42844-0-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

TAWANA LEA DAVIS
Respondent

42844-0

On Appeal from the Kitsap County Superior Court

Cause No. 11-1-00248-7

The Honorable Sally F. Olsen

APPELLANT'S SUPPLEMENTAL BRIEF

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ARGUMENT

The Court has invoked RAP 10.1(h) and requested supplemental briefing to resolve an inherent ambiguity in RCW 69.53.010(1).

> MUST THE STATE ESTABLISH THAT "AN OWNER, LESSEE, AGENT, EMPLOYEE, OR MORTGAGEE" ALLOWED *SOMEONE ELSE* TO USE THE PROPERTY UNDER THEIR CONTROL TO STORE, MANUFACTURE, SELL, OR DELIVER DRUGS?

Ms. Davis worked at the Chieftain Motel and lived in a room there. The cost of the room was deducted from her paycheck. Accordingly, her relationship to the room was that of a lessee to her private domicile. The police implicitly recognized this when they served their search warrant on Ms. Davis, not on the motel manager.

Omitting non-germane terms and employing English syntax, RCW 69.53.010(1)[1] provides:

> It is unlawful for any person who has a room under her control as a lessee, to knowingly rent, lease, or make the room available for use, with or without compensation, for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW.

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[1] The full text of RCW 69.53.010(1) reads:
It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance under chapter 69.50 RCW, legend drug under chapter 69.41 RCW, or imitation controlled substance under chapter 69.52 RCW.

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The question presented is whether this statute can be violated by one person acting alone, or whether the legislature contemplated that control of the room would pass to a second person.

Standard of Review. This Court reviews issues of statutory interpretation de novo. *State v. Bunker*, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). And where a term carries legal implications, whether or not the condition has been established is a question of law. *Miebach v. Colasurdo*, 35 Wn. App. 803, 814, 670 P.2d 276 (1983). The Court must interpret statutes so as to give effect to the legislature's intent. *Bunker*, 169 Wn.2d at 577-78.

The Court's interpretation of a penal statute will be either the only reasonable interpretation of the plain language; or, if there is no single reasonable interpretation of the plain language, then whichever interpretation is clearly established by statutory construction; or, if there is no such clearly established interpretation, then whichever reasonable and justifiable interpretation is most favorable to the defendant. *State v. Evans*, 177 Wn.2d 186, 194, 298 P.3d 724 (2013); *State v. Stratton*, 130 Wn. App. 760, 764-65, 124 P.3d 660 (2005).

I. RCW 69.53.010(1) IS MULTIPLY AMBIGUOUS.

As a preliminary matter, the Court's inquiry assumes that the term *for the purpose of manufacturing*, etc., refers to the purpose of *the lessee*

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in making the room available. It is only by focusing on the initial lessee that it is even plausible to suppose that the legislature might have intended to characterize a person's own use of her own property as "making it available for use." If, however, the term "for an unlawful purpose" modifies the term "for use," rather than "rent, lease or make available," then the ambiguity regarding the minimum number of participants does not arise. This is the interpretation Ms. Davis urges the Court to adopt.

It is at least equally plausible that the term "for the purpose of unlawfully manufacturing," etc., refers to the use to which the party to whom the lessee rents, leases or makes the room available. In that case, the statutory "quorum" is no less than two persons. If the unlawful purpose attaches to the use planned by one to whom the primary lessee rents, leases or otherwise makes the room available, then the Legislature must have contemplated that some person other than the initial lessee assumes control of the room.

II. AMBIGUITY INHERENT IN USE BY THE INITIAL LESSEE

The statute criminalizes three courses of conduct by a person who rents a room: renting, leasing, and making the room available for use. RCW 69.53.010(1). Renting and leasing necessarily involve someone else, and Davis is not accused of renting or leasing her room, so these two

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prohibitions may be set aside. Accordingly, the question presented is the legal meaning of the term "make available for use."

A. PLAIN LANGUAGE.

By its plain language, the operative element of this statute is to prohibit a person with lawful access to a room from making the room available to another to be used ***for*** an unlawful purpose, not to prohibit her from using it herself ***with*** an unlawful purpose. If the legislature had intended to criminalize using one's own room, RCW 69.53.010(1) would say, "rent, lease, make available, or use."

