No. 52183-1-II

98201-5

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

JERRY L. PETERSON

ANSWER TO PETITION FOR REVIEW

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A. Identity of Respondent

Jerry Peterson was the Respondent in the Court of Appeals. The State seeks review of the Court of Appeals decision affirming her judgment and sentence.

B. Argument of Respondent Opposing Review

"What do we do with the fact that RCW 69.50.410 is. . . ridiculous?!?" So asked Justice Sheryl Gordon McCloud when questioning Lewis County DPA Sara Beigh in State v. Cyr, 97323-7, Oral Argument at 24:35. While the term "ridiculous" is not a legally precise term and one that is generally avoided in cases involving statutory construction, no other term better describes the word salad that is RCW 69.50.410.

Between 2012 and the present, roughly 1200 people per year have been convicted of drug dealing in Washington State.[1] Almost all of them have been charged with violating RCW 69.50.401 – delivery, manufacture and possession with intent to deliver or manufacture controlled substances. Between 2012 and 2017, only one person[2] was charged with violating RCW 69.50.410 – Selling Heroin for Profit. Knowing that no other

[1] http://www.cfc.wa.gov/Publications.htm See Statistical Study of Adult Felony Sentencing for the years 2012 to 2019.

[2] The CFC web site does not identify the charging county of the one person in 2017, nor is the identity of the third person in 2018 known.

counties were charging RCW 69.50.410, Lewis County decided to make itself an outlier and started charging the long dormant statute. In 2018, out of a total of 1162 people convicted of drug dealing, three people were charged with Selling Heroin for Profit, at least two of whom were in Lewis County. Those three people are Johnny Ray Cyr, Jerry Peterson, and one other unidentified person.

In 2018, Lewis County inexplicably decided to start charging drug dealers with Selling Heroin for Profit, apparently expecting those defendants to receive stiffer and more draconian sentences. This expectation was not without foundation. When RCW 69.50.410 was first passed in 1973, the understanding was it would result in intentionally "harsh mandatory sentences." *State v. McGinley*, 18 Wn.App. 862, 868, 573 P.2d 30 (1977). This expectation was further reinforced when the legislature classified RCW 69.50.410 as a Level III Drug Offense, whereas RCW 69.50.401 is classified as a Level II Drug Offense. Therefore, taking into account their criminal history, Mr. Cyr and Ms. Peterson would receive 68+ to 100[3] months in prison instead of 20+ to 60 months.

[3] RCW 9.94A.517 defines 12+ as one year and one day. 20+ and 60+ are not defined in the SRA and, although many assume it means 20 months and one day and 60 months and one day respectively, no one actually knows.

The Lewis County Prosecutor's diabolical plan was thwarted, however, when it came time to sentence. Two different Lewis County judges interpreted the sentencing provisions of RCW 69.50.410 as superseding the sentencing provisions of chapter 9.94A RCW. Mr. Cyr was sentenced to 60 months and Ms. Peterson to 24 months. The State appealed both sentences. In the first of those cases to reach the Court of Appeals, State v. Cyr, Division II disagreed with the trial court and remanded for resentencing. Mr. Cyr filed a Petition for Review in this Court, which was granted. Oral argument was held on March 3, 2020 and a decision is pending in that case.

Meanwhile, in the second of those cases, a different panel of Division II judges affirmed the trial court's sentence of 24 months against Ms. Peterson. The State now petitions for review.

Preliminarily, it is possible the issues raised in the State's Petition for Review will be resolved by the Cyr case. But there are some factual differences between this case and Cyr. For instance, there is some dispute over Mr. Cyr's applicable criminal history. Regardless of how the Court resolves the Cyr case, the Court of Appeals properly interpreted RCW 69.50.410 as it applies to Ms. Peterson and review should be denied.

RCW 69.50.410 statute was first enacted in 1973 and has since been amended twice, in 1999 and 2003. Prior to 2003, unlike most

felonies in Washington which are classified as Class A, B, or C, the original statute contained no sentencing provisions other than those contained in subsections (2) and (3). Rather than classify Sale for Profit as a Class A, B, or C felony, the legislature instead chose to create mandatory minimum sentences and maximums unique to the statute. A first offense for Sale of Heroin for Profit carries a mandatory sentence of two years and maximum sentence of five years, to be served in a "correctional facility of the department of social and health services" (DSHS). A second offense carries a mandatory sentence of ten years, also to be served in a DSHS facility.

