IN THE SUPREME COURT OF THE STATE OF WASHINGTON

CITY OF SEATTLE, Respondent, v. SCOTT WINEBRENNER, Petitioner.	)	No. 81279-9 (consolidated) En Banc
CITY OF SEATTLE, Respondent, v. JESUS QUEZADA, Petitioner.	)	No. 81280-2 Filed October 29, 2009

CHAMBERS, J. — In separate prosecutions, petitioners Scott Winebrenner and Jesus Quezada were each found guilty of driving under the influence (DUI) after their deferred prosecutions were revoked by the trial court. In both cases, the court declined to consider offenses committed after the current offense in determining the mandatory minimum sentence under RCW 46.61.5055.[1] At issue is the meaning of "prior offenses" under the

statute and whether a "prior offense" is one that occurs before the arrest for the current offense or before sentencing. Concluding that the statute is ambiguous and subject to two reasonable interpretations, we apply the rule of lenity and construe it in favor of the petitioners. We reverse the Court of Appeals.

Facts and Procedural History

Quezada

Quezada was convicted of DUI in 2001.[2] In 2002, he was again arrested for DUI and later entered into a deferred prosecution on that charge. In 2005, Quezada was again charged with DUI, which he pleaded to the lesser charge of reckless driving. Based on the 2005 conviction, the municipal court revoked Quezada's 2003 deferred prosecution and sentenced him for the underlying offense. The court rejected the city of Seattle's argument that the 2005 conviction was a prior offense for purposes of sentencing for the 2002 offense. It found that Quezada had one prior offense and sentenced him to 120 days of electronic home monitoring.

On appeal, the superior court affirmed that Quezada had only one prior offense for purposes of sentencing for the deferred prosecution.[3] The Court

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[1] RCW 46.61.5055 has been recodified several times since 2005. These recodifications do not substantively affect the provisions we analyze here. We refer to the current version of the statute throughout this opinion.
[2] The parties agree that Quezada was convicted of DUI in 2001, but we note the record does not establish that fact.
[3] The superior court also held that the trial court was required to sentence Quezada to at least 45 days of jail time rather than sentencing Quezada solely to electronic home monitoring. This issue is not before us.

of Appeals reversed, holding that the 2005 conviction for reckless driving should have been considered a prior offense when Quezada was sentenced for the 2003 offense. *City of Seattle v. Quezada*, 142 Wn. App. 43, 52, 174 P.3d 129 (2007).

Winebrenner

Winebrenner was arrested for DUI in 2001 and entered into a deferred prosecution. In 2005, Winebrenner was again arrested for DUI, though he later pleaded guilty to the lesser charge of reckless driving. The 2005 reckless driving conviction violated the conditions of the 2001 deferred prosecution. The municipal court revoked the deferred prosecution and proceeded to sentence Winebrenner for the 2001 offense. For purposes of sentencing, the court considered the 2001 charge a first offense and sentenced Winebrenner to the mandatory minimum term of imprisonment and 30 days of electronic home monitoring.

The city of Seattle appealed the sentence to the King County Superior Court, arguing that the 2001 DUI was not a first offense because the 2005 offense should have been considered a "prior offense" under RCW 46.61.5055. The superior court agreed holding that for purposes of sentencing Winebrenner for his 2001 DUI, the 2005 reckless driving conviction was a "prior offense" and should have been included when determining the mandatory minimum sentence. The superior court also concluded that the deferred prosecution of the 2001 DUI itself should also

have been included as a prior offense. It therefore found that Winebrenner had two prior offenses (one being the deferred prosecution) for purposes of sentencing for the 2001 DUI offense and remanded the case back to the trial court for resentencing.

Winebrenner appealed the superior court's decision, and the case was consolidated with Quezada's. The Court of Appeals agreed that for purposes of sentencing for the 2001 DUI offense, the 2005 conviction should have been considered a "prior offense," but that the deferred prosecution itself could not be considered. *Quezada*, 142 Wn. App. at 52-53. The court concluded that the 2001 charge was Winebrenner's second offense for sentencing purposes and upheld the decision of the superior court. *Id.* at 53.

