

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

STATE OF WASHINGTON,  
Respondent,

v.

ROGER DALE SANDERS,  
Appellant.

No. 42279-4-II

UNPUBLISHED OPINION

Van Deren, J. — Roger Dale Sanders appeals his sentences entered after pleading guilty to two counts of driving under the influence (DUI). He argues that the sentencing court lacked authority to impose probation conditions or electronic home monitoring. We vacate the sentences and remand for resentencing.<sup>1</sup>

On May 19, 2011, Sanders pleaded guilty to attempting to elude a pursuing police vehicle and two counts of DUI. The trial court sentenced Sanders to 22 months in custody on the eluding charge. It sentenced him to two concurrent sentences of 365 days in custody plus 150 days of electronic home monitoring and two years of probation for the DUIs.

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<sup>1</sup> A commissioner of this court initially considered Sanders's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges. The court granted Sanders's motion to accelerate review on June 1, 2012.

Sanders argues, and the State concedes, that his DUI sentences exceeded the superior court's statutory sentencing authority.<sup>2</sup> Although Sanders did not object at sentencing, we will permit him to challenge the jurisdictional authority of the sentencing court for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999).

On the dates of the DUI offenses,<sup>3</sup> the maximum penalty for a DUI was 365 days. Former RCW 9A.20.021(2) (2003).<sup>4</sup> The sentencing court could impose probation for DUIs only when "the court impose[d] less than one year in jail." Former RCW 46.61.5055(11)(a) (2008). RCW 9.95.210(1) (2005) also provided that probation may not extend beyond "the maximum term of sentence or two years, whichever is longer." *See also State v. Gailus*, 136 Wn. App. 191, 201, 147 P.3d 1300 (2006) ("The imposition of probation is not authorized when the maximum jail sentence is imposed on an offender."), *overruled on other grounds by State v. Sutherby*, 165 Wn.2d 870, 204 P.3d 916 (2009). Similarly, the sentencing court could impose an electronic home monitoring term only if the term of imprisonment plus the home monitoring term did "not exceed three hundred sixty-five days." Former RCW 46.61.5055(12)(c).

Here, the two 365-day terms of imprisonment represented the maximum prison sentence available for Sanders's DUI convictions. Consequently, the trial court lacked the power to impose additional terms of either probation or electronic home monitoring.

Accordingly, we vacate Sanders's DUI sentences and remand for resentencing in

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<sup>2</sup> Sanders filed a statement of additional grounds for review (SAG) on January 12, 2012. The SAG requests resentencing on his DUIs and adds, "I don't agree with my criminal history . . . but, I'm not going to appeal that at this time." SAG at 1.

<sup>3</sup> The two DUI offenses occurred on or before July 2, 2010.

<sup>4</sup> In 2011, the legislature changed the maximum sentence to 364 days. Laws of 2011, ch.96, § 13.

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accordance with then-existing statutory authority.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

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Van Deren, J.

We concur:

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Armstrong, J.

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Hunt, J.