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NO. 51685-3-II

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

In re Postsentence Review of Ricky Carroll,
STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS

Petitioner,

v.

RICKY CARROLL,

Respondent,

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

The Honorable Daniel Stahnke, Judge

BRIEF OF RESPONDENT

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A. IDENTITY OF RESPONDENT

Ricky L. Carroll was the defendant in Clark County No. 17-1-00443-0, and one of two respondents in this Court.

B. ISSUES

1. Do reviewing courts lack authority to rewrite statutes by inserting language the county prosecutor believes is missing?

2. Do reviewing courts lack authority to reshuffle a statute's subsections in order to avoid clear rules of construction?

3. Assuming RCW 9.94A.030(47)(a)(v) is ambiguous, does the rule of lenity require that it be construed in Carroll's favor?

C. STATEMENT OF THE CASE¹

On March 2, 2017, the Clark County prosecutor charged Carroll with Failure to Register as a Sex Offender. CCR App. A. The case was resolved when Carroll agreed to plead guilty to an amended lesser charge of attempted failure to register. The parties made an agreed recommendation which the sentencing court accepted. On January 4, 2018, the sentencing court imposed a 36-month prison term followed by 24 months of community custody. The 36-month

¹ Relevant parts of the trial court record are attached as exhibits to the Department of Corrections Post-Sentence Petition (DOC PSP) and appendices to the Clark County Response (CCR).

prison term is roughly in the middle of the 32.25- to 42.75-month standard range. CCR App. C, D; DOC PSP Ex. 1.

D. ARGUMENT

1. CARROLL DOES NOT SEEK TO WITHDRAW HIS PLEA NOR DOES HE SEEK COLLATERAL REVIEW OF THE CONVICTION.

The Department of Corrections argues the trial court lacked statutory authority to impose a term of community custody and the sentence should be remanded for correction. DOC PSP at 1-10. In response, Clark County contends the trial court had authority to impose the community custody term. Clark County Response (CCR) at 2-9.

DOC, Clark County, and Michael Thompson have argued the same basic claims in another case pending in this Court, In re Post Sentence Review of Michael Thompson, No. 50767-6-II. Thompson adopted by reference DOC's arguments that the trial court lacked authority to impose community custody.² In addition, Thompson challenged the conviction itself, contending that attempted failure to register is not a crime. According to Thompson, when an appellate court determines that a defendant pleaded guilty to a nonexistent

² See Thompson's Response to Post-Sentence Petition, at 10 (citing RAP 10.1(g)(2)).

crime, the remedy is to vacate the conviction and sentence and to remand for dismissal with prejudice.³

Unlike Thompson, Carroll does not seek to withdraw his plea, nor does he seek collateral review of his conviction for attempted failure to register. Carroll is concerned that such a challenge could lead the state to refile the original charge of completed failure to register. This would place Carroll at risk for a longer potential sentence.⁴ Carroll therefore makes it clear that he does not challenge his conviction, and his conviction should stand. See State v. Hall, 162 Wn.2d 901, 909, 177 P.3d 680 (2008) (where Hall did not raise an Andress⁵ challenge to his felony murder plea, the state could not preemptively move to vacate the plea and recharge Hall with other offenses without violating double jeopardy).

³ See Thompson's Response to Post-Sentence Petition, at 1-10.

⁴ See CCR Appendix C, Statement of Plea of Guilty Pretrial Settlement Agreement, at 3 (noting that the state may seek various remedies if Carroll "later moves to withdraw this plea or collaterally attack[s] the conviction under this cause number[.]").

⁵ In re Restraint of Andress, 147 Wn.2d 602, 56 P.3d 981 (2002).

2. CARROLL ADOPTS DOC'S ARGUMENTS. IN ADDITION, THE RULE OF LENITY REQUIRES STRICT CONSTRUCTION IN CARROLL'S FAVOR.

The DOC is correct that a sentencing court's authority to impose sentence conditions is constrained by statute. DOC PSP at 4 (citing In re Postsentence Review of Leach, 161 Wn.2d 180, 184, 163 P.3d 782 (2007)). The fact that Carroll pleaded guilty does not expand the court's sentencing authority. In re Restraint of Goodwin, 146 Wn.2d 861, 867-72, 50 P.3d 618 (2002) (correcting an erroneous sentence despite Goodwin's plea agreement). To avoid repetition, Carroll adopts DOC's sentencing challenge as allowed by RAP 10.1(g)(2).⁶

Briefly distilled, DOC argues attempted failure to register is not a "sex offense" as defined in RCW 9.94A.030(47)(a)(v).⁷ Because the attempted offense does not fall within that definition, there is no statutory authority to impose community custody. RCW

⁶ Carroll does not adopt any argument that could be construed to be a challenge to the conviction. See e.g., DOC PSP at 8 (noting "that the crime of 'attempted failure to register is arguably not even a crime in Washington").