Analysis

Questions of statutory interpretation are reviewed de novo. *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If after examination of a statute we find that it is subject to more than one reasonable interpretation, the statute is ambiguous. *Id.* at 600-01. However, a statute is not ambiguous merely because more than one interpretation is conceivable. *Agrilink Foods, Inc. v. State Dep't of Revenue*, 153 Wn.2d 392, 396, 103

P.3d 1226 (2005) (citing *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)).

RCW 46.61.5055 sets out a penalty schedule for persons convicted of certain alcohol related offenses, including DUI. The statute requires the court to sentence violators to increasingly severe minimum penalties based on the number of "prior offenses" an offender has "within seven years" of the current offense. RCW 46.61.5055. For example, an offender with a blood alcohol concentration (BAC) of at least 0.15 who has no prior offenses within seven years of the current offense must be sentenced to a minimum of two days, nondeferrable imprisonment, and given a minimum $500 fine. RCW 46.61.5055(1)(b)(i)-(ii). An offender with a BAC of at least 0.15 and one prior offense within seven years must be sentenced to a minimum of 45 days' imprisonment, 90 days of home monitoring, and a minimum $750 fine. RCW 46.61.5055(2)(b)(i)-(ii). The schedule continues in that pattern for each offense with multiple prior offenses increasing the minimum penalty the court must impose.[4]

The issue here is whether "prior offense" applies only to offenses that occurred before the current offense or whether "prior offense" encompasses all offenses the defendant has before sentencing. Put differently, we must decide whether "prior," as used in the RCW 46.61.5055, means before the offense or before sentencing. "Prior" is not specifically defined in the statute

[4] Sentencing courts are required to verify a defendant's criminal history current to within one day of sentencing. RCW 46.61.513(1).

but "prior offense" is. The statute lists eight specific offenses and dispositions that are considered prior offenses when determining a defendant's mandatory minimum sentence. For example, a prior offense may be a "conviction for a violation of RCW 46.61.502 or an equivalent local ordinance." RCW 46.61.5055(14)(a)(i). Or a prior offense may be a "deferred prosecution under chapter 10.05 RCW granted in a prosecution for a violation of RCW 46.61.502, 46.61.504, or an equivalent local ordinance." RCW 46.61.5055(14)(a)(vii). While these and other dispositions are specifically included, the statutory definition of "prior offense" does not include any temporal limit.

The petitioners argue that "prior offense" plainly means an offense that occurred before the offense for which they are being sentenced. To construe the statute differently, they argue, would create a scheme in which defendants may be sentenced twice for a second DUI offense rather than once for a first offense, once for a second offense, and so on. Winebrenner's Pet. for Review at 1-2. As petitioners point out, under the city's interpretation, both Winebrenner's and Quezada's earlier DUI offenses count as "prior offenses" for the later offenses, and the later offenses also count as "prior offenses" for the earlier offenses. Such a result, the petitioners contend, is "unlikely, absurd, [and] strained." *Id.* at 2.

Petitioners also argue that to construe the statute as requiring courts to consider offenses that occurred both before and after the current offense

would render the word "prior" superfluous. As the petitioners correctly note, under such a reading the word "prior" would not in any way serve to modify "offense." *Id.* at 12. "Prior offense" and "offense" would have the same meaning. We presume the legislature does not use superfluous words. *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000). Since the legislature did not specifically define "prior" the petitioners urge that it should be given its common meaning.

The city counters that while the legislature did not define "prior" it did define "prior offenses" and did not specify that the term was limited to offenses occurring before the current offense. It claims it would be "non-sense for the legislature to separately define the word 'prior' when it defined and exclusively relied upon the specific term 'prior offense'." Suppl. Br. of Resp't at 2. To extract one word from a defined term to introduce ambiguity, the city argues, should be rejected.

