69825-7 69825-7

NO. 69825-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

STEVEN DWAYNE SYMITH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS R. HILL

BRIEF OF RESPONDENT

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2. A court may not impose a sentence where the term of confinement and community custody period exceeds the statutory maximum for the crime. Felony DUI has a statutory maximum of five years. Did the trial court exceed its authority by imposing a sentence of 54 months in custody followed by 12 months of community custody?

3. The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender. Gross misdemeanors are punishable by imprisonment for a maximum term of not more than 364 days. Did the trial court exceed its authority by imposing the maximum term and probationary conditions on each gross misdemeanor?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

The State charged Steven Dwayne Symith with Felony-Driving Under the Influence (DUI) and Driving While License Suspended/Revoked (DWLS) in the First Degree on January 7, 2011. CP 1-7. Prior to trial, the State added a Reckless Driving charge against Symith. CP 11-12. The Honorable Hollis Hill received the case for trial on August 29, 2012. 1RP 6.[1] Symith pled guilty to the first degree DWLS on September 4, 2012. CP 41-48; 3RP 6-15. A jury convicted Symith of Felony DUI and Reckless Driving on September 12, 2012. CP 63-64; 6RP 74.

At Symith's sentencing hearing, the trial court imposed a total of 54 months and 364 days in custody, 12 months community custody, and driving-related prohibitions to be abided by during community custody. CP 127-38; 6RP 112-15. Symith timely appealed. CP 140-54.

[1] The Verbatim Report of Proceedings will be referenced as follows: 1RP – 8/29/12, 8/30/12; 2RP – 8/30/12, 9/4/12 (voir dire); 3RP – 9/4/12, 9/5/12; 4RP – 9/10/12; 5RP – 9/11/12; 6RP – 9/12/12, 1/4/13.

2. SUBSTANTIVE FACTS.

At around 8 p.m. on December 27, 2010, in Federal Way, Washington, witnesses observed a car with no headlights stopped at a traffic light in both the left-turn lane and the oncoming traffic lane. 3RP 26-27; 4RP 30-32. When the light turned green, the car took off quickly, made three huge sweeping turns on the road, and weaved into oncoming traffic. 3RP 28-29; 4RP 32-33. The car drove off the side of the road and crashed into some bushes down an embankment, wedging itself between two trees. 3RP 30, 32; 4RP 35. The driver of the car, Symith, rolled out of the car, fell on the ground, and began trying to remove branches from his car. 3RP 34; 4RP 35. Witnesses called 911 and several police officers promptly arrived at the crash scene. 3RP 30, 54, 70, 90; 4RP 34, 36.

Federal Way Police Officer Scott Parker observed that Symith had slow, slurred speech and red, watery eyes. 3RP 91-92, 94-95. Symith's coordination was slow and he smelled of alcohol. 3RP 91-92. Medical personnel determined Symith was uninjured from the crash; however, Symith had a difficult time walking without assistance. 3RP 104; 4RP 80-84, 99-100. When asked by Officer

Parker for his identification, Symith handed the officer two one dollar bills and laughed. 3RP 91, 137.

Symith told Officer Parker at the crash scene that he had consumed two shots of alcohol, but at the police station said he had five to six drinks. 3RP 93, 157. Symith agreed to perform a horizontal gaze nystagmus test, which indicated impairment. 3RP 101-04; 4RP 118-21, 153-55. While Symith gave a first breath sample for the purposes of a blood alcohol content test, he refused to give a second breath sample, even after having being advised of the consequences of doing so. 3RP 113, 115-17, 122, 163. Officer Parker observed that Symith was highly intoxicated. 3RP 125.

Symith stipulated that he had a prior conviction for Vehicular Assault While Under the Influence; this prior conviction raised the DUI charge to the status of a felony. CP 95-96; 4RP 177. He was convicted as charged. CP 63-64; 6RP 74.

