

FILED
Court of Appeals
Division II
State of Washington
9/6/2023 3:20 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
9/7/2023
BY ERIN L. LENNON
CLERK

Supreme Court No. 102352-9
COA No. 56533-1-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

ALYSE WAGNER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT
OF LEWIS COUNTY

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. IDENTITY OF PETITIONER..... 1

B. DECISION ON WHICH REVIEW IS SOUGHT 1

C. ISSUES PRESENTED ON REVIEW 1

D. STATEMENT OF THE CASE 1

E. ARGUMENT 3

Ms. Wagner is entitled to remand and dismissal of the charge of bail jumping because an amended version of the statute applies to her case on direct appeal and the change in the law was remedial..... 3

(1). Review is warranted. 3

(2). Trial court. 3

(3). Washington law, properly applied, establishes that Ms. Wagner’s conviction for bail lumping must be reversed and the charge dismissed. 5

a. The Washington legislature revised the bail jumping statute in recognition of the injustice and harshness of the offense. 5

b. Ms. Wagner is entitled to the benefit of the change in the law as her case is on direct appeal and not final.... 6

c. The change in the law applies retroactively..... 10

(3). The prosecution for bail jumping contravened the law and the conviction should be reversed and the charge dismissed. 19

F. CONCLUSION 20

TABLE OF CONTENTS

WASHINGTON CASES

<u>State v. Blake</u> , 197 Wn.2d 170, 481 P.3d 521 (2021)	4,18
<u>State v. Brake</u> , 15 Wn. App.2d 740, 476 P.3d 1094 (2020), review dismissed, 197 Wn.2d 1016 (2021)..	3,9
<u>State v. Gradt</u> , 192 Wn. App. 230, 366 P.3d 462 (2016)..	
<u>State v. Grant</u> , 89 Wn.2d 678, 575 P.2d 210 (1978).	10,11
<u>State v. Heath</u> , 85 Wn.2d 196, 532 P.2d 621 (1975).	13,16
<u>State v. Hoffman</u> , 16 Wn. App.2d 563, 481 P.3d 604, review denied, 198 Wn.2d 1018 (2021)	9
<u>State v. Jefferson</u> , 192 Wn.2d 225, 429 P.3d 467 (2018)	3,6
<u>State v. Kane</u> , 101 Wn. App. 607, 5 P.3d 741 (2000)	14
<u>State v. Ramirez</u> , 191 Wn.2d 732, 426 P.3d 714 (2018).	3,6
<u>State v. Wiley</u> , 124 Wn.2d 679, 880 P.2d 983 (1994).	13
<u>State Dep't of Ecology v.</u> <u>Campbell & Gwinn, L.L.C.</u> , 146 Wn.2d 1, 43 P.3d 4 (2002)14,15	
<u>Washington State Farm Bureau Fed'n v. Gregoire</u> , 162 Wn.2d 284, 174 P.3d 1142(2007)..	12
<u>State v. Zornes</u> , 78 Wn.2d 9, 475 P.2d 109 (1970).	11

UNITED STATES SUPREME COURT CASES

<u>Dorsey v. United States</u> , 567 U.S. 260, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012)..	10,12
<u>Marcello v. Bonds</u> , 349 U.S. 302, 310, 75 S. Ct. 757, 99 L. Ed. 1107 (1955)..	12
<u>United States v. Winstar Corp.</u> , 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).	12

TREATISES

Aleksandra E. Johnson, Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington's Bail Jumping Statute and Court Nonappearance, 18 Seattle J. for Soc. Just. 433 (2020)

A. IDENTITY OF PETITIONER

Alyse Wagner was the appellant in Court of Appeals No. 56533-1-II.

B. DECISION ON WHICH REVIEW IS SOUGHT

Alyse Wagner was the appellant in Court of Appeals No. 56533-1-II. Appendix A.

C. ISSUES PRESENTED ON REVIEW

1. Whether the 2020 amendments to the bail jumping statute apply to all cases on direct appeal which are not final.

2. Whether the 2020 amendments to the bail jumping statute apply retroactively to all bail jumping offenses.

D. STATEMENT OF THE CASE

Alyse Wagner was charged with criminal impersonation per RCW 9A.60.050(1)(a) because she gave police a false name to avoid an arrest warrant on November 26, 2019. CP 2-3.

