

Form 9. Petition for Review
[Rule 13.4(d)]

90152-0
Court of Appeal Cause No. 901152-0

IN THE SUPREME COURT OF THE STATE OF
WASHINGTON

___ State of Washington ___, Respondent

v.

___ Todd James Wixon ___, [Petitioner or Appellant]

FILED

AUG 18 2014

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

CRF

PETITION FOR REVIEW

Todd James Wixon
toddwixon@gmail.com, (206) 432-6995

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ORIGINAL

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Brady v Maryland

A. Identity of Petitioner [Todd Wixon]

B. Court of Appeals Decision, and some of issues

[asks this court to accept review of the Court of Appeals decision that they would not review my case because the issue was not reserved for appeal, dated Jan. 28, 2014, in Division II. I did not understand that all the old sentences would be permitted, nor did I sign any document stating so. I was desperate to declare my innocence, because my lawyer did not do anything to defend me, so I had to defend myself. I have proof I did not run red lights, as there are red light cameras along that route, they claimed I took. I have an email to prove I had not run a red light at 512, and only got verbal proof from the city of Tacoma. You could call to verify this. There is a Red light camera at 56th, 26th and Pacific, and then 2 other spots. I have proof I took a breathalyzer test in the field, was being forced to do a blood, but had agreed to a breathalyzer, and did not get a second one, nor was one offered to me at the station. The officer had given me a head injury where I was detained. That causes Nystagmus. I have the medical record showing I received a head injury from having my head pounded into the pavement a number of times, because I was taken to the emergency room after that, (I could walk, and was awake)I still had nystagmus in both eyes, as well as loss of vision, a week later, so the nystagmus was not from drinking. The slurred speech also was from the head injury, and dental work. The police officer knew I had a head injury, because he saw it happen. I have medical records showing a serious amount of dental surgery 2 days before, and I have a flapper, and a bridge which would affect my breathalyzer reading. My body was swaying from the police abuse, and being ripped up by my shoulders. I had complied, though not fast enough by their estimation. I was not running away. I was at a stop light. I have the CAD reports showing the police officer was not where he said he was, and I got in his car later, and it was not marked. He was never chasing me. I have the police report showing that they were guessing I was the one that Officer Maahs was "chasing earlier." There was no physical evidence presented, of audio, visual, camera, etc. Even his testimony at trial was "I was going north, or south on S. Tacoma Way at approx. 5200 or 5400 block. I would have..." He did not remember any of it. I was not read my Miranda rights until later that night, as far as I know. I never ever signed anything. They forged my signature on one copy that even had the wrong date on it.

So I testified, not understanding the harm.

A copy of the decision is attached, or in an email following.

C. Issues Presented for Review

Preservation of impeachment appeal, that caused prejudice of jury, and affected seriously affected the outcome. The prosecutor got into more detail than necessary.

2. New evidence- Medical, and dental proof for nystagmus, and slurred speech, traffic proof of not running red lights or speeding. Evidence suppressed

3. Ineffective council, as he did not get any of my records, (medical, auto tickets) or a witness concerning head injuries, or the ticket records from Lakeland, or Tacoma, that would have disproved all witnesses. He did not have me sign something, or let me really understand the impeachment, continued the trial 5 times, because he was busy with other cases, and not to help my trial, did not ask for bail, at my sentencing, and had not talked to me, let me rot in jail, and would not respond to my calls, wanted me to plead guilty right from the start, and told my family I was guilty, that's why he didn't get any evidence, should have tried to get the felony elude proof, by finding the automobile the officer was driving, to make sure it was a marked

vehicle, with lights and sirens, should have preserved more issues for me, had preserved the heresay, but then let the officer testify anyway, approved the longest sentence possible, and finally did not impeach the witness, that didn't know 40 feet, from 2 miles.

4. The brief written on the appeal was inaccurate making me look worse. There was one witness, not 3, that claimed she saw my license. Two witness in one car saw a car swerving into the next lane, and only one saw the person run a red light, or saw the license. The license started with a B8, which 40 feet away could have been misread. There were 2 calls. The second witness saw a vehicle, and not the person, or the license. There is no record in the trial showing a failed breath test. There was one test in the field, and not a second. They are inaccurate, and that one was suppressed at the trial. I did not testify I drank alcohol that night, in fact one officer testified he "overheard someone saying that he over heard..", and that was a motion in limine, but that officer was allowed to later be called to the stand.

5. Burden of proof not met, request case dismissed, for all errors.

6. Possible new trial

7. Recalculated sentence

8. Correct any errors, correct brief

D. Statement of the Case

Arrested for Felony Elude, DUI, resisting Arrest, and reckless driving. No burden of proof was met. Did not have a lawyer for awhile after, (due process violation)and did take one breath test in the field, didn't want a blood, and was entitled to a breath test, but not offered, which I think is unconstitutional. I have been sentenced to 1035 days. No bail was set for me, which is unconstitutional.

