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NO. 63627-8-I

CRIMINAL DIVISION
KING COUNTY PROSECUTORS

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

STATE OF WASHINGTON,

Petitioner,

v.

ROBERT CASTLE,

Respondent.

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

The Honorable Michael Hayden, Judge

BRIEF OF RESPONDENT

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I. IDENTITY OF RESPONDING PARTY

Robert Castle is the defendant in the captioned matter and the responding party herein.

II. STATEMENT OF THE CASE

The State has alleged that Robert Castle was arrested on December 29, 2007 for operating a motor vehicle while under the influence of an intoxicating liquor or drug, Felony Hit and Run, Disobeying a Police Officer, and Driving while License Suspended or Revoked in The Second Degree. Mr. Castle was released on these charges and detained on outstanding warrants.

At the time of his arrest on December 29, 2007, the State has alleged that Mr. Castle had criminal history for the commission of a prior "Physical Control" charge in 1998. The State further alleges that at the time of his arrest on December 29, 2007, Mr. Castle had three other pending DUI prosecutions for cases occurring in September 2006, January of 2007, and February of 2007 respectively. The State concedes that none of the latter cases had resulted in convictions prior to the incident occurring in December of 2007 which is the subject of the pending prosecution.

For tactical reasons the State declined to file on Mr. Castle's case until his other pending prosecutions had been resolved.

By waiting to charge Mr. Castle with the December 2007 allegations until his other pending matters had been reduced to convictions, the State now maintains that Mr. Castle is subject to a Felony DUI prosecution.

On June 1, 2009, trial began before the Honorable Michael Hayden of the King County Superior Court.

Mr. Castle maintained that based upon a plain reading of RCW 46.51.502, only allegations that had been reduced to conviction at the time of his arrest in December of 2007 should score and that he was therefore statutorily ineligible for a Felony DUI prosecution.

The trial court agreed with Mr. Castle and on June 1, 2009, granted the Defense *Knapstad* Motion to Dismiss the felony DUI prosecution. The trial court advised the State that they could proceed with a Misdemeanor DUI prosecution.

The State thereafter filed a Notice of Appeal, an Emergency Motion For a Stay of Superior Court Proceedings, a Motion For Discretionary Review, and after the granting of Discretionary Review based upon the certification of the trial court pursuant to RAP 5.2, this appeal follows.

III. ARGUMENT

The language of RCW 46.61.502(6) is clear and unambiguous when read in the context of a charging determination.

The State has alleged that absent the granting of their request for relief that it may suffer “potentially irreparable prejudice”. SEE State’s *Emergency Motion For Stay of Proceedings In Superior Court* at page 7.

In support of its position, the state posited that if they are required to proceed on the merits of its case pending before the Superior Court on a misdemeanor DUI that it may lose the ability to charge Mr. Castle with a felony violation of the DUI statutes because of double jeopardy limitations. While this may be true it does not prohibit the State from pursuing a misdemeanor DUI prosecution against Mr. Castle and seeking the maximum penalties provided by law for an ensuing conviction.

A. **THE LANGUAGE OF RCW 46.61.502 IS CLEAR AND UNAMBIGUOUS.**

An analysis of the issues involved must begin with the language of the statutory authority for the charging of individuals such as Mr. Castle.

RCW 46.61.502(6) reads:

(6) It 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; or (b) the person has ever previously been convicted of (i) vehicular homicide while under the influence of intoxicating liquor or any drug, RCW 46.61.520(1)(a), (ii) vehicular assault while under the influence of intoxicating liquor or any drug, RCW 46.61.522(1)(b), or (iii) an out-of-

state offense comparable to the offense specified in (b)(i) or (ii) of this subsection.

Emphasis added.

B. TO QUALIFY AS A "PRIOR OFFENSE" THE "CONVICTION" MUST PREDATE THE ARREST FOR THE CHARGED OFFENSE OTHERWISE IT MAKES NO SENSE FROM A NOTICE AND CHARGING PERSPECTIVE

Prior offenses are defined at RCW 46.61.5055(14):

A "prior offense" includes any of the following:

- (i) A **conviction** for a violation of RCW 46.61.502 or an equivalent local ordinance;
- (ii) A **conviction** for a violation of RCW 46.61.504 or an equivalent local ordinance;
- (iii) A **conviction** for a violation of RCW 46.61520 committed while under the influence of intoxicating liquor or any drug;
- (iv) A **conviction** or a violation of RCW 46.61.522 committed while under the influence of intoxicating liquor or any drug;
- (v) A **conviction** for a violation of RCW 46.61.5249, 46.61.500, or 9A.36.050 or an equivalent local ordinance, if the **conviction** is the result of a charge that was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance, or of RCW 46.61.520 or 46.61.522;
- (vi) An out-of-state **conviction** for a violation that would have been a violation of (a)(i), (ii), (iii), (iv), or (v) of this subsection if committed in this state;
- (vii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation RCW 46.61.502m 46.61.504, or an equivalent local ordinance; or
- (viii) A deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.5249, or an equivalent local ordinance, if the charge under which the deferred prosecution was granted was originally filed as a violation of RCW 46.61.502 or 46.61.504, or an equivalent local ordinance or of RCW46.61.520 or 46.61.522."

Emphasis added.

The only issue left unresolved, per Commissioner Verellen, was the proper construction and interpretation of RCW 46.61.5055(14)(c) which purports to define “Within ten years”:

(c) “Within ten years” means that the arrest for a prior offense occurred within ten years of the arrest for the current offense.

SEE: *Commissioner’s Ruling Granting Motion For Discretionary Review* dated August 12, 2009, at page 6.

The objective of statutory interpretation is to ascertain and carry out legislative intent. *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 43 P.3d 4 (2002). If the meaning of a statute is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. *Campbell & Gwinn*, 146 Wn.2d at 9-10, 43 P.3d 4. Each provision of a statute should be read together with other provisions to achieve a harmonious and unified statutory scheme. *Bennett v. Ruegg, (In re Estate of Kerr)*, 134 Wn.2d 328, 336, 949 P.2d 810 (1998).

As indicated RCW 46.61.5055 sets forth the penalty schedule for violations of RCW 46.61.502.

RCW 46.61.5055(14) specifically sets forth those dispositions that may be treated as a “prior offenses” for sentencing purposes under RCW 46.61.502.

The quandary in Mr. Castle's case becomes the significance of the violation date vis a vis the charging scenario. The State posits that they should be not be constrained by the violation date for charging purposes and that their only constraints should arguably be the Statute of Limitations. Ordinarily this might be true should there be a legitimate rationale to extend filing determinations to complete an investigation. Under the circumstances of Mr. Castle's case however it is clear that the extension of the filing deadline was a strictly strategic determination, made with the sole purpose of enhancing prospective penalties, and with no regard to the need for additional fact related investigation. The prosecution's references to the need for "further investigation" is misleading. The defense received their original packet of discovery in February of 2009. The original investigation consisted of the DUI arrest reports and on scene witness interviews. There was a request by the prosecutor for additional investigation which was purportedly made to interview Ms. Yuen. Ms Yuen was the driver of the vehicle allegedly struck by Mr. Castle. Ms Yuen was identified at the scene on December 29, 2007 and statements taken from her were included in the incident reports generated in conjunction with the arrest of Mr. Castle. Ms Yuen was interviewed again on March 25, 2008 by the WSP. The defense became aware of that interview after the defense interviewed Ms. Yuen

and she reported the making a taped interview. The defense requested a copy of the interview and was finally provided the transcript sometime around the Omnibus Hearing. The investigation (if it was still open at all) ended on March 25, 2008 with this additional interview. Nothing further was done until the filing of charges in January of 2009.

The police and prosecutor's office took no action and investigated nothing (beyond the follow up interview of Ms Yuen) until the case was filed over 13 months after the arrest of Mr. Castle. During this time, Mr. Castle was having jury trials on his pending DUI's out of county. His last one, 07-1-03673-8 was reduced to judgment on 12-3-08. Conveniently, the prosecutor then filed this case approximately six weeks later.

The "investigation" of Mr. Castle's case was completed on the day of his arrest. The prosecution all but concedes this point by suggesting in their arguments that "investigation" can now be interpreted to mean: waiting to see what happens with pending DUI charges on unrelated cases.