3. SENTENCING.

Symith's sentencing was held before the trial judge on January 4, 2013. 6RP 90. Symith's defense counsel moved to dismiss the Reckless Driving charge claiming that convicting him of both Felony DUI and Reckless Driving would violate double

jeopardy. CP 88-94; 6RP 92-93. The prosecutor argued that the two charges were not the same in fact or in law. 6RP 94. He stated that, to prove DUI, the State had to prove only that Symith drove a vehicle while he was under the influence, whereas, to prove Reckless Driving, the State had to prove that he drove with willful and wanton disregard for the safety of others. 6RP 94-96. The prosecutor also noted that there was no case law supporting the proposition that DUI and Reckless Driving convictions together violate double jeopardy. 6RP 96. The judge denied Symith's double jeopardy motion, stating "the law does not prohibit the convictions for Reckless Driving and DUI" and "because they have different elements they are not considered to be the same conduct under the law." 6RP 96.

The parties and court then moved to the topic of Symith's offender score. 6RP 96-101. The State first corrected its previous calculation and asserted that Symith's score should be a seven instead of an eight because Symith's 1983 burglary conviction was dismissed pursuant to a deferred sentence. 6RP 96-97. Defense counsel asserted that the Appendix B in the State's pre-sentence report suggested that the State had erroneously counted a point for the current DUI conviction. CP 164-65; 6RP 99. The prosecutor

then inaccurately conceded that Symith's offender score should be a six instead of a seven; the prosecutor failed to notice that he had not added a point for the current Reckless Driving conviction on that Appendix B, which would keep Symith's offender score at a seven.[2] CP 164-65; 6RP 99-100.

In the defense pre-sentence report, defense counsel asserted that Symith's 2008 Vehicular Assault and Reckless Driving convictions were the same criminal conduct, and that his current Felony DUI and Reckless Driving convictions were the same criminal conduct. CP 97-100. However, during the sentencing hearing, defense counsel only mentioned the "same criminal conduct" issue with respect to the prior convictions, 6RP 98, but did not orally raise the issue at the hearing with respect to the current convictions. 6RP 90-116.

In the 2008 Vehicular Assault and Reckless Driving convictions, Symith drove on a motorcycle with a passenger while having a blood alcohol level of .23 g/mL. CP 105, 116, 123. Symith sped at rates twice the speed limit, weaved aggressively through traffic, and came dangerously close to other vehicles.

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[2] The scoring worksheet in the State's pre-sentence report shows the correct calculation of Symith's offender score, with the exception of the one point that should be subtracted for the 1983 deferred burglary. CP 163.

CP 105, 123. He ultimately crashed into a guardrail, causing himself and his passenger to be ejected from the motorcycle and thrown to the pavement. CP 105, 116. As a result of the collision, Symith's own leg was broken and his passenger's leg had to be amputated due to the injuries he suffered. Id.

In response to defense counsel asserting that the 2008 Reckless Driving conviction should not count as a point towards Symith's offender score, the prosecutor stated that "they don't merge for the very same arguments I made to the Court moments ago. They should be counted as separate offenses." 6RP 100. The judge stated, "[T]hey do count as separate offenses, so that leaves the offender score at 6." Id. The trial court then sentenced Symith based on that offender score. CP 127-38; 6RP 101-15. Symith did not object to the ruling by the court.

On the Felony DUI, the trial court imposed a sentence of 54 months in prison, a community custody period of 12 months, and a requirement to abide by several crime-related conditions while on community custody. CP 130-31, 135; 6RP 112-13. On each of the gross misdemeanors, DWLS in the First Degree and

Reckless Driving, the trial court imposed 364 days in custody[3] and the condition that Symith have no further criminal law violations.[4] CP 136-38; 6RP 112-13. The trial court ordered that Symith's felony sentence run consecutive to one of the gross misdemeanor sentences and concurrent with the other, for a total period of confinement of one day short of 66 months.[5] CP 130, 136; 6RP 112, 115.

C. ARGUMENT

The current convictions for Felony DUI and Reckless Driving, and prior convictions for Vehicular Assault and Reckless Driving, do not constitute the "same criminal conduct." However, the State concedes that the trial court lacked the authority to impose a combined term of confinement and community custody exceeding the statutory maximum for the felony, and to impose probation conditions when Symith was sentenced to the statutory

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[3] The trial court did not orally impose suspended sentences, 6RP 112, but the non-felony judgment and sentence reflects that the sentences are suspended. CP 136.

