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APR 06 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32170-3-III

FILED

APR 13 2015

COURT OF APPEALS

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON CRF

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CASTULO JOSE RIVAS,

Defendant/Appellant.

MOTION FOR DISCRETIONARY REVIEW

- PRN -

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STATUTES

Chapter 9A.36 RCW 2, 5

RCW 9.94.010 1, 2, 3, 4

RCW 9.94.010 (1) 3, 4, 5, 6

RCW 9A.36.011 (1)(a) 1, 2

RCW 9A.36.100 (1) 2, 3, 6

RCW 10.01.160 (3) 6

RULES AND REGULATIONS

RAP 13.5 (b)(1) 7

RAP 13.5 (b)(2) 7

1. IDENTITY OF MOVING PARTY

CASTULO JOSE RIVAS requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Rivas seeks review of Commissioner Monica Wasson's ruling of January 5, 2015 granting the State's Motion on the Merits. (Appendix "A" 1-4), and the Order Denying Motion to Modify Commissioner's Ruling entered on March 10, 2015. (Appendix "B")

Mr. Rivas respectfully requests that the Commissioner's Ruling be modified. He should be relieved of his LFOs. The trial court should be directed to re-sentence him on prison riot only.

3. ISSUES PRESENTED FOR REVIEW

A. Are RCW 9.94.010 and RCW 9A.36.011 (1)(a) concurrent statutes?

B. Is it reasonable to impose legal financial obligations (LFOs) on a prisoner serving a sentence of life imprisonment without a possibility of parole?

4. STATEMENT OF THE CASE

An Information was filed on September 24, 2013 charging Castulo Jose Rivas with 1st degree assault. (CP 4)

Mr. Rivas was found guilty following a jury trial on December 16, 2013. The trial court imposed legal financial obligations (LFOs) even though Mr. Rivas was already serving a life sentence without possibility of

parole. *See: State v. Rivas*, 97 Wn. App. 349, 351, 984 P.2d 432 (1999).

Mr. Rivas filed a Notice of Appeal on January 7, 2014. (CP 208)
Mr. Rivas took the position that the assault statutes contained in chapter 9A.36 RCW are concurrent with the prison riot statute. *See: RCW 9.94.010.*

The State filed a Motion on the Merits dated September 5, 2014.
Commissioner Wasson granted that motion on January 5, 2015.

The Court of Appeals denied Mr. Rivas's Motion to Modify the Commissioner's ruling by an Order dated March 10, 2015.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. CONCURRENT OFFENSES

Initially, Mr. Rivas's position is one of first impression concerning the interrelationship between the assault statutes and the prison riot statute.

The Legislature has seen fit to enact overlapping statutes;

RCW 9A.36.011 (1)(a) involves assault with a deadly weapon;

RCW 9.94.010 defines the specific offense of prison riot; and

RCW 9A.36.100 (1) defines the offense of custodial assault.

Mr. Rivas asserts that the three (3) statutes are all concerned with assaultive conduct. They are complementary and must be construed together. If he is correct then the most specific statute controls. *See: Wilson v. Grant*, 162 Wn. App. 731, 736, 258 P.3d 689 (2011).

The custodial assault statute pertains to "full or part-time staff member(s) of any "adult corrections institution." The assault occurred at the

Washington State Penitentiary in Walla Walla. It would be a custodial assault if it was either 4th degree assault or 3rd degree assault. RCW 9A.36.100 (1) specifically excludes 1st and 2nd degree assault.

On the other hand, the prison riot statute, RCW 9.94.010 (1) does not exclude 1st or 2nd degree assault.

Mr. Rivas contends that Commissioner Wasson misconstrued the concurrency of the respective statutes. If he had been acting alone, then he concedes that the prosecuting attorney would have appropriate discretion to charge him with 1st degree assault. However, due to the fact that there were multiple inmates involved in a riot at the prison, the more specific statute (RCW 9.94.010) is the applicable statute.

