IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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| STATE OF WASHINGTON,<br><br>Appellant,<br>v.<br><br>JASON HENRY O'GRADY,<br><br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 65125-1-I<br><br>DIVISION ONE<br><br>UNPUBLISHED OPINION<br><br><br>FILED: August 8, 2011 |

Schindler, J. — Jason O'Grady appeals his conviction of felony driving under the influence (DUI) in violation of RCW 46.61.502. O'Grady argues the information charging him with felony DUI was constitutionally deficient because it did not allege the essential element that he had four prior DUI convictions "within ten years." O'Grady also claims insufficient evidence supports the felony DUI conviction. In State v. Castle, 156 Wn. App. 539, 234 P.3d 260 (2010); State v. Chambers, 157 Wn. App. 465, 237 P.3d 352 (2010); and State v. Cochrane, 160 Wn. App. 18, ___ P.3d ___ (2011), this court held that proof of the four prior DUI convictions within ten years is an essential element of the crime of felony DUI. Accordingly, we conclude the information was constitutionally deficient. But because sufficient evidence supports the felony DUI conviction, we reverse without prejudice to the State's right to recharge and refile felony DUI charges against O'Grady.

FACTS

On November 4, 2009 at approximately 11:00 p.m., Washington State Patrol Trooper Dave Hintz pulled over a car with a defective headlight. Trooper Hintz said the driver, later identified as Jason O'Grady, was extremely jittery with bloodshot, watery eyes, constricted pupils, and a raspy voice. O'Grady told the Trooper that he did not have a driver's license but gave Trooper Hintz a Washington State identification card. The identification card indentified the driver as Jason O'Grady with a birth date of August 6, 1970. According to the Department of Licensing (DOL) database, O'Grady had a suspended driver's license and four prior DUI convictions.

After O'Grady performed poorly on several field sobriety tests, Trooper Hintz placed him under arrest for driving with a suspended license while under the influence of intoxicants. In a search incident to arrest, Trooper Hintz found marijuana and a small scale with brown residue. O'Grady told Trooper Hintz that he consumed a large quantity of heroin right before the Trooper pulled the car over. O'Grady also admitted that within the last hour, he injected a gram of heroin, smoked some marijuana and methamphetamine, and took some Klonopin and Valium. A blood test confirmed O'Grady had ingested the drugs he admitted taking.

The State charged O'Grady with felony DUI in violation of RCW 46.61.502, unlawful possession of heroin, possession of marijuana, and driving while license suspended in the first degree. Before trial, the State dismissed the marijuana possession charge.

O'Grady waived his right to a jury trial. The State called Trooper Hintz and forensic experts to testify at trial. The court admitted certified copies of the sentencing

documents for four prior DUI convictions as exhibits: (1) a June 25, 2004 DUI conviction in Ferndale Municipal Court for Jason O'Grady stating he was 33-years-old with a 12th grade education, (2) a June 4, 2000 DUI deferred prosecution and conviction for Jason O'Grady stating his date of birth is August 6, 1970, (3) a July 8, 2003 DUI conviction signed by Jason O'Grady stating his date of birth is August 6, 1970, and (4) a September 5, 2006 DUI conviction stating that Jason O'Grady's date of birth is August 6, 1970.

At the close of the State's case in chief, O'Grady moved to dismiss the felony DUI charge. O'Grady argued that because the State did not introduce independent evidence showing O'Grady was the person identified in the certified documents for the four prior DUI convictions, the State failed to prove beyond a reasonable doubt felony DUI. In opposition, the State cited to the evidence at trial including the testimony establishing O'Grady gave Trooper Hintz a Washington identification card with the name Jason O'Grady and a date of birth of August 6, 1970. The State argued independent evidence showed O'Grady committed the four prior DUI offenses. The trial court denied O'Grady's motion to dismiss. The defense then presented the testimony of the passenger in the car and a medical expert.

The court found O'Grady guilty of felony DUI, possession of heroin, and driving with his license suspended in the first degree. The court sentenced O'Grady to 60 months confinement plus 9 to 18 months of community custody.[1] O'Grady appeals his conviction for felony DUI.