[4] This is the only condition that the trial court explicitly assigned to the non-felony sentences, 6RP 113, but several additional conditions were written on the non-felony judgment and sentence. CP 138. These conditions (which were also ordered on the felony judgment and sentence) include not driving without a valid license, insurance, and an ignition interlock device. CP 135, 138.

[5] The court clarified it was imposing 54 months plus 364 days, 6RP 115, but 66 months was the total written on the felony judgment and sentence. CP 130.

maximum on the misdemeanors. Upon remand to amend the judgment and sentence, the State requests that the trial court be permitted to recalculate the offender score to accurately reflect the separate criminal conduct of the current and prior offenses.

1. THE TRIAL COURT PROPERLY DETERMINED THAT SYMITH'S CURRENT OFFENSES AND HIS PRIOR OFFENSES WERE SEPARATE CONDUCT FOR SENTENCING PURPOSES.

A sentencing court calculates an offender score for purposes of sentencing by adding current offenses and prior convictions.[6] RCW 9.94A.589(1)(a). The offender score for each current offense includes all other current offenses unless the trial court finds "that some or all of the current offenses encompass the same criminal conduct." Id. Where the court makes such a finding, those current offenses are counted as one crime for purposes of calculating the sentence. Id. Prior offenses that were previously found under RCW 9.94A.589(1)(a), to encompass the same criminal conduct "shall" be counted as one offense, the offense that yields the highest offender score; that is, the previous court's same

[6] "[W]henever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score..." RCW 9.94A.589(a)(1).

criminal conduct determination is final to the later sentencing court. RCW 9.94A.525(5)(a)(i).

A trial court's determination of whether two crimes constitute the "same criminal conduct" will not be disturbed on appeal unless the sentencing court abused its discretion or misapplied the law. State v. Graciano, 176 Wn.2d 531, 536, 295 P.3d 219 (2013). A challenge to the application of a same criminal conduct analysis must be raised to the sentencing court or else the defendant waives the right to appeal the issue. State v. Jackson, 150 Wn. App. 877, 892, 209 P.3d 553 (2009). The defendant bears the burden of proving that crimes constitute the "same criminal conduct" at sentencing. Graciano, 176 Wn.2d at 539-40.

Multiple crimes constitute the "same criminal conduct" only if they are 1) committed with the same criminal intent, 2) committed at the same time and place, and 3) involve the same victim. RCW 9.94A.589(1)(a); State v. Vike, 125 Wn.2d 407, 410, 885 P.2d 824 (1994). All three prongs must be met; the absence of any one of them prevents a finding of "same criminal conduct." Vike, 125 Wn.2d at 410 (citing State v. Lessley, 118 Wn.2d 773, 778, 827 P.2d 996 (1992)). "The statute is generally construed narrowly to disallow most claims that multiple offenses constitute

the same criminal act." State v. Porter, 133 Wn.2d 177, 181, 942 P.2d 974 (1997); see also State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994) (finding that "[t]he Legislature intended the phrase 'same criminal conduct' to be construed narrowly").

In determining whether multiple crimes constitute the same criminal conduct, courts consider "how intimately related the crimes are," "whether, between the crimes charged, there was any substantial change in the nature of the criminal objective," and "whether one crime furthered the other." State v. Burns, 114 Wn.2d 314, 318, 788 P.2d 531 (1990); see also State v. Dunaway, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987) ("[I]n deciding if crimes encompassed the same criminal conduct, trial courts should focus on the extent to which the criminal intent, as objectively viewed, changed from one crime to the next...[P]art of this analysis will often include the related issues of whether one crime furthered the other and if the time and place of the two crimes remained the same." (emphasis added)). Intent, in this context, is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime. State v. Phuong, 174 Wn. App. 494, 546, 299 P.3d 37

(2013) (quoting State v. Adame, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990)).