Where criminal conduct violates both a special and a more general statute, courts generally assume the Legislature intended that the accused be charged only under the special statute.... In other words, “the special statute will supersede the general *[s]o long as it is not possible* to commit the special crime without also committing the general crime.” *State v. Williams*, 62 Wn. App. 748, 753-54, 815 P.2d 825 (1991) (quoting *Shriner* [*State v. Shriner*, 101 Wn. 2d 576, 681 P.2d 237 (1984)] at 583 (first emphasis added) (alteration in original).

State v. Long, 98 Wn. App. 669, 674, 991 P.2d 102 (2000); *see also: State v. Wilson*, 158 Wn. App. 305, 313-14, 242 P.3d 19 (2010).

Assault is the designation for a general crime divided into specific degrees. Assaultive conduct by a prison inmate in conjunction with other

inmates constitutes prison riot irrespective of the degree of the assault.

RCW 9.94.010 defines a specific offense - prison riot. The statute states, in part:

- (1) Whenever two or more inmates of a correctional institution assemble for any purpose, and act in such a manner as to disturb the good order of the institution and contrary to the commands of the officers of the institution, **by the use of force or violence ... and whether acting in concert or not, they shall be guilty of prison riot.**

(Emphasis supplied.)

The “use of force or violence” constitutes assault. In *Pasco v. Ross*, 39 Wn. App. 480, 483, 694 P.2d 37 (1985) the Court adopted the rule that:

The terms “violence” and “force” are synonymous when used in relation to assault, and include any application of force, even though it entails no pain, bodily harm, or serious injury
....

(Footnote omitted.) 6A C.J.S. *Assault and Battery*, § 66, at 434 (1975); *see also: People v. Flummerfelt*, 153 Cal. App. 2d 104, 313 P.2d 912, 913 (1957); *Falconiero v. Maryland Cas. Co.*, 59 N.J. Super. 105, 157 A.2d 160 (1960); *State v. Smith*, 306 A.2d 5 (Me. 1973).

Mr. Rivas asserts that since the terms “violence” and “force” are synonymous then any assault which occurs in a prison comes within the parameters of prison riot as defined in RCW 9.94.010(1).

Multiple inmates were involved in the riot that occurred on February 2, 2012. Mr. Rivas and Mr. Valdez were two (2) of those inmates. They were the two (2) inmates who used “force” or “violence” against Sgt. Bailey.

RCW 9.94.010(1) does not differentiate degrees of force or violence. It therefore encompasses all degrees of assault, along with reckless endangerment, as set forth in Chapter 9A.36 RCW.

Statutes are concurrent only when every violation of the specific statute would result in a violation of the general statute. [Citation omitted.]

In determining whether two statutes are concurrent, we examine the elements of each of the statutes to ascertain whether a person can violate the specific statute without necessarily violating the general statute. [Citations omitted.] Statutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute.

State v. Wilson, supra, 314.

It is Mr. Rivas’s position that a violation of RCW 9.94.010(1), requiring the “use of force or violence” will necessarily violate the assault statutes. This specific statute is aimed at assaults occurring within the correctional institutions of the State of Washington.

The Legislature is presumed to know what it is doing, including the statutes it enacts. *See: State v. Slattum*, 173 Wn. App. 640, 655, 173 P.3d 318 (2007).

Thus, if RCW 9.94.010(1) was intended not to apply if an assault is a first or second degree assault, then the Legislature would have included the same language that it did in RCW 9A.36.100(1) concerning custodial assault.

B. LFOs

RCW 10.01.160(3) states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of the costs will impose.

The trial court conducted a colloquy with Mr. Rivas at the sentencing hearing. The colloquy involved his ability to pay LFOs. Mr. Rivas is currently serving a life sentence without possibility of parole under Skagit County Cause Number 96 1 00519 2. Even under those circumstances the trial court imposed LFOs. (Latham RP 429, l. 23 to RP 430, l. 25)

Mr. Rivas will never be released from prison. The trial court imposed an additional three hundred (300) months to run consecutive to that life sentence. (Latham RP 431, ll. 6-10)

It is ludicrous to believe that Mr. Rivas will ever have any funds with which to pay any LFOs. The trial court's imposition of LFOs violates RCW 10.01.160 (3).

