

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 37944-9-II

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

Respondent,

v.

JOSHUA M. SHADDAY,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF PACIFIC COUNTY

Before
The Honorable Michael Sullivan, Judge

APPELLANT'S RESPONSE BRIEF
TO RESPONDENT'S CROSS-APPEAL

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**A. RESPONSE TO CROSS -APPELLANT'S
ASSIGNMENT OF ERROR**

In light of Division Three's ruling in *In Re Gutierrez*, 146 Wn. App. 151, 188 P.3d 546 (2008), the trial court correctly added the school bus zone enhancement prior to calculating Mr. Shadday's DOSA sentence.

B. STATEMENT OF THE CASE IN RESPONSE

As discussed in detail in his opening brief, Joshua Shadday was convicted of three counts of delivery of methamphetamine and one count of possession of methamphetamine. Clerk's Papers [CP] 54. The jury found by special verdict that the delivery counts were committed within 1000 feet of a school bus stop. CP 56. The court calculated Mr. Shadday's standard range for Counts I, II, and III at 20 to 60 months, plus 24 months for the school bus enhancement, and 6 to 18 months for Count IV. CP 59.

The court imposed a DOSA sentence under RCW 9.94A.660, and ordered Mr. Shadday to serve 56 months in total confinement for Counts I, II, and III, to be served concurrently, and 56 months on community custody. CP 59.

The State filed a cross-appeal, arguing that the DOSA statute requires a sentencing court in a prison-based DOSA to impose one-half of the midpoint of the "standard range" and that the school bus zone

enhancement should have been added after that calculation under RCW 9.94A.660, as an additional 24 months. Brief of Respondent at 17; CP 90-91.

C. CROSS-RESPONDENT'S ARGUMENT

1. THE TRIAL COURT CORRECTLY INCLUDED THE SCHOOL BUS STOP ENHANCEMENT IN THE STANDARD RANGE SENTENCE.

In its cross-appeal, the State contends that the trial court erred by adding the school bus zone enhancement prior to calculating Mr. Shadday's DOSA sentence. The State relies upon the statutory language in RCW 9.94A.533(6) that states all enhancements "shall run consecutively to all other sentencing provisions" The State concludes that this language mandates the school bus enhancement must be added after the court determined the midpoint of the standard range, and that "[f]ailure to run the school zone enhancements consecutively to a DOSA sentence violates the clear and unambiguous language of RCW 9.94A.533(6)." Brief of Respondent at 17.

a. The school bus zone enhancement is properly considered part of the presumptive range.

RCW 9.94A.533(6) imposes a 24-month enhancement when a defendant commits a drug crime within 1,000 feet of a school bus stop under RCW 69.50.435. RCW 9.94A.533(6) 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.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(Emphasis added.)

Nothing in the statutory language prohibits the court from including the enhancement in the DOSA sentence. The trial court correctly interpreted RCW 9.94A.533(6) when it included the enhancements in the standard range sentence prior to calculating the midpoint of the sentence under DOSA. Statutory interpretation involves questions of law that is reviewed de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In construing a statute, the court's objective is to determine the legislature's intent. *Id.* “[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.” *Id.* at 9-10. 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. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148 Wn.2d 637, 645, 62 P.3d 462 (2003). If after that examination, the provision is still subject to more than one reasonable interpretation, it is

ambiguous. *Id.* If a statute is ambiguous, the rule of lenity requires the court to interpret the statute in favor of the defendant, absent legislative intent to the contrary. *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); *State v. Roberts*, 117 Wn.2d 576, 585, 817 P.2d 855 (1991).