Crimes affecting more than one victim cannot encompass the same criminal conduct. Dunaway, 109 Wn.2d at 215. "Convictions of crimes involving multiple victims must be treated separately. To hold otherwise would ignore two of the purposes expressed in the Sentencing Reform Act: ensuring that punishment is proportionate to the seriousness of the offense, and protecting the public." Id. (citing RCW 9.94A.010(1), (4).)

a. Symith's Current Offenses Of Felony DUI And Reckless Driving Do Not Involve The Same Objective Criminal Intent.

Symith argues that the Felony DUI and Reckless Driving were the same criminal conduct. This argument should be rejected; Felony DUI is a strict liability crime, whereas Reckless Driving has a very specific mental state. RCW 46.61.502; RCW 46.61.500. A DUI that includes reckless driving is a far more serious offense. To hold that DUI and Reckless Driving were the same criminal conduct would be to conflate these distinct traffic crimes in every situation, meaning that more serious conduct would be punished the same as less serious conduct.

In State v. Rodriguez, 61 Wn. App. 812, 812 P.2d 868 (1991), Division Two of this Court explained the two components involved in determining the objective criminal intent of a crime:

> The first [component] is to 'objectively view' each underlying statute and determine whether the required intents, if any, are the same or different for each count. State v. Collicott, 112 Wn.2d at 405, 771 P.2d 1137 (plurality opinion); State v. Dunaway, 109 Wn.2d at 215, 743 P.2d 1237; State v. Lewis, 115 Wn.2d at 301, 797 P.2d 1141. If the intents are different, the offenses will count as separate crimes. If the intents are the same, then the second component is to 'objectively view' the facts usable at sentencing, and determine whether the particular defendant's intent was the same or different with respect to each count.

Rodriguez, 61 Wn. App. at 816. Under this analysis, if the facts, objectively viewed, only support a finding that the defendant had the same criminal intent with respect to each count, then the counts constitute the same criminal conduct; if the facts, objectively viewed, don't support that finding, then the counts are different criminal conduct. Id. If the facts are sufficient to support either finding, then the matter lies within the trial court's discretion, and an appellate court will defer "to the trial court's determination of what constitutes the same criminal conduct when assessing the appropriate offender score." Id. (quoting Burns, 114 Wn.2d at 317). Indeed, the Washington Supreme Court has suggested that failure

to satisfy the "intent" element can lead to a determination of different criminal conduct only where the crimes charged have "different statutory mental elements." State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998).

Felony DUI and Reckless Driving are not the same criminal conduct because they have different objective criminal purposes. Burns, 114 Wn.2d at 318. Intending to drive a vehicle "in willful or wanton disregard for the safety of persons or property" is a statutory element of the crime of Reckless Driving. RCW 46.61.500(1). In contrast, the crime of DUI has no corresponding statutory intent element, or *mens rea*; rather, it is a strict liability crime. RCW 46.61.502. Where one of the two crimes charged has a statutory mental element and the other one does not, the two crimes' statutory mental elements are nonetheless different. State v. Hernandez, 95 Wn. App. 480, 485, 976 P.2d 165 (1999). Thus, under the first component of the analysis, the offenses of Felony DUI and Reckless Driving should count as separate crimes because each underlying statute, objectively viewed, requires a different intent. Rodriguez, 61 Wn. App. at 816.

Moreover, even if one moves to the second component of the analysis, the facts, when viewed objectively, demonstrate that

Symith's criminal intent was different with respect to each count. Id. When viewed objectively, the facts showed that Symith's purpose in the DUI was simply driving. But DUI is unlike many crimes in that it is the driver's physical *condition,* as opposed to the driver's intent, which makes the driving illegal. In other words, the conduct itself, without the accompanying condition of being under the influence, is not innately criminal; thus there is no objective criminal intent. The objective criminal intent of Reckless Driving, on the other hand, is to drive with willful or wanton disregard for the safety of persons or property. Since Symith's DUI did not have an objective criminal purpose and the Reckless Driving did, the criminal purposes of the two crimes objectively differed and thus these offenses were not the same criminal conduct.