E. Argument Why Review Should Be Accepted

[The burden of proof was not met. The court said the DUI burden of proof had not been met, and the prosecutor said that he had to still sentence me for it. The burden of proof for all counts, was not met. I have new evidence. I was sentenced consecutively, and it seems the average is 5 months. The prosecutor had me calculated at about 1035 days. They are counting the misdemeanors, too.

The sentencing is wrong from what I can see. Even if I was guilty, the range is 4-12, if my score was 5. I don't thing the misdemeanors are supposed to be counted, and my score should be 2. The guideline says only felonies are counted. The sentence is not clear in the trial either. If sentenced before 1986, those should not be counted.

Due process was violated, and evidence by the prosecutor was suppressed, heresay allowed which was preserved for appeal. Dui evidence was suppressed, and at sentencing was sentenced, although Court said Burden of Proof not met.

F. Conclusion

[To dismiss the case, or re calculate the sentence, or re check the burden of proof to exonerate me. To recalculate the bail, as I think \$100,000 is way outside the range, and right now they have \$35,000 of borrowed money.

[8/18/14]

Respectfully submitted,

[Todd James Wixon]
Pro Se toddwixon@gmail.com

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Tuesday, August 19, 2014 8:13 AM
To: 'Cynthia Brown'
Subject: RE: Todd Wixon 90152-0 added items new letter

Rec'd 8/18/14. Please note, this email contained a three page petition for review and two separate, but identical copies of the opening brief of appellant from the Court of Appeals #43782-1-II.

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Cynthia Brown [mailto:cbrown57@gmail.com]
Sent: Monday, August 18, 2014 4:59 PM
To: OFFICE RECEPTIONIST, CLERK
Subject: Todd Wixon 90152-0 added items new letter

Todd Wixon

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STATE OF WASHINGTON
Aug 18, 2014, 4:58 pm
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No. 43782-1-II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

TODD JAMES WIXON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 12-1-00197-1
The Honorable Frederick Fleming, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court improperly admitted evidence of Todd Wixon's prior convictions for impeachment purposes under ER 609.
2. The trial court erred when it determined that Todd Wixon's prior convictions for crimes involving dishonesty were not more than 10 years old.
3. The trial court erred when it admitted evidence of Todd Wixon's prior convictions for crimes involving dishonesty without first balancing their probative value against their prejudicial effect.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Did the trial court err when it determined that Todd Wixon's prior convictions for crimes involving dishonesty were not more than 10 years old, where he was sentenced in 1979 to concurrent five year terms of confinement for those crimes, but remained incarcerated until 2005 because he received another concurrent 26-year sentence for a different crime?
(Assignments of Error Nos. 1 & 2)
2. Did the trial court err when it admitted evidence of Todd Wixon's prior convictions for crimes involving dishonesty without first determining on the record whether their

- probative value substantially outweighed their prejudicial effect? (Assignments of Error Nos. 1 & 3)
3. Did the trial courts erroneous admission of Todd Wixon's prior convictions for crimes involving dishonesty, within reasonable probabilities, affect the outcome of the trial where Wixon's credibility was at issue? (Assignment of Error 1)

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Todd James Wixon by Information with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024), one count of driving under the influence of intoxicants (RCW 46.61.502), one count of reckless driving (RCW 46.61.500), and one count of resisting arrest (RCW 9A.76.040). (CP 1-2)

Following a CrR 3.5 hearing, the trial court ruled that, with one exception, all statements made by Wixon before he invoked his right to counsel would be admissible at trial. (RP1 91-92; CP 74-81)¹ A statement Wixon made to medical personnel indicating he had consumed one beer was not initially admitted in the State's

¹ The transcripts containing trial proceedings will be referred to by their volume number ("RP#"). The transcript containing the sentencing hearing will be referred to as "SRP."

case in chief, but was later admitted to rebut Wixon's testimony that he had not been drinking alcohol on the night of the charged incident. (RP1 RP 91-92; RP4 46-48, 52)

The trial court denied Wixon's motions to dismiss the resisting arrest charge for lack of proof. (RP4 55-57) The jury convicted Wixon as charged. (RP4 102-03) The trial court sentenced Wixon to a total of 818 days of incarceration. (SRP 12-15; CP 56, 63, 65-69) This appeal timely follows. (CP 70)

B. SUBSTANTIVE FACTS

Catherine and Alexander Earl were driving on Highway 512 towards Tacoma at about 9:30 on the night of January 12, 2012. They saw an older-model pickup truck approach other motorists at a high rate of speed and then slam on the brakes, repeatedly swerve in and out of lanes without using a signal, and come almost to a stop while still in a lane of travel. (RP2 35, 36 (RP2 17-19, 22, 34, 35, 36) They saw several other motorists swerve out of the way to avoid colliding with the truck. (RP2 19)

Damian Younger was also driving on Highway 512 at the same time, when he saw a truck approaching quickly from behind. (RP2 43-44, 45) The truck came very close to Younger's car, then slowed abruptly, fishtailed, and swerved into the adjacent lane.

