL CASES

United States v. Gaudin,
515 U.S. 506, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995)..... 11

Washington v. Recuenco,
548 U.S. 212, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006)..... 17

OTHER AUTHORITIES

4 W. Blackstone, Commentaries on the Laws of England 343 (1769)..... 16

Former RCW 46.61.502(6)(a) (2016)..... 2

Former RCW 46.61.5055(14)(a) (2016)..... 2

Former RCW 46.61.5055(14)(a)(xii) (2016) 2, 8

Laws of 2017, ch. 335, § 1 2

RCW 46.61.500(1)..... 11, 15

RCW 46.61.502 2

RCW 46.61.502(1)(a) 7

RCW 46.61.502(5)..... 2

RCW 46.61.502(6)(a) (2017)..... 2

RCW 46.61.5055(12)(a)(v)..... 4

U.S. Const. amend. VI 1-2, 9-10, 12-13, 15, 17

U.S. Const. amend. XIV 20

A. ISSUES

1. Where involvement of drugs or alcohol must be proven by the State to establish that prior convictions for reckless driving qualify as "prior offenses" elevating the crime of DUI from a gross misdemeanor to a felony, whether involvement of drugs or alcohol is a fact that must be found by the jury under the Sixth Amendment as opposed to a threshold legal question to be determined by the judge?

2. Whether the State failed to prove the prior convictions for reckless driving involved drugs or alcohol because the conviction itself does not establish the fact and the original DUI charge is not proof of it?

3. Assuming the evidence was sufficient, whether the court erred in failing to instruct the jury that it needed to find the prior reckless driving offenses involved drugs or alcohol in order to return a verdict on "prior offenses" because this was a factual matter for the jury to decide?

B. STATEMENT OF THE CASE

The relevant facts are set forth in the petition for review under the "Statement of the Case" heading.

C. ARGUMENT

1. THE STATE MUST PROVE A "PRIOR OFFENSE" INVOLVED DRUGS OR ALCOHOL TO ELEVATE A DUI TO A FELONY AND THE STATE DOES NOT MEET ITS BURDEN SIMPLY BY SHOWING THE ORIGINAL CHARGE WAS FOR DUI.

To sustain a conviction for felony DUI, the State must prove "prior offenses" as defined by statute. Based on Supreme Court precedent, there must be evidence that the prior offenses involved drugs or alcohol. This is a question of fact for the jury to decide, as mandated by the Sixth Amendment right to a jury trial.

Generally, DUI is a gross misdemeanor. RCW 46.61.502(5). The offense becomes a felony if "[t]he person has four or more prior offenses within ten years as defined in RCW 46.61.5055." Former RCW 46.61.502(6)(a) (2016).¹ A "prior offense" is defined by statute in multiple ways. Former RCW 46.61.5055(14)(a) (2016). As relevant here, a "prior offense" includes a conviction for reckless driving "if the conviction is the result of a charge that was originally filed as a violation of RCW 46.61.502," the DUI statute. Former RCW 46.61.5055(14)(a)(xii) (2016).

Where criminal statutes raise the level of a crime from a misdemeanor to a felony based upon the defendant's prior convictions, those convictions are elements of the charged crime that the State must prove beyond a reasonable doubt. State v. Roswell, 165 Wn.2d 186, 189,

¹ This is the version of the statute applicable to Wu. The legislature has since amended RCW 46.61.502(6)(a) to reduce the number of prior offenses to three. Laws of 2017, ch. 335, § 1.

196 P.3d 705 (2008). In that circumstance, "[t]he prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged." Id. at 192.

The State must prove involvement of alcohol or drugs as part of a "prior offense" originally charged as a DUI but amended to another charge. State v. Mullen, 186 Wn. App. 321, 332, 345 P.3d 26 (2015). This conclusion flows from City of Walla Walla v. Greene, 154 Wn.2d 722, 724-26, 116 P.3d 1008 (2005), cert. denied, 546 U.S. 1174, 126 S. Ct. 1339, 164 L. Ed. 2d 54 (2006), where the Supreme Court addressed a due process challenge to the DUI statute that increased the mandatory minimum sentence for a current DUI conviction based on a "prior offense" of first degree negligent driving.