Nevertheless, Symith argues these crimes should be considered same criminal conduct because "[v]iewed objectively, driving while intoxicated furthered the crime of reckless driving." Appellant's Brief at 8. The "furtherance test" was never meant to be and never has been the lynchpin of the court's analysis of "same criminal conduct." State v. Haddock, 141 Wn.2d 104, 114, 3 P.3d 733 (2000); see also Dunaway, 109 Wn.2d at 215 ("*part of* this analysis [of criminal intent] will often include the related issues of

whether one crime furthered the other" (emphasis added)). "The furtherance test lends itself to sequentially committed crimes. Its application to crimes occurring literally at the same time is limited." Vike, 125 Wn.2d at 412. The "furtherance test" is of limited value as applied to the crimes of Felony DUI and Reckless Driving because these crimes occurred simultaneously, as opposed to sequentially. Moreover, objectively viewed, the criminal intent of Reckless Driving could not have been furthered by the criminal intent of DUI because there is no criminal intent associated with DUI.

Because Symith's current offenses of Felony DUI and Reckless Driving did not involve the same objective criminal intent, the trial court properly determined that they were separate conduct and imposed additional punishment in the form of a higher offender score.

b. Symith's Prior Offenses Of Vehicular Assault And Reckless Driving Did Not Involve The Same Victim.

Symith asserts that his prior convictions for Vehicular Assault and Reckless Driving were the same criminal conduct. However, this claim should also be rejected. The court properly

exercised its discretion by finding that the 2008 Vehicular Assault and Reckless Driving charges were separate criminal conduct. 6RP 100. The two prior offenses involved different victims.

Under the "same victim" requirement, two crimes cannot be the same criminal conduct if one crime involves only one specific victim and the other crime involves either additional victims, State v. Davis, 90 Wn. App. 776, 782, 954 P.2d 325 (1998), or is directed against the public at large. State v. Hollis, 93 Wn. App. 804, 816-18, 970 P.2d 813, review denied, 137 Wn.2d 1037 (1999).

The victim of Reckless Driving is the general public. The victim of the Vehicular Assault was, in contrast, the specific passenger whose leg was amputated as a result of the injuries caused when Symith crashed his motorcycle. CP 105, 116. Because, here, one crime involves only the general public as the victim and the other crime involves one specific victim, these two crimes cannot be the same criminal conduct. Davis, 90 Wn. App. at 782. Stated differently, the general public cannot suffer the "substantial bodily harm" required to commit Vehicular Assault, which in this case was a broken leg. RCW 46.61.522.

Nevertheless, Symith argues that his 2008 convictions for Vehicular Assault and Reckless Driving did constitute the same criminal conduct and maintains that they had the same victim: the passenger on Symith's motorcycle. Symith's "same criminal conduct" argument regarding the prior convictions, however, is internally inconsistent with his argument regarding the current convictions. While Symith asserts that the victim for the current offense of Reckless Driving is the public, Appellant's Brief at 7, he maintains that the lone victim for the prior offense of Reckless Driving is Symith's motorcycle passenger who had his leg amputated. Appellant's Brief at 12. However, Symith admitted to "speeding and aggressively weaving around traffic," before ultimately hitting the guardrail. CP 123. Therefore, Symith's Reckless Driving endangered, not only his passenger's safety, but the safety of the general public.

For these reasons, the trial court properly considered Symith's prior and current offenses as separate criminal conduct.[7]

[7] Although the trial court's ruling is brief, 6RP 100, it is apparent from the defense pre-sentence briefing that the court was aware of the relevant factors pertaining to "same criminal conduct." CP 98-100.

2. THE COMBINED TERM OF CONFINEMENT AND COMMUNITY CUSTODY ON THE FELONY DUI EXCEEDS THE STATUTORY MAXIMUM.

Symith asserts, and the State concedes, that the trial court improperly sentenced Symith to a combined term of confinement and community custody in excess of the statutory maximum for Felony DUI.

Under RCW 9.94A.505(5), a court "may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW." The length of the term of community custody in a case such as this one is governed by RCW 9.94A.701(9), which provides:

> The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

This provision of the statute was effective beginning on July 26, 2009. LAWS OF 2009, ch. 375, § 5; State v. Franklin, 172 Wn.2d 831, 837, 263 P.3d 585 (2011).