(1) "'The plain meaning of a statute may be discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.'" *Bunker*, 169 Wn.2d 578. Where the legislature uses particular statutory language, we must assume a particular intent. *In re Det. of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990).

Here, just as a person does not rent or lease a room to herself, neither does one make her own room available to herself for her own use. She simply uses the room. That is, just as the terms "rent" and "lease" imply "*to someone*," so the term "make available for use" equally implies the existence of *someone* to whom the room is made available.

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(2) Where a term is not defined in a statute, this Court employs "the plain and ordinary meaning" of the term "as found in a dictionary." *State v. Ceglowski*, 103 Wn. App. 346, 350, 12 P.3d 160 (2000). This statute does not define the term "make available for use," and the words are too common for the phrase to be defined in the dictionary. Nevertheless, the term has a plain and ordinary meaning.

As a matter of general usage, to "use" and to "make available for use" are sufficiently distinguishable that, absent some indication to the contrary, we should assume the legislature employed the one that expressed its intent. Had the legislature intended to include both meanings, the statute would say "use ***or*** make available for use."

B. CANONS OF STATUTORY CONSTRUCTION

If the Court feels that the plain language of a statute leaves room for argument as to the Legislature's intent, it will employ time-honored canons of construction. By any canon of construction, RCW 69.53.010(1) does not apply to Ms. Davis.

(1) ***Legislative History***. RCW 69.53.010(1) was introduced as part of legislation entitled: **Landlord and Tenant** — eviction for drug-related activities. 1988 Wash. Legis. Chapter 150, S.H.B. 1445. The legislature recited a preamble which concludes: "The legislature finds that it is beneficial to rental property owners and to the public to permit

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landlords to quickly and efficiently evict persons who engage in drug-related activities at rented premises." *Id.*

This demonstrates that the legislature contemplated two parties to the prohibited conduct: a landlord who controls the room, and a tenant to whom the room is made available.

(2) ***Last Antecedent Rule***. A list separated by a comma from a qualifying phrase means the qualifier is intended to apply to all antecedents, not just the immediately preceding one. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); *Berrocal v. Fernandez*, 155 Wn.2d 585, 593, 121 P.3d 82 (2005).

Here, RCW 69.53.010(1) prohibits renting [comma 1] leasing [comma 2] and making available [comma 3] with or without compensation. Applying the last antecedent rule, comma 3 tells us that "with or without compensation" applies to all three of the listed activities. But, personally using one's own room is not a compensable activity. If the legislature intended only renting and leasing to be compensable, the statute would say "renting or leasing with or without compensation, or making available for use."

(3) ***Expressio Unius***. Under the canon of "expressio unius est exclusio alterius," expressing one thing in a statute "implies the exclusion

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of the other." *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003), quoting *In re Det. of Williams*, 147 Wn.2d 476, 491, 55 P.3d 597 (2002).

Here, the Legislature expressly prohibits making a room available for use. By doing so, the Legislature implicitly excludes from this statute simply using the room. To accommodate the State's view, the statute should say, "use ***or*** make available for use" a room… etc.

(4) ***Superfluous Terms***. The Court construes legislative Acts "as a whole, considering all provisions in relation to one another and harmonizing all rather than rendering any superfluous.'" *Bunker*, 169 Wn.2d 578, quoting *State v. George*, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). If "making available for use" does not involve *someone else*, then the reference to compensation makes no sense whatsoever and is superfluous. Statutes must be interpreted and construed so that no portion is rendered superfluous. *State v. Marohl*, 170 Wn.2d 691, 699, 246 P.3d 177 (2010).

(5) ***Noscitur a Sociis***. Words are known by the company they keep. That is, context matters. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995); *State v. Roggenkamp*, 153 Wn.2d 614, 623, 106 P.3d 196 (2005).

Here, the Legislature included "make available for use" in the same chapter, same provision, and same sentence as "rent" and "lease."

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And Chapter 69.53 is designated a "Landlord-Tenant" Act. This strongly suggests that the Legislature intended all three to be classified as the same category of conduct and that all necessarily imply another person.