The Court cited In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970) for the proposition that "every element of a crime must be proved beyond a reasonable doubt in the context of a criminal proceeding." Id. at 728. It rejected Greene's argument that the statute relieved the State of proving a prior DUI charge by interpreting the statute to require proof that drugs or alcohol were involved in the prior offense. Id. at 726-28. The definitional statute "limits applicability to those convictions where DUI was the predicate charge, thus requiring alcohol or drugs to be involved with the convicted driving offense." Id. at 727.

"Accordingly, the statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs. Thus, due process is satisfied for the purposes of this mandatory enhancement if the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Id. at 727-28 (footnote omitted, emphasis added).

The Court of Appeals in State v. Shaffer, 113 Wn. App. 812, 55 P.3d 668 (2002) "thus erred in concluding that the due process protections articulated in Winship rendered the statute unconstitutional." Id. at 728. "For Greene, the fact that she was convicted of first degree negligent driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself. Accordingly, we hold that here, RCW 46.61.5055(12)(a)(v) survives constitutional challenge." Greene, 154 Wn.2d at 728 (emphasis added).

Wu's case involves a prior conviction for reckless driving, not negligent driving, as in Greene. In dissent, Judge Becker grasped the distinction: "A reckless driving conviction does not inherently involve alcohol or drugs. Greene does not hold that an accusation equals proof." State v. Wu, 6 Wn. App. 2d 679, 694, 431 P.3d 1070 (2018) (Becker, J., dissenting). As recognized by Division Two in Mullen, Greene "establishes the involvement of alcohol or drugs as part of the definition of

a prior offense" and "that it is an element of the crime." Mullen, 186 Wn. App. at 332.

The legislature could have constitutionally chosen to specify prior driving offenses qualify as "prior offenses" under the DUI statute without reference to an original DUI charge. The legislature, in taking the additional step of inserting the original DUI charge requirement, limited the kinds of offenses that qualify to those involving drugs and alcohol. Greene, 154 Wn.2d at 727. But that additional step triggers constitutional concerns. To comply with due process, the State needs to establish drug/alcohol involvement. The charge alone does not cut it.

A due process problem arises when there is a conclusive presumption that alcohol was involved based on a mere charge, i.e., that the court or fact-finder must presume the ultimate offense of conviction involved alcohol because the State originally charged a DUI that was later dropped. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." Patterson v. New York, 432 U.S. 197, 210, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) (quoting McFarland v. American Sugar Rfg. Co., 241 U.S. 79, 86, 36 S. Ct. 498, 60 L. Ed. 899 (1916)).

According to the State, to prove a reckless driving conviction qualifies as a "prior offense," the prosecution need only prove such

offense was originally charged as a DUI. If the State is right, and proof of a DUI charge establishes that drugs or alcohol were involved, we would have expected to Greene to say just that. But it didn't. Instead Greene held "the fact that she was convicted of first degree negligent driving is sufficient to satisfy her due process protections because all elements of that offense are established by virtue of the conviction itself." Greene, 154 Wn.2d at 728. That holding only makes sense if the "elements" being referred to include establishment that drugs or alcohol were involved. Greene had just stated due process is satisfied where "the prior conviction exists and the prosecution can establish that intoxicating liquor or drugs were involved in that prior offense." Id.

As Mullen points out, "if the Greene court sought merely to require the State to prove that (1) the prior conviction existed and (2) the prior conviction was originally charged as a DUI, the Greene court could have relied solely on the language of the statute. . . . Instead Greene states that due process requires the State to 'establish' that alcohol or drugs were involved." Mullen, 186 Wn. App. at 335 (quoting Greene, 154 Wn.2d at 728). The clear legislative intent behind the statute is to increase the punishment for those who have prior driving offenses related to drugs and alcohol. It makes sense, then, that such involvement be established by factual proof rather than simple accusation.

To equate the filing of a DUI charge with proof that the offense involved drugs or alcohol impermissibly substitutes proof beyond a reasonable doubt for the say-so of the prosecution. An original DUI charge may be amended to another offense for various reasons. One reason is failure of proof, i.e., the prosecution determines it cannot prove drugs or alcohol were involved. Hypothetical scenarios illustrate why the original DUI charge does not equal proof that drugs or alcohol were involved and why the legislature could not have intended to increase punishment without a factual basis for such involvement.

Suppose a driver is pulled over after cutting off another driver in traffic and is given a breath test, which shows a blood alcohol concentration (BAC) above the legal limit. The prosecutor accordingly charges the person under the BAC prong of the DUI statute. RCW 46.61.502(1)(a). Subsequent investigation reveals the breath test was improperly administered, or the machine malfunctioned at the time the breath samples were obtained, and therefore the BAC result is invalid. Without proof that alcohol was involved, the charge is amended to reckless driving.

