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Driving While License Suspended – Third Degree, A Framework for Requesting Alternative Sentences

Sahar Fathi*

In Washington State, a person's driver's license can be suspended indefinitely for failure to pay tickets.[1] Under RCW 46.20.342, an individual who drives with a suspended license for nonpayment of fines can be charged and convicted of "Driving While License Suspended in the Third Degree" (DWLS 3)—this is a misdemeanor crime and carries a penalty of up to ninety days in jail and up to a $1000 fine.[2]

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[1] CTR. FOR JUSTICE, AN INTIMATE LOOK INTO WASHINGTON'S POLICY OF SUSPENDING DRIVER'S LICENSES FOR NON-PAYMENT OF TRAFFIC FINES: VOICES OF SUSPENDED DRIVERS 1 (2013), *available at* http://www.cforjustice.org/wp-content/uploads /2013/01/DWLS-REPORT-Final-1-14-13.pdf. Traffic tickets are defined in this article as citations by law enforcement, generally issued when the violator is pulled over by a police officer. See *Traffic Tickets in Washington*, DMV.ORG, http://www.dmv.org/wa-washington/traffic-tickets.php (last visited Feb 27, 2013) for more examples.

[2] CTR. FOR JUSTICE, *supra* note 1.

The purpose of this article is to provide defense attorneys with a framework to request alternative and more equitable sentences for DWLS 3 cases in Washington State courts. First, this article will illustrate that current DWLS 3 penalties have little impact on public safety. Second, this article will provide an overview of the current prosecution of DWLS 3, the overview will show that the statute not only perpetuates institutional racism, but also unnecessarily costs Washington State taxpayers millions of dollars. Finally, this article will conclude that in light of these consequences, alternative sentences should be sought for DWLS 3 convictions.

I. DWLS 3 PENALTIES HAVE LITTLE PROVEN IMPACT ON PUBLIC SAFETY

The failure to pay a traffic fine does not appear to correlate with a decrease in public safety, at least not in any significant way. However, the Washington State legislature has repeatedly focused on reducing the number of DWLS 3 cases because of a perceived correlation between the failure to pay traffic fines and public safety.[3] For example, in an attempt to reduce the number of total DWLS offenses,[4] the Washington legislature passed a law in 1997 that enabled law enforcement to impound vehicles driven by individuals with suspended licenses; and in 1998, the City of

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[3] *See* Petitioner's Statement of Additional Grounds for Review at A29, State v. Johnson, No. 86885-9 (Wash. Aug. 27, 2012), *available at* http://templeofjustice.org/data /courts/wasc/cases/2013/868859/briefs/868859%20petitioner%27s%20stmt%20of%20add%27l%20grounds.pdf.

[4] *See* WASH. REV. CODE § 46.20.342 (2011). Driving while license suspended in the first degree ("DWLS 1") is a gross misdemeanor and carries significant mandatory minimum penalties. WASH. REV. CODE § 46.20.342(1)(a). Driving while license suspended in the second degree ("DWLS 2") is committed by operating a motor vehicle in the state when one's license to drive has been suspended and he/she is not eligible for reinstatement. WASH. REV. CODE § 46.20.342(1)(b). DWLS 3 is committed by operating a motor vehicle in the state while one's license to drive is suspended but one is eligible for reinstatement. WASH. REV. CODE § 46.20.342(1)(c).

Seattle passed a similar law.[5] The impetus behind that law was the idea that suspended drivers, even those suspended for a non-driving reason (i.e., failure to pay a traffic ticket), posed a higher traffic safety risk.[6]

In 2003, the City of Seattle's Legislative Department sponsored a Research and Development (RAND) Working Paper[7] to address whether "the accidents of DWLS 3 drivers [were] worse than the accident records of validly licensed drivers."[8] The RAND tested the hypothesis "that DWLS 3 offenses are associated with other driving related offenses (such as speeding and failure to stop at stop signs), which are indicators of unsafe driving."[9] If this hypothesis were true, the study would have shown a greater share of DWLS 3 drivers involved in accidents, with and without injury or fatalities, than validly licensed drivers.[10] However, the RAND's findings were arguably negligible; it found that the odds of involvement in an injury or fatality accident for a DWLS 3 driver were only 10 percent greater than validly licensed drivers, and that DWLS 3 suspensions typically arose from the least serious underlying traffic behavior.[11] As a result, the RAND opined "the magnitude of the difference is small and thus may not warrant intervention[12] for this reason alone."[13]

