NO. 46386-5

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN ALLEN ROBERTS, II, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin (Plea) and
The Honorable Frank E. Cuthbertson (sentencing)

No. 13-1-03522-9

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the sentencing court properly interpreted RCW 9.94A.030(20) to conjunctively incorporate the definitions of "domestic violence" found in RCW 10.99.020 and RCW 26.50.010?

2. Whether, where the defendant has provided no evidence of any seized property, has claimed no possessory interest in such property, and has not shown the property was not contraband, the record is insufficient to review whether the re-sentencing court had statutory authority to order forfeiture of any items seized?

B. STATEMENT OF THE CASE.

1. Procedure and Facts Relevant to Appeal

On September 12, 2013, the Pierce County Prosecutor's Office charged BRIAN ALLEN ROBERTS, II, hereinafter "defendant" with four counts of domestic violence court order violation, and one count of assault in the fourth degree, domestic violence related. CP 1-3. On March 3, 2014, defendant pleaded guilty to three counts of domestic violence court order violation. CP 11-20; RP[1] 5-8. As part of the plea agreement,

[1] The verbatim report of proceedings is contained in two volumes and will be referred to as follows: March 11, 2014, as "RP," and May 29, 2014, as "SRP."

defendant agreed to "forfeit any items in Tacoma Police Department property room." CP 11-20; RP 5. The parties disagreed about defendant's offender score and standard range, and agreed to set sentencing over. CP 11-20; RP 8-9.

Both parties filed sentencing memorandums, and sentencing was held on May 29, 2014. CP 34-77, 82-93, 94-106. The dispute concerned whether defendant's prior domestic violence convictions had been pled and proven as required by RCW 9.94A.525(21). SRP 3; CP 34-77, 82-93. RCW 9.94A.030(20) reads " 'Domestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010." CP 34-77; SRP 7-13. Defense argued that this language meant that in order for something to qualify as domestic violence, it had to satisfy both of those meanings. CP 34-77; SRP 7-13. Defendant argued that because his did not, his offender score should be a six and he requested the court sentence him to a DOSA. CP 34-77; SRP 7-13.

The State, in contrast, argued that the legislature was describing the definition of domestic violence as having the same meaning in each of the statutes, not creating a requirement that defendant's convictions must fall under both RCW 10.99.020 and RCW 26.50.010. SRP 3-6; CP 82-93. Under this interpretation, the State argued defendant's offender score would be an 11, and the State argued against the court granting defendant a DOSA sentence. SRP 6; CP 82-93. After hearing arguments from both

counsel, the court agreed with the State's interpretation of RCW 9.94A.030, found the State had pled and proven the previous domestic violence offenses, and found defendant's offender score was an 11. SRP 17-18. The court declined to impose the DOSA sentence and sentenced defendant to 60 months on each count to run concurrently. CP 84-106; SRP 18. Section 4.4 of defendant's judgment and sentence also contained a handwritten order to "forfeit any items in property" and a box was checked in section 4.4a which stated "All property is hereby forfeited." CP 84-106.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY INTERPRETED RCW 9.94A.030(20) TO CONJUNCTIVELY INCORPORATE THE DEFINITIONS OF "DOMESTIC VIOLENCE" FOUND IN RCW 10.99.020 AND RCW 26.50.010.

An appellate court reviews a trial court's interpretation of statutes de novo. ***State v. Schultz,*** 146 Wn.2d 540, 544, 48 P.3d 301 (2002). The primary duty of the court in interpreting a statute is to discern and implement the intent of the legislature. ***State v. J.P.***, 148 Wn.2d 444, 450, 69 P.3d 318 (2003). If a statute's meaning is plain on its face, the court must give effect to that plain meaning as an expression of legislative intent. ***Dep't of Ecology v. Campbell & Gwinn, L.L.C.***, 146 Wn.2d 1, 9-

10, 43 P.3d 4 (2002). The "plain meaning" of a statutory provision is discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. ***State v. Jacobs***, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If after a plain meaning examination, the statute is still subject to more than one reasonable interpretation, it is ambiguous. *Id.*, at 600-601. If the statute is ambiguous, the court may resort to aids to construction, including legislative history. ***Campbell & Gwinn***, 146 Wn.2d at 12.

In the present case, defendant pleaded guilty to three counts of domestic violence court order violation, but the parties disputed how to calculate defendant's offender score. CP 11-20. Defendant's criminal history included three domestic violence related convictions which the State argued implicated the provisions of RCW 9.94A.525(21).

The relevant provisions in RCW 9.94A.525 read:

> (21) If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was plead and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:
>
> (a) Count two points for each adult prior conviction where domestic violence as defined in RCW 9.94A.030 was plead and proven after August 1, 2011, for the following offenses: [list of offenses]

...

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

The State argued that defendant's offender score was an eleven because several of the convictions satisfied the relevant provision of RCW 9.94A.525(21). CP 82-93. Defendant argued several of his prior convictions did not fall under RCW 9.94A.525(21) because they did not satisfy the definition of domestic violence as defined in RCW 9.94A.030. CP 34-77. RCW 9.94A.030(20) states " '[d]omestic violence' has the same meaning as defined in RCW 10.99.020[2] and 26.50.010[3]." Defendant argued that the "and" should be read as conjunctive and thus, to satisfy the definition of domestic violence as defined in RCW 9.94A.030, the prior conviction must fall under both RCW 10.99.020 and RCW 26.50.010. CP 34-77. Because several of defendant's prior convictions did not fall under both of those statutes, he argued those convictions were not "domestic

[2] RCW 10.99.020(5) states " 'Domestic violence' includes but is not limited to any of the following crimes when committed by one family or household member against another: [list of crimes]."

[3] RCW 26.50.010(1) states " 'Domestic violence' means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by one another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member."

violence" convictions as contemplated by RCW 9.94A.030 and defendant's offender score only amounted to a six. CP 34-77.

The trial court agreed with the State that the legislature intended a disjunctive interpretation of the definition in RCW 9.94A.030, saying that "that's consistent with the legislature's intent to protect citizens from domestic violence in the broadest sense." SRP 17. As a result, the trial court found defendant had an offender score of eleven and sentenced him within the relevant standard range.

On appeal, defendant argues that the trial court erred in its interpretation of the legislature's intent in RCW 9.94A.030 and rather, the statute should be read wherein the term "and" has a conjunctive meaning joining RCW 10.99.020 and RCW 26.50.010. This exact issue was addressed by this Court in ***State v. Kozey***, 183 Wn. App. 692, 334 P.3d 1170 (2014), *review denied*, 182 Wn.2d 1007, 342 P.3d 327 (2015), and the Supreme Court recently declined to review this issue.

In that case, this Court discussed "whether the word 'and' in RCW 9.94A.030(20) conjunctively or disjunctively joins the definitions of 'domestic violence' found in RCW 10.99.020 and RCW 26.50.010 for purposes of enhancing sentences for crimes involving domestic violence?" ***Kozey***, 183 Wn. App. At 695. This Court first began its analysis by looking at the plain meaning of the term "and" in RCW 9.94A.030(20),

and acknowledged that "Washington courts have long recognized that, despite the common, conjunctive usage of 'and,' service of the legislature's intent may require reading the word disjunctively." ***Kozey***, 183 Wn. App. at 696 (*citing* ***State v. Keller***, 98 Wn.2d 725, 728-31, 657 P.2d 1384 (1983))(*see also* ***State v. Tiffany***, 44 Wn.602, 603-05, 87 P. 932 (1906) (discussing the interchangeability of "and" and "or")). After looking at the analysis in a case out of Division Three involving a similar issue[4], this Court stated that:

> [RCW 10.99.020 and RCW 26.50.010's] presence virtually compels adoption of the disjunctive reading of RCW 9.94A.030(20), since the conjunctive reading would effectively rob one of them to any effect. As discussed above, RCW 10.99.020 defines "domestic violence" through a nonexclusive list of qualifying behaviors. If the conjunctive reading of RCW 9.94A.030(20) were correct, then the list of crimes found in RCW 10.99.020 would have meaning only where the offender commits an act encompassed by RCW 26.50.010. The reference to 10.99.020 would be superfluous.

Kozey, 183 Wn. App. at 699-700.

This Court then looked at the legislative's statement of intent accompanying the 2010 domestic violence amendments and found that "[r]eading RCW 9.94A.030(20) disjunctively preserves this legislative purpose by capturing the wider range of behaviors that legislature has already deemed to constitute domestic violence in RCW 10.99.020 and

[4] *See* ***Mount Spokane Skiing Corp. v. Spokane County***, 86 Wn. App. 165, 936 P.2d 1148 (1997)(reasoning that the plain meaning and legislative intent of "and" in RCW 35.21.730 evinced a disjunctive interpretation of the term in the statute)

RCW 26.50.010." ***Kozey***, 183 Wn. App. At 702. Despite holding that further analysis was not necessary as the term was not ambiguous, this Court went on to analyze the legislative history and principles of statutory construction. *Id.*, at 702-705. This Court found that even if the term had been found to be ambiguous, Kozey's interpretation of the term would still fail as both the legislative history and cannons of construction pointed to a disjunctive reading of RCW 9.94A.030(20). *Id.*