⁷ DOC also argues the offense is not a "sex offense" under RCW 9.94A.030(47)(a)(iv) and is not a "crime against persons" under RCW 9.94A.411(2). DOC PSP at 5-6, 9-10. Clark County expressly concedes the former, CCR at 5, and implicitly concedes the latter by offering no argument in response.

9.94A.701(1)(a). DOC relies on two persuasive cases that refused to include inchoate attempts and conspiracies within sentencing statutes that only listed the completed offense. DOC PSP at 6-9 (citing Leach regarding attempts, and In re Hopkins, 137 Wn.2d 897, 976 P.2d 616 (1999) regarding conspiracies). Both cases held the relevant SRA provisions could not be expanded and rejected the state's contrary claims.

In response, Clark County contends that attempted failure to register falls within this narrow provision:

(v) A felony violation of RCW 9A.44.132(1) (failure to register as a sex offender) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register as a sex offender) or 9A.44.130 prior to June 10, 2010, on at least one prior occasion.

RCW 9.94A.030(47)(a)(v). Clark County also argues that commission of an attempt "is a violation of the underlying criminal statute." CCR at 6.

DOC has the better of the arguments. Although "failure to register" is listed in the definition, "attempted failure to register" is not. A court cannot add language to a statute that the state believes is missing. State v. Taylor, 97 Wn.2d 724, 728, 649 P.2d 633 (1982) ("This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent

omission”, quoting Jenkins v. Bellingham Municipal Court, 95 Wn.2d 574, 579, 627 P.2d 1316 (1981)).

In addition, the legislature placed subsection (v) after subsection (iv). Subsection (iv) expressly includes inchoate attempts, conspiracies, and solicitations to commit other listed crimes. But as Clark County properly concedes, subsection (iv)’s antecedent placement precludes its application to the single offense listed later in subsection (v). CCR at 5. The concession is proper because settled rules of construction support it. CCR at 5 (citing, *inter alia*, Jepson v. Dept. of Labor and Industries, 89 Wn.2d 394, 404, 573 P.2d. 10 (1977)). But Clark County’s subsequent argument is little more than a request to reshuffle the subsections to avoid its concession. This Court must, instead, give effect to the Legislature’s choice in ordering the subsections. Guillen v. Contreras, 169 Wn.2d 769, 776, 238 P.3d 1168, 1172 (2010) (the Legislature’s use of different language in different sections exhibits a different legislative intent) (citing State v. Jackson, 137 Wn.2d 712, 724, 976 P.2d 1229 (1999)).

Nor does Clark County’s position benefit from reliance on jury instructions, scoring manuals, or the SRA’s general scoring and standard range calculations. CCR at 6-7. None of these sources informs the SRA definition of “sex offense,” nor does Clark County cite

authority showing why a reviewing court should reach for such disparate tools to decide a basic question of statutory construction.

Clark County's strained effort to distinguish Leach and Hopkins also lacks merit. When distilled to their essence, in both cases the court refused to expansively read a statute to include an inchoate offense when the Legislature did not write the statute to include an inchoate offense. DOC PSP at 6-10.

Consistent with Leach and Hopkins, where community custody is punitive,⁸ the statutes imposing that penalty must be strictly construed. State v. Halsen, 111 Wn.2d 121, 123, 757 P.2d 531 (1988). Here two different state entities, represented by experienced and competent counsel, have come to diametrically opposed conclusions as to whether RCW 9.94A.030(47)(a)(v) includes the offense of attempted failure to register. Given that disagreement, citizens of ordinary intelligence would not have notice that commission of this offense would result in a term of community custody. Assuming arguendo 9.94A.030(47)(a) is ambiguous, the rule of lenity

⁸ In re Restraint of McNeal, 99 Wn. App. 617, 632, 994 P.2d 890 (2000) ("The purpose of community placement is primarily punitive.") Given the substantial number of restrictions imposed on Carroll's liberty during the community custody period, no party could reasonably contest that community custody is punitive.

still requires that it be construed in Carroll's favor. City of Seattle v. Winebrenner, 167 Wn.2d 451, 462, 219 P.3d 686 (2009); State v. Jacobs, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

In short, Clark County is asking this Court to do one of three things: (1) insert the word "attempted" into subsection (v); (2) effectively switch the order of subsections (iv) and (v) to give broader effect to subsection (iv); or (3) give the state the benefit of the rule of lenity. Because reviewing courts rightly reject these options, Clark County's arguments lack merit.

E. CONCLUSION

This Court should grant the DOC petition and remand to the sentencing court with narrow directions to vacate the term of community custody.

DATED this 28th day of June, 2018.

Respectfully Submitted,

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