The State's argument that the enhancement does not become part of the standard range is not only hypertechnical, but it is also incorrect. The school bus zone enhancement as defined by RCW 9.94A.533(6) is "an additional" twenty-four months "added to the standard sentence range." The statutory language explicitly provides that the 24-month school bus zone enhancement is "added to" the standard range sentence imposed. During the 17 years that the school bus zone enhancement legislation has been in effect, it has been consistently applied in accordance with the plain language of the statute as an additional 24-month period of confinement added to the sentence imposed. *See State v. Silva-Baltazar*, 125 Wn.2d 472, 478, 886 P.2d 138 (1994) (school bus zone enhancement provision adds 24 months onto the presumptive sentence); *State v. Lusby*, 105 Wn. App. 257, 265-66, 18 P.3d 625 (2001) (citing legislative history that the school bus stop zone enhancement statute intended to add two years to the presumptive sentence); *See also, State v. Johnson*, 116 Wn. App. 851, 856, 68 P.3d 290 (2003); *State v.*

Nunez-Martinez, 90 Wn. App. 250, 256, 951 P.2d 823 (1998); *State v. Wimbs*, 74 Wn. App. 511, 514, 874 P.2d 193 (1994); *State v. Dobbins*, 67 Wn. App. 15, 18-19, 834 P.2d 646 (1992).

Moreover, the fact that there is not a different rule for computing the standard range in drug zone enhancement cases was recently reiterated by Division 3 in *In re Gutierrez, supra*. In that case, Gutierrez pleaded guilty to delivery of a controlled substance and also stipulated to the accompanying enhancement that the offense occurred within 1,000 feet of a school bus route. *Id.*, 146 Wn. App. at 152-53. The enhancement added 24 months to Gutierrez' sentence of 12 to 20 months. The parties agreed to a DOSA sentence, which was accepted by the trial court. *Id.* The court imposed a midrange sentence of 40 months and suspended half of that time, ordering Gutierrez to serve 20 months in prison, followed by 20 months to be served in community custody. *Id.* The Washington Department of Corrections challenged the computation of Gutierrez' DOSA. *Id.* Division 3 disagreed with the DOC's contention, dismissed the petition, and did not reach the interesting question of whether or not the plea agreement could even be challenged by the DOC's petition. *Id.* at 157. The Court held:

Thus, neither the definition of "standard sentence range" nor the longstanding practice of adding enhancements to a base range to create a new "standard range" supports the

Department's position that the phrase refers only to an unenhanced "base" range. Similarly, the 2006 amendments to the DOSA statute and the drug enhancement statute do not aid the Department's argument.

Id. at 155.

The State argues that *Gutierrez* decision "goes off on several tangents without addressing the fundamental issue." Brief of Respondent at 20. The State contends, without citing to authority, that *Gutierrez* "flies in the face of the plain meaning of RCW 9.94A.533(6)" and that because the statute is "crystal clear, a court does not need to analyze anything beyond the plain meaning of the statute." Brief of Respondent at 20. The State concludes by arguing, again without citing to authority, that the Court's logic in *Gutierrez* "is flawed and that this decision should be rejected by Division II." Brief of Respondent at 20.

Division Three thoroughly reviewed the statute by looking at its language and by reviewing "the longstanding practice of adding enhancements to a base range to create a new "standard range" *Gutierrez*, 146 Wn. App. at 155. The Court then considered the Legislative history, concluding that "[t]he addition of the stacking provision in the 2006 legislation to change the *Jacobs* [154 Wn.2d 596, 115 P.3d 281 (2005)] result did not change the command of the first sentence of RCW 9.94A.533(6) that enhancements are to be added to the

base range.” *Gutierrez*, 146 Wn. App. at 156. Last, the Court looked at RCW 9.94A.660 *in toto*, finding that “nothing in the DOSA statute itself suggests that a special rule applies to enhancements.” *Gutierrez*, 146 Wn. App. at 156.

Far from going off “on several tangents[,]” as the State contends, the Court summarized each sphere of its analysis:

The 2006 amendments—stacking enhancements and setting minimum terms for prison-based DOSA sentences—simply did not change the way a sentence range is calculated when an enhancement exists. There is no ambiguity in the DOSA statute. The trial court did not err when it calculated the DOSA sentence in Mr. Gutierrez's case.