Ms. Wagner was not at a hearing scheduled for January 21, 2020. On February 13, the state added a charge of bail jumping pursuant to former RCW 9A.76.170(3)(c). CP 4.

On that date the Legislature was already considering substantial amendments to the bail jumping statute.

<https://app.leg.wa.gov/billssummary?BillNumber=2231&Year=2019&Initiative=false>.

Pending trial Ms. Wagner was released with conditions. The matter dragged on through multiple hearings and entry of multiple orders including “JURY TRIAL - CANCELED OR RESCHEDULED” on December 10, 2019; a stipulated continuance on December 11, 2019; “OMNIBUS CANCELED OR RESCHEDULED” on March 18, 2020; multiple motions to withdraw and orders for new counsel; and multiple ex parte orders, until trial finally commenced on October 7, 2021. Accords (Thurston County No. 19-1-02229-34).

After the jury found Ms. Wagner guilty on October 14, 2021 of criminal impersonation and bail jumping, she continued to remain out of custody by agreement of the court and counsel. RP 279; CP 67-68. On November 15, she was

sentenced to nine months of electronic home monitoring. RP 299, 302-05; CP 74-84, CP 85. She appealed. CP 89. The Court of Appeals affirmed, relying in great part on State v. Brake, 15 Wn. App.2d 740, 476 P.3d 1094 (2020), review dismissed, 197 Wn.2d 1016 (2021).

D. ARGUMENT

Ms. Wagner is entitled to remand and dismissal of the charge of bail jumping because an amended version of the statute applies to her case on direct appeal and the change in the law was remedial.

(1). Review is warranted.

Review is warranted under RAP 13(b)(1) where the court's decision conflicts with this Court's decisions in State v. Jefferson, 192 Wn.2d 225, 245, 429 P.3d 467 (2018) and State v. Ramirez, 191 Wn.2d 732, 749, 426 P.3d 714 (2018).

(2). Trial court.

Ms. Wagner was originally charged with criminal impersonation and unlawful possession of a controlled substance, per RCW 69.50.4013(1), on December 2, 2019. CP

3 (the simple drug possession law was found unconstitutional in State v. Blake, 197 Wn.2d 170, 195, 481 P.3d 521 (2021)). The charge of bail jumping pursuant to former RCW 9A.76.170(3)(c) was added by amendment of the information on February 13, 2020. CP 4.

Before trial Ms. Wagner moved to dismiss the charge of bail jumping because her failure to appear was for an unspecified hearing, not a failure to appear for trial as required for felony prosecution under RCW 9A.76.170 as later enacted. CP 9-10; see Laws 2020 ch. 19 § 1, eff. June 11, 2020; see also CP 69-70 (defense sentencing memorandum); RP 286-88 (argument at sentencing). Counsel was aware of recent Court of Appeals decisions that had rejected his arguments and argued that those appellate cases should not be followed by the trial court and/or warranted an exceptional sentence downward. CP 9-10 and n. 1; CP 69-70.

(3). Washington law, properly applied, establishes that Ms. Wagner’s conviction for bail lumping must be reversed and the charge dismissed.

Under the change in the law made during Ms. Wagner’s prosecution for bail jumping, the conduct supporting her conviction on that count was decriminalized. Ms. Wagner is entitled to the benefit of this remedial change in the law.

a. The Washington legislature revised the bail jumping statute in recognition of the injustice and harshness of the offense.

On March 7, 2020, the legislature amended the bail jumping statute. Laws of 2020, ch. 19, §§ 1, 2. The law took effect on June 11, 2020. *Id.* Under the prior law, conviction for felony bail jumping needed only to be supported by showing that a person failed to appear “before any court of this state” without regard to the perfunctory nature of many pretrial hearings where the defendant is, and here was, ably represented by counsel. Former RCW 9A.76.170(1), (3).