(6) ***Ejusdem Generis***. Under the ejusdem generis canon of statutory construction, where general words follow specific words, "the general words are construed to embrace a similar subject matter" as the specific words. *Marohl*, 170 Wn.2d at 700, quoting *Burns v. City of Seattle*, 161 Wn.2d 129, 149, 164 P.3d 475 (2007). That is, the specific terms modify or restrict the application of general terms where both are used in sequence.

Here, "rent" and "lease" are specific words followed by the general word "make available for use." This canon tells us that making available denotes the same subject matter as renting and leasing, all three of which are different ways of conveying possession or control to another person.

(7) ***Context***. The meaning of a statutory provision is not determined solely from its own language but from all the terms and provisions of the Act as they relate to the subject of the legislation, its purpose, and the consequences that would result from construing the statute in one way or another. *In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343, 227 P.3d 1284 (2010). Thus, the Court views a disputed provision not only in the context of the statute in which it is found, but also

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considers "related provisions, and the statutory scheme as a whole." *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005); *Williams*, 147 Wn.2d at 490.

This canon of construction suggests that the Legislature did not intend to increase the penalty for selling meth in one's own room relative to selling the same meth elsewhere. Where the Legislature intends that the location of drug activity should be separately penalized, the place-related prohibition is included in the same chapter. For example, chapter 69.50 RCW includes various prohibited drug activities together with conditions that warrant additional penalties. These include RCW 69.50.435, which increases the penalty for drug offenses committed in a school zone.

Of particular significance here is that Chapter 69.50 RCW includes a so-called "drug house" statute, whereby it is unlawful "[k]nowingly to keep or maintain any … dwelling, or other … place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter." RCW 69.50.402(f). The 'using' prong applies only to the use of controlled substances by <u>persons other than the defendant</u>. *State v. Fernandez*, 89 Wn. App. 292, 300, 948 P.2d 872 (1997).

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By contrast, the "making available" statute at issue here is found in its own separate chapter, 69.53 RCW — "use of building for unlawful drugs." Moreover, if the State is correct, one would expect to find in 69.53 a provision corresponding to RCW 69.50.404 — penalties under other laws.[2]

In addition, RCW 69.53.010 includes a follow-up provision that establishes a defense for the person in control of the room. She can report the drug activity to the police or process an unlawful detainer action against the tenant or occupant. RCW 69.53.010(2). Again, this assumes that someone else is using the room either as a renter or lessee, or otherwise. The "tenant" is one who rents or leases, while an "occupant" is one to whom the room is made available under some other arrangement. This construction gives effect to a legislative intent to regard renting, leasing, and making available for use as three ways to facilitate drug activity by others.

Stringing three criminal acts together — rented, leased or made available for use — suggests that the Legislature viewed all three in the same context, with a third party beneficiary of the unlawful conduct. That

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[2] Any penalty imposed for violation of this chapter is in addition to, and not in lieu of, any civil or administrative penalty or sanction otherwise authorized by law. RCW 69.50404. RCW 69.53 would say, a penalty under this chapter is in addition to any penalty under Chapter 69.50 RCW.

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is, the premises must be rented, leased, or made available to another person.

(8) ***No Additional Language***. The court does not add language to a clear statute, even if it believes the Legislature harbored an additional intent but failed to express it adequately. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)

Here, the Court should not add "or use" to a list the Legislature limited to "rent, lease, or make available for use."

(9) ***Federal Law Is Persuasive***. The interpretation given to essentially identical language by the federal courts is deemed persuasive. *State v. Radan*, 143 Wn.2d 323, 331, 21 P.3d 255 (2001).

The U.S. Congress has enacted a statute that uses essentially identical language in making it unlawful to "knowingly and intentionally rent, lease, or make available for ... the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance." 21 U.S.C. § 856(a)(2). Federal case law holds that the legislative purpose in 21 U.S.C. § 856(a)(2) is to "punish those who knowingly allow others to use their property to run drug operations." *U.S. v. Verners*, 53 F.3d 291, 297, n. 4 (10th Cir. 1995); *U.S. v. Tamez*, 941 F.2d 770, 774 (9th Cir. Wash., 1991).