(RP2 46-47)

The Earls and Younger followed the truck as it exited Highway 512 onto South Tacoma Way. (RP2 21, 47) They saw the truck stop at a green light, then as the light turned red the truck sped through the intersection. (RP2 21, 37, 49) The truck then pulled quickly into a gas station, nearly hitting a flower pot and gas pump before coming to a stop. (RP2 21-22, 48) They saw a white male get out of the truck and walk inside. (RP2 22, 49-50) Catherine Earl and Younger both called 911 and reported what they had seen. (RP2 22-23, 44, 47) Catherine Earl also took note of the truck's license plate number, and reported it to the 911 operator.

(RP2 23)

Tacoma Police Officer Jeffrey Maahs was on duty and driving his fully marked patrol car on this same night. (RP2 64, 66) He heard the sound of an engine revving loudly, then saw a truck speed past him going the opposite direction on South Tacoma Way. (RP2 68-69) Officer Maahs turned his vehicle around and attempted to catch up to the truck. (RP2 69) After he observed the truck speed through a red light, Officer Maahs activated his vehicle's overhead lights and siren in an attempt to conduct a traffic stop. (RP2 69) The truck did not pull over or stop, but instead

continued to drive at speeds in excess of 60 miles per hour in a 25 mile per hour zone. (RP2 67, 68-69, 71-72, 75, 88)

As he followed the truck, Officer Maahs repeatedly saw it weave in and out of traffic and drive through red lights. (RP2 71-72, 75) However, there were several open businesses and significant vehicle and pedestrian traffic on that stretch of South Tacoma Way, so in the interest of public safety Officer Maahs decided to end his pursuit. (RP2 66-67, 75) He turned off the vehicle's lights and siren, and reported the truck's location to other patrol units in the area. (RP2 76, 77)

Other units eventually intercepted and stopped the truck. (RP2 102-03, 117-18, 122; RP3 20-21, 22) Several units surrounded the truck, and officers yelled commands for the driver to exit the truck, turn, walk backwards, and lay on the ground. (RP2 104, 107; RP3 23, 46-47) The driver, identified as Todd Wixon, was slow to follow commands and did not perform exactly as directed. (RP2 103, 125; RP3 23-24, 25, 47-48) But he did exit the truck and kneel on the ground. (RP3 25) Wixon did not get into a prone position on the ground, however, so Officer Jewell Lerum approached Wixon and pushed him to the ground. (RP3 25) Officer Lerum testified that Wixon refused to put his hands at his

sides, so he had to struggle with Wixon to get his arms together and handcuffed. (RP3 26, 27, 35, 51)

Several officers testified that Wixon smelled of intoxicants, had watery and bloodshot eyes, and his speech was slurred. (RP2 81, 108; RP3 65, 67) A bottle of what appeared to be rum was found inside Wixon's car. (RP3 64) Wixon also performed poorly on several field sobriety tests. (RP3 76-77, 80, 81, 83)

The officers noticed that Wixon had suffered an abrasion over his eye from the struggle with Officer Lerum, so they called for medical aid. (RP2 108; RP3 27-28) As he was being treated, Wixon became verbally abusive to the officers and aid personnel. (RP2 82, 109-10; RP3 28-29, 31) Wixon was transported to the hospital, where he continued to be loud and profane. (RP2 82, 83, 84, 93) Wixon did not consent to a blood draw to test his blood alcohol concentration. (RP3 87, 92)

Wixon testified in his own defense, and denied that he drank alcohol that night.² (RP4 22, 31) After playing pool at Freddie's Casino near Highway 512, he agreed to give an acquaintance a ride home. (RP4 22-23) But Wixon is not familiar with Tacoma, so

² On rebuttal, the State recalled Officer Lerum to testify that he overheard Wixon tell medical aid personnel that he drank one beer earlier in the evening. (RP4 52)

he got lost and was confused about how to return to the freeway. (RP4 24) He went through some yellow lights as he tried to find his way home, but denied driving through any red lights. (RP4 25)

Wixon testified that he was not aware that an officer was signaling him to stop on South Tacoma Way. (RP4 25) He also denied intentionally disobeying the officers' orders after he stopped his truck; he testified that several officers were yelling at the same time and he could not understand what he was supposed to do. (RP4 27) He testified that he yelled at the officers and aid personnel because he was upset at how rough the officers had treated him and because he was in pain from being pinned to the ground. (RP4 27, 28, 38)

IV. ARGUMENT & AUTHORITIES

The State sought to introduce four of Wixon's prior convictions involving crimes of dishonesty in order to impeach his credibility after he took the stand in his defense. (RP4 8, 15, 17-19) Wixon was convicted and sentenced for the four crimes—possession of stolen property and three counts of taking a motor vehicle without permission—in 1979. (RP4 14-15; Sup. CP 88) Wixon was sentenced to five years of confinement for each of the crimes, to run concurrent with each other, and concurrent with a 26-

year sentence for a contemporaneous murder conviction. (RP4 14-15, 21, 43-44; Sup. CP 88) Wixon was released from confinement in 2005. (RP4 9, 14; Sup. CP 88)

The State argued that the convictions were admissible under ER 609, which states, in relevant part:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted . . . only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

(b) Time Limit. Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.