Under the change in the law, felony bail jumping requires proof of a failure to appear for trial. Laws of 2020, ch. 19, § 1

(1)(a). The legislature downgraded a failure to appear for a court date other than trial to a gross misdemeanor, or no crime at all. Id. at § 2. Ms. Wagner merely failed to appear for a non-trial court hearing. Id. at § 2(1).

b. Ms. Wagner is entitled to the benefit of the change in the law as her case is on direct appeal and not final.

Ms. Wagner failed to appear for a pretrial hearing, not any part of her trial. Because her case is on direct appeal and is not final, Ms. Wagner is entitled to the benefit of the change in the law. “[S]tatutes generally apply prospectively from their effective date unless a contrary intent is indicated.” State v. Jefferson, 192 Wn.2d at 245. But another rule must also be considered in determining whether a statutory change applies to a given case: “the rule that a newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final.” Jefferson, 192 Wn.2d at 246. An amendment applies prospectively when the precipitating event for application of the statute occurs after its effective date. State v.

Ramirez, 191 Wn.2d at 749. “[A] newly enacted statute or court rule will only be applied to proceedings that occurred far earlier in the case if the triggering event to which the new enactment might apply has not yet occurred.” Jefferson, 192 Wn.2d at 246.

Notably, to make this determination, a court analyzes “whether the new provision attaches new legal consequences to events completed before its enactment.” Ramirez, 191 Wn.2d at 749. Washington courts generally hold that when the new statute concerns a post judgment matter like the sentence or revocation of release . . . then the triggering event is not a past event but a future event. In such a case, the new statute or court rule will apply to the sentence or sentence revocation while the case is pending on direct appeal, even though the charged acts have already occurred. See Ramirez, at 749. In Ramirez, for example, the Supreme Court held the 2018 amendments addressing legal financial obligations (LFOs) applied prospectively to cases pending on direct appeal. Ramirez, at

747-49. The Court held the precipitating event for the imposition of LFOs was the termination of the defendant's case. Id. The 2018 amendments therefore applied to the imposition of LFOs in Mr. Ramirez's judgment and sentence because his case was pending on direct appeal and not final. Id.

Applying the analysis in Ramirez and Jefferson, the triggering event for imposition of Ms. Wagner's sentence is the termination of her appeal, which has not yet happened. The legislature downgraded bail jumping from a felony to a gross misdemeanor or no crime at all, impacting Ms. Wagner's judgment and sentence. The amendments apply prospectively to her sentence "while the case is pending on direct appeal, even though the charged acts have already occurred." Jefferson, at 24. Because the change in the law applies prospectively to a triggering event that has not yet occurred (the termination of the appeal), Ms. Wagner is entitled to the benefit of the change in the law.

Several decisions have viewed Jefferson and Ramirez differently, which Ms. Wagner respectfully argues was error. The Court of Appeals in State v. Brake, 15 Wn. App.2d at 740, reasoned that the decision in Ramirez did not require that the bail jumping statute be applied to all cases pending on direct appeal, and that Ramirez's holding was limited to costs imposed following conviction. State v. Brake, 191 Wn.2d at 746 ("Ramirez did not state a rule of general application[.]"); see also State v. Hoffman, 16 Wn. App.2d 563, 581–82, 481 P.3d 604, review denied, 198 Wn.2d 1018 (2021) (distinguishing Ramirez).

The particular issue of the statute, at bar in Ramirez, involved costs, and Ms. Wagner argues that the Court did not explain why this was material. Costs are part of the offender's sentence. See State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). The difference is immaterial. Under Ramirez, Ms. Wagner was entitled to the benefit of the change in the law because her case was on direct appeal and not final.

c. The change in the law applies retroactively.

The constitutional prohibition against ex post facto laws forbids the retroactive application of laws that increase punishment or create punishment where none existed before. Dorsey v. United States, 567 U.S. 260, 275, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012). Consistent with the common law, where a criminal statute is repealed or modified to the benefit of a defendant, the prior statute “is regarded as though it had never existed regarding all pending litigation.” State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978).

