

Supreme Court No. 92133-4
(COA No. 45829-2-II)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARCO MEDINA,

Petitioner.

FILED
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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Marco Medina, petitioner here and appellant below, asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition pursuant to RAP 13.3(a)(1) and RAP 13.4(b).

B. COURT OF APPEALS DECISION

Mr. Medina seeks review of the Court of Appeals decision dated June 23, 2015, a copy of which is attached as Appendix A.

C. ISSUE PRESENTED FOR REVIEW

This Court has granted review in *State v. Conover*, Supreme Court No. 90782-0, to determine whether under the statute governing sentencing enhancements, the court erred in running the bus-zone enhancements for each count consecutively rather than concurrently. The statute governing enhancements does not expressly mandate that multiple enhancements for drug-related offenses must be served consecutively to each other even though it uses this explicit language in other provisions of the same statute for other enhancements. Should this Court grant review when the issue is presently before this Court and the courts below have misconstrued the explicit terms of a statute requiring substantially increased punishment? RAP 13.4(b)(4).

D. STATEMENT OF THE CASE

Marco Medina pled guilty to selling drugs on three occasions to an informant who was working for the police. CP 2-4, 14-15, 22. Each police-arranged drug sale occurred at the same location, which was within 1000 feet of a designated school bus stop route. CP 2-4, 22. He also pled guilty to one count of possession of a controlled substance. CP 22.

Mr. Medina was sentenced with an offender score of "3." CP 26. The standard range was 20 to 60 months on the underlying offense. *Id.* The plea did not involve an agreed sentencing recommendation. 5/11/12RP 3. Mr. Medina asked for a prison-based DOSA sentence, while the prosecution asked the court to impose a 120-month prison sentence, without the DOSA. 5/18/12RP 2. Both attorneys asserted the sentencing statute provided that the three 24-month enhancements for committing the offense within 1000 feet of a school bus stop route must be imposed consecutively to each other, and consecutively to the sentence imposed for the underlying offenses. *Id.* at 24. The court ordered Mr. Medina to serve 30 months for the three drug sales, as well as three school bus stop route enhancements served consecutively to each other and consecutively to the underlying offenses, for a total term

of 102 months. CP 27. The court did not order the DOSA Mr. Medina requested. *Id.*

Mr. Medina filed a CrR 7.8 motion, arguing that the court imposed a sentence that was not authorized by statute. CP 37-45. The State argued that the motion was “just untimely” and the enhancements are served consecutively by statute. 12/20/13RP 2; CP 66-67. The court granted the State’s motion to dismiss the CrR 7.8 motion because the prosecution’s argument was “persuasive” without further explanation. *Id.* at 2. Mr. Medina was not transported to the hearing and was not represented by counsel on his CrR 7.8 motion. CP 37; 12/20/13RP 2.

Mr. Medina appealed, challenging the consecutive imposition of sentencing enhancements. In an unpublished decision, the Court of Appeals agreed that the language of the relevant statute might be ambiguous, but the legislature intended to apply enhancements consecutively. Slip op. at 6. The opinion makes no mention of *Conover*, which is pending in this Court.

E. ARGUMENT

This Court should grant review because this case is identical to *Conover* and involves the same improper imposition of multiple consecutive sentencing enhancements for a drug offense absent clear legislative authority

This Court has granted review in *Conover* to decide “Whether multiple school bus stop sentence enhancements imposed in a single controlled substances prosecution must run consecutive to each other under RCW 9.94A.533(6).” *State v. Conover*, 183 Wn.App. 1011 (2014) (unpublished), *rev. granted in part*, 182 Wn.2d 1007, 344 P.3d 688 (2015).¹

Mr. Medina raised the same issue in the trial court and Court of Appeals. The Court of Appeals acknowledged that RCW 9.94A.533 uses different language in various subsections to explain when multiple sentencing enhancements are to be served consecutively to each other. Slip op. at 6. It agreed this language may be ambiguous. *Id.* But it concluded that the legislature did not have a different intent even though it used different language within the statute and each 24-month

¹ The issue for which review has been granted is listed on the Court’s website, available at: http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/?fa=atc_supreme_issues.display&fileID=2015May (last viewed July 10, 2015).

enhancement for a police-arranged drug sale must be served consecutively to each other, adding a mandatory 72 months to Mr. Medina's sentence for which the standard range was 20 to 60 months. *Id.*

RCW 9.94A.533 is the controlling statute. RCW 9.94A.533(3) governs firearm enhancements. Subsection (3)(e) dictates that multiple firearm enhancements "shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter." RCW 9.94A.533(3)(e) (emphasis added). RCW 9.94A.533 (4) uses identical language for deadly weapon enhancements, requiring that "all deadly weapon enhancements . . . shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter." RCW 9.94A.533(4)(e) (emphasis added). The sexual motivation enhancement identically provides that "all sexual motivation enhancements . . . shall run consecutively to all other sentencing provisions, *including other sexual motivation enhancements*." RCW 9.94A.533(8)(b) (emphasis added). This provision was added to the statute in the same legislative session

as the school bus enhancement language at issue. *LAWS* 2006, ch. 123; ch. 339 §301.