The prosecution's reliance upon the *Diaz*¹ line of cases is misplaced. The 1912 case of *Diaz versus the United States* and its progeny, including *State of Washington v McMurray*, and *State of Washington v Higley*,² addressed the Due Process and Double Jeopardy

¹ *Diaz v United States*, 223 U.S. 442, 32 S.Ct. 250, 56 L.Ed 500 (1912)

² *State of Washington v McMurray* 40 Wn.App. 872, 700 P2d 1203

ramifications related to the state's ability to file greater charges arising out of the same factual scenario pending the "ripening" of certain "facts" (the subsequent death of the victim) after the defendants had already pled out to lesser charges arising out of the incident in question. In Mr. Castle's case, the facts of the incident itself never change or "ripen" into facts that would support the filing of "greater charges".

The only thing that changes are the status of pending charges which were not reduced to convictions when the instant offense occurred.

Protracted caselaw speaks to the issue of notice in charging documents. Encapsulated in notice requirements are the requirements that specified conduct be clearly defined as well as the proscribed penalties for violations.

In *State v Talley*, 122 Wa.2d 192, 858 P.2d 217 (1993), the Washington Supreme Court addressed the issue of notice. The Court found:

This court applies the federal due process test for vagueness; a statute must provide both adequate notice **and standards to prevent arbitrary enforcement.** *Huff*, 111 Wash.2d at 929, 767 P.2d 572 (upholding state telephone harassment statute); *accord*, *Plowman*, 314 Or. at 162, 838 P.2d 558.

State v. Talley at 212. (Emphasis added)

(1985), *State of Washington v Higley*, 78 Wn.App. 172, 902 P.2d 659

In relation to the definition of “within ten years”, and undefined terms, the Supreme Court of Washington in *Talley* noted that:

Turning to the terms under challenge we note they are not defined in the statute. Where terms are not defined, the court will look to the plain, ordinary meaning of the words. *American Legion Post No. 32 v. Walla Walla*, 116 Wash.2d 1, 802 P.2d 784 (1991). In ordinary usage, the terms “related” and “associated” are synonymous and mean “connected” or “united” in purpose and interest. *Webster's New World Dictionary of the American Language* 89, 1227 (1968). “Directed toward” means aimed at achieving an objective. *Webster's*, at 414; *see also State v. Hansen*, 67 Wash.App. 511, 837 P.2d 651 (1992) (defining the verb “direct”).

Additionally, when analyzing the wording of a statute, the court will read the statute as a whole. *Service Employees Int'l Union, Local 6 v. Superintendent of Pub. Instruction*, 104 Wash.2d 344, 348-49, 705 P.2d 776 (1985). Applying the doctrine of ejusdem generis to the terms in the paragraph at issue, RCW 9A.36.080(1), we interpret the allegedly vague terms in a manner consistent with the other words in the sequence, in this case, consistent with the words “because of”. *State v. Hutsell*, 120 Wash.2d 913, 918, 845 P.2d 1325 (1993) (citing *Dean v. McFarland*, 81 Wash.2d 215, 221, 500 P.2d 1244, 74 A.L.R.3d 378 (1972)). In ordinary usage “because of” means “by reason of” or “on account of.” *Webster's*, at 131; *see Plowman*, 314 Or. at 161-62, 838 P.2d 558.

When read as a whole, and in particular in the context of charging determinations, how can “prior offenses” “within ten years” mean anything other convictions within the ten years prior to the triggering event in question, which has to be the arrest of Mr. Castle.

Should the window for specified conduct and charging determinations always remain open regardless of whether or not there exists any legitimate investigation to pursue? The state would urge this court to find

(1995).

that the trial court's findings constitute reversible error because the trial court found that that the charging window should close as of the date of the violation (and Mr. Castle's arrest), and that only those "prior offenses" that had resulted in convictions at the time of his arrest should be counted in terms of fixing the chargeable violation.

Assume hypothetically that Mr. Castle's priors had resulted in convictions prior to the date of violation. It seems clear that that he could be chargeable with a "felony" violation of the DUI statutes. Also assume that the state's construction, with an open window, were the correct interpretation of the law. With this interpretation, charging determinations could arguably fluctuate for ten years after the violation date. Presumably this concept would be limited by the Statute of Limitations to three years for misdemeanor DUI's and five years for felony DUI's.

