TERC lacks jurisdiction over DRI's appeal as a result of the Board's failure to comply with the Act. As such, DRI's 2005 valuations are voided and revert to the valuations placed on the property at issue in 2004. We therefore reverse TERC's decisions in this case, vacate the decision of the Board denying DRI's protests, and declare as void the actions of the county assessor increasing the valuations of the subject properties for the purposes of taxation as of January 1, 2005.

CONCLUSION

Because TERC lacks jurisdiction over these appeals, we reverse TERC's decisions, vacate the decisions of the Board, and void the 2005 valuations of DRI's properties.

REVERSED AND VACATED.

STATE OF NEBRASKA, APPELLEE, V. APRIL DINSLAGE, ALSO KNOWN AS APRIL CLEARY, APPELLANT.

789 N.W.2d 29

Filed October 1, 2010. No. S-10-252.

1. **Criminal Law: Convictions: Evidence: Appeal and Error.** When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.
2. **Sentences: Probation and Parole.** Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.
3. **Criminal Law: Convictions: Evidence: Appeal and Error.** In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.
4. **Drunk Driving: Blood, Breath, and Urine Tests: Proof.** The State is not required to prove a temporal nexus between a breath test and the defendant's alcohol level at the moment he or she was operating the vehicle.
5. ____: ____: ____. Matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.
6. **Criminal Law: Statutes: Legislature: Intent.** Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the

legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.

7. **Statutes.** A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.
8. **Sentences: Appeal and Error.** A sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.

Appeal from the District Court for Lancaster County: ROBERT R. OTTE, Judge. Affirmed.

Dennis R. Keefe, Lancaster County Public Defender, Scott P. Helvie, and Brett B. Pettit, Senior Certified Law Student, for appellant.

Jon Bruning, Attorney General, George R. Love, and Elizabeth W. Alderson, Senior Certified Law Student, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

MCCORMACK, J.

NATURE OF CASE

April Dinslage, also known as April Cleary, appeals her conviction and sentence for driving under the influence (DUI), third offense, with more than .15 of 1 gram of alcohol per 210 liters of her breath. The breath test conducted 50 minutes after the stop demonstrated that Dinslage had a concentration of .20 of 1 gram of alcohol per 210 liters of breath. Nevertheless, Dinslage argues that the test was insufficient proof of her breath alcohol concentration at the time she was stopped, because she had consumed several drinks immediately before driving and those drinks had not yet metabolized into her system. Dinslage also argues that the trial court lacked statutory authority to impose 180 days' confinement as a condition of the sentence of probation and that her sentence was otherwise excessive.

BACKGROUND

Dinslage testified that on the night of May 21, 2008, she had gone to a bar to meet a friend at approximately 9:30 p.m. Within the first hour, she consumed one "Southern Comfort

and Mountain Dew" and one "Jägerbomb." Dinslage explained that the Southern Comfort drinks at this bar were especially large and strong, each containing at least 2½ ounces of alcohol. Jägerbombs contain a shot of liqueur. Dinslage was not entirely sure how much she drank in between the time she arrived and "last call," but it was at least 1½ more Southern Comfort drinks. At "last call," her friend bought her another Southern Comfort drink and Jägerbomb. She quickly drank those and the remainder of the Southern Comfort drink she had from earlier, and left the bar at 12:50 a.m.

At approximately 1 a.m., Officer Brock Wagner observed Dinslage's vehicle swerve twice past the right fog line of the road. Wagner initiated a traffic stop at approximately 1:09 a.m. Upon approaching the vehicle, Wagner noticed that Dinslage had slurred speech; bloodshot, watery eyes; and a strong odor of alcohol on her breath. When Dinslage exited her vehicle, Wagner observed that Dinslage swayed and stumbled when she walked.

Dinslage failed several field sobriety tests. During the nine-step walk-and-turn test, she was unable to maintain the heel-to-toe position or keep her arms at her sides. She was also unable to keep her balance during the instructional phase and when she turned. During the one-leg stand, Dinslage was unable to maintain her arms at her sides, and she put her foot down prematurely. During the "Romberg balance test," which consists of tilting one's head back and closing one's eyes while estimating the passage of 30 seconds, Wagner observed that Dinslage swayed from left to right and front to back. Dinslage was able to recite the alphabet, but she demonstrated slurred speech while doing so. She showed all seven clues of impairment in the horizontal gaze nystagmus test.

