No. 81279-9

MADSEN, J. (concurring)—The majority errs when it applies the rule of lenity in order to construe RCW 46.61.5055 and determine the meaning of the term "prior offenses." Despite the fact that the parties disagree as to its meaning, the statute is amenable to only one reasonable construction and there is no ambiguity that must be resolved by the rule of lenity. "Prior offenses" are offenses that precede in time commission of the offense for which the defendant is being sentenced. Because this is what the statute plainly means, the rule of lenity has no place in this case.

In construing a statutory provision, a court must first determine whether there is a plain meaning discernible from the language used expressing the legislature's intent. *State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009). The language used, the context, related statutes, and the statutory scheme as a whole are examined to determine the plain meaning, if possible. *Id*.

RCW 46.61.5055(1) states, "Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504

and who has no prior offense within seven years shall be punished as follows." In similar fashion, the statute refers to increasingly greater numbers of prior offenses. For example, RCW 46.61.5055(2) states, "Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has one prior offense within seven years shall be punished as follows." In addition, former RCW 46.61.5055(12)(a) (2004) defines "prior offenses" to specify that convictions for certain offenses and deferred prosecutions for certain violations constitute "prior offenses" and former RCW 46.61.5055(12)(b) provides, "within seven years" means that "the arrest for a prior offense occurred within seven years of the arrest for the current offense."

The key language is "a person who is convicted of a violation . . . and who has ["no" or a specified number] prior offense . . . shall be punished as follows." The conviction referred to here is obviously the conviction for which the person is being sentenced. Given the structure of this language, this conviction is the only possible reference point for "prior offense." The conviction and the prior offense(s) are the existing facts upon which the punishment will depend, and each stands in relationship to the other.

Next, former subsection (12)(a) tells us which particular offenses and deferred prosecutions constitute prior offenses. Then, former subsection (12)(b) tells us that the specific event that defines the period of time from which the "prior offenses" must be considered is the "arrest"—both for the current offense and the prior offense.

Accordingly, the statute provides that a "prior offense" is an offense or deferred prosecution that was prior to the conviction

for the current offense for which the defendant is being punished and the arrest for the prior offense must have occurred within seven years prior to the arrest for the current offense.

The statutory language also supports this reading because, as the petitioners argue, construing the statute to mean that "prior offenses" means offenses occurring both before and after the current offense renders the word "prior" superfluous. The word "offenses" is all that would be required. In discerning the meaning of a statute, a court must give effect to all the language used, and not interpret any part of the statute to be meaningless or superfluous. *State v. Lilyblad*, 163 Wn.2d 1, 6, 11, 177 P.3d 686 (2008).

The second reason why the statute must be read to mean that "prior offenses" refers to those occurring before the present conviction is that the alternative interpretation urged by the city of Seattle leads straight to absurd results. In determining the plain meaning of a statute we avoid a reading that produces absurd results because we presume that the legislature did not intend absurd results. *Engel*, 166 Wn.2d at 579. Assume, as the city of Seattle argues, that "prior offenses" includes all offenses prior to sentencing rather than prior to the current offense. A defendant who commits three offenses spread out in time will be sentenced with respect to each offense in light of the prior offenses that actually precede the current offense in time. When the defendant is sentenced for the second offense, only the first will be a "prior offense." When the defendant is sentenced for the third offense, the first and second offenses will be the "prior offenses." However, if the circumstances are that the defendant commits offenses that occur within a close proximity in time, and the defendant ends

up being sentenced for the second offense after a third, the result can be that the defendant is sentenced for the second offense with the first *and third* as "prior offenses." Then, when the defendant is sentenced for the third offense, the first and second offenses are prior offenses.

Two absurd results are apparent from these examples. First, the second defendant has the same number of "prior offenses" for the second offense as for the third and there is no increasing severity of consequences. Second, this defendant will be subjected to a greater punishment than the previous defendant for committing exactly the same offenses. These absurd results were surely not intended by the legislature.