Instead, the city suggests that although the statutory definition of "prior offense" does not provide a temporal limit on which offenses must be counted to determine the mandatory minimum sentence, a temporal limitation can be found in the term "within seven years." The statute defines "within seven years" to mean "that the arrest for a prior offense occurred within seven years of the arrest for the current offense." RCW 46.61.5055(14)(b). The term "within" may mean any time before, during, or after a specified period. *See Glenn v. Garrett*, 84 S.W.2d 515, 516 (Tex. App. 1935). Thus, according to

the city, sentencing courts may consider any offenses the defendant has been convicted of at the time of sentencing, provided the arrests occurred either seven years before or seven years after the arrest for the current offense. The city notes that had the legislature wished to limit prior offenses to those that occur only before the current offense, it could have done so by specifying that "within seven years" meant seven years *before* the current offense.[5]

The city also argues that when read in conjunction with RCW 46.61.513, it is clear that the legislature intended to include all convictions against the defendant at the time of sentencing regardless of whether they occurred before or after the current offense. RCW 46.61.513(1) states that before the court enters a deferred prosecution, dismisses a charge, or orders a sentence, "the court and prosecutor shall verify the defendant's criminal history." The criminal history must include all convictions current to within one working day. RCW 46.61.513(3). While the city is correct that the statute requires the court to "verify" convictions that have occurred

[5] In fact, former RCW 46.61.5051(1)(a) (1994) specifically stated that DUI offenders who had no convictions for similar offenses "that [were] *committed within five years before* the commission of the current violation" would face certain penalties that would increase in severity as the number of convictions increased. Laws of 1994, ch. 275, § 4(1) (emphasis added). Then in 1995, the legislature repealed former RCW 46.61.5051 and rewrote the DUI sentencing statute omitting among other things, the "before the commission of the current violation" language. Laws of 1995, ch. 332, § 21(2); Laws of 1995, 1st Spec. Sess., ch. 17, § 2. But the new sentencing statute did not simply remove the above referenced language. It also added to the new statute the term "prior offense." It is at least reasonable to conclude that the legislature removed the phrase, "before the commission of the current violation" because the term "prior offense" made it no longer necessary. Because the 1995 changes to the DUI sentencing statute were so comprehensive, their value in discerning the legislature's intent regarding this particular issue is very limited.

subsequent to the deferred prosecution, nothing in the statute mandates that those verified convictions must be applied in setting a defendant's mandatory minimum sentence for the earlier offense. We are still required to determine whether prior offenses include convictions entered after the deferred prosecution. The statute is unhelpful in definitively answering this question.[6]

In a somewhat analogous case, this court has determined that a sentencing scheme that would allow two convictions that occurred at different times to be treated as prior to each other would be "illogical." *State v. Whitaker*, 112 Wn.2d 341, 346, 771 P.2d 332 (1989). In *Whitaker,* the defendant entered into a deferred sentence in 1981 on a charge of negligent homicide. *Id.* at 342. Then, in 1986, after the adoption of the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, Whitaker was convicted of reckless driving, his deferred sentence was revoked, and he was sentenced for the 1981 offense. *Whitaker*, 112 Wn.2d at 342. Because the SRA required the court to consider a defendant's convictions that existed *before the date of sentencing*, the court counted the 1986 conviction as a prior offense in calculating Whitaker's offender score for the 1981 offense. *Id.* We held that

[6] In contrast to RCW 46.61.5055, the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, has specifically defined "prior conviction" as "a conviction which exists before the date of sentencing for the offense for which the offender score is being computed." RCW 9.94A.525(1). The word "prior" in this context serves to exclude "[c]onvictions entered or sentenced on the same date as the conviction for which the offender score is being computed." *Id*. But unlike the SRA, RCW 46.61.5055 does not specify that prior offenses include all convictions at the time of sentencing. Nor would the word "prior" serve the same purpose as it does in the SRA to differentiate between "other current offenses" and "prior offenses." *See* RCW 9.94A.525(1).

the 1986 sentence should not have counted in calculating Whitaker's offender score for the 1981 charge because to hold otherwise would allow each offense to be treated as a prior conviction to the other. *Id.* at 346.