On cross-examination, Wagner admitted that Dinslage was not "falling down drunk." No specific calculations were offered regarding alcohol consumption and weight, but Wagner agreed that it takes several drinks to get over the legal limit at any size. The identification technician responsible for maintaining the Intoxilyzer units confirmed on cross-examination that it takes approximately 30 to 90 minutes for an alcoholic beverage to be absorbed into the bloodstream and recognized by the

Intoxilyzer. The Intoxilyzer test was conducted on Dinslage at 1:59 a.m., showing a concentration of .20 of 1 gram of alcohol per 210 liters of breath at that time.

The trial court overruled defense counsel's motion for directed verdict. Sitting as the trier of fact, the court found Dinslage guilty of DUI, third offense, with more than .15 of 1 gram of alcohol per 210 liters of her breath. At sentencing, defense counsel argued that Dinslage was an appropriate candidate for probation. The presentence investigation report showed that Dinslage had a small child, born after the arrest, who had reportedly motivated Dinslage to change. Dinslage successfully participated in a rehabilitation program for alcohol abuse. However, reports evaluated her risk of relapse and reoffending as "very high." Besides two previous DUI's, Dinslage had a record of multiple misdemeanor offenses, including negligent driving, disturbing the peace, making false statements to police officers, and four convictions for driving with a suspended license.

The trial court explained that it was not entirely convinced that Dinslage was an appropriate candidate for probation, but, in deference to the minor child and the probation officer's opinion that Dinslage might be a reasonable candidate for probation, the court was willing to give her the opportunity to show that she could comply. The trial court sentenced her to 180 days' confinement as a condition of the probation. The court denied defense counsel's motion to modify the sentencing order on the ground that the maximum jail time under Neb. Rev. Stat. § 60-6,197.03(6) (Supp. 2007) was 60 days. The trial court explained that, as required by § 60-6,197.03(6), his order "include[d]" 60 days' confinement. And the court found no conflict between § 60-6,197.03(6) and Neb. Rev. Stat. § 29-2262 (Reissue 2008), which authorizes trial courts to impose jail time as a condition of probation for a period "not to exceed" 180 days for a felony, which this was.

ASSIGNMENTS OF ERROR

Dinslage asserts that the trial court erred in (1) finding her guilty of having a breath alcohol level of .15 or more, as no rational trier of fact could have made that finding based upon

the offered evidence; (2) sentencing Dinslage to 180 days' confinement when such sentence is not permitted by law; and (3) sentencing Dinslage to 180 days' confinement, as such sentence is excessive under the circumstances.

STANDARD OF REVIEW

[1] When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[1]

[2] Whether a condition of probation imposed by the sentencing court is authorized by statute is a question of law.[2]

ANALYSIS

Sufficiency of Evidence to Show .15

[3] Dinslage concedes she was driving while intoxicated, in violation of Neb. Rev. Stat. § 60-6,196 (Reissue 2004). She argues that the evidence was insufficient to prove that she was driving with a concentration of .15 of 1 gram or more of alcohol per 210 liters of her breath, which, in conjunction with her prior DUI's, makes her offense punishable under § 60-6,197.03(6). When reviewing a criminal conviction for sufficiency of the evidence to sustain the conviction, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.[3] In reviewing a criminal conviction, an appellate court does not resolve conflicts in the evidence, pass on the credibility of witnesses, or reweigh the evidence. Such matters are for the finder of fact.[4]

[4,5] Dinslage argues that because the significant amount of alcohol she consumed at "last call" could not have entered

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[1] *State v. Prescott, ante* p. 96, 784 N.W.2d 873 (2010).

[2] *State v. Lobato*, 259 Neb. 579, 611 N.W.2d 101 (2000).

[3] *State v. Prescott, supra* note 1.

[4] *Id.*

her blood or breath when she was stopped approximately 35 minutes later, the Intoxilyzer test results obtained approximately 50 minutes after the stop did not establish that she was operating a vehicle with a breath alcohol concentration of .15 or greater. Neb. Rev. Stat. § 60-6,201(1) (Cum. Supp. 2008) states that any chemical test conducted according to methods approved by the Department of Health and Human Services and with a valid permit "shall be competent evidence" in any prosecution for operating a motor vehicle "when the concentration of alcohol in the blood or breath is in excess of allowable levels." In *State v. Kubik*,[5] we explained that the State is not required to prove a temporal nexus between the test and the defendant's alcohol level at the moment he or she was operating the vehicle. It would be an impossible burden on the State to conduct such an extrapolation when its accuracy depends on the defendant's willingness to testify and his or her honesty in reporting all relevant factors, including the time and quantity of consumption.[6] Thus, matters of delay between driving and testing are properly viewed as going to the weight of the breath test results, rather than to the admissibility of the evidence.[7] And a valid breath test given within a reasonable time after the accused was stopped is probative of a violation.[8] We speculated in *Kubik* that there might in some cases be a "delay . . . so substantial as to render the test results nonprobative of the accused's impairment or breath alcohol level while driving."[9] But we held that a breath test given "less than 1 hour" after the defendant was stopped did not entail an unreasonable delay.[10]