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[5] WASH. REV. CODE 46.55.113 (1997). *See also* Laura J. Hickman et al., *Evaluation of the Impact of Seattle's DWLS Impound Law* 7 (Rand Corp., Working Paper, WR-117-SEA, 2003), *available at* http://www.rand.org/content/dam/rand/pubs/working_papers /2003/RAND_WR117.pdf.

[6] *See* Statement of Additional Grounds for Review, *supra* note 3, at A31.

[7] *See* Hickman et al., *supra* note 5, at iii. The RAND Corporation (Research ANd Development) is a nonprofit global policy think tank. *See Frequently Asked Questions*, RAND CORP., http://www.rand.org/about/faq.html (last visited Mar. 15, 2013).

[8] Hickman et al., *supra* note 5, at xix.

[9] *Id.* at 11.

[10] *Id.* at 39.

[11] *Id.* at 47. "For example, they can arise from failure to respond to or appear in court for a traffic violation, failure [SIC] pay fines and fees owed for a moving violation, or failure to maintain insurance." *Id.* at 6. These are compared to DWLS 2 (arising from convictions for Driving under the Influence) and DWLS 1 (arising from the most serious driving offenses). *Id.* at 38–39.

[12] *Id.* at 49. By "intervention," here, the report is referring to the Seattle Impound Law (passed in 1998, implemented in 1999) that was applied to individuals who committed

In 2012, arguments in favor of a proposed amendment to DWLS 3 laws, which would strike the requirement for law enforcement intervention for failure to appear or for failure to pay a traffic ticket stated, "Driving while license is suspended in the third degree is a burden on the court system, but also a burden on people who simply can't pay. This bill doesn't help everybody, but it certainly helps a good portion of people without jeopardizing public safety."[14]

Furthermore, academics have criticized studies[15] that show a correlation between unlicensed drivers and a decrease in public safety; they believe such studies, to prove the correlation, lump together drunk drivers (who would likely have licenses suspended in the first or second degree) with drivers suspended in the third degree.[16] Therefore, the argument can be made that "the use of revocations, further fines, and incarceration for the failure to pay traffic fines [are] not for the purpose of keeping us safe while on the roadway. It is to collect revenue."[17] All of these points support the argument that DWLS 3 is largely intended for individuals who have not paid their tickets and that it does not impact public safety.

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the offense of Driving While License Suspended. *Id.* at xix. The law was criticized to have an "overly harsh" impact on DWLS 3 drivers. *Id.*

[13] *Id.* at 49. The study showed a 10 percent greater chance that DWLS 3 driver would be involved in injury or accident compared to validly licensed driver. *Id.* at 47.

[14] S.B. Rep. E2SSB 6284, Reg. Sess., at 4 (Wash. 2012), *available at* http://apps.leg.wa.gov/documents/billdocs/2011-12/Pdf/Bill%20Reports/Senate/6284-S2.E%20SBR%20HA%2012.pdf.

[15] ROBERT A. SCOPATZ ET AL., AAA FOUND. FOR TRAFFIC SAFETY, UNLICENSED TO KILL: THE SEQUEL 43 (2003), *available at* http://www.aaafoundation.org/pdf /UnlicensedToKill2.pdf.

[16] John B. Mitchell & Kelly Kunsch, *Of Driver's Licenses and Debtor's Prison*, 4 SEATTLE J. FOR SOC. JUST. 439, 456–57 (2005).

[17] *Id*. at 456–58. In the article, the author references "further fines" in relation to fines incurred because of nonpayment of original fines.