The city and the Court of Appeals dismiss *Whitaker* because it dealt specifically with the SRA and was addressing a dilemma that arose due to "the overlap of two sentencing systems." *Id.* at 344. While the Court of Appeals concluded that "*Whitaker* provides no meaningful guidance for our analysis of RCW 46.61.5055," *Quezada*, 142 Wn. App. at 51, we note that the same result that we found "illogical" in *Whitaker* will occur here if we adopt the Court of Appeals' reading of the statute. Since a deferred prosecution is considered a "prior offense" under the statute, whenever a defendant who is participating in that program is convicted on a later charge, each offense will be treated as a prior conviction to the other. While it is possible the legislature intended such a result when it enacted RCW 46.61.5055, it is not clear from the statutory language.

We recognize that both interpretations of the statute have merit. For example, Judge Mary Kay Becker of the Court of Appeals advanced a persuasive articulation of the city's position. In noting that before imposing a sentence for DUI the sentencing court must verify the defendant's current criminal history, the Court of Appeals wrote:

> A "prior offense" for purposes of DUI sentencing is one of the convictions specified in former RCW 46.61.5055(12)(a) (2004), including DUI convictions and certain convictions

> resulting from an initial charge of DUI, such as Quezada's 2005 reckless driving conviction. *See* former RCW 46.61.5055(12)(a)(v). Under the circumstances, the legislature's definition of "prior offense" could not be clearer, and its application to the issues raised in these appeals leaves no room for further construction.
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> The legislature's definition of "within seven years" is equally clear. "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). Because the court applies this definition at the time of sentencing, the plain meaning of the term "within seven years" encompasses the period both before and after the arrest date for the current offense.

Quezada, 142 Wn. App. at 48-49 (footnote omitted). However, King County Superior Court Judge Theresa B. Doyle also persuasively articulated the petitioner's contrary interpretation in her RALJ decision in Quezada's case:

> The City's proposed construction of RCW 46.61.5055(12)(b) ignores the Legislature's use of the word "prior" to modify "offense". The dictionary definition of "prior" is "[p]receding in time or order:". The American Heritage Dictionary of the English Language (4th ed. 2004). Thus, a prior offense within seven years must mean that the arrest for the prior offense preceded in time the arrest for the current offense, and was within seven years of the current offense. Here, the defendant's arrest for the DUI/Reckless offense occurred in 2005 and therefore did not precede in time the 2002 arrest on the current offense. Accordingly, the 2005 DUI/Reckless offense was not a prior offense that occurred within seven years of the current offense. Hence, the trial court correctly determined that the defendant had one "prior offense" rather than two prior offenses.

Decision on RALJ; Clerk's Papers (Quezada) at 58.

Each of these interpretations of RCW 46.61.5055 is reasonable. Neither a plain reading of the statute, the statutory scheme as a whole, nor legislative history clearly establish the legislature's purpose in using the word "prior" or the appropriate temporal limit for a "prior offense." We conclude that RCW 46.61.5055 is subject to more than one reasonable interpretation and therefore hold the statute is ambiguous.

If after applying rules of statutory construction we conclude that a statute is ambiguous, "the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary." *Jacobs*, 154 Wn.2d at 601 (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)). The rule states that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed. *State v. Adlington-Kelly*, 95 Wn.2d 917, 920-21, 631 P.2d 954 (1981). Because the legislature failed to specify whether prior offenses included offenses that occurred both before and after the defendant is sentenced on a deferred prosecution, we find the statute is ambiguous, apply the rule of lenity, and construe the statute in favor of the petitioners. Offenses that occur after the current offense must not be considered "prior offenses" for purposes of sentencing for DUI.

Conclusion

We conclude that both interpretations of the statute are reasonable.

RCW 46.61.5055 is ambiguous as to whether it requires sentencing courts to consider offenses that occurred both before and after the offense for which the defendant is being sentenced. We hold under the rule of lenity that the statute must be construed in favor of the defendants. The Court of Appeals is reversed.

AUTHOR:
Justice Tom Chambers

WE CONCUR:

Chief Justice Gerry L. Alexander	Justice Susan Owens
	Justice James M. Johnson
Justice Richard B. Sanders	Justice Debra L. Stephens