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NO. 67664-4-I

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

REC'D
APR 09 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER I. McCORMACK

Appellant.

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

The Honorable Steven Gonzalez, Judge

BRIEF OF APPELLANT

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
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A. ASSIGNMENT OF ERROR

The trial court exceeded its statutory sentencing authority by ordering an Interlock Ignition Device (IID) as a condition of the driving under the influence (DUI) sentence.

Issue Pertaining to Assignment of Error

At the time Alexander I. McCormick drove his car under the influence, the applicable sentencing statute required an IID only if the DUI was alcohol-related. There was no evidence McCormick was under the influence of alcohol when he committed the crime. Did the trial court therefore exceed its statutory sentencing authority by ordering the IID?

B. STATEMENT OF THE CASE

Officer Childers was patrolling the streets of Bellevue when he observed a speeding car fishtail through a turn and continue at a high rate of speed. 2RP 77-79.¹ The traffic was "fairly moderate to light." 2RP 80. Childers caught up to the car as it turned onto the on-ramp for State Route 520 (520). 2RP 80-82.

As the vehicle merged onto 520, it quickly shot across two traffic lanes and narrowly missed the back of another car before settling into the

¹ The verbatim report of proceedings is cited as follows: 1RP – 7/25/2011; 2RP – 7/26/2011; 3RP -- 7/27/2011; 4RP – 8/1/2011; 5RP – 8/2/2011; 6RP – 8/12/2011.

far lane. 2RP 83-84. Traffic was fairly heavy. At that point, Childers determined "that this vehicle was driving in a reckless manner with a willful wanton disregard for the safety of other people," so he turned on the flashing lights of his police vehicle. 2RP 84.

The driver of the suspect car changed into the lane Childers occupied, then slammed on his brakes. Childers braked hard in response and avoided a collision. 2RP 85-86. The suspect then continued driving westbound on 520 at about 45 m.p.h. Childers turned his vehicle's siren on, but the driver did not stop. 2RP 86-87.

As they continued, Childers saw a Washington State Police trooper engaged in a traffic stop. The trooper, Raymond Seaburg, said Childers and the suspect car passed him at about 35 m.p.h. 2RP 109. Seaburg finished his business, jumped into his own car and replaced Childers as the pursuing officer. 2RP 87-89, 110-12. Seaburg activated the flashing lights and siren on his marked car. 2RP 111, 114.

Seaburg's vehicle was equipped with an in-car video recorder that filmed the chase. 2RP 110-11, Ex. 4. Seaburg observed the pursued vehicle drift over the fog line and come close to striking the guardrail. 2RP 112-13. Using his loudspeaker, Seaburg commanded the driver to stop, but he continued forward. 2RP 113. The suspect drove from about

32 m.p.h. to 42 m.p.h. during the chase, which continued over the length of 520. 2RP 114. Seaburg saw the car swerve back and forth and almost hit the barrier several times. 2RP 124-25. During most of this time, Seaburg observed the driver "jumping around, swinging his arms . . . hitting himself in the head" and generally "acting very erratic." 2RP 115-16, 131.

By this time other troopers had arrived to assist Seaburg. 2RP 62-63. One of the troopers threw spike strips onto the roadway and the suspect driver hit them. 2RP 117. This flattened the tires and the driver stopped the car. 2RP 67-69.

The driver was Alexander I. McCormack. 2RP 71-72, 117-18. Seaburg cuffed McCormack, patted him down, and read him his rights. 2RP 118-19. As he did so, Seaburg smelled the odor of marijuana. 2RP 118-19. Seaburg did not employ field sobriety tests or other tools to determine whether McCormack was under the influence because of his unusual behavior. 2RP 132-34. He arrested McCormack for attempting to elude a pursuing police vehicle and driving under the influence (DUI). 2RP 124. Seaburg moved McCormack into the back seat of his patrol car and sat behind the wheel, filling out papers and waiting for a tow truck. 2RP 120-22.

McCormack made several spontaneous statements to Seaburg as they were in the patrol car. He asked the officer whether he liked pancakes, and told him where he could find good pancakes and pigs in the blanket. He complained about inhumane treatment and said there were nails in his handcuffs. McCormack also said he was going to carve his name somewhere in the patrol car and "was like essentially chewing or trying to grind his teeth" into the car seat. 2RP 122-24, 131. He also screamed, grunted, moaned and threw some "F-bombs." 2RP 125.

Seaburg declined to take McCormack to the police station for a breath test because did not believe McCormack was under the influence of alcohol. 2RP 126-28. He instead transported McCormack to Harborview Medical Center for a blood test and because of his unusual behavior. McCormack was admitted to the mental health unit at the hospital. 2RP 129.

The state charged McCormack with attempting to elude a pursuing police vehicle and DUI. CP 8-9. McCormack's defense was diminished capacity. 2RP 54-59. A psychiatric emergency services nurse testified she spoke with McCormack at the hospital. 3RP 9, 14-15. McCormack told the nurse he remembered being chased by the police and stopping after hitting the spike strip. 3RP 15. He said he had nothing to lose. 3RP 15-

16. McCormack was angry, hostile and menacing. He swore at the nurse, kicked over a cup of juice and hit his head against the wall. 3RP 16. The nurse diagnosed McCormack as suffering from psychosis not otherwise specified. 3RP 18. The nurse believed McCormack was an imminent danger to himself or others. She recommended he be involuntarily hospitalized for further evaluation. 3RP 14.

McCormack was transferred from emergency services to the psychiatric Intensive Care Unit (ICU). 3RP 25-26. Patients in the ICU are those determined to have a serious psychiatric disorder. 3RP 32. An ICU nurse recalled McCormack was often agitated and required much redirection. 3RP 29.

Forensic psychologist Dalton Young evaluated McCormack and testified on his behalf. 4RP 13. Young reviewed discovery, mental health and medical records, and witness interviews, and interviewed McCormack and his father. 4RP 26-28. Young learned the 21-year-old McCormack began having mental health problems at age 15 and had been diagnosed with schizophrenia. 4RP 21, 26-27. McCormack's history included recurrent episodes of psychotic and manic behavior. 4RP 27-28. He was involuntarily committed at age 18 after cutting back on or cutting off his medications. 4RP 28.

Young diagnosed McCormack with schizoaffective disorder, bipolar type.² He explained that although the condition can be managed with appropriate use of medications, young people commonly decide at some point they no longer need the medications. 2RP 29-32.

As for the night of the chase across Route 520, Young said McCormack was "very, very severely in a psychotic state. Disorganized, manic, and probably having auditory hallucinations." 4RP 32. McCormack told Young he knew the officers were behind him and that he was supposed to pull over. He did not believe he had done anything wrong, and said he could not figure out how or find a place to pull his car over. 4RP 33. Young testified McCormack's normal cognitive faculties – such as reasoning, planning, and judgment – were "very heavily impacted." 4RP 34.

² In the August 1, 2011 transcript, the court reporter continually typed "blood pressure disorder" rather than bipolar disorder. The following entry leads counsel for McCormack to believe "bipolar disorder" is the term Young used:

I described his schizo affective disorder as meeting criteria for schizophrenia and major mood disorder. In this case bipolar disorder. So it's the diagnosis is schizo effective [*sic*] disorder, blood pressure type, and if one has blood pressure disorder and meets criteria for that, one has, by definition, one has had at least one episode of manic – a manic episode.

4RP 29.

McCormack told Young he smoked marijuana about four times during the five hours leading up to the car chase, including just before he got into the car to drive. 4RP 40-41. In Young's opinion, the marijuana use may have contributed something to McCormack's impaired faculties, but "by far the primary factor is schizo affective psychosis in his mental state at the time." 4RP 46.

After hearing the above testimony, the jury found McCormack guilty of attempting to elude and driving under the influence. CP 10-11. The trial court thereafter denied McCormack's Motion for Arrest of Judgment. CP 33-44, 46; 6RP 37. The trial court sentenced McCormack as a first offender for attempting to elude. The court ordered McCormack to serve 30 days in the King County Supervised Community Option and 12 months community custody. CP 22-28. For the DUI, the court imposed a suspended sentence to include a concurrent 30 days in the Community Option and 60 months probation. CP 29-32.

As conditions of the probation, the court ordered McCormack to undergo a substance abuse evaluation, abstain from unprescribed controlled substances, and "comply with the statutory requirements that were attached in the appendix." CP 31. 6RP 21-22. The appendix to which the court referred was the "DUI Sentencing Grid" as amended

through January 1, 2011. CP 32. Among the statutory requirements set forth on the grid were an Interlock Ignition driver's license and an Interlock Ignition Device (IID). CP 32. Consistent with the court's oral directive, the judgment and sentence includes the IID as a probation condition. CP 31.

C. ARGUMENT

THE TRIAL COURT EXCEEDED ITS STATUTORY SENTENCING AUTHORITY BY ORDERING THE IID AS A CONDITION OF THE DUI PROBATION TERM.

A trial court's sentencing authority is limited to that expressly found in the statutes. In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). When a trial court acts beyond its statutory sentencing authority, the error may be reviewed for the first time on appeal. State v. Moen, 129 Wn.2d 535, 545–46, 919 P.2d 69 (1996). A sentencing court must apply the version of the statute in effect at the time of the offense when determining the proper sentences. State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

McCormack committed his crimes September 24, 2010. CP 8-9. The DUI sentencing statute in effect on that date provided in pertinent part as follows:

The court shall require any person convicted of an *alcohol-related* violation of RCW 46.61.502 or 46.61.504 to apply for an

ignition interlock driver's license from the department under RCW 46.20.385 and to have a functioning ignition interlock device installed on all motor vehicles operated by the person.

Former RCW 46.61.5055(5)(a) (emphasis added).

This provision was amended effective January 1, 2011. Laws of 2010, ch. 269, § 12. The amendment struck the italicized "alcohol-related" language. Laws of 2010, ch. 269, § 4. Effective January 1, 2011, therefore, anyone who committed DUI by driving under the influence (RCW 46.61.502) or by being in actual physical control while under the influence (RCW 46.61.504) – whether under the influence of alcohol or drugs – was subject to the IID requirement.

The State presented no evidence McCormack's DUI was alcohol-related. Trooper Seaburg, who attended a class to become certified as a drug recognition expert, and who had seen "thousands of DUI arrests," did not take McCormack for a breath test because there was "no alcohol onboard." 2RP 106, 125-26. Instead, Seaburg assumed McCormack was under the influence of marijuana. 2RP 127. He said the only way to determine whether an individual is under the influence of a drug is to test his blood. 2RP 128.

Therefore, the version of the statute in effect when McCormack committed DUI did not require use of an IID. The trial court exceeded its

statutory sentencing authority by ordering the IID. This Court should therefore reach this issue and remand for vacation of the IID requirement.

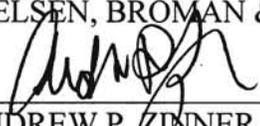
D. CONCLUSION

For the stated reasons, this court should remand for vacation of the IID condition of McCormack's DUI sentence.

DATED this 9 day of April, 2012.

Respectfully submitted,

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COA NO. 67664-4-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 9TH DAY OF APRIL, 2012 I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALEXANDER McCORMACK
718 123RD AVENUE NE
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SIGNED IN SEATTLE WASHINGTON, THIS 9TH DAY OF APRIL, 2012.

x Patrick Mayovsky

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