6. CONCLUSION

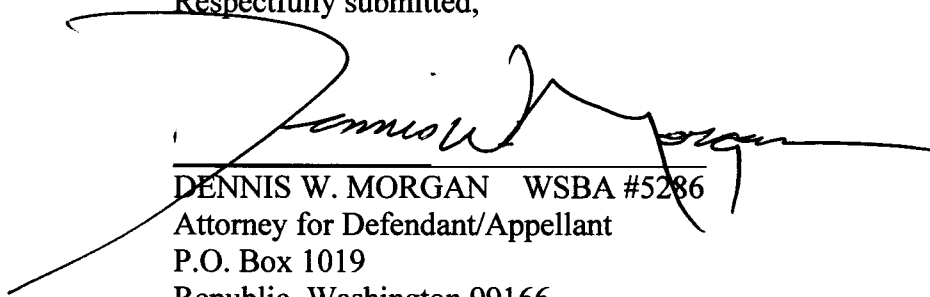
RAP 13.5 (b)(1) and (2) appear to govern Mr. Rivas' current predicament. Further action by Mr. Rivas is precluded and/or substantially limited by the Commissioner's Ruling and Order Denying Modification.

It is obvious error for Mr. Rivas to be required to pay LFOs. *See: State v. Blazina, slip opinion 89028-5 (March 12, 2015).*

It is probable error that Commissioner Wasson's ruling misconstrues the concurrent nature of the respective statutes involved in this case.

DATED this 2nd day of April, 2015.

Respectfully submitted,



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NO. 32170-3-III
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	WALLA WALLA COUNTY
Plaintiff,)	NO. 13 1 00020 2
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
CASTULO JOSE RIVAS,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this ___ day of April, 2015, I caused a true and correct copy of the *MOTION FOR DISCRETIONARY REVIEW* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals Division III
500 North Cedar Street
Spokane, Washington 99201

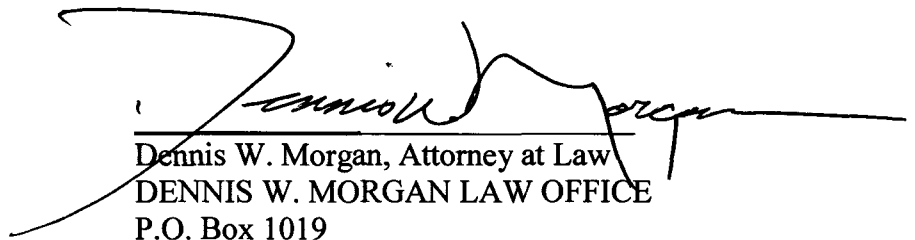
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U.S. MAIL

Castulo Jose Rivas #907450
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1313 N 13th Ave, IMU South F-05
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U.S. MAIL

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line. The signature is stylized and extends to the right of the line.

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APPENDIX “A”

The Court of Appeals
of the
State of Washington
Division III

JAN -5 2015

CLERK OF COURT
COURT OF APPEALS
DIVISION III
1000 UNIVERSITY BLVD
SEASIDE, WA 98148

STATE OF WASHINGTON,)	No. 32170-3-III
)	
)	
Respondent,)	
)	
v.)	COMMISSIONER'S RULING
)	
)	
CASTULO JOSE RIVAS,)	
)	
Appellant.)	
<hr/>		

Castulo Jose Rivas appeals the Walla Walla County Superior Court's January 6, 2014 judgment and sentence that the court entered after a jury found him guilty of first degree assault. He contends that the State should have charged him under the more specific statute, i.e., RCW 9.94.010 (prison riot). He also challenges the legal financial obligations that the court imposed because he is already serving a life sentence without possibility of parole. The State moves on the merits to affirm.

On February 4, 2012, Mr. Rivas and two other inmates at the Washington State Penitentiary were involved in an altercation. When correctional officer Dustin Davis attempted to stop the altercation, Mr. Rivas attempted to stab him in the abdomen with a shank. He also stabbed Sergeant James Bailey in the chest with a sharpened toothbrush. The State charged Mr. Rivas with first degree assault of Sergeant Bailey. His conviction followed.