The 50-minute delay in this case was not unreasonable. Nor are we persuaded that the consumption of large quantities

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[5] See *State v. Kubik*, 235 Neb. 612, 456 N.W.2d 487 (1990). See, also, *State v. Tejral*, 240 Neb. 329, 482 N.W.2d 6 (1992); *State v. Towler*, 240 Neb. 103, 481 N.W.2d 151 (1992).

[6] See *State v. Kubik, supra* note 5.

[7] *Id.*

[8] *Id.*

[9] *Id.* at 634, 456 N.W.2d at 501.

[10] *Id.*

of alcohol immediately before driving somehow rendered Dinslage's breath test result nonprobative. The evidence demonstrated that well before "last call," Dinslage had been drinking, and that she was impaired enough to fail almost every field sobriety test given. Viewing the evidence in the light more favorable to the prosecution, there was sufficient evidence for a rational trier of fact to conclude that Dinslage was operating her vehicle with a breath alcohol concentration of .15 or greater.[11]

Maximum Term of Imprisonment as Condition of Probation

We next consider Dinslage's argument that the jail term imposed by the trial court was outside its statutory authority. Section 60-6,197.03 describes 10 different levels of DUI, which are classified by the statute as ranging from a Class W misdemeanor to a Class II felony. Where the court orders probation, § 60-6,197.03 specifies the mandatory conditions of such probation, including jail time for the greater offenses. Thus, if the court orders probation for a person who has no prior DUI's and who was most recently stopped with an alcohol level of less than .15, then the court must order a 60-day license revocation and the order of probation "shall also include" a $400 fine.[12] But, if the court gives probation to a defendant who has had four or more prior convictions and who had an alcohol level of .15 or greater, then the court must revoke the offender's license for 15 years and the order of probation "shall also include" a $1,000 fine and confinement in the city or county jail for 180 days.[13]

Dinslage had two prior DUI convictions and a breath alcohol level of at least .15, so it was mandated by subsection (6) that her license be revoked "for a period of at least five years but not more than fifteen years," and her order of probation "shall also include, as conditions, the payment of a one-thousand-dollar fine and confinement in the city or county jail for sixty

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[11] See *State v. Prescott, supra* note 1.

[12] § 60-6,197.03(1).

[13] § 60-6,197.03(9).

days."[14] Dinslage argues that this 60-day period of confinement is both the minimum and the maximum term allowed by law for a defendant granted probation under this subsection. We disagree.

In *State v. Vasquez*,[15] we considered a similar argument under the previous version of § 60-6,197.03, Neb. Rev. Stat. § 60-6,196 (Cum. Supp. 2002). We concluded that § 60-6,196 did not set forth maximum jail times for probation and should be read in conjunction with § 29-2262. Section 29-2262 generally sets forth the conditions of probation which may be imposed by the trial judge. Section 29-2262(2)(b) states that the court may require the offender "[t]o be confined periodically in the county jail . . . but not to exceed (i) for misdemeanors, the lesser of ninety days or the maximum jail term provided by law for the offense and (ii) for felonies, one hundred eighty days." In *Vasquez*, we concluded that the jail times described in § 60-6,196 were an additional minimal requirement and that the maximum was set forth in § 29-2262(2)(b). We noted that the legislative history to § 60-6,196 also supported this conclusion.

At the time *Vasquez* was decided, the law was distinct from its current form insofar as it set forth only four levels of DUI, ranging from a Class W misdemeanor to a Class IV felony, and the punishments were less severe. However, there is no relevant difference in the operative language governing the question of whether a stated incarceration period means to set forth a maximum as well as a minimum. The offense considered in *Vasquez* was classified as a misdemeanor, and § 60-6,196 mandated that any order of probation "*shall . . . include*, as conditions, the payment of a six-hundred-dollar fine and either *confinement in the . . . county jail for ten days* or the imposition of not less than four hundred eighty hours of community service."[16] The trial court had given probation and chosen confinement rather than community service, ordering 90 days' confinement. The

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[14] § 60-6,197.03(6).