Id. at 157.

The State has not demonstrated why the Court’s analysis is wrong or why its contention that the “plain meaning” of RCW 9.94A.533(6) dictates the precedent that an enhancement must be added to the base range sentence should now be abandoned.

Because the school bus zone enhancement has been consistently interpreted as adding 24 months onto the presumptive sentence, or standard range, the trial court in this case was within its discretion in adding the 24 months in calculating the DOSA sentence. The State has cited no authority to the contrary, and no authority to support its untenable position.

2. **THE LEGISLATURE'S WORDING OF THE SCHOOL BUS ZONE ENHANCEMENT IS DIFFERENT THAN OTHER ENHANCEMENTS AND THUS THE ENHANCEMENT MUST BE INTERPRETED DIFFERENTLY.**

RCW 9.94A.533(6) states that all enhancements under its section shall run consecutively to all other sentencing provisions:

(6) 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.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

By contrast, the Legislature used different language in directing the sentencing courts to apply the firearm enhancement and the time “shall be served in total confinement”:

(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and 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).

Similar to the firearm enhancement, the Legislature crafted the deadly weapon enhancement to make it clear that the enhancement “shall be served in total confinement”:

(e) Notwithstanding any other provision of law, all deadly weapon enhancements under this section are mandatory, shall be served in total confinement, and 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).

“ ‘[W]here the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent.’ ” *In re Detention of Swanson*, 115 Wn.2d 21, 27, 804 P.2d 1 (1990)(quoting *United Parcel Serv., Inc. v. Department of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984)). Because the Legislature used different language in the enhancements for firearm and deadly weapons, it is axiomatic that the Legislature had a different intent related to the school bus zone enhancement. Because the school bus zone enhancement does not contain a similar requirement that the enhancement be served in “total confinement”, the trial court did not err by adding the enhancement prior to calculating Mr. Shadday’s DOSA sentence. In *State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005), the court examined a similar question related to RCW 9.94A.533(6). In that case, the court found that the statute was ambiguous as to whether sentencing courts should apply sentence enhancements under RCW 69.50.435 and RCW 9.94A.605 consecutively or concurrently. The *Jacobs* court found the statute was ambiguous, and relied upon rule of lenity to hold that sentencing courts should apply those enhancements concurrently to each another. In its analysis, the *Jacobs*

court noted that the legislature specified that in the case of deadly weapon and firearm sentence enhancements, sentencing courts must apply them consecutively. RCW 9.94A.533(3)(e),(4)(e). "Thus, the legislature clearly knows how to require consecutive application of sentence enhancements and chose to do so only for firearms and other deadly weapons." *Jacobs*, 154 Wn.2d at 603. Because the Legislature knew how to require a sentence enhancement be served in total confinement and not be added to the presumptive sentence prior to calculating a DOSA sentence, but chose not to use such language, this Court should find that the trial court did not err by adding the enhancement prior to calculating Mr. Shadday's DOSA sentence.

D. CONCLUSION

This Court should reverse Mr. Shadday's convictions and remand for a new trial, or vacate the enhancements and remand for further proceedings. If the convictions are not reversed or the enhancements are not vacated, this Court should reject the State's cross-appeal and affirm the DOSA sentence in all respects.

DATED: April 1, 2009.

Respectfully submitted,

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DIVISION II

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07-1-00255-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Appellant's Response Brief to Respondent's Cross-Appeal were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to, Joshua M. Shadday, Appellant, and Michael N. Rothman, Deputy Prosecuting Attorney, by first class mail, postage pre-paid on April 1, 2009, at the Centralia, Washington post office addressed as follows:

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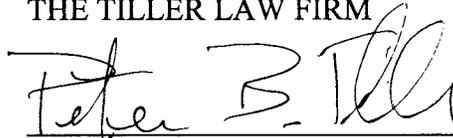
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