

63627-8

63627-8

NO. 63627-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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STATE OF WASHINGTON,

Appellant,

v.

ROBERT CASTLE,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HAYDEN

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**BRIEF OF APPELLANT**

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in granting the defendant's Knapstad motion that resulted in the dismissal of the felony driving under the influence (felony-DUI) charge. RP 18; CP14; CP \_\_\_ (Sub No. 77)<sup>1</sup>.

2. The trial court erred in finding that the defendant's four "prior offenses" as defined by RCW 46.61.5055, had to be adjudicated and reduced to convictions *before* the arrest for the current felony-DUI. RP 18. CP \_\_\_ (Sub No 77).

**B. ISSUES PRESENTED**

1. A DUI may be charged as a felony offense if, inter alia, the defendant has four or more "prior offense" as defined by RCW 46.61.5055 within ten years of his current arrest date. Must each "prior offense" be already adjudicated and reduced to a conviction before the date of the current arrest for DUI or, as long as the arrest for the "prior offense" occurred prior to the current arrest, can the "prior offense" be adjudicated after the current arrest

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<sup>1</sup> Supplemental Designation of Clerk's Papers was erroneously filed with Court of Appeals on 11/17/2009. The Supplemental Designation was properly filed with Superior Court on 12/1/2009. The CP # ought to now be available, but not before the 12/2/2009 brief due date.

and if a predicate conviction results, be used to support the charge of felony-DUI for the most current DUI?

2. The defendant was arrested for DUI, but not charged in any Court until further investigation occurred. At the time of that arrest, he had three prior arrests for DUI crimes which had been charged and were pending adjudication. He had active warrants for failing to appear on those three DUI charges and was also then arrested on those warrants. Those DUI's were adjudicated and he was convicted of them before he was charged in Superior Court with felony-DUI for his last DUI. Did the Court err in finding that he could not be charged with a felony-DUI for the last DUI due to the pending status at the time of his arrest, despite the fact that he was not charged until those DUIs had resulted in convictions?

**C. STATEMENT OF THE CASE**

The State has alleged that Robert Castle was driving a truck on December 29, 2007, around mid-day. He exited the freeway and slammed into the rear of a car waiting for a red light, causing injury to the driver of that car. Instead of stopping, Castle left the scene in his truck. A witness pursued him until police arrived. A Washington State Patrol trooper caught up with Castle and

activated his emergency lights. Castle eventually pulled over, but when the trooper walked up to Castle's truck, Castle pulled away again and ignored the trooper's subsequent efforts to get him to stop. Eventually, several Seattle Police Department vehicles converged on the defendant at a stop light. Castle was forcibly removed from the truck and arrested when he refused to exit the truck. He smelled strongly of alcohol, his speech was slurred, and he was so unsteady while walking that an officer had to provide support. He refused any alcohol testing but officers noted that he was extremely impaired. A nearly empty bottle of strong liquor was found in the truck. CP 4-9.

Before the December, 2007 arrest for this incident, Castle had been convicted of "Physical Control" in 1998 and he had three pending DUI prosecutions. The arrests in the three pending cases had occurred in September 2006, January 2007, and February 2007. CP 9, 15-16. Adjudication of those prior cases was delayed by Castle's repeated failures to appear in court. RP 9<sup>2</sup>; CP 16. One of the pending cases had been continued at least 10 separate times. Id.

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<sup>2</sup> A verbatim report of proceedings for June 1, 2009 (Pre-trial Hearings) is designated as RP.

On December 29, 2007, Castle was booked on the three warrants. CP 7. Charges were not filed out of the December 29, 2007 incident due to the request for further investigation. CP 15. Now in custody, the three pending DUI charges were tried and he was convicted of each one; on May 6, 2008, November 6, 2008, and November 25, 2008. CP 16.