[15] *State v. Vasquez*, 271 Neb. 906, 716 N.W.2d 443 (2006).

[16] Neb. Rev. Stat. § 60-6,196(2)(c) (Cum. Supp. 2002) (emphasis supplied).

trial court subsequently modified the order of confinement to 10 days, convinced that the 10-day period referred to in § 60-6,197.03(3) (Reissue 2004) was both the minimum and maximum. We held that the 10-day period was only the minimum and that the first order of 90 days' confinement was within the court's statutory authority.

Dinslage argues that *Vasquez* does not control our decision here because the Legislature has demonstrated in § 60-6,197.03 (Supp. 2007) its ability to clearly specify a range of penalties when that is intended—and "shall include" must be interpreted in this context. We observe that such legislative ability was also demonstrated in § 60-6,196, when the Legislature provided that community service shall be "not less than" a specified number of hours[17] or, in the case of a level-four offense, that the sentence shall be "at least ten days" of imprisonment.[18] Nor do we find it apposite that the legislative history to the amended statute does not specifically address whether it intended only a minimum period of confinement. The legislative history cited in *Vasquez* merely bolstered a conclusion already reached based upon a sensible construction viewed in pari materia with all related statutes. Furthermore, the legislative history cited in *Vasquez* continues to be part of the history of § 60-6,197.03, and has not since been contradicted.

[6,7] Although the rule of lenity requires a court to resolve ambiguities in a penal code in the defendant's favor, the touchstone of the rule of lenity is statutory ambiguity, and where the legislative language is clear, a court may not manufacture ambiguity in order to defeat that intent.[19] A statute is ambiguous when the language used cannot be adequately understood either from the plain meaning of the statute or when considered in pari materia with any related statutes.[20] The mandate that an order of probation "shall include" 60 days' confinement[21] does

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[17] §§ 60-6,196(c) and 60-6,196(d) (Reissue 2004).

[18] § 60-6,196(d).

[19] *State v. Fuller*, 278 Neb. 585, 772 N.W.2d 868 (2009).

[20] *State v. Lebeau, ante* p. 238, 784 N.W.2d 921 (2010).

[21] § 60-6,197.03(6).

not conflict with the provision that a trial court may require the offender to be confined for a period not to exceed 180 days.[22] Read in pari materia, it is clear that the minimum jail term for a period granted probation for an offense punishable under § 60-6,197.03(6) is 60 days and that the maximum is 180 days. There is no indication that the Legislature intended to make terms of probation imposed upon DUI offenders more lenient than would otherwise be allowed by law. We find no merit to Dinslage's argument that the trial court exceeded its statutory authority in ordering her to serve 180 days' confinement as a condition of her probation.

Excessive Sentence

[8] Finally, we address Dinslage's argument that in light of her recent rehabilitation, the sentence imposed was excessive. The steadfast rule in this state is that a sentence imposed within the statutory limits will not be disturbed on appeal in the absence of an abuse of discretion by the trial court.[23] Where a sentence imposed within the statutory limits is alleged on appeal to be excessive, the appellate court must determine whether the sentencing court abused its discretion in considering and applying the relevant factors as well as any applicable legal principles in determining the sentence to be imposed.[24] When imposing a sentence, a sentencing judge should consider the defendant's (1) age, (2) mentality, (3) education and experience, (4) social and cultural background, (5) past criminal record or record of law-abiding conduct, and (6) motivation for the offense, as well as (7) the nature of the offense, and (8) the violence involved in the commission of the crime.[25] But the appropriateness of a sentence is necessarily a subjective judgment that includes the sentencing judge's observation of the defendant's demeanor and attitude and all the facts and circumstances surrounding the defendant's life.[26]

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[22] § 29-2262(2)(b).

[23] *State v. Tejral, supra* note 5.

[24] *State v. Alford*, 278 Neb. 818, 774 N.W.2d 394 (2009).

[25] *State v. Casillas*, 279 Neb. 820, 782 N.W.2d 882 (2010).

[26] *State v. Davis*, 277 Neb. 161, 762 N.W.2d 287 (2009).

Because Dinslage committed a Class IIIA felony, the trial court could have sentenced her to up to 5 years' imprisonment.[27] But, despite a substantial criminal record, the court elected to sentence Dinslage to probation. The court did not abuse its discretion in imposing the maximum term of incarceration as a condition of Dinslage's probation.

CONCLUSION

For the foregoing reasons, we affirm.

AFFIRMED.

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[27] See Neb. Rev. Stat. § 28-105 (Reissue 2008).