Or suppose an untreated diabetic driver crashes into a car. Police arrive, smell what seems to be alcohol on the driver's breath, and arrest her for DUI. The State initially charges DUI but later learns from medical

examination that the smell of alcohol on the driver's breath resulted from diabetic ketoacidosis. Independent witnesses, meanwhile, verify that the driver did not consume alcohol prior to the crash. The State amends the charge to reckless driving.

In either scenario, there is a failure of proof for the DUI charge and there are no facts to show the reckless driving offense involved drugs or alcohol. The legislature could not have intended that the filing of the DUI charge alone equals proof of drug/alcohol involvement where there are no underlying facts that could be proven to support the proposition. Courts avoid constructions of a statute that yield unlikely, absurd or strained consequences. State v. Barbee, 187 Wn.2d 375, 389, 386 P.3d 729 (2017). And statutes are construed to avoid constitutional problems, if at all possible. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

No appellate judge interpreting Greene has sided with the State's argument that proof of filing equals proof of drug/alcohol involvement. Even the judges believing the question is one for the judge to decide as a matter of law interpret Greene to mean the State must establish involvement of drugs or alcohol in the prior offense and proof of an original DUI charge alone does not allow the State to meet its burden. The Court of Appeals majority in Wu thus stated: "under Greene, to demonstrate a prior conviction for reckless driving meets definition of a

'prior offense' under RCW 46.61.5055(14)(a)(xii), the State must establish that intoxicating liquor or drugs were involved in the event leading to the reckless driving conviction." Wu, 6 Wn. App. 2d at 687. The majority found sufficient evidence that the prior reckless driving convictions were "prior offenses" because "reckless driving was originally charged as a DUI and involved alcohol." Id. at 689 (emphasis added). According to the dissent in Mullen, "Our Supreme Court held that it is not enough that the original charge, prior to amendment, was DUI." Mullen, 186 Wn. App. at 339 (Melnick. J., dissenting). The real debate is over who has authority to make the drug/alcohol finding: the judge or the jury.

2. BECAUSE INVOLVEMENT OF DRUGS OR ALCOHOL IN THE PRIOR OFFENSE OF RECKLESS DRIVING IS A FACTUAL FINDING THAT ELEVATES THE DUI TO A FELONY, THE SIXTH AMENDMENT RIGHT TO A JURY TRIAL MANDATES THAT THE JURY, NOT THE COURT, MAKE THAT FINDING.

Under the Sixth Amendment right to a jury trial, any fact (other than the fact of a prior conviction) that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Blakely v. Washington, 542 U.S. 296, 301-05, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). The Court of Appeals majority in Wu wrongly held "it was a threshold question for the trial court to determine if Wu's prior convictions for reckless driving involved

intoxicating alcohol or drugs." Wu, 6 Wn. App. 2d at 688. As recognized by Judge Becker in dissent, facts elevating a misdemeanor to a felony must be found by a jury to comply with the Sixth Amendment, and whether a prior offense involved alcohol or drugs is such a fact. Wu, 6 Wn. App. 2d at 690 (Becker, J., dissenting). That determination cannot be made as a matter of law. It is not a legal question to be decided by the court, but a factual question to be decided by the jury.

In Mullen, Division Two rejected the State's argument that whether alcohol or drugs were involved is a threshold legal question for the trial court to decide. Mullen, 186 Wn. App. at 328. Rather, the State must prove beyond a reasonable doubt that a prior conviction for reckless driving involved alcohol or drugs in order to use that conviction as a prior offense to elevate a misdemeanor DUI to a felony. Id. at 325-26.

Relying on Greene and cases analyzing the Sixth Amendment right to a jury trial, Mullen held that because "the legislature's intent was to charge defendants who are guilty of prior *alcohol- or drug-related* offenses with felony DUI, the involvement of alcohol or drugs in prior convictions is an essential element that must be proved to a jury where it was not an essential element of the prior conviction itself." Id. at 329. Because involvement of alcohol or drugs is an essential element of first degree negligent driving, the State in Greene needed to prove only the

existence of the prior offense. Greene, 154 Wn.2d at 728. But the involvement of alcohol or drugs is not an essential element of a prior reckless driving conviction, so "the State must prove both the existence of the prior offense and the fact of alcohol or drug involvement." Mullen, 186 Wn. App. at 333.