What if prior to sentencing (and he had been charged with felony DUI) one of Mr. Castle's priors was dismissed. Should Mr. Castle then be able to argue that he should have only been charged with a misdemeanor violation and should the information be amended? What if Mr. Castle had pled to a felony DUI, could the plea be set aside? As a practical matter the issue of the appropriate charge would never be resolvable until sentencing or the expiration of the Statute of Limitations.

In the consolidated cases of *The City of Seattle v. Jesus Quezada*, and

The City of Seattle v. Scott Weinbrenner, 142 Wn.App. 43, 174 P.3d 129, (2007), Division One of the Washington Court of Appeals addressed what it described as the plain meaning of RCW 46.61.502.

We review issues of statutory construction de novo. *State v. Hahn*, 83 Wash.App. 825, 831, 924 P.2d 392 (1996). Our duty is “to ascertain and give effect to the intent and purpose of the Legislature.” *Hahn*, 83 Wash.App. at 831, 924 P.2d 392. But when statutory language is plain and unambiguous, the legislative intent is clear and no further construction is permitted. *State v. J.P.*, 149 Wash.2d 444, 450, 69 P.3d 318 (2003). A statute is not ambiguous merely because different interpretations are conceivable. *State v. Leyda*, 157 Wash.2d 335, 352, 138 P.3d 610 (2006).

Quezada at 47 and 48.

The Court of Appeals also dispensed with the defense contentions (in the context of sentencing) who suggested that within seven years had to mean within seven years prior to the date of arrest of Mr. Quezada.

Quezada and Amicus maintained that combining these perspectives(looking forward and backwards) 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*). 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*). Thus, given its “plain” and “ordinary meaning,”³ a “prior offense” under RCW 46.61.5055 consists of one of the statutorily designated dispositions when it “precedes in time or order”⁴ the offense being sentenced.⁵

Mr. Castle maintains that for purposes of charging determinations that the statute is even more clear and that the relevant “ten year” period as being based upon dates of **convictions preceding his arrest** on the current offense. *State v. Bays*, 90 Wn.App. 731, 737 (1998). Accordingly, the plain language of the statute mandates that date of arrest be utilized as the yardstick by which a “ten year” period will be determined.⁶*Id.*

That is, to qualify as a “prior offense” under RCW 46.61.5055, the

³ “Undefined statutory terms are given their usual an ordinary meaning.” *State v. Hahn*, 83 Wn.App. 825, 832 (1996). “Plain words do not require construction.” *Jenkins*, 99 Wn.App. at 290.

⁴ “Prior” is defined as “preceding in time or order.” THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, 1395 (4th ed. 2000). “When a term is not defined in the statute, courts may look to the ordinary dictionary meaning.” *Hahn*, 83 Wn.App. at 832.

⁵ Logically speaking, the conclusion just arrived at is obviously true as a semantic tautology. It simply says that to be considered a “prior offense” an offense must “precede in time or order” a “later” offense it is “prior” to.

⁶ The Court is “duty-bound to give meaning to every word that the Legislature chose to include in a statute and to avoid rendering any language superfluous.” *State v. Chester*, 82 Wn.App. 422, 426 (1996). Accordingly, “language of a statute which is explicit and unequivocal” must be given effect. *In re Phillips’ Estate*, 193 Wn. 194, 200 (1938). “If a statute is unambiguous, then its meaning must be derived from the statutory language alone.” *State v. Kuhn*, 74 Wn.App. 787, 790-1 (1994). “[C]ourts may not read into a statute a meaning that is not there.” *Hahn*,

“conviction” for a particular offense must have occurred before the arrest for the offense being charged.

C. THE ONLY “PRIOR OFFENSES” UNDER RCW 46.61.5055, FOR PURPOSES OF CHARGING, WAS MR. CASTLE’S PHYSICAL CONTROL CONVICTION IN 1998.

The State has alleged that in 1998, Mr. Castle was arrested for, and found guilty of, Physical Control. This is the only “conviction” that can be counted for purposes of making a charging determination.

The determination by the trial court was the correct conclusion.

The only position the State proffers in support of this issue is the need for a legislative review of the statutory language of RCW 46.61.502 and 46.61.504. The state concedes that for purposes of these sections the definition of a “prior offense” is spelled out in RCW 46.61.5055 (14)(a), and that all pertinent definitional interpretations lead to the same inescapable conclusion i.e. that “prior offenses” are triggered on the day of arrest and must be “convictions”. SEE *State’s Motion for Discretionary Review* at page 6.