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United States v. Chen, 913 F.2d 183, 190 (5th Cir.1990), is directly on point. It discusses the difference between the maintaining and making available, which in the U.S. statute are in the same section, 21 U.S.C. 856. Maintaining premises is (a)(1) and making available is (a)(2). *Chen*, 913 F.2d at 185. The elements of making available include "having control of a building and knowingly *allowing someone else* to use it. *Chen*, 913 F.2d at 190. Likewise, in Washington, a landlord violates RCW 69.53.010(1) by knowingly acquiescing in illicit drug activity by a tenant or subtenant. *State v. Roberts*, 80 Wn. App. 342, 356, 908 P.2d 892 (1996).

(10) ***Constitutional Considerations***. Wherever possible, the Court construes statutes so as to preserve their constitutionality. *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997), citing *New York v. Ferber*, 458 U.S. 747, 769 n. 24, 102 S. Ct. 3348, 3361 n. 24, 73 L. Ed. 2d 1113 (1982); *City of Seattle v. Montana*, 129 Wn.2d 583, 590, 919 P.2d 1218 (1996).

Here, the State's proposed interpretation of RCW 69.53.010(1) renders it void for vagueness.

A statute is unconstitutionally vague if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not contain adequate standards to protect against arbitrary enforcement. *Spokane v. Douglass*,

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115 Wn.2d 171, 178, 795 P.2d 693 (1990); *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984). The question is whether the statute is unconstitutionally vague *as applied to the defendant's conduct*, not whether it is vague on its face. *State v. Sigman*, 118 Wn.2d 442, 445, 826 P.2d 144 (1992). Accordingly, the statute is tested for unconstitutional vagueness by inspecting the actual conduct of the person challenging it and not by "examining hypothetical situations at the periphery" of the statute's scope. *Sigman*, 118 Wn.2d at 446.

The State's proposed interpretation renders RCW 69.53.010(1) void for vagueness by both definitions as applied to Davis's conduct here.

If the legislature intended to increase the penalty for a drug offense committed in the defendant's own room, the constitution requires this to be set forth clearly enough to enable an ordinary person to understand what constitutes the offense. *Douglass*, 115 Wn.2d at 178. Here, this Court is unsure what conduct the statute prohibits. Therefore, an ordinary person cannot understand it, and it is necessarily void for vagueness.

Moreover, diligent search turns up no Washington case of an additional penalty having been upheld for violating chapter 69.50 RCW in one's own home. Apparently, the State invoked the statute arbitrarily against Ms. Davis, merely because her home was a motel room rather than a house or apartment.

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(11) ***Avoid Absurd Results***. In construing statutes, this Court presumes the legislature "did not intend absurd results." *State v. Eaton*, 168 Wn.2d 476, 481, 229 P.3d 704 (2010), quoting *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Assuming arguendo that Ms. Davis committed a controlled substance offense in her room, the offense and her presence in the room required the same criminal intent, were committed at the same time and place, and involved the same victim. Therefore, they constituted the same criminal conduct for sentencing purposes. RCW 9.94A.400(1)(a); *State v. Hernandez*, 95 Wn. App. 480, 483, 976 P.2d 165 (1999).[3]

This will be true in every case based on comparable facts. Therefore, multiple penalties will never accrue merely for violating RCW 69.50 in one's own room. Therefore, the State's proposed interpretation of RCW 69.53.010(1) leads to an absurd result.

(12) ***Rule of Lenity***. Last, but not least, where the Court requires additional briefing in order to properly construe a statute, the statute is ambiguous.

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[3] Offenses that constitute same criminal conduct are treated as a single offense for offender score purposes. RCW 9.94A.589(1)(a). The Court will remand to delete Count III, on which the jury acquitted, from the Judgment & Sentence. At minimum, the Court should also instruct the sentencing court to adjust the offender score to omit Count V.

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Ambiguous penal statutes are strictly construed in favor of the accused. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). If a plain language analysis fails, and consideration of the legislative history and case law fail to resolve an ambiguity, then the Court must apply the rule of lenity. *State v. Stratton*, 130 Wn. App. 760, 764-65, 124 P.3d 660 (2005).

Here, the plain language, canons of construction, and state and federal case law combine to render the intended meaning of this statute clear. If all else fails, however, the Court will resort to the Rule of Lenity and resolve any remaining ambiguity in favor of Ms. Davis.

III. CONCLUSION. For these reasons, Ms. Davis respectfully asks the Court to reverse this conviction.

Respectfully submitted this 9th day of July, 2013.

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