II. DWLS 3 PERPETUATES INSTITUTIONAL RACISM AND UNNECESSARILY INCREASES STATE COSTS

In 2011, Washington State announced that it was facing a two billion dollar deficit.[18] Unfortunately, the economic crisis facing state legislators takes a disproportionate toll on the people of color in Washington State. According to the Poverty Action Network, an anti-poverty coalition in Washington State, the presence of institutional racism is directly perpetuated by budget cuts.[19]

To compound this disproportionate effect, people of color are also far more likely to be unemployed. Specifically, in 2011, 19.3 percent of African-Americans in Washington State were unemployed, while only 9.1 percent of Caucasians in Washington State were unemployed.[20] Because most Americans must commute to work, if an individual cannot drive, it is more difficult to work and earn an income.[21] A report by Washington State courts showed that the great majority of those caught in the cycle of unpaid tickets, failed court appearances, and revoked licenses were incapable of dealing with the court system and were not purposefully evading the law.[22] This suggests a scenario of people of color losing their jobs because of the economic depression, being unable to pay for tickets because the court system is too cumbersome or because they do not have the money, and thus losing the right to drive their cars to find a new job. Thus the institution,

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[18] Andrew Garber, *Latest Forecast Calls for $1.4 Billion Less; More Cuts Expected*, SEATTLE TIMES, Sept. 15, 2011, http://seattletimes.com/html/localnews/2016215473_staterevenue16m.html.

[19] *See Race Equity*, POVERTY ACTION NETWORK, http://povertyaction.org/racial-equity/ (last visited Feb. 25, 2013).

[20] *Unemployment Data*, ANNIE E. CASEY FOUND., http://datacenter.kidscount.org/data/bystate/Rankings.aspx?order=a&loct=2&dtm=10998&state=WA&tf=867&ind=4699&ch=2&by=a (last visited Feb. 27, 2013).

[21] Mitchell & Kunsch, *supra* note 16, at 459–60.

[22] *See* MARTI MAXWELL, NAT'L CTR. FOR STATE COURTS, *The Suspended Driver: New Strategies Addressing the Impact of Driver's License Suspensions*, *available at* http://www.ncsc.org/~/media/Files/PDF/Education%20and%20Careers/CEDP%20Papers/2001/Suspended_Driver.ashx.

(i.e., the court or legal system) is disproportionately impacting people of color.

Generally, it is common knowledge that the criminal justice system imposes disproportionately heavier sentences for less serious crimes for people of color when compared to white defendants.[23] In 2011, the incarceration rate of African-Americans in King County was around eight times the rate of incarcerations for whites in King County.[24] Thus, the individuals getting prison time for nonpayment of tickets are people of color.

In 2013, the Center for Justice issued a report entitled: "An Intimate Look into Washington's Policy of Suspending Driver's Licenses for Nonpayment of Traffic Fines."[25] The report surveyed and interviewed over fifty individuals about their license suspension, revealing that many individuals were incapable of paying the traffic tickets initially because of unemployment, incarceration, or some combination of these factors.[26] Furthermore, relying on public transportation was impossible for individuals who lived in rural and suburban areas;[27] thus, people often made the difficult choice to drive with a suspended license. Finally, the addition of interest and collection fees generally made the total cost so exorbitant that payment plans made little difference on the total amount due.[28]

"Legal Financial Obligations" (LFOs) are difficult to pay for most indigent people.[29] Individuals with LFOs include men and women who have

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[23] WASH. CMTY. ACTION NETWORK, WASHINGTON FACING RACE: 2012 LEGISLATIVE REPORT CARD ON RACIAL EQUITY 4 (2012), *available at* http://washingtoncan.org /reports/Facing_Race.pdf. *See also* Farrakhan v. Gregoire, 590 F.3d 989, 1010 (9th Cir. 2010), *reh'g granted*, 623 F.3d 990 (9th Cir. 2010).

[24] KING CNTY., EQUITY AND SOCIAL JUSTICE ANNUAL REPORT 11 (2012), http://www.kingcounty.gov/exec/~/media/exec/equity/documents/EquityReport2012.ash.

[25] CTR. FOR JUSTICE, *supra* note 1.

[26] *Id.* at 8.

[27] *Id.* at 6.

[28] *Id.* at 8.