On January 30, 2009, Castle was charged with felony crimes stemming from the December, 2007 incident. CP 1-9. The information was later amended to charge the following: Count I: felony driving under the influence (DUI); Count II: felony hit and run; Count III: failure to obey police officer; Count IV: driving while license suspended. CP 10-13.

Castle moved to dismiss Count I, the felony DUI charge, based on State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986). RP 3-8. He argued that because several of his prior offenses were pending, i.e. judgment and sentence had not been entered, when he was arrested for the current offense, the current offense cannot be prosecuted as a felony. CP 17-34. The State argued that the current offense could be a felony as long as the defendant was *arrested* on the current offense within ten years of the *arrests* on the prior offenses, regardless of whether the prior offenses had

been reduced to judgment. CP 15-16; RP 8-17. Defense counsel seemed to acknowledge that other cases would present similar questions. RP 43 ("I mean there are a number of these cases that may be pending, and those can be dealt with on a case-by-case basis"). The trial court granted Castle's Knapstad motion, thus dismissing the felony charge. **CP \_\_ (Sub No 77)**; RP 18.

The State filed a timely Notice of Appeal and this Court granted a stay for the State to file a motion for discretionary review. CP 41-42. Castle is serving a sentence of incarceration in the department of corrections for his prior out-of-county convictions and is not scheduled to be released until March, 2011. RP 30-31.

#### **D. ARGUMENT**

The constitutionality of a statute is a matter of law reviewed de novo. City of Walla Walla v. Greene, 154 Wn.2d 722, 725, 116 P.3d 1008 (2005), cert. denied, 546 U.S. 1174 (2006) (citing State v. Shultz, 138 Wn.2d 638, 643, 980 P.2d 1265 (1999)). The law in effect at the time a criminal offense is committed controls disposition of the case. In re Hartzell, 108 Wn. App. 934, 944, 33 P.3d 1096 (2001) (citing State v. Schmidt, 143 Wn.2d 658, 673-74, 23 P.3d 462 (2001)). "The due process clause of the Fourteenth

Amendment requires that citizens be afforded a fair warning of proscribed conduct.” State v. Immelt, 150 Wn. App. 681, 208 P.3d 1256 (2009) (footnotes omitted) (quoting City of Spokane v. Douglass, 115 Wn.2d 171, 178, 795 P.2d 693 (1990)). There must be adequate standards to protect against arbitrary, erratic, and discriminatory enforcement. State v. Immelt, 150 Wn. App. at 690 (2009) (citing Douglass, 115 Wn.2d at 180-81 (citing American Dog Owners Ass'n v. City of Yakima, 113 Wn.2d 213, 216, 777 P.2d 1046 (1989))). And, a defendant has a due process right to notice of the laws with which he must comply. State v. Halstien, 122 Wn.2d 109, 116-17, 857 P.2d 270 (1993).

Determining whether a statute sufficiently defines an offense “does not demand impossible standards of specificity or absolute agreement.” State v. Alphonse, 147 Wn. App. 891, 907-908, 197 P.3d 1211 (2008) (quoting City of Spokane v. Douglass, supra at 179 (citing Kolender v. Lawson, 461 U.S. 352, 361, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983))). For a statute to be unconstitutional, its terms must be “ ‘so loose and obscure that they cannot be clearly applied in any context.’ ” Alphonse, supra (quoting Id. at 182, n. 7, 795 P.2d 693 (quoting Basiardanes v. Galveston, 682 F.2d 1203, 1210 (5th Cir.1982))). It must not be

subject to arbitrary and selective enforcement. Id. Mere uncertainty regarding the application of a statute does not establish vagueness. State v. Amos, 147 Wn. App. 217, 232, 195 P.3d 564 (2008) (citing State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007)). Rather, “[t]he test is whether men of reasonable understanding are required to guess at the meaning of the statute.” State v. Amos, supra (quoting In re Pers. Restraint of Myers, 105 Wn.2d 257, 267, 714 P.2d 303 (1986) (citing City of Seattle v. Rice, 93 Wn.2d 728, 731, 612 P.2d 792 (1980))).

