

FILED
SUPREME COURT
STATE OF WASHINGTON
4/29/2021 12:15 PM
BY SUSAN L. CARLSON
CLERK

No. 99645-8
COA NO. 53839-3-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

T-JAY DUANE DELO
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Carol Murphy, Judge
Cause No. 17-1-02318-34

ANSWER TO PETITION FOR REVIEW

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether it is appropriate to stay consideration of the portion of this petition which pertains to the application to amendments to the bail jumping statute until this Court enters its opinion in State v. Jenks, No. 98496-4, and decides whether review will be granted in State v. Brake, No. 99393-9.

2. Whether an unsupported assertion that the Court of Appeals decision regarding issues raised in the statement of additional grounds conflicts with decisions of this court and the court of appeals, without identifying any cases which the decision conflicts with, is sufficient for this Court to accept review under RAP 13.4(b).

B. STATEMENT OF THE CASE

The appellant, T-Jay Duane Delo, was originally charged with one count of criminal impersonation in the first degree, a class C felony. CP 4, RCW 9A.60.040. Delo failed to appear for his initial arraignment hearing on January 9, 2018, and failed to appear for evidentiary hearings on August 6, 2018, and February 25, 2019. RP (8/6/19) 184-185, 186-187, 210, 214. As a result of his failures

to appear, Delo was charged additionally charged with three counts of felony bail jumping. CP 45-46.

Prior to the start of trial, the State agreed to amend the charge of criminal impersonation in the first degree to the gross misdemeanor charge of making a false or misleading statement to a public servant. CP 48-49, 85-89, RP (8/6/19) 6-10. Following the plea on the amended count one, trial proceeding on the bail jumping charges. RP (8/6/19) 10. The jury found Delo guilty of counts 2, 3, and 4. CP 140-142, RP (8/7/19 PM) 53. With an offender score of 8, the trial court sentenced Delo to a total term of incarceration of 43 months. CP 162-164.

Delo appealed. The Court of Appeals rejected Delo's claim that recent changes to the bail jumping statute applied to Delo's case on appeal. State v. Delo, No. 53839-3-II (Unpublished Opinion at 3-4. Relying on its opinion in State v. Brake, 15 Wn. App.2d 740, 743, 476 P.3d 1094 (2020), the Court of Appeals held that "the version of the statute in effect on the date of ...the offense is the one that applies." Unpublished Opinion, at 4. The Court of Appeals also held that Delo had failed to preserve evidentiary issues for appeal. Unpublished Opinion at 4-5. The Court of Appeals further rejected arguments made in Delo's Statement of

Additional Grounds indicating that the issues raised were either adequately addressed by counsel, outside the record on appeal, or insufficient to inform the court of the nature and occurrence of alleged errors. This petition for review follows.

C. ARGUMENT

A petition for review will be accepted by this Court

only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Delo argues that RAP 13.4(b)(1) and (4) apply.

1. The Court of Appeals correctly ruled that the version of the bail jumping statute that was in effect on the date of the offense applied; however, the State does not oppose an order staying the petition for review.

The Court of Appeals' decision that the version of the bail jumping statute that was in effect on the date of the offense applies is correct and consistent with case law from this Court. The same issues that were addressed in this case were addressed in State v. Brake. In Brake, the Court of Appeals rejected a claim that State v.

Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018), adopted a rule of prospective application of statutory amendments to all cases on direct review because “*Ramirez* clearly limited its holding to costs imposed on criminal defendants following conviction.” Brake, 15 Wn. App.2d at 746.

That holding was correct. In Ramirez, this Court held that amendments to the statutes which govern legal financial obligations applied prospectively to Ramirez’s case because the LFO statutes “pertain to costs imposed on criminal defendants following conviction, and Ramirez’s case was pending on direct review and thus not final when the amendments were enacted.” *Id.* The Court noted that because the LFO statutes applied to cost imposed upon conviction and a conviction is not final until the direct appeal is decided, Ramirez was entitled to the benefit of the statutory change. *Id.* at 746. Contrary to the situation with legal financial obligations, a statutory amendment takes effect on its effective date.

The general rule is that a defendant’s sentence is determined based on the law in effect at the time the defendant committed the crime for which he is being sentenced. State v. Jenks, 12 Wn. App.2d 588, 592, 459 P.3d 389 (2020) *review*

granted, 196 Wn.2d 1001 (2020); State v. Ross, 152 Wn.2d 220, 236-237, 95 P.3d 1225 (2004). The general rule stems from the application of RCW 9.94A.345 and RCW 10.01.040, also known as the saving statute. Jenks, 12 Wn. App.2d at 592.

RCW 9.94A.345 states, “any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” RCW 10.01.040 states:

No offense committed and no penalty of forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal is express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, unless a contrary intention is expressly declared in the repealing act.

Pursuant to the rule, a defendant whose crime is repealed or amended after the date of commission of the offense, is subject to the version of the offense in effect at the time the charges were committed. In Brake, the Court of Appeals followed that rule, by citing to the decision in State v. Molia, 12 Wn. App.2d 895, 904, 460 P.3d 1086 (2020). Brake, 15 Wn. App.2d at 746-747. By following the decision in Brake, in this case the Court of Appeals

correctly followed precedent from both this Court and the Court of Appeals to find that the legislative changes to the bail jumping statute neither applied retroactively nor applied to.

However, a petition for review has been filed in State v. Brake, No. 99393-9, which is currently stayed pending this Court's decision in State v. Jenks, No. 98496-4. The Court of Appeals decision in Molia has also been stayed pending the decision in Jenks. No. 98499-9, 2020 Wash. App. LEXIS 453. While the State believes that the decision of the Court of Appeals is correct and consistent with prior decisions of both this Court and the Court of Appeals, the State is not opposed to an order staying this matter pending the outcome of Jenks and the petition for review in Brake.

2. Delo has provided no basis upon which this Court should accept review of the issues raised in the statement of additional grounds.

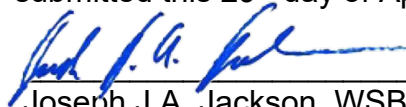
Delo asks this Court to accept review of the issues rejected by the Court of Appeals in the statement of additional grounds arguing "Mr. Delo contends that the Court of Appeals decision is in conflict with decisions of this Court, and with decisions of the Court of Appeals," without specifying which decisions he alleges the rulings to be in conflict with. To the contrary, the decision of the Court of Appeals is consistent with State v. Thompson, 169 Wn.

App. 436, 492-93, 290 P.3d 996 (2012), State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995), and the confines of RAP 10.10(c). Delo has provided no basis upon which this Court should accept review of the issues rejected in the SAG.

D. CONCLUSION

The State contends that the decision of the Court of Appeals is consistent with prior decisions of both this Court and the Court of Appeals. However, given the stays in Molia and Brake based on this Court's upcoming opinion in Jenks, the State is not opposed to an order staying consideration of this petition pending the decision in Jenks and the petition for review in Brake. There is no basis upon which this Court should accept review of the issues raised in the statement of additional grounds and the State respectfully request that review of those issues be denied.

Respectfully submitted this 29th day of April, 2021.



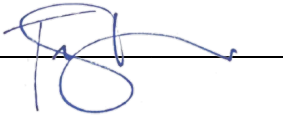
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DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: April 29, 2021

Signature: 

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

April 29, 2021 - 12:15 PM

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Appellate Court Case Title: State of Washington v. T-Jay Duane Delo
Superior Court Case Number: 17-1-02318-7

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