But unlike these other enhancements, RCW 9.94A.533(6) directs the imposition of a school bus stop route enhancement only consecutively to other sentencing provisions and not to other bus stop enhancements:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827.^[2] All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

RCW 9.94A.533 (6).

The Court of Appeals misapplied the basic principles of statutory construction. The court's sentencing authority is controlled by statute. *State v. Pillatos*, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). Even when a court believes the Legislature has inadvertently omitted a sentencing provision, courts "do not have the power to read into a statute that which we may believe the legislature has omitted, be it an

² RCW 69.50.435 lists various additional allegations that may be proved to the jury, including selling drugs near a designated school bus stop route. RCW 9.94A.827 pertains to manufacturing methamphetamine with a special allegation that a child was present.

intentional or an inadvertent omission.” *State v. Martin*, 94 Wn.2d 1, 8, 614 P.2d 164 (1980). When construing a penal statute, the court “cannot add words or clauses” that do not appear in the statute. *State v. Delgado*, 148 Wn.2d 723, 727, 729, 63 P.3d 792 (2003).

The Legislature showed it knows how to expressly order that multiple enhancements must be served consecutively to each other in RCW 9.94A.533(3)(e), 4(e), and (8)(b). It did not include this explicit language for enhancements in section (6) regarding school bus stop enhancements that it used in these other sections. The failure to include clear language requiring consecutive enhancement sentences in section (6), while using it in other sections of the same statute, requires the court to “presume the absence of such language . . . was intentional.” *Delgado*, 148 Wn.2d at 729.

Generally, all enhancements are not treated the same for sentencing purposes. Firearm and deadly weapon enhancements are ineligible for earned early release time credits, unlike other enhancements. RCW 9.94A.729(2). The Court of Appeals erred by misconstruing the statutory language. The plain language of RCW 9.94A.533(6) does not mandate the imposition of multiple enhancements consecutive to each other, but instead only directs that

the drug-related enhancements are served consecutively to the underlying offense.

The court erroneously imposed three consecutive 24-month enhancements for selling drugs within 1000 feet of a designated school bus stop route. The Court of Appeals construed the statute based on its own assumptions about what the legislature intended, rather than applying the doctrine of lenity to an ambiguity.

By granting review of this issue in *Conover*, this Court has already determined that the legal issue merits review under RAP 13.4(b). This Court should grant review of Mr. Medina's petition for the same reasons and hold that multiple sentencing enhancements for a police-arranged drug sales conducted in the same location are not consecutively imposed under RCW 9.94A.533.

An erroneous sentence may be corrected at any time. *In re Personal Restraint of Goodwin*, 146 Wn.2d 861, 873-77, 50 P.3d 618 (2002); *see also In re Pers. Restraint of Moore*, 116 Wn.2d 30, 803 P.2d 300 (1991). Mr. Medina's CrR 7.8 motion correctly challenged the consecutive imposition of multiple sentencing enhancements under RCW 9.94A.533 (6). "[A] defendant cannot agree to be punished more than the Legislature has allowed for." *Goodwin*, 146 Wn.2d at 871-72;

In re Hudgens, 156 Wn.App. 411, 418-19, 233 P.3d 566 (2010). This case should be remanded to strike the 72-month consecutive sentences imposed for the three school bus stop route enhancements and instead impose one 24-month enhancement.

F. CONCLUSION

Based on the foregoing, Petitioner Marco Medina respectfully requests that review be granted pursuant to RAP 13.4(b).

DATED this 10th day of July 2015.

Respectfully submitted,



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APPENDIX A

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STATE OF WASHINGTON

BY _____
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

MARCO R. MEDINA,

Appellant.

No. 45829-2-II

UNPUBLISHED OPINION

JOHANSON, C.J. — Marco Medina pleaded guilty to three counts of delivery of a controlled substance with three school bus route stop enhancements. The sentencing court imposed the three 24-month sentence enhancements consecutively to one another and consecutively to the underlying charge. Medina appeals, alleging that the sentencing court lacked the authority to impose the sentencing enhancements to run consecutively to one another. To the extent that RCW 9.94A.533(6) is ambiguous, legislative history reveals an unequivocal intent to impose multiple enhancements consecutively. Thus, we affirm.