RCW 46.61.502(1) essentially states that "a person is guilty of driving while under the influence of intoxicating liquor or any drug if the person drives" impaired by alcohol or drugs. The statute further states that "[i]t is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) the person has four or more prior offenses within ten years as defined in RCW 46.61.5055. RCW 46.61.502(6). RCW 46.61.5055 states that a "prior offense" means, inter alia, a *conviction* for RCW 46.61.502 and that "within ten years" is calculated from the arrest date of the prior offense to the arrest date of the current offense.

A plain reading of the statute would require the State to prove that the predicate crimes that raise the misdemeanor driving

under the influence (DUI) to a felony DUI must be convictions. Clearly, at the time the State files and prosecutes the felony-DUI, the predicate crimes must be convictions. However, there is no requirement that the predicate crimes be reduced to convictions at the time that the felony-DUI based incident *occurs*.

At the time that a DUI occurs and an offender is arrested, the incident becomes a "prior offense" that is pending in the Court system, even if not yet reduced to conviction. When the defendant commits a subsequent offense, knowing that he has committed a prior offense, he is on notice that this prior offense will result in a higher punishment for the new offense, if the prior offense results in conviction. Thus, due process is not violated if the State files a felony-DUI once the "prior offense" ripens into a conviction.

This ripening is the same as seen in the Diaz exception to the double jeopardy prohibition. State v. Higley, 78 Wn. App. 172, 180-181, 902 P.2d 659 (1995). "[T]he State is *unable to proceed* on the more serious charge at the outset *because the additional facts necessary to sustain that charge have not yet occurred...*" State v. McMurray, 40 Wn. App. 872, 874, 700 P.2d 1203 (1985) (emphasis in the original). Even if the double jeopardy clause would otherwise apply, it does not bar prosecution for a greater

charge if, when jeopardy attached to a lesser charge, a fact essential to support the greater charge was not in existence or was not discoverable by the State in the exercise of due diligence. Diaz v. United States, 223 U.S. 442, 448-49, 32 S. Ct. 250, 251, 56 L. Ed. 500 (1912); Illinois v. Vitale, 447 U.S. 410, 420 n. 8, 100 S. Ct. 2260, 2267 n. 8, 65 L. Ed. 2d 228 (1980); Brown v. Ohio, 432 U.S. 161, 169 n. 7, 97 S. Ct. 2221, 2227 n. 7, 53 L. Ed. 2d 187 (1977); State v. Escobar, 30 Wn. App. 131, 135, 633 P.2d 100 (1981).

Here, a fact essential to the greater charge, the judicial resolution of a prior DUI offense by entry of a conviction, did not exist at the time that the defendant committed the fifth DUI. The fact of the prior offense had occurred but the essential element for the felony-DUI was undetermined due to the still ripening judicial process.

The essential elements rule requires the State to identify the crime charged and allege facts supporting every element of the offense in the charging document. State v. Simms, 151 Wn. App. 677, 686-687, 214 P.3d 919 (2009) (citing State v. Recuenco, 163 Wn.2d 428, 434, 180 P.3d 1276 (2008)). The State cannot charge a felony-DUI unless and until the prior offenses are adjudicated; however, the fact of the prior offense has already occurred.

The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Byrd, 125 Wn.2d 707, 713, 887 P.2d 396 (1995). In the current case, each element of the crime of felony-DUI was based on a fact that existed at the time that the defendant was arrested for this current offense, his fifth DUI. The fact ripened into an element of the felony crime within the statute of limitations, permitting the State to charge the felony crime.

In City of Seattle v. Winebrenner, No. 81279-9, slip op. (filed Oct. 29, 2009), the Supreme Court found that the term "prior offense," as defined in RCW 46.61.5055, was ambiguous as to whether the offense must occur before or after the arrest for the current offense. Winebrenner, slip op. at 13. The sole issue, however, was whether the term was ambiguous for sentencing purposes. In both consolidated cases, the offenses took place *after* the incident before the bar. Thus, the State's argument here is consistent with Winebrenner.