The State attempted to shift the focus in the trial court, and initially on appeal by alluding to the consolidated cases of *Weinbrenner* and *Quezada* which, up until October 29, 2009, were pending review in the Supreme Court. As the trial court correctly noted, *Quezada* clearly deals

with **sentencing** considerations and what a **sentencing** court is at liberty to consider when fixing a **sentencing** range.

On October 29, 2009, the Supreme Court of Washington issued its opinion in *The City of Seattle v Weinbrenner*, 167 Wn.2d 451, 219 P.3d 686 (2009)(No.81272-9) resolving any issues related to statutory construction of the meaning RCW 46.61.5055(14)(c) “Within ten years”.⁷

The issue not resolved, nor even contemplated in *Weinbrenner* and *Quezada* are the permissible parameters/limitations of a **charging** determination.

At trial, the Superior Court granted a Defense Motion to Dismiss Count I of the Information charging Mr. Castle with a Felony DUI violation based upon a clear and plain reading of RCW 46.61.502(6) which limits the applicability of felony filings/penalties to individuals who have four or more “prior offenses” within the ten years **preceding his arrest** for the current offense. See State’s *Emergency Motion For Stay of Proceedings In Superior Court* at page 3.

As noted previously, RCW 46.61.5055 (14)(a) clearly defines “prior offenses” as prior convictions.

The Petitioner concedes both in his Emergency Motion and in his

⁷ *Weinbrenner* actually dealt with RCW 46.61.5055(12)(b) “within seven years”

Motion for Discretionary Review that Mr. Castle had only one “prior offense” i.e. conviction, on the day of his arrest on December 29, 2007, thus, disqualifying Mr. Castle for a felony filing pursuant to RCW 46.61.5055. SEE *State’s Emergency Motion For Stay of Proceedings in Superior Court* at page 2.

The State thereafter asserted to the trial court, and now in the court of appeals 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 or not the prior offenses had been reduced to convictions.

The trial court disagreed.

In part, the trial court adopted the reasoning advanced by Mr. Castle that looked at a similar construction of DUI legislation out of the State of Utah. In *State v Pixton*, 98 P.3d 433, the Utah Court of Appeals examined a very analogous factual setting where the defendant had been charged with Misdemeanor DUI and while that DUI was pending he was charged with another Misdemeanor DUI out of another jurisdiction. The defendant later pled to the first DUI so the prosecution dismissed the second DUI and re-filed it as a felony. The Court of Appeals found that because no “conviction” had been entered in the first DUI at the time of his arrest on the second DUI,

that the second DUI should be remanded to the trial court to be tried as a misdemeanor.

D. THE PETITIONER'S INSISTENCE THAT THE LANGUAGE OF RCW 46.61.502 PERMITS THE FILING OF FELONY DUI CHARGES AGAINST MR. CASTLE BECAUSE HE HAD THREE PRIOR "ARRESTS"(WHICH SUBSEQUENTLY RESULTED IN CONVICTIONS PRIOR TO CHARGING), IS CONTRARY TO THE PLAIN AND UNAMBIGUOUS LANGUAGE OF THE STATUTE

The State maintains that permissible charging parameters can fluctuate up until that point in time wherein an individual is actually charged and they are not constrained by conviction history at the time of arrest. The State claims that the plain meaning of the statute would permit offenders to escape felony prosecutions on double jeopardy grounds were they compelled to proceed with the filing of misdemeanor charges and later attempt to amend up should Mr. Castle's pending DUI's result in convictions, which subsequently happened in this case.

The State urges this court to understand that an adverse ruling could potentially impact hundreds of pending DUI prosecutions.

As noted by counsel in *Quezada* "If 'hard cases make bad law,' unusual cases surely have the potential to make even worse law."

Department of the Air Force v. Rose, 425 U.S. 352, 382, 96 S.Ct. 1592 (1976)(Burger, C.J., dissenting). The situation described by the State is

sufficiently unlikely that the mere possibility that it might occur does not justify the departure from the plain meaning of the statute that the State advances. Cf., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 n.29, 101 S.Ct. 2748 (1981); *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514, 110 S.Ct. 2972 (1990).