Next, and likely the more common scenario, assume that a defendant has a first offense that resulted in a deferred prosecution, followed by a second offense two years later that in addition to resulting in a conviction for that offense also revokes the deferred prosecution and leads to a conviction for the first offense. Under the plain reading of the statute, the first offense, following revocation, will have no prior offenses, as there were no offenses occurring prior in time to this offense. The second offense will have one prior offense—the offense for which deferred prosecution was revoked upon the subsequent conviction, *see* RCW 10.05.100, because that offense occurred prior to the second offense (the arrest for the offense that was the subject of the deferred prosecution occurred within the seven years prior to the arrest for the current, revoking, offense).

If, however, one accepts the argument that "prior offenses" includes all offenses up to the time the defendant is sentenced for the current offense, the first offense, following revocation, will have a prior

offense—the second offense for which the defendant was convicted and which caused the revocation of the first offense. The second offense will also have a prior offense—the first offense. Under this reading of "prior offense," there is no increasing severity of consequences. This is an unlikely, absurd result, given RCW 46.61.5055's overall scheme of increasingly severe punishment for successive offenses.

In addition, an illogical result ensues analogous to that in *State v. Whitaker*, 112 Wn.2d 341, 771 P.2d 332 (1989). Each of two offenses is treated as a "prior offense" to the other. This is not a logical reading of the statute's language. In fact, it is contrary to the ordinary meaning of the word "prior," which is defined as "earlier in time or order **:** preceding temporally, causally or psychologically **:** antecedent, previous." Webster's Third New International Dictionary 1804 (2002). *See generally HomeStreet, Inc. v. Dep't of Revenue*, 166 Wn.2d 444, 451, 210 P.3d 297 (2009) (the plain meaning of undefined terms may be found in a standard dictionary).

A third possibility, argued by the city of Seattle and rejected by the Court of Appeals, would have made the first offense count as two offenses based on the original deferred prosecution *and* the subsequent conviction. That is, the offense for which the prosecution was originally deferred would be effectively sentenced as a third offense, although the individual actually committed only two offenses. However, the legislature's definition of "within seven years" as being that "the *arrest* for a *prior offense* occurred within seven years of the *arrest for the current* offense" necessarily means that the prior offense and the current offense are two separate offenses. Former RCW 46.61.5055(12)(b) (emphasis added).

Moreover, such a result would be absurd in light of the legislature's obvious intent to punish more severely for multiple offenses, not for the success or failure of deferred prosecutions.

The statute's plain language demonstrates that "prior offenses" means offenses that precede in time the arrest for the current offense, i.e., the offense for which the defendant is being sentenced.

Against the weight of these reasons, the majority has little to support its statement that there are two reasonable definitions of "prior offense." The majority accepts as a reasonable interpretation the Court of Appeals' analysis in *City of Seattle v. Quezada*, 142 Wn. App. 43, 48-49, 174 P.3d 129 (2007), that the legislature's definition of "prior offenses" in former RCW 46.61.5055(12)(a) and its application in the cases before the court, and the legislature's definition of "within seven years" in former RCW 46.61.5055(12)(b) could not be clearer. Majority at 11.

The first of these definitions does not help in any way in determining what "prior offenses" means in a temporal sense. All that the definition of "prior offenses" in former RCW 46.61.5055 tells us, as mentioned above, is what specific violations constitute the relevant offenses that will count as prior offenses. The second definition is no more helpful. Indeed, it merely sets up the question that must be answered. "Within seven years" means that the "arrest for a prior offense occurred within seven years of the arrest for the current offense." Former RCW 46.61.5055(12)(b). We do not know any more from this definition about what a "prior offense" is than without it. We do know from this definition, as explained above, that the

seven year time period is counted from the time of arrest to the time of arrest.

I would hold that the statute's plain meaning, and the only reasonable construction, is that a prior offense is an offense that precedes in time the arrest for the current offense. While the majority ultimately reaches this correct result, it does so only after applying the rule of lenity to resolve an "ambiguity" that does not exist. The rule of lenity should not apply here at all because there is only one reasonable reading of the statute.