FACTS

In January 2012, Medina sold methamphetamine and heroin to a confidential informant (CI) three times. Each of the sales occurred within 1,000 feet of a school bus route stop.

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The State charged Medina with three counts of delivery of a controlled substance, each with accompanying sentence enhancements for Medina's proximity to the school bus stop, and one count of unlawful possession of a controlled substance.¹ Medina pleaded guilty as charged.

Medina's standard sentencing range was 20 to 60 months. Both Medina and the State agreed that the three 24-month sentencing enhancements were mandatory and that they were to run consecutively both to the underlying offense and to one another. The court sentenced Medina to 30 months on each of the three delivery counts, to run concurrently, plus three consecutive 24-month bus stop enhancements, for a total of 102 months.

Medina then filed a CrR 7.8 motion seeking to withdraw his guilty plea based on his belief that the sentencing court erred by imposing the school bus stop enhancements consecutively rather than concurrently. The court denied Medina's motion. Medina appeals his judgment and sentence as well as the court's order denying his CrR 7.8 motion.

ANALYSIS

Medina contends that RCW 9.94A.533(6) does not authorize a sentencing court to apply the school bus stop enhancements consecutively to one another. Specifically, Medina argues that the legislature intended these specific sentencing enhancements to run concurrently because, unlike other statutory provisions that specify when multiple enhancements of the same category run consecutively to each other, the school bus stop enhancement provision does not. We hold that the sentencing court did not err by imposing consecutive school bus stop enhancements because RCW 9.94A.533(6) and the accompanying legislative history support the court's sentence.

¹ Medina does not challenge the possession charge on appeal.

Absent an abuse of discretion, we will not reverse an order denying a motion for relief from judgment. *State v. Bourgeois*, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The legislature has plenary authority over sentencing. *State v. Jones*, 182 Wn.2d 1, 6, 338 P.3d 278 (2014). Under this authority, it passed the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW, which guides sentencing discretion through the SRA's detailed statutory procedures. *Jones*, 182 Wn.2d at 6. Although sentencing courts generally enjoy discretion in tailoring sentences, for the most part that discretion does not extend to deciding whether to apply sentences concurrently or consecutively. *State v. Jacobs*, 154 Wn.2d 596, 602, 115 P.3d 281 (2005). It is also within the purview of the legislature to amend these procedures in response to judicial interpretation. *Jones*, 182 Wn.2d at 6.

In construing a statute, the court's objective is to determine the legislature's intent. *Jacobs*, 154 Wn.2d at 600. “[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Jacobs*, 154 Wn.2d at 600 (alteration in original) (quoting *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002)). The “plain meaning” of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. If a statute is susceptible to more than one reasonable interpretation, it is ambiguous and we may resort to legislative history for guidance in discerning legislative intent. *State v. Larson*, 185 Wn. App. 903, 909, 344 P.3d 244 (2015).

RCW 9.94A.533(6) governs the category of sentencing enhancements at issue here. It provides,

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.827. *All enhancements under this subsection shall run consecutively to all other sentencing provisions*, for all offenses sentenced under this chapter.

(Emphasis added.) And RCW 69.50.435(1) provides, in pertinent part,

Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana to a person:

....
(c) Within one thousand feet of a school bus route stop designated by the school district.

Importantly, the legislature had amended RCW 9.94A.533(6) in 2006 in light of our Supreme Court's decision in *Jacobs*. LAWS OF 2006, ch. 339, § 301. There, our high court, construing former RCW 9.94A.533(6) (2002),² ruled that the provision was ambiguous as to whether the enhancements should be applied concurrently or consecutively. *Jacobs*, 154 Wn.2d at 599. Consequently, the court applied the rule of lenity and remanded the case to the sentencing court with instructions to impose the two enhancements concurrently rather than consecutively. *Jacobs*, 154 Wn.2d at 604.

After *Jacobs*, the legislature amended RCW 9.94A.533(6), adding the second sentence to specify that courts are to impose drug zone enhancements "consecutively to all other sentencing provisions." RCW 9.94A.533(6); H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th

² Former RCW 9.94A.533(6) read, "[T]wenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW . . . if the offense was also a violation of RCW 69.50.435 or 9.94A.605." *Jacobs*, 154 Wn.2d at 601 (footnotes omitted). One of the two sentencing enhancements at issue there was also a school bus stop enhancement.