The situation here is different. For a felony-DUI, the predicate crimes must be based on DUI *arrests* that occurred *before* the current, fifth, DUI arrest. But, the *adjudication* of those

prior offenses need not occur before the fifth DUI arrest. If the legislature had wanted to limit prosecution to situations where an offender has made separate "trips through the system," it could have done so, See RCW 9.94A.030(34) (definition of "persistent offender" requires prior convictions of most serious offenses to be prior to the commission of the next most serious offense to qualify as a predicate crime).

In the present case, Robert Castle was arrested on December 29, 2007, for, inter alia, DUI. CP 4-9, 15. At that time, he was additionally arrested on three warrants for three pending DUI charges. CP 7, 9, 15-16. All three pending DUI charges stemmed from DUI arrests within ten years of the December 29, 2007 arrest. CP 7, 9, 15-16. None of the three DUIs had been adjudicated due to the defendant's continuation of trial dates and ultimately, his failures to appear in court. CP 15-16; RP 9.

On January 30, 2009, the State filed felony charges arising out of the December 29, 2007 incident. CP 1-9; 15. During the investigation of the December 29, 2007 incident, the defendant was convicted by juries of the three pending DUI charges; May 6, 2008, November 6, 2007, and November 25, 2008. CP 9, 15-16; RP 21-22. These three DUIs were combined with a 1998 physical control

conviction, to form the predicate offenses for a felony-DUI. CP 1-2, 9.<sup>3</sup>

Clearly, the legislature did not intend DUI defendant's to defeat the felony-DUI law by delaying the adjudication of their pending DUIs. In fact, DUI legislation is unique in that it focuses on the circumstances at the time of the arrest and less on the results of the adjudication. See City of Walla Walla v. Greene, 154 Wn.2d 722, 725-726, 116 P.3d 1008 (2005) (legislature defined DUI enhancements to include DUI charges that resulted in convictions for other crimes). Additionally, the legislature specifies that the crime involves looking at arrest dates, not conviction dates. RCW 46.61.5055. This was done to ensure that a defendant could not thwart a felony-DUI charge by perpetually delaying adjudication of his pending DUIs.

#### **E. CONCLUSION**

On December 29, 2007, Robert Castle was arrested for his sixteenth DUI. Within the prior ten years, he had four DUI arrests and was pending a resolution on three of those cases. When they

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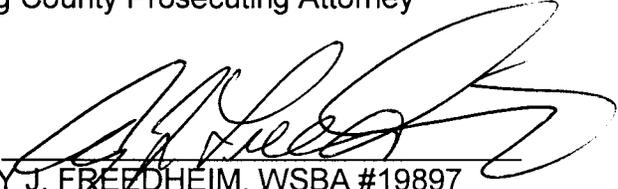
<sup>3</sup> The defendant's other DUI convictions fall outside of the ten year arrest requirement and include eight DUIs, a reckless driving amended from a DUI, and two completed deferred prosecutions, all between 1990-1997. CP 7, 9.

were finally adjudicated and ended up being convictions for DUI, they ripened into elements for a felony-DUI. Since this occurred prior to the statute of limitations expiring for the felony-DUI, the State was able to charge him with the felony-DUI. This Court is respectfully requested to reverse the trial court and reinstate the felony-DUI.

DATED this 2 day of December, 2009.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to James W. Conroy, the attorney for the respondent, at Society of Counsel Representing Accused Persons, 1401 E. Jefferson Street, Ste 200 Seattle, WA 98112-5570, containing a copy of the Brief of Appellant, in STATE V. ROBERT CASTLE, Cause No. 63627-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Sandra Atkinson  
Name Sandra Atkinson  
Done in Seattle, Washington

December 2, 2009  
Date

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