In State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012), the Washington Supreme Court held that, in cases where the defendant was sentenced *after* the effective date of the RCW 9.94A.701(9), the trial court – not the Department of Corrections – is required to reduce the term of community custody to avoid a sentence that exceeds the statutory maximum. Boyd, 174 Wn.2d at 473.

Because Felony DUI is a class C felony, it has a statutory maximum of five years (or 60 months). RCW 46.61.502(6); RCW 9A.20.021(1)(c). Here, where the trial court sentenced Symith to 54 months of confinement and 12 months of community custody[8] on the Felony DUI, the combined term exceeds the 60 month statutory maximum by six months. CP 130-31.

Symith's sentencing date was January 4, 2012. 6RP 90. Therefore, like the defendant in Boyd, Symith was sentenced after RCW 9.94A.701(9) became effective on July 26, 2009. See LAWS OF 2009, ch. 375, § 5. As a result, the trial court, not the Department of Corrections, is required to modify Symith's sentence to avoid a sentence in excess of the statutory maximum. Boyd, 174

[8] See RCW 9.94A.701(3)(a) (one year term of community custody for any crime against persons under RCW 9.94A.411(2)); RCW 9.94A.411(2) (felony DUI counts as a "crime against a person").

Wn.2d at 473. This case should be remanded for the trial court to amend the community custody term or resentence Symith on the Felony DUI conviction consistent with RCW 9.94A.701(9).[9] Id.

3. THE COURT LACKED AUTHORITY TO IMPOSE PROBATION CONDITIONS ON THE GROSS MISDEMEANORS.

Symith also argues, and the State concedes, that the trial court improperly imposed probation conditions on the Reckless Driving and DWLS in the First Degree charges because the court sentenced Symith to serve the maximum term of confinement for each count.

The superior court's authority to suspend or defer a sentence is codified in RCW 9.95.210, which states:

> In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer. RCW 9.95.210(1)(a).

[9] Upon remand, Symith's offender score should be 7 based on the following convictions: #11-1-01066-6 (1 pt. for Reckless Driving, current offense), #08-1-03689-4 (2 pts. for Vehicular Assault; 1 pt. for Reckless Driving), #04-1-00059-2 (1 pt. for Theft in the Second Degree), #CR24439KC (1 pt. for Reckless Driving), and #307310 (1 pt. for DUI). CP 163-65.

However, the imposition of probation is not authorized when the maximum jail sentence is imposed on an offender. State v. Gailus, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006), overruled on other grounds by State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009).

A gross misdemeanor is punishable by imprisonment for a maximum term of not more than 364 days. RCW 9A.20.021(2). Reckless Driving and DWLS in the First Degree are each gross misdemeanors. RCW 46.61.500(1); RCW 46.20.342(1)(a). Here, the trial court sentenced Symith to the maximum amount of time that it could impose on each of the gross misdemeanors (364 days). CP 136; 6RP 112. The court also imposed at least one probationary condition (no further criminal law violations), 6RP 113, though others were written on the non-felony judgment and sentence. CP 138.

However, the trial court was not authorized to impose probation conditions on the gross misdemeanor sentences because it did not actually suspend any jail time. CP 136-38; 6RP 112-13; Gailus, 136 Wn. App. at 201. As a result, there was no probationary period on these charges. Accordingly, this matter should be remanded so that the trial court can vacate the

requirement that Symith comply with any probationary conditions on the gross misdemeanor counts.[10]

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to find that the trial court properly considered Symith's current and prior convictions as separate offenses. The State further requests that this case be remanded for the trial court to correct Symith's Felony DUI sentence exceeding the statutory maximum, to strike the probation conditions from the non-felony judgment and sentence, and to resentence Symith with the correct offender score of seven.

DATED this 17th day of December, 2013.

Respectfully submitted,

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[10] Symith would still be required to comply with those conditions set forth on the felony judgment and sentence. CP 135.

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 Casey Grannis, the attorney for the appellant, at Nielsen, Broman & Koch, PLLC, 1908 East Madison St., Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. STEVEN SYMITH, Cause No. 69825-7-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.

Dated this 18th day of December, 2013

W Brame

Wynne Brame
Done in Seattle, Washington