The State asserted that because the convictions were for crimes involving dishonesty, they were automatically admissible under ER 609(a)(2). (RP4 12, 14-15) The State asserted that the 10-year time limit did not begin to run until Wixon was released from prison in 2005. (RP4 12, 14-15, 20)

Wixon objected, arguing that (1) his lengthy incarceration, ending in 2005, was not due to the convictions for the crimes of dishonesty so the convictions were beyond the 10-year limit of ER 609(b); (2) because of the age of the crimes, the court should balance their probative value against their prejudicial effect; and (3) their prejudicial effect outweighed any probative value. (RP4 9-10, 11, -14)

The trial court agreed with the State that the 10-year time limit did not begin to run until Wixon's 2005 release, and therefore the convictions were automatically admissible, without any balancing of probative value versus prejudice needed. (RP4 11-12, 13-14, 17) Accordingly, during the State's cross-examination of Wixon, the prosecutor questioned Wixon about the four prior convictions. (RP4 43-44) The trial court erred because the convictions were beyond the 10-year limit of ER 609(b), because a prejudicial effect versus probative value balancing should have been undertaken, and because the prejudicial effect far outweighed any probative value.

The aim of ER 609 is to achieve the proper "balance between the right of the accused to testify freely in his own behalf and the desirability of allowing the State to attack the credibility of

the accused who chooses to testify.” 5A Karl B. Tegland, WASHINGTON PRACTICE: EVIDENCE LAW AND PRACTICE § 609.1, at 471 n. 14 (5th ed.2007). Overarching this balance is the need to curb jurors' tendencies to impermissibly infer that since “the defendant has sinned in the past ... he is more likely to have committed the offense for which he is being tried.” United States v. Sims, 588 F.2d 1145, 1147-48 (6th Cir.1978) (quoting United States v. Harding, 525 F.2d 84, 89 (7th Cir.1975)).

ER 609(a) controls the admissibility of a conviction that is not more than 10 years old. Under that section, a crime involving dishonesty is automatically admissible, without any need to balance probative value versus prejudicial effect, if the conviction is less than 10 years old. State v. Russell, 104 Wn. App. 422, 433-34, 16 P.3d 664 (2001).

ER 609(b) controls the admissibility of a conviction that is more than 10 years old. Under that section, any conviction that is more than 10 years old, even crimes of dishonesty, are subject to a balancing of probative value versus prejudicial effect before the conviction may be admitted against a testifying witness. Russell, 104 Wn. App. at 433-34.

The 10-year period is judged separately for each conviction.

Russell, 104 Wn. App. at 432. Deciding when the 10-year period begins and ends is a matter of court rule interpretation and is subject to *de novo* review. State v. O'Connor, 155 Wn.2d 335, 343, 119 P.3d 806 (2005); State v. O'Dell, 70 Wn. App. 560, 564, 854 P.2d 1096 (1993) (stating that the meaning of ER 609 is a pure issue of law). In determining the meaning of a court rule, courts should first consider the plain language of the rule. O'Connor, 155 Wn.2d at 343.

The ten year period starts at conviction or “release from confinement for *that conviction*,” whichever is later. ER 609(b) (emphasis added); Russell, 104 Wn. App. at 432. The plain language of the rule thus dictates that the 10-year period begins to run at the conclusion of confinement imposed for the specific conviction that a party wishes to admit. In this case, the State was permitted to elicit evidence of Wixon’s 1979 convictions. Wixon served concurrent five year sentences for each of those convictions. The “confinement imposed for [those] conviction[s]” therefore ended in 1984, nearly thirty years ago. After that year, he was no longer confined for those convictions. The trial court therefore erred when it determined that the 10-year time period did not begin to run until Wixon’s 2005 release.

Because confinement for the four crimes of dishonesty ended more than 10 years ago, the trial court was required to balance the probative value against their prejudicial effect. Russell, 104 Wn. App. at 433-34 (“A trial court is always required to balance on the record when a conviction is more than ten years old, regardless of whether the conviction involves dishonesty or false statement.”). The trial court’s failure to do so in this case was error. Russell, 104 Wn. App. at 433-34.

ER 609(b) provides that a trial court shall not admit any conviction more than 10 years old “unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.” Russell, 104 Wn. App. at 436-37. By its plain terms, ER 609(b) requires a finding that probative value outweighs unfair prejudice not just slightly, but substantially. Russell, 104 Wn. App. at 433. The record in this case is devoid of any “specific facts and circumstances” from which to conclude that these convictions possessed probative value that substantially outweighed unfair prejudice despite their age.