E. TO THE EXTENT THAT THERE WAS ANY AMBIGUITY WITH RESPECT TO THE CONSTRUCTION OF RCW 46.61.5055, THAT AMBIGUITY HAS BEEN RESOLVED BY THE WASHINGTON SUPREME COURT DECISION IN *CITY OF SEATTLE V WEINBRENNER* AND THE APPLICABILITY OF THE RULE OF LENITY.

In *The City of Seattle v Weinbrenner* Supra., the Washington Supreme Court found;

At issue is the meaning of "prior offenses" under the statute and whether a "prior offense" is one that occurs before the arrest for the current offense or before sentencing. Concluding that the statute is ambiguous and subject to two reasonable interpretations, we apply the rule of lenity and construe it in favor of the petitioners. We reverse the Court of Appeals.

Weinbrenner Slip Opinion at 2

The issue here is whether "prior offense" applies only to offenses that occurred before the current offense or whether "prior offense" encompasses all offenses the defendant has before sentencing. Put differently, we must decide whether "prior," as used in the RCW 46.61.5055, means before the offense or before sentencing. "Prior" is not specifically defined in the statute.

Weinbrenner Slip opinion at 4

As the petitioners correctly note, under such a reading the word "prior" would not in any way serve to modify "offense." *Id.* at 12. "Prior offense"

and "offense" would have the same meaning. We presume the legislature does not use superfluous words. In re Recall of Pearsall-Stipek, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000). Since the legislature did not specifically define "prior" the petitioners urge that it should be given its common meaning.

Weinbrenner Slip Opinion at 6

But unlike the SRA, RCW 46.61.5055 does not specify that prior offenses include all **convictions** at the time of sentencing. Nor would the word "prior" serve the same purpose as it does in the SRA to differentiate between "other current offenses" and "prior offenses." See RCW 9.94A.525(1).

Weinbrenner Slip Opinion at 8 (Emphasis added)

The Supreme Court went on to find that RCW 46.61.5055 was ambiguous

(although the Concurring Opinion did not so find) and concluded:

If after applying rules of statutory construction we conclude that a statute is ambiguous, "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." Jacobs, 154 Wn.2d at 601 (citing In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)). The rule states that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed. State v. Adlington-Kelly, 95 Wn.2d 917, 920-21, 631 P.2d 954 (1981).

Weinbrenner Slip Opinion at 11.

We hold under the rule of lenity that the statute must be construed in favor of the defendants. The Court of Appeals is reversed.

Weinbrenner Slip Opinion at 12.

IV. CONCLUSION

RCW 46.61.5055(5). gives judges “broad authority” and “flexibility” in determining what **sentence** to impose. *Wahleithner v. Thompson*, 134 Wn.App. 931, 939, 941, 143 P.3d 321 (2006). Under the Statute, the court may impose jail in addition to the mandatory minimums up to a maximum of 1 year or, in the alternative, suspend any remaining “period of confinement for period not exceeding five years.” RCW 46.61.5055(9)(a). In the latter context, “The court may impose conditions of probation...that may be appropriate [and t]he sentence may be imposed in whole or in party upon violation of a condition of probation during the suspension period.” *Id.*

For **charging** purposes, an individual must have four “prior offenses (convictions)” under RCW 46.61.5055, and the **conviction** for a particular offense must have occurred prior to the arrest for the offense being charged.

To the extent that there ever was any ambiguity in the statute, the rule of Lenity mandates that any ambiguity must resolved in favor of the defendant.

The State is clearly at liberty to pursue a Misdemeanor DUI prosecution against Mr. Castle and seek the maximum penalties provided by

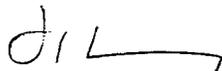
law and therefore adequate relief can be obtained in the trial court.

The trial court is also arguably at liberty to consider convictions subsequent to Mr. Castle's arrest on the instant offense in relation to fixing the penalties for a conviction for this DUI should that be the outcome of the current charges.

The decision of the Superior Court does not rise to the level of reversible error, and has been proven to be a correct interpretation of the law given the decision in *City of Seattle v Weinbrenner*.

The State's discontent should be addressed to the legislature and not this court.

RESPECTFULLY SUBMITTED this 29th day of January 2010.



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