In a frequently cited passage, this court summarized the rule of lenity in *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 250 n.4, 955 P.2d 798 (1998), *superseded on other grounds by statute as recognized in State v. Thomas*, 150 Wn.2d 666, 672, 80 P.3d 168 (2003):

> The rule of lenity has been adhered to by this Court consistently and recently, and we have never indicated it is abrogated. However, the rule of lenity does not require forced, narrow or overstrict construction if it defeats the intent of the Legislature. *State v. Carter*, 89 Wn.2d 236, 242, 570 P.2d 1218 (1977). We have explained that the rule only applies when a penal statute is ambiguous *and* legislative intent is insufficient to clarify the ambiguity. *In re* [*Pers. Restraint of*] *Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994); *see also Moskal v. United States*, 498 U.S. 103, 107-08, 111 S. Ct. 461, 112 L. Ed. 2d 449 (1990). A statute is not ambiguous for purposes of the rule of lenity simply because there is a division of judicial authority over its proper construction. *Reno v. Koray*, 515 U.S. 50, 64-65, 115 S. Ct. 2021, 132 L. Ed. 2d 46 (1995).

If the legislature's intent can be discerned, it is inappropriate to apply the rule of lenity as an automatic, unconsidered reaction. To this end, "the rule of lenity does not preclude ordinary statutory construction." *State v. Coria*, 146 Wn.2d 631, 639, 48 P.3d

980 (2002).

> The rule of lenity originally arose in England in response to an increasingly harsh legal regime that punished just about every crime by hanging. Government not having invested in prisons, punishment in seventeenth century England varied between transportation to the colonies and capital punishment, with the latter inflicted liberally. A common law defense to many such crimes, "benefit of the clergy," granted immunity to prosecution to those who could read portions of the Bible. With the rise in literacy, more defendants who were not members of the clergy qualified for this defense. In response, the legislature exempted more and more crimes from the benefit of the clergy defense, leading to a "march to the gallows." The courts, doing what they could to frustrate the legislative will, developed the principle that penal statutes were to be construed strictly, a principle that was firmly in place by the time of the founding of the United States.

Lawrence M. Solan, *Law, Language, and Lenity*, 40 Wm. & Mary L. Rev. 57, 87 (1998) (footnotes omitted).

The most obvious change, of course, in construing criminal statutes is that the goal now is to effectuate, not thwart, legislative will. Jumping forward several centuries to the time the article was written, the author said, "Lenity . . . does not take the place of serious investigation into statutory language, the overall purpose of the statute, and the statute's legislative history." *Id*. at 115. This statement applies equally to the role of lenity in this court's decisions. The legislature's will is still central, but unlike in the 17th century, if we can fairly and justly determine what the legislature intended (and so resolve any apparent ambiguity), then the rule of lenity has no role at all.

To determine whether to apply the rule, the court must first make a "serious investigation" of the language of the statute and its purpose, its context, related statutes, the statutory scheme, and legislative

history. It is improper to create or assume ambiguity and then turn to the rule of lenity to resolve it.

It is important to bear in mind that the rule of lenity does not apply any time a statute is determined to be ambiguous, despite the statements in the majority's introductory comments and conclusion (that if two reasonable interpretations of a criminal statute are possible, the rule of lenity applies and the statute is construed in favor of the criminal defendant). Majority at 2, 13. This is not how the rule of lenity applies. Rather, as stated elsewhere in the opinion, "'the rule of lenity requires us to interpret the statute in favor of the defendant *absent legislative intent to the contrary*.'" Majority at 12 (emphasis added) (quoting *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005)); *accord Seitz*, 124 Wn.2d at 652; *see also* majority at 12 ("[i]f after applying rules of statutory construction we conclude that a statute is ambiguous," the rule of lenity applies).

The rule of lenity is the last, not the first, resort when a criminal statute must be construed. Unfortunately, the majority accepts its own invitation to apply the rule of lenity without attempting to resolve ambiguity.

While I disagree with the majority's analysis, I concur in its result.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Charles W. Johnson

Justice Mary E. Fairhurst