Traditionally, questions of "pure historical fact" are for the jury to decide, as are mixed questions of law and fact where the jury applies the facts to the legal standard to render a verdict. United States v. Gaudin, 515 U.S. 506, 512-14, 115 S. Ct. 2310, 132 L. Ed. 2d 444 (1995). The court only retains authority to decide "pure questions of law." Id. at 513. Whether a prior offense involved alcohol or drugs is a factual determination, not a legal one. The issue cannot be decided as a matter of law because the existence of a conviction for reckless driving does not in and of itself prove that the offense involved drugs or alcohol. As pointed out in Mullen, the elements of reckless driving do not require drug or alcohol involvement. See RCW 46.61.500(1) ("Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.").

Whether drugs or alcohol were involved in Wu's conduct is a question of pure historical fact that cannot be decided without looking to evidence outside of the conviction itself. "[T]he *existence* of a prior

conviction need not be presented to a jury and proved beyond a reasonable doubt." State v. Olsen, 180 Wn.2d 468, 473, 325 P.3d 187, (emphasis added), cert. denied, 135 S. Ct. 287, 190 L. Ed. 2d 210 (2014). "But when it comes to the question of what facts were established by a prior conviction," courts "may assess 'only facts that were admitted, stipulated to, or proved beyond a reasonable doubt' during the prior proceeding." State v. Allen, 5 Wn. App. 2d 32, 37, 425 P.3d 529 (2018) (quoting Olsen, 180 Wn.2d at 473-74). In examining a prior conviction, "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense" without running afoul of the Sixth Amendment right to a jury trial. Mathis v. United States, ___ U.S. ___, 136 S. Ct. 2243, 2252, 195 L. Ed. 2d 604 (2016).

Wu did not stipulate or admit to drug or alcohol being involved in in connection with his prior reckless driving convictions, nor was the fact proved beyond a reasonable doubt during the prior proceedings. The existence of a prior conviction for reckless driving does not by itself prove involvement of drugs or alcohol because that factual predicate is not an element of the crime. Mullen, 186 Wn. App. at 333; compare Allen, 5 Wn. App. 2d at 37-39 (whether prior vehicular assault conviction qualified as "prior offense" under DUI statute was for court to decide as matter of law where the court looked at records to determine the conviction by plea

agreement was based on the statutory alternative means involving intoxication). "Any fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to the jury and found beyond a reasonable doubt." Alleyne v. United States, 570 U.S. 99, 133 S. Ct. 2151, 2155, 186 L. Ed. 2d 314 (2013); accord State v. Allen, 192 Wn.2d 526, 534, 431 P.3d 117 (2018). Wu therefore had the right to have the jury decide this issue of fact. The Sixth Amendment right to a jury trial does not allow the court to usurp the function of the jury and decide the matter on its own authority.

The majority in Wu's case relied on a line of cases holding whether a prior conviction qualifies as a predicate conviction for a current offense is a question of law for the court to decide. Wu, 6 Wn. App. 2d at 685-88. In each of those cases, however, there was no factual determination at issue. They all involved pure legal issues, so the Sixth Amendment right to a jury trial was not implicated.²

² State v. Boss, 167 Wn.2d 710, 718-19, 223 P.3d 506 (2009) (lawfulness of a custody order was not an essential element of custodial interference, but rather a threshold issue to be determined by the trial court as a matter of law); State v. Case, 187 Wn.2d 85, 92, 384 P.3d 1140 (2016) (legal validity of prior convictions; i.e., whether they were based on violations of protection orders issued under one of the qualifying statutes, was for court to decide); State v. Carmen, 118 Wn. App. 655, 662-64, 77 P.3d 368 (2003) (same), review denied, 151 Wn.2d 1039, 95 P.3d 352 (2004); State v. Gray, 134 Wn. App. 547, 556, 138 P.3d 1123 (2006) (same), review denied, 160 Wn.2d 1008, 158 P.3d 615 (2007); State v. Cochrane, 160 Wn.