[29] ACLU, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS 5 (2010), *available at* http://www.aclu.org/files/assets/InForAPenny_web.pdf.

been released from jail, but who maintain insurmountable legal debt, and can be chained to the system for decades.[30] Furthermore, alarmingly high interest rates on the debt make it seemingly impossible to free oneself from the original crime.[31] A recent report issued by the American Civil Liberties Union (ACLU) cites that imprisoning those in debt is a new phenomenon, growing in response to the failing budgets and the possibility of a new stream of revenue.[32] According to the ACLU:

> States and counties, hard-pressed to find revenue to shore up failing budgets, see a ready source of funds in defendants who can be assessed LFOs that must be repaid on pain of imprisonment, and have grown more aggressive in their collection efforts. Courts nationwide have assessed LFOs in ways that clearly reflect their increasing reliance on funding from some of the poorest defendants who appear before them.[33]

Furthermore, the Honorable Calvin Johnson, a former chief judge of the New Orleans Parish Criminal District Court in Louisiana, emphasized the findings of the ACLU's report by stating the following: "Now, how can you describe a system where the City pays $23 a day to the Sheriff to house someone in the Jail for 30 days to collect $100 as anything other than crazy?"[34]

In Seattle alone, from October 1, 2010, through August 31, 2011, 41.8 percent of DWLS 3 cases filed were against African-Americans, when they only make up 8 percent of the total population.[35] Couple this with the resulting LFO burdens as well as the disproportionate rising unemployment

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[30] *Id.* LFO is an umbrella term generally including all fines, fees and costs associated with a criminal sentence. *Id.* at 6.
[31] *Id.*
[32] *Id.* at 8.
[33] *Id.*
[34] *Id.* at 17.
[35] Seattle City Att'y, *Seattle City Attorney's Race and Social Justice Initiative: 2011 Council Briefing*, SEATTLE.GOV, http://clerk.seattle.gov/~public/meetingrecords /2011/pse20110907_5.pdf (last visited Feb. 27, 2013).

rates for African-Americans, and it is clear that DWLS 3 citations impact people of color far more than whites.

III. PARTIES SHOULD SEEK ALTERNATIVE PENALTIES FOR DWLS 3 VIOLATIONS

There are a number of alternative penalties for DWLS 3 violators that have been identified at the local level and in independent reports.

For example, between 1999 to 2001, consistent with changes in the Washington State Impound law, Seattle City Attorney Mark Sidran began to follow a new policy to not prosecute DWLS 3 drivers who had the following: (1) charges with no companion criminal citation; (2) charges not involving an accident; and (3) charges that were not the result of driving convictions.[36] Furthermore, the new policy meant that vehicles would no longer be impounded if DWLS 3 drivers failed to pay their fines (as long as that driver was not on deferred prosecution[37] for driving under the

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[36] *See* Hickman et al., *supra* note 5, at 9.

[37] *Deferred Prosecution Law & Legal Definition*, USLEGAL.COM, http://definitions.uslegal.com/d/deferred-prosecution/ (last visited Feb. 27, 2013) ("With a deferred prosecution agreement, the defendant must admit his/her guilt, waive the same constitutional rights as s/he would if s/he were pleading guilty before a judge, agree to specific written terms of the agreement (including counseling, community service hours, etc.) and promise not to break any law more serious than a speeding ticket. If the defendant breaks this agreement, the County Attorney can refile the original case and already has the defendant's confession in his refiled case."). *See* WASH. REV. CODE § 10.05.010 (2008); 1985 Wash. Sess. Laws 1219. The legislature finds that the deferred prosecution program is an alternative to punishment for persons who will benefit from a treatment program if the treatment program is provided under circumstances that do not unreasonably endanger public safety or the traditional goals of the criminal justice system. This alternative to punishment is dependent for success upon appropriate treatment and the willingness and ability of the person receiving treatment to cooperate fully with the treatment program. The legislature finds that some persons have sought deferred prosecution but have been unable or unwilling to cooperate with treatment requirements and escaped punishment because of the difficulties in resuming prosecution after significant delay due to the absence of witnesses at a later date and the congestion in courts at a later date. The legislature further finds that the deferred prosecution statutes require clarification. The purpose of sections 4 through 19 of this act is to provide specific standards and procedures for judges and prosecutors to use in carrying out the original intent of the deferred prosecution statutes.

influence)[38] As a result of Seattle's program, nearly 5,600 cases were dismissed.[39] This not only saved money for the City of Seattle, but also helped individuals avoid the cycle of debt.