The legislature in 1901 purported to modify this common-law rule by enacting what is often called the savings statute, RCW 10.01.040. Laws of 1901 ex. s. ch. 6 § 1.4.¹

¹ RCW 10.01.040 provides:

No offense committed and no penalty or 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

Because this statute is in derogation of the common law, the Supreme Court has interpreted it narrowly and reasoned that the legislature may enact a retroactive criminal law to the benefit of the defendant if the statute “fairly convey[s] that intention.” State v. Grant, 89 Wn.2d at 683; State v. Zornes, 78 Wn.2d 9, 13, 475 P.2d 109 (1970).

In interpreting RCW 10.01.040, Washington courts have appeared to overlook the fundamental principle that a

for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be 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. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

legislature cannot bind a future legislature from exercising its legislative power. Washington State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 301-02, 174 P.3d 1142 (2007); United States v. Winstar Corp., 518 U.S. 839, 872-73, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996).

In interpreting the analogous federal saving statute to not impose an express intention of retroactivity, the United States Supreme Court has recognized this principle. Dorsey, 567 U.S. at 274. Therefore, a statute applies retroactively not merely when there is express intent, but also when that intent can be inferred “by necessary implication.” Dorsey, at 274. The Court reasoned this was so “because statutes enacted by one Congress cannot bind a later Congress, which remains free to repeal the earlier statute, to exempt the current statute from the earlier statute, to modify the earlier statute, or to apply the earlier statute but as Modified.” Dorsey, at 274. And “no magical passwords” are required to make a statute retroactive. Dorsey, at 274 (quoting Marcello v. Bonds, 349 U.S. 302, 310, 75 S. Ct.

757, 99 L. Ed. 1107 (1955)). The legislative body remains free to express its intention of retroactivity “either expressly or by implication as it chooses.” Id.

Moreover, when the legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases. State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). In such cases:

the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases.

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621

(1975). Wiley recognized this is so because “the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of punishment.” Wiley, 124 Wn.2d at 687.

In contravention of these fundamental principles, the Brake Court of Appeals reasoned that RCW 10.01.040 created a

“bright-line rule” requiring explicit language stating the change in the law is retroactive. Brake, at 746 (quoting State v. Kane, 101 Wn. App. 607, 618, 5 P.3d 741 (2000)). The Brake Court reasoned that unless there is “clear legislative intent” that a statute is retroactive, the statute must be interpreted to apply only prospectively. Brake, at 747.

This reasoning conflicts with the Court’s precedents, which hold that RCW 10.01.040 must be interpreted narrowly and that the proper inquiry is simply whether the fair import of the statute shows it was intended to apply retroactively. Grant, 89 Wn.2d at 683; Zornes, 78 Wn.2d at 13. It is also inconsistent with the United States Supreme Court’s decision in Dorsey, which applied the same rule of narrow construction to the analogous federal savings statute. Dorsey, 567 U.S. at 274.

Ultimately, the proper analysis for whether a change in the law applies retroactively is one of statutory interpretation. The meaning of a statute is an issue of law reviewed *de novo*. State Dep’t of Ecology v.

Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). The courts use the “plain meaning” rule, which examines not only the text of the statute, but related statutes and other provisions of the same act. State Dep’t of Ecology, 146 Wn.2d at 10-11. If there is ambiguity, it is appropriate to examine legislative history. State Dep’t of Ecology, at 12.

The new law at issue in Ms. Wagner’s case does not contain a formal statement of legislative intent. See Laws of 2020, ch. 19. The language of the statute does not make clear whether the law was intended to have retroactive effect. The text of the law, however, impliedly indicates that retroactivity was intended. The amended offense of bail jumping and the newly created lesser offense of failure to appear or surrender, do not impose criminal liability for missing non-trial hearings. Laws of 2020, ch. 19, § 1 (1), § 2(1)(b).

This statute recognizes that it is fundamentally unfair to impose criminal liability for missing a court appearance under circumstances such as those of Ms. Wagner’s case. See

Aleksandrea E. Johnson, Decriminalizing Non-Appearance in Washington State: The Problem and Solutions for Washington's Bail Jumping Statute and Court Nonappearance, 18 Seattle J. for Soc. Just. 433, 433–34 (2020).

