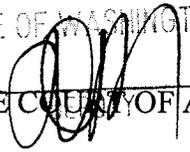


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COURT OF APPEALS
DIVISION II

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NO. 38662-3-II

STATE OF WASHINGTON

BY  IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAVID ARLIN TAYES,

Appellant.

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

The Honorable Thomas J. Felnagle

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL AND REMAND IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN COUNTING TAYES' CONVICTION FOR THIRD DEGREE RAPE AS A MOST SERIOUS OFFENSE AND SENTENCING HIM TO LIFE WITHOUT PAROLE AS A PERSISTENT OFFENDER.

The State argues that the trial court properly counted Tays's 1979 conviction for rape in the third degree as a strike offense because the crime of rape has always existed, the elements of the crime have not changed, and the crime merely changed its location in the code. Brief of Respondent at 9-11. The State's argument fails because it disregards the plain language of the controlling statute. At the time of Tays's murder conviction in May 1996, the legislature defined "sex offense" as follows:

- (a) **A felony that is a violation of chapter 9A.44.RCW or RCW 9A.64.020 or 9.68A.090 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;**
- (b) A felony with a finding of sexual motivation under RCW 9.94.127 or 13.40.135; or
- (c) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

RCW 9.94A.030(33)(Emphasis added).

In 1979, Tays pled guilty to rape in the third degree in violation of RCW 9.79.190(1)(a). CP 86. In applying the cardinal principles of statutory interpretation and looking to the plain language of the controlling

statute, Teyes' conviction was not a sex offense because it was not "a felony that is in violation of chapter 9A.44 RCW." Courts must assume the legislature meant exactly what it said. State v. Keller, 143 Wn.2d 267, 276-77, 19 P.3d 1030 (2001). Significantly, the legislature amended RCW 9.94A.030, effective July 2001, and defined "sex offense" as follows:

- (a) A felony that is a violation of chapter 9A.44 RCW, other than RCW 9A.44.130(10), or RCW 9A.64.020 or 9.68A.00 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;
- (b) Any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection;**
- (c) A felony with a finding of sexual motivation under RCW 9.94A.127 or 13.40.135; or
- (d) Any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this section.

RCW 9.94A.030(36) (Emphasis added).

The amendment included as a sex offense "any conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense" in subsection (a). Importantly, the amendment does not apply retroactively and consequently Teyes' third degree rape conviction was not a sex offense as defined by the legislature in 1996.

The State argues further that a court may remedy a numbering error when it creates an absurd result and undermines the law's purpose,

mistakenly relying on State v. Albright, 144 Wn. App. 566, 183 P.3d 1094 (2008). Brief of Respondent at 11. In Albright, the SRA defined “sex offense” as “[a] felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.130(11).” Id. at 569. The legislature amended RCW 9A.44.130 and renumbered the sections, changing the number of the section regarding failure to register as a sex offender from section 10 to 11 and the section regarding failure to register as a kidnapping offender from section 11 to 12. However, the legislature did not amend the numbered references in the definition of “sex offense.” The definition therefore excluded RCW 9A.44.130(11), which related to sex offenders instead of kidnapping offenders. Id. at 570-71. This Court corrected the numbering error, concluding that the unusual numbering error created an absurd result and undermined the law’s purpose. Id. at 572-73. Albright has no application here because the plain reading of RCW 9.94A.030(33) does not render the statute absurd or necessarily undermine its purpose. State v. Taylor, 97 Wn.2d 724, 729-30, 649 P.2d 633 (1982).

Accordingly, because Tayes’ 1979 third degree rape conviction was not a sex offense as defined by the controlling statute, the 1990 amendment eliminating sex offenses from the washout provision does not apply to Tayes. With Tayes’ third degree rape conviction washing out, he has only one prior most serious offense and does not meet the

requirements of a persistent offender. See Brief of Appellant at 9-12. Consequently, the trial court erred in sentencing Taves to life in prison without parole as a persistent offender and the court's error requires reversal of Taves' sentence and remand for resentencing.

2. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN ENTERING FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR THE ASSAULT IN THE FIRST DEGREE ASSAULT CONVICTION RATHER THAN VACATING THE CONVICTION IN VIOLATION OF TAVES' CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY.

The State argues that under State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007), "a guilty verdict does not trigger double jeopardy unless and until the court enters a judgment on it," and argues further that this case is like State v. Faagata, 147 Wn. App. 236, 193 P.3d 1132 (2008), review granted, 165 Wn.2d 1041, 204 P.3d 215 (2009) and State v. Turner 144 Wn. App. 279, 182 P.3d 478 (2008), review granted, 165 Wn.2d 1002, 198 P.3d 512 (2008) "and satisfies scrutiny under Womac." Brief of Respondent at 14-18. The fact that the Washington Supreme Court granted review in Faagata and Turner diffuses the State's argument because obviously the Court would not have granted review if the issue of double jeopardy were as clear as the State asserts. In any event, the State misapprehends the Supreme Court's analysis supporting its decision in

Womac. The Court agreed with the reasoning articulated in Green v. United States, 355 U.S. 184, 187-88, 78 S. Ct. 221, 2 L. Ed. 2d 199 (1957):

[T]he State “with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.”

Womac, 160 Wn.2d at 651.

The Supreme Court concluded that this Court’s “conditional dismissal of Womac’s lesser charges and verdicts, allowing for reinstatement if the greater verdict and sentence are later set aside, is entirely without merit.” Id. at 658. The record here substantiates that entering findings and conclusions to hold the assault conviction in abeyance for a later time is the equivalent of conditionally dismissing the conviction, which the Supreme Court deemed a violation of double jeopardy. Id. The findings and conclusions serve no other purpose as reflected by the State’s argument that the court should enter findings and conclusions “because you never know what could happen in the meantime while this case is on appellate review for the manslaughter conviction.”

16RP 3-4.

Resentencing is required for the trial court to strike the findings of fact and conclusions of law and unconditionally vacate the assault conviction in accordance with the Supreme Court's holding in Womac.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Mr. Tayes' sentence of life without the possibility of parole and remand for resentencing.

DATED this 12th day of February, 2010.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, David Arlin Tayes

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas C. Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of February, 2010 in Kent, Washington.



Valerie Marushige
Attorney at Law
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