Under RCW 9A.36.011(1), first degree assault occurs when a person assaults another with intent to inflict great bodily harm with a deadly weapon likely to cause great bodily harm or death. Assault includes “an attempt, with unlawful force, to inflict bodily injury upon another accompanied with the apparent present ability to give effect to the attempt.” *State v. Krup*, 36 Wn. App 454, 457, 676 P.2d 507 (1984), (quoting *State v. Stewart*, 703 Wn.2d 701, 703, 440 P.2d 815 (1968)).

Under RCW 9.94A.010, the offense of “prison riot” occurs “(1) [w]henver two or more inmates of a correctional institution assemble for any purpose, and in such a manner as to disturb the good order of the institution and contrary to the commands of the officers of the institution, by the use of force or violence.”

The element of prison riot – “use of force or violence” – satisfies the definition of assault. Mr. Rivas relies upon the rule that “[w]hen a specific statute and a general statute punish the same conduct, the statutes are concurrent and the State can only charge a defendant under the specific statute.” *State v. Wilson*, 158 Wn. App. 305, 313-14, 242

P.3d 19 (2010). The court in *Wilson* stated at 314, that to determine whether two statutes are concurrent, the courts “examine the elements of each . . . to ascertain whether a person can violate the specific statute without necessarily violating the general statute.” And, “[s]tatutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute.” *Id.*

Mr. Rivas also references the rule of statutory construction that the Legislature is presumed to know the statutory scheme. *See State v. Slattum*, 173 Wn. App. 640, 655, 295 P.3d 788 (2013). The Legislature intended that custodial assault *not* take the place of a charge of first or second degree assault because it specifically stated that in RCW 9A.36.100(1). He reasons that if the Legislature had intended that prison riot not apply to first degree assault, it would have enacted a statute with language similar to RCW 9A.36.100.

However, as the State points out, prison riot and first degree assault are not concurrent statutes. For that, every violation of the specific statute must also constitute a violation of the general statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984). Here, not every violation of the prison riot statute constitutes first degree assault. The latter requires proof of more than the former. I.e., for first degree assault, the State must prove intent to commit great bodily harm committed with a firearm or other deadly weapon likely to cause great bodily harm or death. A person can commit prison riot without intent to commit great bodily harm and without a deadly weapon likely to cause

No. 32170-3-III

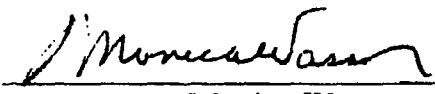
great bodily harm or death.

Second, Mr. Rivas contends the superior court erred when it imposed on him legal financial obligations. He argues that because he is serving a life sentence without the possibility of parole, he will never have the ability to pay these obligations. He cites *Utter v. Department of Social and Health Services*, 140 Wn. App. 293, 303-04, 165 P.3d 299 (2007) which holds that the court may not impose a repayment obligation if no likelihood exists that the defendant's indigency will end.

Mr. Rivas did not object in superior court to the legal financial obligations. He cannot challenge them for the first time on appeal. See *State v. Duncan*, 180 Wn. App. 245, 254-55, 327 P.3d 699 (2014).

Accordingly, IT IS ORDERED, the State's motion on the merits is granted. Mr. Rivas' conviction is affirmed.

January 5 , 2015



Monica Wasson
Commissioner

APPENDIX “B”

FILED
MARCH 10, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,)	
)	No. 32170-3-III
Respondent,)	
)	
v.)	
)	ORDER DENYING
CASTULO JOSE RIVAS,)	MOTION TO MODIFY
)	COMMISSIONER'S RULING
Appellant.)	


Having considered Appellant's motion to modify the commissioner's ruling of January 5, 2015, and the record and file herein;

IT IS ORDERED the motion to modify the commissioner's ruling is denied.

PANEL: Judges Korsmo, Fearing, Lawrence-Berrey

DATED: March 10, 2015

FOR THE COURT:


LAUREL SIDDOWAY
Chief Judge