Given the legislature's determination of the injustice of imposing criminal liability in circumstances like Ms. Wagner's, no purpose is served by applying the old law to her case. See Heath, 85 Wn.2d at 196-98 (when legislature has effectively created a new reduced penalty for a crime, "no purpose would be served by imposing the older, harsher one"). The fair implication or import of the law is that the Washington legislature intended to not criminalize her conduct and that this change in the law should apply retroactively, or at least to cases that are not final.

To the extent that ambiguity remains, legislative history also supports a conclusion that the law was intended to apply retroactively.

Consistent with the changes made in the law, legislative hearings show agreement that the existing scheme was too harsh and not used as originally planned, which was to deter people from intentionally evading justice, whether to improve their cases through delay or avoid prosecution entirely). See, e.g., Hearing on HB 2231 before H. Pub. Safety Comm., 66th Leg. 2020 (Jan. 14, 2020) (statements of Rep. Pellociotti, Sponsor, 41:50-46:57, 47:43-48:21) (statement of opponent Rep. Klippert, Member, 46:57-47:34) (available at <https://www.tvw.org/watch/?eventID=2020011091>); Hearing on ESHB 2231 before S. Law & Just. Comm., 66th Leg. 2020 (Feb. 25, 2020) (statements of Rep. Pellociotti, Sponsor, 31:26-35:08, 39:16-40:25, 41:42-42:15) (statement of Sen. Holy, Member, 40:25-41:42) (available at <https://www.tvw.org/watch/?eventID=2020021343>).

A committee report summarizing public testimony in support of the law recounts how bail jumping charges were

being improperly used by prosecutors, resulting in convictions that were “fundamentally unfair”:

The charge of bail jumping is utilized as a tool to get convictions rather than to promote justice. Prosecutors frequently use the charge to coerce a plea even though evidence may be insufficient for the underlying charge. In many cases these are administrative hearings that people miss. This may be the 10-12th appearance because the prosecutor keeps moving for a continuance. For indigent or near indigent clients, these hearings result in missed work, transportation costs, day care expenses, and reliance on calendaring tools or skills that these people do not have. In many cases, the defendant is not trying to abscond, but doesn't have the resources to appear at all the court dates. The Legislature should prohibit the prosecutor from using these charges inappropriately.

2019 Washington House Bill No. 2231, Washington Sixty-Sixth Legislature - 2020 Regular Session.

In this case, the State had to abandon a charge of unlawful possession of a controlled substance charge pursuant to the law found unconstitutional in State v. Blake, 197 Wn.2d 170, 195, 481 P.3d 521 (2021).

On February 13, 2020 the charge of bail jumping under former RCW 9A.76.170(3)(c) had been added. CP 4. The legislative history shows agreement by the people's representatives that imposing criminal liability, generally, in cases like Ms. Wagner's is unjust, including because some prosecutors have misemployed the law in the past in a manner that could evince unfairness.

(3). The prosecution for bail jumping contravened the law and the conviction should be reversed and the charge dismissed.

Before trial Ms. Wagner moved to dismiss the charge of bail jumping. CP 9-10. The law fairly conveys an intention to decriminalize Mr. Wagner's conduct of missing a perfunctory non-trial hearing. And regardless, any ambiguity must be resolved in Ms. Wagner's favor. See State v. Gradt, 192 Wn. App. 230, 235-36, 366 P.3d 462 (2016) (ambiguity in law that decriminalized marijuana warranted retroactive application).

F. CONCLUSION

For these reasons, Ms. Wagner respectfully requests that this Court grant review, and reverse her judgment and sentence for bail jumping and dismiss the charge.

This brief contains 3,231 words formatted in Times New Roman font 14.

Respectfully submitted this 7th day of September, 2022.

s/ Oliver R. Davis
Washington Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98102
Telephone: (206) 587-2711
FAX: (206) 587-2710
E-mail: Oliver@washapp.org

August 8, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

ALYSE MARIE WAGNER,

Appellant.