[1] The State concedes that O'Grady's sentence exceeded the statutory maximum. We accept the concession. In re Pers. Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009).

ANALYSIS

Information

For the first time on appeal, O'Grady asserts the information charging him with felony DUI in violation of RCW 46.61.502 does not include an essential element of the crime—that he had four prior DUI convictions "within ten years."

All essential elements of a crime must be included in a charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Wash. Const. art. I, § 22 (amend. 10); U.S. Const. amend. VI; CrR 2.1(b). Washington Constitution article I, section 22 (amendment 10) provides, in pertinent part: "In criminal prosecutions the accused shall have the right . . . to demand the nature and cause of the accusation against him." United States Constitution amendment VI provides, in pertinent part: "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation." CrR 2.1(b) provides, in pertinent part, that the information shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.

In sum, an information "is constitutionally adequate only if all essential elements of a crime, statutory and nonstatutory, are included in the document so as to apprise the accused of the charges against him or her and to allow the defendant to prepare a defense." State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

When a defendant claims for the first time on appeal that the information is constitutionally deficient, we liberally construe the information to determine whether the "necessary elements appear in any form, or by fair construction may be found" in the

information. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000). However, there must be "at least some language in the information giving notice of the allegedly missing element(s) and if the language is vague, an inquiry may be required into whether there was actual prejudice." Kjorsvik, 117 Wn.2d at 106. If the information cannot be construed to give notice of the essential elements of a crime, "the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). When the essential elements are not alleged or fairly implied, we presume prejudice. McCarty, 140 Wn.2d at 425.

The information charging O'Grady with the crime of felony DUI states as follows:

> That on or about the 4th day of November, 2009, the said Defendant, JASON HENRY O'GRADY, then and there being in said county and state, did drive a vehicle (a) and had, within two hours after driving, an alcohol concentration of or higher as shown by analysis of the person's breath or blood, and/or (b) while under the influence of or affected by intoxicating liquor or any drug, and/or (c) while under the combined influence of or affected by intoxicating liquor and any drug; And further, that the Defendant has four (4) or more prior offenses for Driving Under the Influence of Alcohol or Drugs as defined in RCW 46.61.5055; contrary to Revised Code of Washington 46.61.502(1) & (6), which violation is a Class C Felony.

O'Grady argues the information is constitutionally deficient because it does not allege that the four prior DUI convictions occurred "within ten years." Under RCW 46.61.502(6)(a), a gross misdemeanor DUI is elevated to a class C felony if the "person has four or more prior offenses within ten years as defined in RCW 46.61.5055." RCW 46.61.502(6)(a) provides, in pertinent part:

> It is a class C felony punishable under chapter 9.94A RCW, or chapter 13.40 RCW if the person is a juvenile, if: (a) The person has four or more prior offenses within ten years as defined in RCW 46.61.5055.[2]

[2] (Emphasis added.)

The State argues the information alleged all the essential elements of felony DUI. Citing to Castle and Chambers, the State asserts that whether the four prior DUI convictions "occurred within 10 years of the pending charge is not an essential element, but rather a threshold issue to be determined by the trial court." We disagree with the State's argument. In Castle, Chambers, and Cochrane, we held the statutory requirement that the four prior offenses occurred "within ten years" of the crime charged is an essential element of the crime of felony DUI in violation of RCW 46.61.502.

In Castle, we held that the four prior qualifying DUI convictions must be "reduced to judgment at the time of arrest for the current DUI." Castle, 156 Wn. App. at 545. But we noted that "not all prior convictions elevate a DUI crime to felony status. When a prior conviction is too remote, our legislature has precluded such a prior conviction from operating to elevate the offense." Castle, 156 Wn. App. at 544. Under the plain and unambiguous language of the statute, we concluded that "[a] prior conviction is too remote when it is more than ten years old." Castle, 156 Wn. App. at 544. Accordingly, we held that the defendant "must have had four prior convictions that occurred not more than ten years previously, meaning that the criminal act that gave rise to the prior conviction could not have occurred more than ten years before the date of the driving at issue in the current offense." Castle, 156 Wn. App. at 544-45 (footnote omitted).