Furthermore, as time passes, the probative value of prior convictions generally diminishes. And after 10 years, any

remaining probative value may be so diminished that its prejudicial effect outweighs its probative value. *See, e.g., State v. Jones*, 117 Wn. App. 221, 233, 70 P.3d 171 (2003); *see also Russell*, 104 Wn. App. at 437 (noting that remote convictions are admissible “very rarely and only in exceptional circumstances”) (quoting *United States v. Beahm*, 664 F.2d 414, 417-18 (4th Cir.1981)). Therefore, it is unlikely that the trial court in this case would have admitted these convictions, whose sentences were completed nearly 30 years ago, if it had properly conducted an on-the-record balancing.

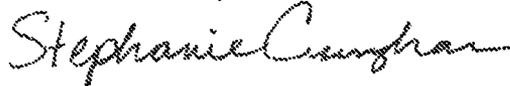
An evidentiary error is harmless if, “within reasonable probabilities, it did not affect the outcome of the trial.” *Russell*, 104 Wn. App. at 438. This case turned largely on whether the jury found Wixon credible when he testified that he had not been drinking earlier in the night, that he did not notice Officer Maahs’ patrol vehicle signaling him to stop, and that he did not purposefully disobey the officers’ directions and resist arrest because he could not understand what he was supposed to do. (RP4 22, 25, 26, 27) Considering that Wixon’s credibility was an issue, and the extremely prejudicial effect that prior convictions have on a jury, there is a “reasonable probability” that the improper admission of Wixon’s criminal history unfairly prejudiced the jury against Wixon.

Accordingly, Wixon's convictions should be reversed.

V. CONCLUSION

Wixon was no longer in custody for the crimes involving dishonesty after 1984, and therefore these crimes were more than 10 years old. They were not automatically admissible under ER 609, and the trial court should have balanced their probative value against their prejudicial effect. If the court had done so, it is likely that the convictions would have been excluded. The trial court's error likely prejudiced the outcome of Wixon's trial, and his convictions should be reversed.

DATED: January 18, 2013



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Todd James Wixon

CERTIFICATE OF MAILING

I certify that on 01/18/2013, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Todd J. Wixon, Bk. #2012206043, Pierce County Jail, 910 Tacoma Ave. S., Tacoma, WA 98402.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

January 18, 2013 - 12:00 PM

Transmittal Letter

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Case Name: State v. Todd James Wixon

Court of Appeals Case Number: 43782-1

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August 3, 2012

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THE COURT: Give me your full true name.

THE DEFENDANT: Todd James Wixon.

THE COURT: Birth date?

THE DEFENDANT: 9/7/58.

THE COURT: State ready?

MR. SANCHEZ: Yes, your Honor.

THE COURT: Defense ready?

MR. KATAYAMA: Yes, your Honor.

MR. SANCHEZ: State of Washington versus Todd James Wixon, Cause 12-1-00197-1. The defendant is present in custody with counsel, Mark Sanchez on behalf of the State. The defendant was found guilty in Count I, Attempting to Elude a Pursuing Police Vehicle, Count II, DUI, Special Verdict for DUI was yes, Count III, Reckless Driving, guilty, and Count IV, Resisting Arrest, and that was on 7/24/2012. So at this time the State is ready to proceed with sentencing.

THE COURT: All right. The defense said they're ready to proceed. What's the recommendation of the State?

MR. SANCHEZ: Your Honor, I scored the defendant and I marked a number of exhibits in order to prove up his prior score. Showing defense what is

1 pre-marked as Plaintiff's Exhibits 1, 2, 3, 4, 5. So
2 first I'll pass forward to the Court a certified copy of
3 the defendant's Washington State driver's license,
4 Plaintiff's Exhibit 1, offer into evidence.

5 THE COURT: Any objections?

6 MR. KATAYAMA: No, your Honor.

7 THE COURT: Granted.

8 MR. SANCHEZ: That indicates of, course, his
9 full name and his date of birth. I'd offer into
10 evidence Plaintiff's Exhibit No. 2, a certified copy of
11 conviction data from an Assault 2, conviction date was
12 9/7/1976, that's the date he pled guilty. I would offer
13 that into evidence at this time.

14 MR. KATAYAMA: No objection.

15 THE COURT: Granted.

16 MR. SANCHEZ: Looks like he was sentenced on
17 October 19th. Passing forward for the Court a certified
18 copy of conviction data, including an Amended
19 Information and Judgment and Sentence for a King County
20 Superior Court conviction, Amended Information, Count I,
21 PSP Second, Count II, Murder in the First Degree, Count
22 III, Count VII, and Count VIII, Taking Motor Vehicle
23 Without Permission, Count IV, Attempted Burglary in the
24 Second Degree, Count V and Count VI, Burglary in the
25 Second Degree, Plaintiff's Exhibit No. 3.

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THE COURT: Any objection?

MR. KATAYAMA: No, your Honor.

THE COURT: Granted.

MR. SANCHEZ: Passing forward Plaintiff's Exhibit No. 4, certified conviction data for a Reckless Driving and Possession of Marijuana, conviction date 5/23/2011, offer that into evidence.

MR. KATAYAMA: No objection.

THE COURT: Granted.

MR. SANCHEZ: And, finally, Plaintiff's Exhibit No. 5, which has been presented to the Court for a pre-trial motion, the Department of Corrections Felony Offender Reporting System along with the final discharge and facility plan which indicates that he was released from work release on 6/15/2007, and I'll go over the significance of that in one minute.

MR. KATAYAMA: No objection.

THE COURT: Admitted, granted.

MR. SANCHEZ: So with Plaintiff's No. 2, Assault Second Degree conviction, that counts as one point. Plaintiff's No. 3, which is the King County convictions, eight total, including Murder in the First Degree, under the SRA that only counts as one point. And the reason why was the date of conviction -- let me find that -- yeah, under the -- determining offender

1 score under SRA, when determining adult criminal
2 history, prior adult convictions should be counted as
3 criminal history unless the sentences were served
4 concurrently and they were committed before July 1st,
5 1986. So the eight convictions that are in Plaintiff's
6 No. 3 were pre-1986 and they were served concurrently.
7 So the eight will only count as one.

8 THE COURT: It was '79 that they were?

9 MR. SANCHEZ: That's correct. And it is
10 offenses occurring before 1986. So those eight
11 convictions count as one point.

12 THE COURT: Do you object to any of these
13 calculations?

14 MR. KATAYAMA: No. Actually, your Honor, I've
15 discussed the matter with Mr. Sanchez. I agree it is
16 five points is the offender score.

17 MR. SANCHEZ: And I'm just making the record
18 so it's clear for the next level. He was sentenced
19 4/17/1979, and released from prison, and it is in
20 Plaintiff's No. 6 I believe, which is the felony
21 offender movement sheet. He was released from prison in
22 '05, but he got out of work release, which counts as
23 essentially incarceration, on 6/15/2007. And that's
24 significant because then he would have to go five years
25 crime free before any of his Class C felonies from 1979

1 would wash. He picked up a Reckless Driving conviction
2 on 5/23/2011, which is four years, so he didn't go five
3 years crime free in the community. I don't know if
4 counsel has an objection to that calculation at all.

5 MR. KATAYAMA: Your Honor, I agree with that.

6 MR. Sanchez: So then, ultimately, looking at
7 all his history, you have the Spokane County Assault 2
8 counts as one point, the King County conviction counts
9 as one point, the Reckless Driving, which counts as one
10 point towards the Felony Eluding, that was amended from
11 a DUI, and then he has two other current under the SRA,
12 Attempting to Elude, you count both DUIs and Reckless
13 Driving. So Mr. Wixon was convicted by jury for DUI and
14 Reckless Driving so I calculate him as a five. As a
15 level one his range then is 4 to 12 months.

16 THE COURT: Is what?

17 MR. SANCHEZ: It's 4 to 12 months.

18 THE COURT: Do you agree, Mr. Katayama?

19 MR. KATAYAMA: Yes, your Honor.

20 MR. SANCHEZ: In terms of the recommendation,
21 however, the State's recommendation for Count I would be
22 12 months. With respect to Count II, which is the DUI,
23 it would be 364 days with 0 days suspended. With
24 respect to Count III, the Reckless Driving, State's
25 recommendation is 364 days with 0 suspended. And with

1 respect to Count IV, the Resisting Arrest, which is a
2 simple misdemeanor, maximum sentence of 90 days, State's
3 recommendation would be 90 days with 0 days suspended.
4 The State is recommending consecutive sentences for a
5 total Pierce County Jail sentence of 39.4 months, that's
6 1,182 days. And the basis for that, your Honor, is to
7 allow the defendant to serve a maximum of one year lets
8 other crimes go unpunished. The Court heard the
9 testimony in this case, there was very dangerous driving
10 that night.

11 THE COURT: So you're recommending how much
12 time then?

13 MR. SANCHEZ: So I'm recommending 12 months on
14 Count I, which keeps him local, and then asking the
15 Court to run the gross misdemeanors consecutive to each
16 other, which is within the Court's discretion.

17 THE COURT: 364, 364, 364 and 90.

18 MR. SANCHEZ: That is correct.

19 THE COURT: And that totals up to be --

20 MR. SANCHEZ: 1,182 days or 39.4 months. The
21 basis for that is to not allow his other currents to go
22 unpunished. The Court heard testimony from three
23 civilians in two separate cars who took it upon
24 themselves to call 911 because they were so concerned
25 with public safety. And the Court heard the testimony

1 regarding the dangerous driving during the eluding
2 incident in which the TPD officer had to terminate.
3 Then heard, of course, the defendant's level of
4 intoxication DUI, then the resisting arrest.

5 In terms of fines, crime victim penalty assessment
6 in the amount of \$500, \$200 court costs, DAC recoupment
7 after trial, \$1,500, DUI fine \$1,620.50, restitution, if
8 any, by later order of the Court, although I do not
9 believe there is any. No contact with any of the
10 victims, which there aren't any in this case. Provide
11 DNA sample and pay the \$100 fee. Forfeit any contraband
12 in evidence. And license suspension and ignition
13 interlock per Department of Licensing since the elude
14 was a felony involving a vehicle, and the reckless
15 driving and DUI do carry license suspensions determined
16 by Department of Licensing. In terms of credit for time
17 served, I show he has 203 days of credit for time
18 served.

19 THE COURT: So the recommendation of the
20 39.4 months, that would be in the Department of
21 Corrections then, not in the County Jail?

22 MR. SANCHEZ: It would be in the County Jail
23 because even -- the way it works is, let's say he was a
24 six, and then his range was 12 and a day to 14, that's
25 when Department of Corrections would take Mr. Wixon.

1 But because his maximum sentence on all convictions
2 including the felony are one year or less, then he's
3 essentially in custody of the Pierce County Jail.

4 THE COURT: So Pierce County has to pay for it
5 instead of Department of Corrections.

6 MR. SANCHEZ: That is correct, your Honor.
7 And that's based on his offender score, I can't control
8 that. But, certainly, another consideration for the
9 Court is punishment. And Mr. Wixon's criminal history
10 is lengthy. He endangered many lives that night. I
11 think that, obviously, in a fiscal environment, we are
12 trying to save money, but at the same time I don't think
13 it should be at the cost of the deterrent effect and the
14 punishment that Mr. Wixon deserves in this case. And
15 that's all.

16 THE COURT: So that's a little over three
17 years at the expense of the County?

18 MR. SANCHEZ: That's correct, your Honor, and
19 for three years the community will be safe.

20 THE COURT: It would be just as safe if he was
21 in the Department of Corrections.

22 MR. SANCHEZ: Unfortunately, because his
23 sentences are under one year or less, I don't believe
24 this Court can send him to Department of Corrections for
25 three years if you were to run them consecutively.

1 THE COURT: Then the question is why tax the
2 County for three years and three years plus, then?

3 MR. SANCHEZ: Because for three years the
4 motorists of Pierce County would be safe.

5 THE COURT: Then you ought to use your
6 imagination and get him sent to Department of
7 Corrections which is set up to take care of these
8 situations and circumstances.

9 MR. SANCHEZ: Your Honor --

10 THE COURT: What do you think of that, Mr.
11 Katayama?

12 MR. KATAYAMA: Legally, I don't think --

13 THE COURT: I can do that?

14 MR. KATAYAMA: Correct.

15 MR. SANCHEZ: It's the --

16 THE COURT: He'd rather be there, too.

17 THE DEFENDANT: No, I wouldn't.

18 THE COURT: You would rather be in the County?

19 THE DEFENDANT: I would rather be free.

20 THE COURT: Well, I know that. But between
21 the County and the Department of Corrections.

22 All right, Mr. Katayama, what do you want to tell
23 me?

24 MR. KATAYAMA: Your Honor, Mr. Wixon -- I
25 agree with many of the calculations the State has made

1 regarding the sentencing ranges. However, I would ask
2 the Court to impose in this case Mr. Wixon has 203 days
3 credit for time served, we ask the Court impose ten
4 months on Attempting to Elude, to suspend the sentence
5 for the misdemeanors. The DUI has a mandatory minimum
6 sentence of 45 days in custody and 90 on EHM. Mr. Wixon
7 has spent 39 days in custody and 164 on EHM. And that's
8 how the State came to the 203 days credit for time
9 served. We ask the Court impose the Elude and DUI
10 concurrently, impose Reckless Driving and Resisting
11 Arrest consecutively, but suspend all time. In essence,
12 Mr. Wixon will be punished and the Court would still be
13 allowed to have conditions of release or conditions of
14 probation placed upon him including alcohol treatment.
15 Mr. Wixon also does have a matter up in King County that
16 he needs to attend.

17 THE COURT: What's going on in King County?

18 MR. Katayama: An open DUI case, your Honor.
19 I have been in contact with his attorney, and right now
20 that matter is being put on hold until Mr. Wixon
21 receives a sentence, and then that court will know when
22 to expect Mr. Wixon. Mr. Wixon does have a wife who is
23 present in the courtroom, and he has written the Court a
24 letter regarding a little about of his own family
25 situation is like. I would like to show that to Mr.

1 Sanchez and then hand it forward to the Court. We're
2 hoping that the Court follows our recommendation in this
3 case.

4 MR. SANCHEZ: May I approach, your Honor,
5 passing up the letter.

6 THE COURT: All right, I read your letter, Mr.
7 Wixon. What else do you want to tell me?

8 THE DEFENDANT: Well, I'd like an opportunity
9 to redeem myself in this matter, and I still have to
10 address another matter in King County. And I'd like an
11 opportunity to pick up the pieces of this mess that's
12 been made here and make a wrong right. If I'm given the
13 opportunity, the proof I guess would be in the pudding.
14 And that's all I ask is an opportunity.