No. 56533-1-II

UNPUBLISHED OPINION

CRUSER, J. —Alyse Wagner appeals her conviction for bail jumping. The State charged Wagner with bail jumping and first degree criminal impersonation. The bail jumping charge was based on a missed court hearing in January 2020. While she was awaiting trial, the legislature adopted an amendment to the bail jumping statute, adding language providing that a person is guilty of bail jumping if he or she fails to appear for trial. The amendment took effect in June 2020. Wagner moved to dismiss the bail jumping charges based on the statutory amendment. The court denied her motion. Ultimately, the jury convicted her of bail jumping and first degree criminal impersonation.

We hold that the changes to RCW 9A.76.170 do not apply retroactively to Wagner’s bail jumping charge. Consequently, we affirm.

FACTS

In December 2019, the State charged Wagner with first degree criminal impersonation and unlawful possession of a controlled substance. That month, Wagner entered an agreed order of

trial continuance with the State, wherein she agreed to attend a “first look” hearing on January 21, 2020. Exhibit 6A. That order included the following language: “*FAILURE TO APPEAR MAY RESULT IN ISSUANCE OF AN ARREST WARRANT, FORFEITURE OF BAIL, AND CRIMINAL PROSECUTION FOR BAIL JUMPING.*” *Id.*

Wagner failed to appear at the aforementioned hearing. The State then filed a second amended information, adding one count of bail jumping under former RCW 9A.76.170 (2001), and dropping the unlawful possession of a controlled substance charge. While Wagner was awaiting trial, the state legislature amended former RCW 9A.76.170(1), adding the requirement that, to be guilty of bail jumping, the defendant must “fail[] to appear for *trial* as required.” LAWS OF 2020, ch. 19, § 1 (emphasis added). The amendment took effect in June 2020. *Id.*

Wagner moved to dismiss her bail jumping charge based on the amendments to former RCW 9A.76.170. The trial court denied her request. RP at 36. The matter proceeded to a jury trial on October 11, 2021, and the jury convicted Wagner of first degree criminal impersonation and bail jumping.

Wagner appeals her conviction for bail jumping.

ANALYSIS

Wagner argues that the trial court erred by not dismissing her bail jumping conviction. She argues that the amendments to former RCW 9A.76.170 require the State to prove that she failed to appear for trial, not a pretrial hearing, and that the amendments apply retroactively, or at least to all cases pending on direct appeal. We disagree.

We review de novo whether a statute applies retroactively. *State v. Brake*, 15 Wn. App. 2d 740, 743, 476 P.3d 1094 (2020). RCW 10.01.040 provides, “No offense committed and no penalty

or 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.” To that end, “statutes generally apply prospectively from their effective date unless a contrary intent is indicated.” *State v. Jefferson*, 192 Wn.2d 225, 245, 429 P.3d 467 (2018). Accordingly, “a statute in effect on the date of a criminal offense is the applicable statute ‘absent clear legislative intent to the contrary.’ ” *Brake*, 15 Wn. App. 2d at 744 (quoting *In re Pers. Restraint of Flint*, 174 Wn.2d 539, 559 n.9, 277 P.3d 657 (2012) (Stephens, J., dissenting)).

Here, the legislature did not express a clear intent that the amendment to former RCW 9A.76.170 should apply retroactively. *Id.* at 745. As such, the 2020 changes to that statute apply prospectively only. *Id.*

Because the changes to that statute apply prospectively, the statute that was in effect on the date of Wagner’s offense is the one that applies to her. Wagner committed the offense in January 2020. As such, the statute in effect was former RCW 9A.76.170, not the amendment to that statute that took effect in June 2020.

Wagner nonetheless argues that the changes to the bail jumping statute apply to her because her case is on direct appeal. Appellant’s Opening Br. at 5 (citing *Jefferson*, 192 Wn.2d at 246). In *Brake*, this court considered that exact argument and rejected it. 15 Wn. App. 2d at 745-46.

Wagner also argues the proper test for determining whether a newly enacted statute applies retroactively is “whether the fair import of the statute shows it was intended to apply retroactively[.]” and that the text of law that modified the bail jumping statute “impliedly indicates” that the law was intended to apply retroactively. Appellant’s Opening Br. at 13-15.