Similarly, in 2010,[40] Seattle City Attorney Pete Holmes[41] built upon the City of Seattle's policy and further reduced the volume of cases filed in Seattle Municipal Court by 10 percent, mostly due to policy changes involving prosecuting DWLS 3.[42] The City of Seattle saved $212,000 in general funds upon implementing these changes.[43]

The Center for Justice suggests that the penalty for DWLS 3 is disproportionate to the crime, and excessively so for indigent drivers.[44] Thus, the Center for Justice recommends decriminalizing DWLS 3, and maintains that one's license can still be suspended without perpetuating the myth that nonpayment of fines would pose a danger to society.[45] In 2011, Professor Bob Boruchowitz told NPR that DWLS 3 should be decriminalized and defendants should be educated about their options—payment plans and community service.[46]

Id.

[38] *See* Hickman et al., *supra* note 5, at 9.

[39] *Id.*

[40] *See Corporation Counsel/City Attorney*, SEATTLE.GOV, http://www.seattle.gov/cityarchives/Facts/law.htm/ (last visited Mar. 15, 2013).

[41] Seattle City Attorneys are elected. From 2002-2009, Tom Carr served as City Attorney in Seattle.

[42] SEATTLE CITY ATT'Y, ANNUAL REPORT 2010, at 10 (2010), *available at* http://www.seattle.gov/law/docs/AnnualReport2010.pdf. 4,284 DWLS 3 cases were filed in 2009 whereas 3,789 cases were filed in 2010. *Id.* Changes included changes in the filing policy and not to file charges against first-time offenders. (p. 10-11).

[43] Letter from Peter S. Holmes, Seattle City Attorney, to Task Force Members (Mar. 1, 2012), *available at* http://www.seattle.gov/law/news/CAO_Taskforce_Letter_DWLS3.pdf. It should be noted that the City of Seattle still pursues DWLS 3 cases that pose serious public safety threats to the community. *Id.*

[44] CTR. FOR JUSTICE, *supra* note 1, at 15.

[45] *Id.* at 16.

[46] Austin Jenkins, *Nearly 300,000 Wash. Drivers Suspended for Failure to Pay Tickets*, NPR (July 22, 2011), http://www.npr.org/templates/story/story.php?storyId=138627811 (audio recording).

Finally, while a viable alternative, only a handful of counties in Washington State provide the option of a "relicensing court."[47] Still, if the option is available, defendants should use the resources. The concept of a Relicensing Program is to serve as a substitute for filing criminal charges of DWLS 3 where the individuals charged with DWLS 3 are given the option to do community service.[48]

IV. CONCLUSION

Until the Washington State legislature takes action on DWLS 3 sanctions, local jurisdictions should refrain from prosecuting DWLS 3 because it is a waste of money, and there is no convincing public safety rationale for prosecution. Most individuals who go to court for DWLS 3 do so for failure to pay a ticket or failure to appear, and studies show that criminalizing this behavior is not an effective means of changing it. Nonpayment is likely due to a number of reasons—and the burden disproportionately falls on people of color. Further, financial penalties for failure to pay a citation lead to a perpetual cycle of debt for both the defendant and taxpayers.

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[47] *Id.*; *see also* King Cnty. Dist. Court Servs., *Relicensing Program*, http://www.kingcounty.gov/courts/DistrictCourt/CitationsOrTickets/RelicensingProgram.aspx (last update Feb. 14, 2013); *City of Spokane: The Relicensing Program*, City of Spokane, http://www.spokanecity.org/government/legal/prosecuting/relicensing/ (last visited Mar. 15, 2013).

[48] *See Relicensing Program*, *supra* note 47.