15 THE COURT: All right. Based upon the jury
16 finding of guilty, it is the judgment of the Court that
17 you are guilty of Attempting to Elude, DUI, Reckless
18 Driving, Resisting Arrest. Attempting to Elude,
19 12 months as represented by the State, Reckless Driving,
20 consecutive, DUI, suspended on conditions, Resisting
21 Arrest, consecutive. Credit for time served 203 days,
22 restitution by later order of the court, 500, 200, 1500
23 for attorney fees, 1620.50, no contact, DNA, Department
24 of Licensing determines the impact of this criminal
25 activity on your privilege to drive. What's the other

1 -- what's that one?

2 MR. Sanchez: Ignition interlock device, your
3 Honor.

4 THE COURT: Yeah, that will be applicable.

5 MR. KATAYAMA: Your Honor, may I inquire how
6 much time are you imposing on the misdemeanors?

7 THE COURT: Well, I ran the DUI suspended, 364
8 suspended, the reckless consecutive to the
9 recommendation of the State which is 12 months,
10 Attempting to Elude, and then the 90 days is consecutive
11 because that's a separate set of circumstances.

12 MR. SANCHEZ: 818 is what I calculate, 364
13 plus 364 plus 90, and then it was the DUI the Court was
14 suspending, is that correct, your Honor?

15 THE COURT: The DUI I was suspending.

16 MR. KATAYAMA: Your Honor, there is a
17 mandatory minimum sentence on the DUI. There is no
18 mandatory minimum sentence on the other two charges, but
19 the DUI requires the Court impose a minimum 45 days in
20 custody and 90 days EHM or a total of 1,035 days.

21 THE COURT: And that's not applicable to the
22 reckless?

23 MR. KATAYAMA: That's not applicable to the
24 reckless.

25 THE COURT: Well, then switch it around.

1 MR. KATAYAMA: So the DUI run concurrent with
2 the elude or consecutive?

3 THE COURT: No, reckless is suspended.

4 MR. SANCHEZ: Okay, and then for two years
5 upon conditions.

6 THE COURT: Upon the conditions, the usual
7 conditions for that.

8 MR. SANCHEZ: I'll need a minute to make it
9 clear, your Honor.

10 THE COURT: I understand. Then the 203 is the
11 credit for time served. Are you with me Mr. Katayama?

12 MR. KATAYAMA: So it would be 365.

13 THE COURT: Let me tell you what my thinking
14 was about the DUI. Because of the law that's
15 applicable, I switched it around. But there was some
16 issue with whether there was sufficient evidence to
17 prove that he was -- you know, they have a different --
18 the eye test. But they didn't have -- he refused to
19 take the breathalyzer and the blood and so on. But he's
20 going to lose his license for a year then, and that's
21 applicable in the order of the Court regarding what the
22 Department of Licensing will do under these
23 circumstances. And so, but because of the requirements,
24 he was convicted by the jury for the DUI, I can't give
25 him the benefit of the doubt for the time involved with

1 the DUI. So you persuaded me and we switched the
2 argument. Now, are you with me?

3 MR. KATAYAMA: Yes. My calculations are the
4 Court's imposing 819 days.

5 THE COURT: I think that's what the State came
6 up with.

7 MR. SANCHEZ: 818 is what we calculate, your
8 Honor.

9 THE COURT: Okay. In the notice of appeal and
10 the order on indigency, what's the State's
11 recommendation about bail?

12 MR. SANCHEZ: We would oppose any appellate
13 bond, your Honor, and ask the Court to impose the
14 sentence and be allowed to go forward.

15 THE COURT: I'll put in there no bail then.
16 Mr. Katayama?

17 MR. KATAYAMA: Your Honor, I don't believe Mr.
18 Wixon can afford much of anything of bond.

19 THE COURT: So I'll put in no bail.

20 MR. KATAYAMA: Yes, your Honor.

21 THE COURT: And I'll sign that after the
22 Judgment and Sentence and Warrant of Commitment. Do you
23 waive a formal reading of the rights of appeal?

24 MR. KATAYAMA: Yes, your Honor, I have
25 reviewed that with Mr. Wixon.

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Your Honor, before we sign the judgment and sentence, Mr. Wixon would like to inquire if the Court would consider any alternatives to jail time, place him back on EHM.

THE COURT: No.

MR. SANCHEZ: Passing forward to the Court the Judgment and Sentence for Count I, Count II, and then Counts III and IV.

THE COURT: Anything further from the State?

MR. SANCHEZ: No, your Honor.

THE COURT: From the defense?

MR. KATAYAMA: Just that I served the State a copy of the notice of appeal.

THE COURT: I signed the order of indigency.

MR. SANCHEZ: And I acknowledge receipt, your Honor.

(Conclusion of Sentencing)

* * * * *

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To: OFFICE RECEPTIONIST, CLERK; Cynthia Brown; Brown, Dallas
Subject: Todd J. Wixon

Some items need to be added, like the cases.

Todd James Wixon