In Chambers, we held the State must prove beyond a reasonable doubt

that the four prior DUI convictions occurred within ten years as an essential element of the crime of felony DUI, but whether the prior DUI convictions meet the statutory definition in RCW 46.61.5055 is a threshold determination for the trial court to decide. Chambers, 157 Wn. App. at 481. And in Cochrane, we held that an information charging the defendant with felony DUI was constitutionally deficient because the State did not allege the essential statutory element that the four prior DUI offenses occurred "within ten years." Cochrane, 160 Wn. App. at 24.

The State asserts that because only those convictions that occurred within the preceding ten years can serve as the basis for charging felony DUI, the information necessarily implies the essential elements of the crime of felony DUI in violation of RCW 46.61.502. In support of this argument, the State relies on State v. Brosius, 154 Wn. App. 714, 225 P.3d 1049 (2010). Brosius is distinguishable.

In Brosius, the defendant Brosius argued that the information charging him with failure to register as a sex offender under former RCW 9A.44.130(7) was constitutionally deficient. Brosius, 154 Wn. App. at 721. The information stated that Brosius did not register as a sex offender in Lewis County. Brosius claimed the information was constitutionally deficient because it did not state as an essential element that he was a level III sex offender. Brosius, 154 Wn. App. at 721-22. The court concluded that even though the information did not expressly state Brosius was a level II or III sex offender, the information alleged that he was "'a person required to register as a sex offender'" and only level II or III are required to report. Brosius, 154

Wn. App. at 718, 722. Consequently, the court concluded the classification level was necessarily implied.

Here, unlike in Brosius, the information does not contain allegations that can be fairly read to imply that the prior DUI convictions occurred within ten years. As explained in Leach, an information must state the acts constituting the offense and cannot just cite the statute. State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989). Because the information does not allege that O'Grady has four or more prior DUI offenses that occurred "within ten years," the information charging him with felony DUI in violation of RCW 46.61.502 is constitutionally deficient.

Sufficiency of the Evidence

Relying on State v. Huber, 129 Wn. App. 499, 119 P.3d (2005), O'Grady asserts he is entitled to dismissal with prejudice because insufficient evidence establishes that he was the Jason O'Grady referred to in the certified documents the court relied on to find that he had four prior DUI convictions.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A challenge to the sufficiency of the evidence admits the truth of the State's evidence. Salinas, 119 Wn.2d at 201. Further, "all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas, 119 Wn.2d at 201.[3]

[3] If the evidence is insufficient to support a jury verdict, we must reverse and dismiss the conviction. State v. Stanton, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

In Huber, the defendant was charged with bail jumping. The State introduced certified copies of documents to prove that Huber was required to appear in court and did not do so. Huber, 129 Wn. App. at 500-01. The State did not present any independent evidence of the defendant's identity. Huber, 129 Wn. App. at 503. The court held that in addition to certified court documents, the State must introduce independent evidence to prove that the person named in the documents is the same person charged with the crime. Huber, 129 Wn. App. at 504.

Here, unlike in Huber, independent evidence established beyond a reasonable doubt that O'Grady was the person identified in the certified court documents admitted to prove that he had four prior DUI convictions. Trooper Hintz testified that O'Grady gave him a Washington State identification card with the name Jason O'Grady with a date of birth of August 6, 1970. The DOL database confirmed the name and date of birth and showed that O'Grady had four prior DUI convictions. The certified court documents for the June 4, 2000 DUI conviction, the July 8, 2003 DUI conviction, and the September 5, 2006 DUI conviction are signed by O'Grady and contain the same date of birth of August 6, 1970. Consistent with a birth date of August 6, 1970, the June 25, 2004 DUI conviction states that O'Grady is 33-years-old. The testimony of Trooper Hintz, the information from the DOL database, and the information from the Washington State identification card that O'Grady provided is sufficient independent evidence establishing beyond a reasonable doubt that Jason O'Grady is the person convicted of four prior DUI offenses.

Because the information is constitutionally deficient, we reverse O'Grady's

felony DUI conviction but without prejudice to the State's right to charge and try him again for felony DUI.

WE CONCUR: