

FILED

MARCH 23, 2015

Court of Appeals
Division III
State of Washington

NO. 322823

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

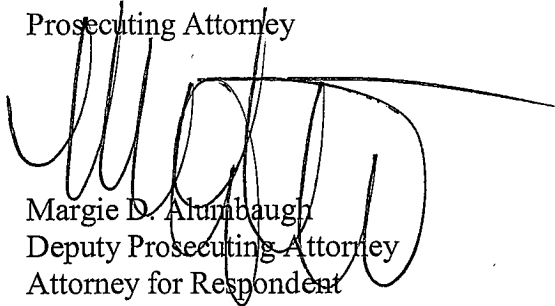
v.

JUSTIN ROSE,

Appellant.

RESPONSE BRIEF

GREGORY L. ZEMPEL
Prosecuting Attorney



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RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR

I. The intent of I-502 is clear and unambiguous. I-502 does not apply retroactively.

The general criminal savings clause does not prevent the state from prosecuting cases due to the passage and effective date of I -502 as codified in RCW 69.50.101.

II. A stipulation and order for stay of proceedings is not considered a "pending" matter. The document constitutes an agreement between the State and the defendant pertaining to the "resolution" of a criminal charge.

I. STATEMENT OF FACTS

The State hereby adopts the statement of the case prepared by Appellant's counsel with the following additions and emphasis:

The appellant entered a Stipulated Order of Continuance on October 30, 2012 and the order was revoked on February 28, 2013 for non-compliance. The defendant stipulated at the revocation hearing that he had not fulfilled the conditions of the stipulated order entered into, as an agreement between the defendant and the State, on October 30, 2012.

ARGUMENT

I. The intent of I-502 is clear and unambiguous. I-502 does not apply retroactively.

The general criminal savings clause does not prevent the state from prosecuting cases due to the passage and effective date of I -502 as codified in RCW 69.50.101.

The appellant suggests the intent of the legislature was to apply the legality of marijuana as enacted by I-502 on December 6, 2012 retroactively to all prior marijuana cases. That is not the case.

RCW 10.01.040 states:

“No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act, and no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 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.”

Based upon the statute, it is clear that both amendments and repeals of criminal or penal laws only apply prospectively unless the statute expressly indicates that the legislature intended otherwise. *Id.* The Supreme Court of Washington’s 2010 reaffirmed the prospective effect of the savings clause in *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186, 2010 Wash. LEXIS 435 (Wash. 2010) which states, “[o]ur courts have long held that under the savings clause, amendments to

criminal statutes (which include reclassification of crimes) do not apply retroactively to offenses committed before the effective dates of those amendments.” In Rivard, the court held that the saving clause precluded retroactive application of the 1996 reclassification of the vehicular homicide statute and further stated, “...no indication exists that the legislature intended this reclassification to apply retroactively...”

The defendant cites State v. Kane, 101 Wn. App. 607, 5 P.3d 741, 2000 Wash. App. LEXIS 1310 (Wash. Ct. App. 2000) and argues that a close reading of the Kane case demonstrates that the criminal savings clause does not save Mr. Rose’s prosecution. That is simply not the case. The Kane case actually, and clearly states that, “[i]n the absence of a contrary expression from the Legislature, all crimes are to be prosecuted under the law existing at the time of their commission,” citing, State v. Lorenzy, 59 Wn. 308,309 (1910). Furthermore, Kane also states that it is not “...‘essential to the life of the charge’ that a criminal prosecution be already *pending (emphasis added)* at the time a new amendatory or repealing act is enacted.” Furthermore, Kane cites Zornes stating that “from the words ‘not ever’ preceding the words ‘be applicable,’ the court found it could be reasonably inferred that the Legislature intended the amendment to apply to

pending cases as well as those arising in the future.” That is not the case here. We do not have any words comparable to “not ever” contained in this statute. Lastly, Kane states that, “[t]he savings statute creates an easily administered, bright-line rule....there is nothing fundamentally unfair in sentencing offenders in accordance with the law they presumably were aware of at the time they committed their offenses.”

In the present case, there is no indication that the legislature intended I-502 to apply retroactively and as correctly identified by the defendant, the intent of RCW 69.50.101 was “...to *stop (emphasis added)* treating adult marijuana use as a crime...”

Thus, the criminal general savings clause applies. The clause very clearly states, “[n]o offense committed....previous to the time when any statutory provision shall be repealed...and no prosecution for any offense... pending at the time any statutory provision shall be repealed...shall be affected by such repeal, but the same shall proceed in all respects....unless a contrary intention is *expressly (emphasis added)* declared in the repealing act...” Here, a contrary intention was not “expressed” in I-502. In addition, I-502 did not take effect until December 6, 2012. It is clear that the intent of the legislature that adult

possession of marijuana would cease (stop) being a crime from December 6, 2012, forward. The law does not apply retroactively. There is no language to support that it does.

Furthermore, the language of I-502 which includes the word “stop” certainly conveys the intention that the people will stop treating it as a crime, and “try a new approach.” Therefore, it means that while we have been treating it as a crime and have treated adult use marijuana as a crime in the past, we no longer will. It will *stop* and we will *try* something new. This language is clear and unambiguous.

II. A stipulation and order for stay of proceedings constitutes an agreement between the State and the defendant pertaining to the “resolution” of a criminal charge.

The appellant argues that prosecutions should cease even in pending cases regardless of the actual date of offense. This is not reasonable. Whether or not a case is pending does not affect the date the defendant committed the crime, nor does it affect the fact that at the time the offense committed, that it was, indeed, a crime/ unlawful.

Here, the defendant entered an agreement with the State. The agreement

provides that the State agrees to continue the matter and the defendant agrees to comply with the requirements set forth in that contract. The defendant, now, wants to terminate his agreement with the State simply because I-502 legalized adult possession of marijuana, several months after the commission of the crime¹. Again, I-502 did not *expressly* declare that the legalization of marijuana was intended to apply retroactively.

The appellant also suggests the stipulated order for and stay of proceedings was a “pending” matter with respect to cases pending after the effect of I-502. This case was resolved by way of a Stipulated Order for and Stay of Proceedings. The defendant entered an agreement with the State. The stipulated order reads as follows:

“The defendant understands and agrees that this document constitutes an agreement between the plaintiff and the defendant pertaining to the *resolution* of a criminal charge(s). The defendant further understands that he/she is obligated to fully and strictly comply with all conditions set forth in this agreement. The defendant further understands that in the event the defendant fails to fully comply with the conditions of this agreement, the prosecuting authority may request a hearing to revoke the stay of proceedings.” (SOP 2, 9.)

¹ The defendant’s crime occurred on June 26, 2012.

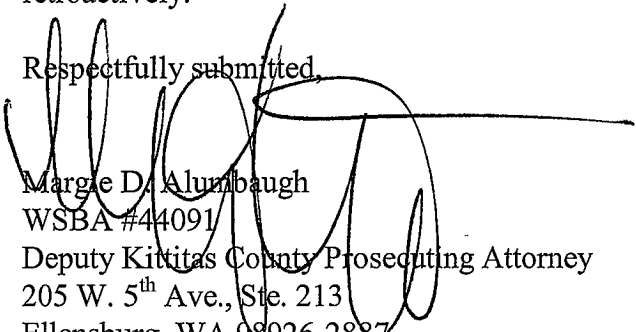
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While the agreement/contract includes a continuance of the matter, it is also an agreement whereby the defendant understands that if he fails to comply with the requirements, the agreement can be terminated and the case would proceed to bench trial as the defendant has waived his right to a jury trial within that agreement and if the defendant complied with those requirements the case would be dismissed. See appendix A. This agreement was entered into by both parties with a clear understanding of its contents and agreed that this agreement constituted a resolution of the matter.

CONCLUSION

The Intent of I-502 is clear and unambiguous. I-502 does not apply retroactively.

Respectfully submitted,



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APPENDIX A

3. The defendant shall pay the following assessment:

- Probation record check fees of \$40
- Probation monitoring fees of \$ ___ per month
- Court appointed attorney fees of \$ ___
- Court costs: \$ 150
- Restitution in the amount of \$ ___
- A Time payment agreement is authorized

4. If the defendant complies with all of the above listed conditions, the prosecuting authority agrees to :

- Move the court for a dismissal of the charge(s) of: POM UDA filed under the above cause number(s).
- Move the court to amend the charge of _____ to the charge of _____ to which the defendant shall: plead guilty Bail forfeit \$ _____
- In the event the defendant pleads guilty, the parties agree to make the following sentencing recommendation to the court: _____

5. In the event the court finds, after a hearing, that the defendant has failed to comply with any of the above listed conditions, or for a positive test for the use of any illegal drug, the court shall, upon the request of the prosecuting authority, revoke the stay of proceedings and proceed to bench trial.

6. As a condition of entering this stay of proceedings, the defendant agrees to waive the following rights:

- A. The right to a jury trial
- B. The right to a trial within 90 days of arraignment.
- C. The right at trial to hear and question witnesses called by the prosecuting authority.
- D. The right to testify at trial and call defense witnesses
- E. All defenses, including statutory and affirmative, to the charge.

7. In the event the court finds cause to revoke the stay of proceedings, the defendant stipulates and agrees:


- A. to the admissibility of the police reports, which are incorporated by reference, (including any statements made by the defendant contained in the reports),
- B. that items seized by police which are alleged to be alcohol or controlled substances are in fact alcohol or controlled substances, and
- C. that facts from the reports are sufficient to convict the defendant of the charged crime(s).

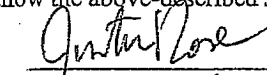
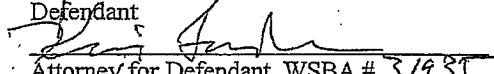
8. The parties agree that in the event the defendant fails to make payments as listed above and is delinquent by fifteen (15) days or more, the plaintiff and/or court have the authority to send such delinquent amounts to a collection agency for collection of said sums. Both parties agree that this authority exists whether or not the plaintiff chooses to have the matter set for review and bench trial. The defendant specifically waives any objection to such collection action by the plaintiff or the court, regardless of whether or not the defendant is found guilty after a trial. The defendant agrees that this document, along with any time payment agreement signed by the defendant, constitutes a judgment on the amounts stated paragraph 3 above.

9. The defendant understands and agrees that this document constitutes an agreement between the plaintiff and the defendant pertaining to the resolution of a criminal charge(s). The defendant further understands that he/she is obligated to fully and strictly comply with all conditions set forth in this agreement. The defendant further understands that in the event the defendant fails to fully comply with the conditions of this agreement, the prosecuting authority may request a hearing to revoke the stay of proceedings.

10. The parties jointly request that the court allow the above-described stay of proceeding and further request that the court enter the attached order.

DATED this 9th day of October, 2012.

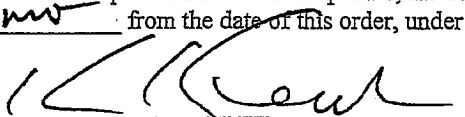

 Brent W. Bottoms, WSBA # 36263
 Deputy Prosecuting Attorney


 Defendant

 Attorney for Defendant, WSBA # 31935

ORDER

Based on the parties' request for a stay of proceedings, and the above stipulation between the parties, the court hereby orders that this cause is stayed for a period of 12 mo from the date of this order, under the terms and conditions contained in the attached stipulation.

Dated 10.30.12


 Judge/Commissioner