Wagner is incorrect. Rather, the proper test for determining whether a statute applies retroactively is if the legislature expressly declared, in the repealing act, an intention that the statute have a retroactive effect. *Brake*, 15 Wn. App. 2d at 743-44. And, “[o]ur legislature clearly did not include language that the statute was meant to apply retroactively. We decline to view this omission as an ambiguity.” *Id.* at 746. As such, there was no clear intent that the amendment should apply retroactively.^{1 2}

CONCLUSION

We hold that the changes to former RCW 9A.76.170 do not apply retroactively to Wagner’s bail jumping charge. Consequently, we affirm.

¹ Wagner argues that under *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994), “when the legislature reduces the maximum punishment for a crime, that reduction is presumed to apply to all cases.” Appellant’s Opening Br. at 12. Thus, she contends, the *Brake* Court acted “[i]n contravention of these fundamental principles” when it “reasoned that RCW 10.01.040 created a ‘bright-line rule’ requiring explicit language stating the change in the law is retroactive.” *Id.* at 13 (internal quotation marks omitted) (quoting *Brake*, 15 Wn. App. 2d at 746). But as the State notes, in *State v. Jenks*, 197 Wn.2d 708, 725, 487 P.3d 482 (2021), our supreme court declined to follow *Wiley* because *Wiley* did not address the savings statute. Br. of Resp’t. at 15. We agree with the State that Wagner’s reliance on *Wiley* is misplaced.

² We note that the State argues that Wagner has not shown that *Brake* is “incorrect and harmful” in asking us not to follow *Brake*, and that we should not “overturn” *Brake* for that reason. Br. of Resp’t at 16 (emphasis omitted). We take this opportunity to reiterate that the incorrect and harmful stare decisis test applies only to our supreme court. *In re Pers. Restraint of Arnold*, 190 Wn.2d 136, 148-49, 410 P.3d 1133 (2018). The three divisions of the court of appeals are not bound by the decisions issued by one another, nor even are three judge panels within the same division of the court of appeals bound by a decision of another panel. *Id.* at 149-50. We do not have a rule of horizontal stare decisis, and we do not overturn other decisions of the court of appeals. *Id.* at 148. When the court of appeals issues conflicting decisions, those conflicts are resolved by our supreme court. *Id.* at 150.

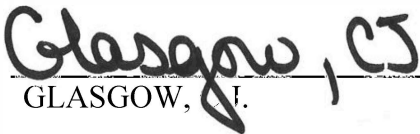
No. 56533-1-II

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.




CRUSER, J.

We concur:



GLASGOW, J.



VELJACIC, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original of the document to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division Two** under **Case No. 56533-1-II**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered by other court-approved means to the following attorney(s) or party/parties of record at their regular office / residence / e-mail address as listed on ACORDS / WSBA website:

- respondent Joseph Jackson, DPA
[joseph.jackson@co.thurston.wa.us]
[PAOAppeals@co.thurston.wa.us]
Thurston County Prosecutor's Office
- Attorney for other party



TAYLOR HALVERSON, Legal Assistant
Washington Appellate Project

Date: September 6, 2023

WASHINGTON APPELLATE PROJECT

September 06, 2023 - 3:20 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56533-1
Appellate Court Case Title: State of Washington, Respondent v. Alyse Marie Wagner, Appellant
Superior Court Case Number: 19-1-02229-2

The following documents have been uploaded:

- 565331_Petition_for_Review_20230906151640D2470704_2906.pdf
This File Contains:
Petition for Review
The Original File Name was washapp_090523-9.pdf

A copy of the uploaded files will be sent to:

- PAOAppeals@co.thurston.wa.us
- joseph.jackson@co.thurston.wa.us
- teri.bryant@lewiscountywa.gov

Comments:

Sender Name: MARIA RILEY - Email: maria@washapp.org

Filing on Behalf of: Oliver Ross Davis - Email: oliver@washapp.org (Alternate Email: wapofficemail@washapp.org)

Address:
1511 3RD AVE STE 610
SEATTLE, WA, 98101
Phone: (206) 587-2711

Note: The Filing Id is 20230906151640D2470704