In his brief, defendant argues that this Court erred in its analysis in ***Kozey*** because it ignored the rule of lenity which favors the defendant and ignored the change in the original statutory language from "or" to "and," suggesting the legislative intent to mean a conjunctive reading of the term. Opening Brief of Appellant, at 15-17. However, this Court did discuss the rule of lenity at the very end of its analysis saying that the rule of lenity only applies when a statutory provision remains ambiguous after the court has exhausted all other means of attempting to ascertain the legislature's intent. Because however, not only was the plain meaning and legislative intent of the term unambiguous, but the extrinsic examination of the legislative history and principles of statutory construction also showed the term to be unambiguous, this Court reasoned that the rule of lenity was not applicable or relevant to its interpretation of the statute. ***Kozey***, at 704-705.

Furthermore, this Court did reference the statutory change of the term from "or" to "and" in Footnote 5 of its analysis. *Id.*, at 703 n. 5 ("We recognize that, under the canons of construction, the change from "or" to "and" could also be taken as a sign of a change in legislative intent. However, the purpose of the 200 legislation, and its consistency with the attorney general's proposal, clearly support the much more direct message of legislative intent: that the disjunctive reading of RCW 9.94A.030(20) should be preserved."). Thus, while defendant attempts to argue that this Court's analysis in ***Kozey*** failed to take into consideration relevant information, a review of the Court's analysis shows the finding that the term "and" should be read disjunctively was made after an extensive and complete analysis of the issue.

This Court has already engaged in a thorough analysis of the interpretation of the term "and" in RCW 9.94A.030, and even went beyond what the usual and necessary analysis of the term required. Furthermore, the fact that the Supreme Court declined to accept review of the case suggests that this Court's interpretation and analysis of the issue was on point. This Court should find that the trial court properly interpreted the relevant statutes, consistent with this Court's subsequent decision in ***Kozey*** and deny defendant's request to re-engage in what was already a detailed and comprehensive examination of the issue by this Court.

2. THIS COURT SHOULD DECLINE REVIEW OF DEFENDANT'S FORFEITURE CONDITION BECAUSE THE RECORD IS INSUFFICIENT FOR REVIEW.

An illegal or erroneous sentence may be challenged for the first time on appeal. ***State v. McWilliams***, 177 Wn. App. 139, 150, 311 P.3d 585 (2013) *review denied*, 179 Wn.2d 1020, 318 P.3d 279 (2014) (*citing* ***State v. Ford***, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)). The court reviews de novo whether the sentencing court had the statutory authority to impose a sentencing condition. ***State v. Armendariz***, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). However, if the record is insufficient for review, the court may decline to review a particular issue. ***Washington Pub. Trust Advocates v. City of Spokane***, 120 Wn. App. 892, 898, 86 P.3d 835 (2004) (*citing* ***Bulzomi v. Dep't of Labor & Indus.***, 72 Wn. App. 522, 525, 864 P.2d 996 (1994)).

There are three reasons a court may refuse to return seized property no longer needed for evidence: (1) the defendant is not the rightful owner, (2) the property is contraband, or (3) the property is subject to forfeiture pursuant to statute. ***McWilliams***, 177 Wn. App. at 150 (*citing* ***City of Walla Walla v. $401,333.44***, 164 Wn. App. 236, 244, 262 P.3d 1239 (2011)). A defendant may file a motion pursuant to CrR 2.3(e) for the return of unlawfully seized property. ***McWilliams***, 177 Wn. App. 150-151; CrR 2.3(e). CrR 2.3(e) requires an evidentiary hearing to determine

the right to possession between the defendant and the State. ***State v. Marks***, 114 Wn.2d 724, 734–735, 790 P.2d 138 (1990).

In the present case, defendant on appeal makes no claim of ownership to any seized property. In fact, defendant does not identify any property seized. Defendant also failed to object to the imposition of the condition at sentencing. Therefore, it is not evident from the record that defendant is the rightful owner, that the alleged property is not contraband, or that the alleged property is not subject to forfeiture pursuant to statute. Defendant has also not made a CrR 2.3(e) motion, which would have been accompanied by a full evidentiary hearing. This Court is unable to properly evaluate whether the sentencing court acted without statutory authority. With these deficiencies in the record, this court should decline to review defendant's challenge.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions.

DATED: April 22, 2015.

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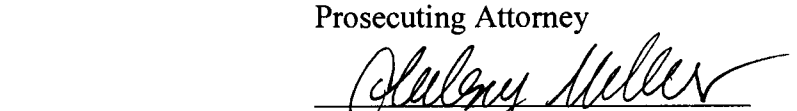

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