State v. Miller, 156 Wn.2d 23, 123 P.3d 827 (2005) is the genesis of this line of cases. There, the Supreme Court held the existence of previous convictions for violation of a no-contact order is an element of current felony violation of a no-contact order, but the question of whether a prior conviction meets the definition and qualifies as a predicate offense under is a threshold question of law for the court. Miller, 156 Wn.2d at 30. Miller addressed a challenge to the legal validity of the prior conviction, concluding "issues relating to the validity of a court order (such as whether the court granting the order was authorized to do so, whether the order was adequate on its face, and whether the order complied with the underlying statutes) are uniquely within the province of the court." Id. at 31. The basis for its holding was that "issues concerning the validity of an order normally turn on questions of law. Questions of law are for the court, not the jury, to resolve." Id.

App. 18, 27, 253 P.3d 95 (2011) (whether two prior Seattle Municipal Court DUI convictions qualified as violation of "an equivalent local ordinance" was a legal question for the court to decide); State v. Chambers, 157 Wn. App. 465, 468, 472-73, 237 P.3d 352 (2010) (whether out-of-state convictions qualified as "prior offenses" was a question for court to decide where the comparison was done under the legal prong of the comparability analysis), review denied, 170 Wn.2d 1031, 249 P.3d 623 (2011); State v. Bird, 187 Wn. App. 942, 943, 352 P.3d 215, review denied, 184 Wn.2d 1013, 360 P.3d 818 (2015) (reversing trial court's order of dismissal because there was sufficient information by which a court could determine that the guilty plea to vehicular assault referred to the DUI means of committing that offense).

Unlike Miller and the cases following in its wake, Wu's case does not involve a challenge the validity of the prior convictions. His challenge goes directly to a factual matter that is not proven by the conviction itself. The Wu majority's mechanical approach to what qualifies as a threshold issue of law for the judge to decide should be rejected in favor of an approach that looks to the actual substance of what is being determined.

"Any time a judge's authority to prescribe a particular sentence depends on an additional fact other than the fact of a prior conviction, that fact must be proven by the jury's verdict or admitted by the defendant." Wu, 6 Wn. App. 2d at 690 (Becker, J., dissenting) (citing Blakely, 542 U.S. at 305). Wu did not admit or stipulate to the underlying facts alleged as part of the complaints associated with the reckless driving convictions. The prior conviction for reckless driving does not itself prove drug or alcohol involvement because the elements of reckless driving do not require such proof. RCW 46.61.500(1). Drug/alcohol involvement is a finding of fact in addition to the fact of conviction. The fact of drug/alcohol involvement therefore needed to be proven to a jury to comply with the Sixth Amendment.

The Wu majority refused to describe the drug/alcohol requirement as an "essential element of the crime" or "aggravating factor," instead characterizing it as part of the definition of "prior offense." Wu, 6 Wn.

App. 2d at 688 n.4. When it comes to the right to a jury trial, the label one attaches makes no difference. "[T]rial by jury has been understood to require that *the truth of every accusation*, where proffered in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of the defendant's equals and neighbours' . . . Equally well founded is the companion right to have the jury verdict based on proof beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 477-78, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)).

Accordingly, "[i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Ring v. Arizona, 536 U.S. 584, 602, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002). In deciding the question of what facts must be subject to a jury finding, "the relevant inquiry is one not of form, but of effect — does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi, 530 U.S. at 494. The required finding here is that the prior offense involved drugs or alcohol. That finding exposes Wu to an increased penalty — elevation of the crime from a gross misdemeanor to a felony.

As such, it needs to be found by a jury to comply with the Sixth Amendment, regardless of the descriptive label attached to it.

Even assuming the Sixth Amendment error here is subject to harmless error analysis,³ it is not harmless beyond a reasonable doubt. "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." State v. Watt, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). Constitutional error is harmless only if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." Neder v. United States, 527 U.S. 1, 18, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). Here, it is far from certain that a jury, had it been given the opportunity, would find a charge of DUI and the unproven allegations contained therein as proof beyond a reasonable doubt that the prior offense involved drugs or alcohol. A reasonable juror may well be unimpressed with an unproven charge and could decide facts, not mere allegations, are needed to find proof of guilt beyond a reasonable doubt. The State cannot overcome the presumption of prejudice.

³ Compare Washington v. Recuenco, 548 U.S. 212, 222, 126 S. Ct. 2546, 2553, 165 L. Ed. 2d 466 (2006) ("Failure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error.") with State v. Williams-Walker, 167 Wn.2d 889, 901, 225 P.3d 913 (2010) (harmless error inapplicable where the judge imposes "a sentence not authorized by the jury's express findings.").

3. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT A FINDING THAT THE PRIOR RECKLESS DRIVING OFFENSES INVOLVED DRUGS OR ALCOHOL.

The Wu majority held the trial court did not err in concluding the prior convictions for reckless driving were "originally charged as a DUI and involved alcohol." Wu, 6 Wn. App. 2d at 689 (emphasis added). For evidentiary support, the Court of Appeals pointed to the complaint signed by the prosecutor in one case and a police citation in the other, both of which alleged Wu had a breath alcohol content of 0.08 or higher. Id. These are mere accusations which the State never proved. And Wu never admitted or stipulated to them.

The State doesn't establish a fact simply by making an accusation. See Tot v. United States, 319 U.S. 463, 469, 63 S. Ct. 1241, 87 L. Ed. 1519 (1943) (legislature could not "validly command that the finding of an indictment . . . should create a presumption of the existence of all the facts essential to guilt."). "[T]he statute requires the State to establish that a prior driving conviction involved use of intoxicating liquor or drugs." Greene, 154 Wn.2d at 727-28. An unproven charge of DUI does not establish that intoxicating liquor or drugs were involved in that prior offense. Neither the Court of Appeals majority nor the State cite a single case for the proposition that a charge equals proof of the facts alleged

therein. "Filing a charge is only an accusation. It is not proof." Wu, 6 Wn. App. 2d at 698 (Becker, J., dissenting).

In assessing sufficiency of the evidence, it does not matter whether involvement of drugs or alcohol is labeled an element of the crime or merely a definitional aspect of an element. "The difference between a definitional statutory requirement and an element is generally pertinent to issues such as the adequacy of an information or the court's 'to convict' instructions." State v. Crowder, 196 Wn. App. 861, 869, 385 P.3d 275 (2016), review denied, 188 Wn.2d 1003, 393 P.3d 361 (2017). "But the same is not true when it comes to a sufficiency challenge. The State is obliged to present sufficient evidence to establish that a defendant's conduct falls within the scope of a criminal statute, regardless of whether the statute's requirements are elemental or definitional." Id. Where, as here, the evidence does not establish that the prior reckless driving convictions involved drugs or alcohol, the State failed to prove that those prior convictions satisfy the definition of "prior offense" found in the statute. Greene, 154 Wn.2d at 727-28; Mullen, 186 Wn. App. at 332.

4. ALTERNATIVELY, THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN NOT INSTRUCTING THE JURY THAT IT MUST FIND THE PRIOR RECKLESS DRIVING CONVICTIONS INVOLVED DRUGS OR ALCOHOL.

Relying on Mullen, defense counsel proposed a jury instruction that defined "prior offense" as involving drugs or alcohol. RP 681, 692-93; CP 121. The trial court refused to give the instruction based on its disagreement with Mullen. RP 692-94. The failure of the court to instruct the jury violated Wu's right to due process of law. U.S. Const. amend. XIV. Wu relies on the instructional argument set forth in the petition for review and the briefing in the Court of Appeals. See Petition for Review at 16-18; Brief of Appellant at 28-31.

D. CONCLUSION

For the reasons stated, Wu requests that this Court reverse the felony DUI conviction.

DATED this 3rd day of May 2019

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC



CASEY GRANNIS

WSBA No. 37301

Office ID No. 91051

Attorneys for Petitioner

NIELSEN, BROMAN & KOCH P.L.L.C.

May 03, 2019 - 1:51 PM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96747-4
Appellate Court Case Title: State of Washington v. Ken V. Wu
Superior Court Case Number: 16-1-03620-8

The following documents have been uploaded:

- 967474_Briefs_20190503135104SC876017_9060.pdf
This File Contains:
Briefs - Petitioners
The Original File Name was SBOP 96747-4.pdf

A copy of the uploaded files will be sent to:

- gaviel.jacobs@kingcounty.gov
- nielsene@nwattorney.net
- paoappellateunitmail@kingcounty.gov

Comments:

Copy mailed to; Ken Wu, 5709 119th PL NE Marysville, WA 98271

Sender Name: John Sloane - Email: Sloanej@nwattorney.net

Filing on Behalf of: Casey Grannis - Email: grannisc@nwattorney.net (Alternate Email:)

Address:
1908 E. Madison Street
Seattle, WA, 98122
Phone: (206) 623-2373

Note: The Filing Id is 20190503135104SC876017