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Leg., Reg. Sess., at 7 (Wash. 2006). The legislature summarized this portion of the amendment by stating that “[s]tatutory language is clarified to specify that all sentence enhancements relating to violations of the [Uniform Controlled Substances Act, ch. 69.50 RCW,] in drug-free zones are to be run consecutively to all other sentencing provisions for all sentences under the [SRA].” H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th Leg., Reg. Sess., at 12 (Wash. 2006).

Additionally, the House Bill Analysis also states that the intent of the amendment is in part to “[c]larif[y] that all sentence enhancements relating to violations of the Uniform Controlled Substance Act in drug-free zones are to be run consecutively (*instead of concurrently*) to all other sentencing provisions.” HOUSE CRIMINAL JUSTICE & CORRECTIONS COMM. H.B. ANALYSIS ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, at 2, 59th Leg., Reg. Sess. (Wash. 2006) (emphasis added). Our courts have recognized that “[t]he acknowledged purpose of the amendment was to overturn the decision in [*Jacobs*].” *Gutierrez v. Dep’t of Corr.*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008).

Medina contends that despite the statute’s amended language, the sentencing court nevertheless erred by imposing the three school bus stop enhancements consecutively because RCW 9.94A.533(6) does not specifically say that school bus stop enhancements run consecutively to other school bus stop enhancements. To support his position, Medina cites the statutory provision which governs firearm enhancements and states specifically that all firearm enhancements run consecutively to all other sentencing provisions, “including other firearm or deadly weapon enhancements.” RCW 9.94A(533)(3)(e). Medina urges us to conclude that the absence of similar language in the school bus stop enhancement provision evinces a different legislative intent.

But Medina's argument is unpersuasive because the legislative history underlying the 2006 amendment establishes that the trial court did not err by applying the enhancements consecutively. While Medina is correct that the provisions governing other categories of sentencing enhancements do use more specific language, he nevertheless fails to demonstrate how RCW 9.94A.533(6) does not require a sentencing court to apply multiple enhancements consecutively to one another.

The statute directs court to impose enhancements to run consecutively "to all other sentencing provisions." RCW 9.94A.533(6). Medina does not contend that the school bus stop enhancements do not constitute "other sentencing provisions."³ Indeed, the language of the related provisions suggests otherwise. As mentioned, RCW 9.94A.533(3)(e) states that firearm enhancements run consecutively to all other sentencing provisions, including other firearm enhancements.

And while Medina is correct that a different legislative intent is presumed where the legislature uses certain language in one instance but different or dissimilar language in another, *State v. Scherz*, 107 Wn. App. 427, 435, 27 P.3d 252 (2001), there is evidence here to suggest that there was no different intent.

To the extent that the statute is ambiguous, the relevant legislative history establishes that the legislature intended multiple school bus stop enhancements to run consecutively to the underlying offense and to each other. As mentioned, the legislature specifically stated that its purpose in amending RCW 9.94A.533(6) was to clarify that the enhancements are to run

³ Medina also does not contend that "other" provisions refers to all sentencing provisions excluding the same category of enhancement.

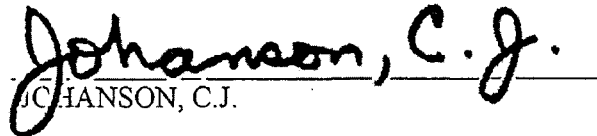
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consecutively. H.B. REP. ON ENGROSSED SECOND SUBSTITUTE H.B. 6239, 59th Leg., Reg. Sess., at 12 (Wash. 2006). The legislature specifically sought to avoid the result in *Jacobs. Gutierrez*, 146 Wn. App. at 155-56. If the legislature intended multiple enhancements to run concurrently, there would have been no reason to address our Supreme Court's holding in *Jacobs*.

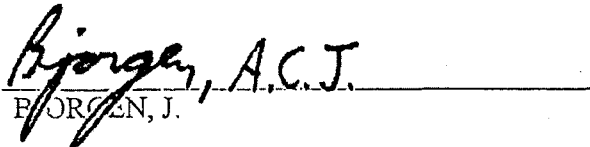
For the foregoing reasons, we hold that Medina's claim fails. Accordingly, we hold that the sentencing court did not err in applying Medina's three school bus stop enhancements consecutively.

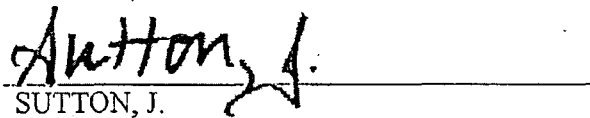
Affirmed.

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.


JOHANSON, C.J.

We concur:


BJORGE, J.


SUTTON, J.

DECLARATION OF FILING AND MAILING OR DELIVERY

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MARIA ANA ARRANZA RILEY, Legal Assistant
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