From the beginning, the sentencing provisions of RCW 69.50.410 were a failure because, despite the Legislature's stated intention, a DSHS drug treatment facility was never created, although trial judges continued to impose the "harsh" mandatory and minimum sentences prescribed by the statute, with defendants serving their time in Department of Corrections (DOC) prisons. When the statute was passed in 1973, the legislature apparently contemplated creating a drug treatment program for drug addicts run by the DSHS as an alternative to prison. See former RCW 69.32.090 (repealed). In a situation not unlike the current attempts to get DSHS to comply with statutory and judicial requirements for restoring competency to incompetent defendants, the requirement that drug addicts

receive treatment in a DSHS facility turned out to be an unfunded mandate. In *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*), this Court held DSHS in contempt for failure to provide the necessary services. The legislature responded by repealing RCW 60.32.090 entirely, a decision acquiesced in by this Court after constitutional review. *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*). Therefore, there being no properly funded DSHS treatment facility from 1973 to 1975 and no statutory provision for such a facility thereafter, all of the sentencing provisions of subsections (2) and (3) requiring incarceration "in a correctional facility of the department of social and health services" were obsolete from the beginning.

Despite the fact the statute calls for mandatory sentences to be served in a non-existent DSHS treatment facility, however, trial courts continued to sentence defendants for violating its provisions, imposing prison terms of two to five years in DOC, and the appellate courts affirmed. See *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 (1980) (affirming judgment of sentence for violation of RCW 69.50.410); *State v. Kinsey*, 20 Wn.App. 299, 579 P.2d 1347 (1978) (same).

In 1981, Washington passed the Sentencing Reform Act (SRA) and established an era of determinate sentencing. But it declined to repeal the Uniform Controlled Substances Act (UCSA), which was passed at a

time that contemplated indeterminate sentencing. The tension between determinate sentencing and indeterminate sentencing lies at the heart of the various possible interpretations of RCW 69.50.410.

This is not the first time the Washington appellate courts have been called upon to resolve inconsistencies between the SRA and the UCSA. The first inconsistent provision addressed by the Washington appellate courts is in the area of conspiracy. RCW 9A.28.040 defines criminal conspiracy while RCW 69.50.407 defines drug conspiracy. The SRA provides that conspiracy charges "under chapter 9A.28 RCW" are sentenced at seventy-five percent of the standard range. RCW 9.94A.533(2). The Court of Appeals held that drug conspiracy is not the same as criminal conspiracy. Drug conspiracies are to be sentenced as unranked felonies under the SRA, and not at seventy-five percent of the standard range like other conspiracies. *State v. Hebert*, 67 Wn.App. 836, 841 P.2d 54 (1992).

The second inconsistent provision is the doubling provision of RCW 69.50.408, applicable to those being sentenced to a subsequent offense "under this chapter," a provision analyzed by this Court in *In re the PRP of Cruz*, 157 Wn.2d 83, 134 P.3d 1166 (2006). The trial court had interpreted RCW 69.50.408 as doubling both the maximum penalty and the standard range. This Court reversed, noting, "Since this statute

was enacted prior to the SRA, we must understand how sentencing was done before the SRA in order to properly interpret the statute." *Cruz* at 88. This Court then cited the rule of lenity and held that the statute doubles only the maximum penalty, and not the standard range. *Cruz* at 88.

Now, for at least the third time, the Washington appellate courts must reconcile a drug sentencing statute enacted under the UCSA that is inconsistent with the SRA. RCW 69.50.410 creates both a minimum penalty of two years and a maximum penalty of five years for Sale of Heroin for Profit. In Lewis County, Ms. Peterson received the minimum penalty of two years while Mr. Cyr received the maximum penalty of five years. Assuming the facial validity of RCW 69.50.410, both sentences are lawful.

When the legislature enacted the SRA, it took pains to repeal almost all existing mandatory minimum statutes.[4] See *In re Bush*, 26 Wn.App. 486, 616 P.2d 666 (1980) (upholding the pre-SRA sentence of a 7-1/2 year mandatory minimum sentence for armed robbery); *State v. Gray*, 25 Wn.App. 789, 612 P.2d 401 (1980) (recognizing the pre-SRA one year mandatory minimum for violation of Uniform Firearm Act). In 2000, the legislature passed RCW 9.94A.540 (former RCW 9.94A.590

[4] The only other mandatory minimum sentence counsel could find not repealed at the time of the enactment of the SRA is the minimum life sentence for aggravated murder. RCW 10.95.030.

(repealed)) resurrecting mandatory minimums for certain enumerated offenses, such as first degree murder and first degree assault. The current version of the statute enumerates six offenses with mandatory minimum sentences. See, also, RCW 9.94A.533 (creating mandatory minimum sentences for firearm and deadly weapon enhancements). But for some reason, the legislature decided not to repeal the sentencing provisions of RCW 69.50.410.

RCW 69.50.410 has been amended twice, in 1999 and 2003, since the enactment of the SRA. The Legislature did so knowing that the DSHS treatment facility referenced in the statute is non-existent, but that trial courts continued to otherwise enforce its sentencing provisions and sentence defendants to lengthy prison sentences. The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). The fact that the Legislature has twice amended the statute is evidence that the Legislature intends for the mandatory sentencing provisions of the statute to continue to be enforced.

The two amendments also evidence an intent by the Legislature to have the sentencing provisions enforced. In 1999, the Legislature amended the statute to add subsection (4). Subsection (4) makes clear that defendants serving mandatory minimum terms pursuant to the statute may

still apply for extraordinary medical placement pursuant to RCW 9.94A.728(4). The only way it makes sense to allow inmates to apply for extraordinary medical placement from the mandatory minimum sentences is if the Legislature intended for the mandatory minimum sentences to continue to be imposed.

The 1999 amendment raises another question: to whom does "an offender serving a sentence under this section" apply for extraordinary medical placement. Pursuant to RCW 9.94A.728, the application is to the secretary of the "department." The "department" is the Department of Corrections, not the Department of Social and Health Services. RCW 9.94A.030(17). This is, therefore, a *sub silencio* acknowledgment by the Legislature that, going forward, the mandatory minimum provisions of subsections (2) and (3) are intended to be served in DOC facilities, and not in DSHS facilities as specified in the statute.

In 2003, the Legislature amended subsection (1) to state for the first time that violations of the statute are Class C felonies. This is the first and only time the penalty provisions of the statute have been amended. The legislative history of this amendment is titled "Technical Reorganization of Criminal Statutes" and states, "The legislature intends by this act to reorganize criminal provisions throughout the Revised Code of Washington to clarify and simplify the identification and referencing of

crimes. It is not intended that this act effectuate any substantive change to any criminal provision in the Revised Code of Washington." Session Laws 2003, S.B. 5758, Section 1. Therefore, the change in classification was not intended to effectuate any substantive change.

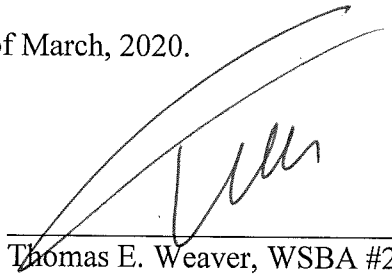
The Court of Appeals in this case adopted the position that the penalty provisions of RCW 69.50.410 and the SRA are irreconcilable and RCW 69.50.410 should prevail. The Court reached this conclusion for two reasons. First, RCW 9.94A.505(2)(a)(i) states that the trial court must apply the SRA "unless another term of confinement applies." Because the penalty provisions of RCW 69.50.410 create another term of confinement, those provisions should apply.

Second, the rule of lenity requires a reviewing court to interpret an ambiguous statute in favor of the defendant. This was the legal principle this Court applied when it tried to reconcile the SRA with the UCSA in *Cruz*. Whether this Court applies RCW 9.94A.505(2)(a)(i) or the rule of lenity, the Court of Appeals was correct when it affirmed Ms. Peterson's sentence.

C. Conclusion

This Court should deny review.

DATED this 6th day of March, 2020.



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