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Court of Appeals
Division II
State of Washington
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NO. 50912-1-II

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

STATE OF WASHINGTON,
Appellant,

v.

JOHNNY CYR,
Respondent.

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

The Honorable Joely A. O'Rourke, Judge

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Whether the trial court correctly exercised its discretion when it sentenced Cyr to five years, which is within the maximum term?

B. STATEMENT OF FACTS

Johnny Ray Cyr was charged by second amended information with three Counts of Sale of a Controlled Substance for Profit – Heroin (RCW 69.50.410). CP 9. Cyr pled guilty to all three counts. In Cyr’s statement on guilty plea he stated, “In Lewis County on 3-22-17, 3-28-17 and 3-29-17 I sold heroin to another and received some money each time.” CP 21. Cyr stipulated to his prior record and offender score. CP 23. Cyr has at least one prior conviction under RCW 69.50. However, Cyr has no prior convictions for the sale of a controlled substance for profit. CP 23-24.

The trial court sentenced Cyr to 60 months under RCW 69.50.410(2) and declined to apply the doubling provision in RCW 69.50.408(1).

C. ARGUMENT

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SENTENCED CYR TO FIVE YEARS.

The trial court correctly determined that it was not required to double Mr. Cyr's sentence. A trial court has broad discretion in sentencing a defendant. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). This Court reviews "a trial court's sentence for errors of law or abuses of discretion in deciding what sentence applies." *State v. Roy*, 147 Wn. App. 309, 314, 195 P.3d 967 (2008) (*quoting State v. Castro*, 141 Wn. App. 485, 494, 170 P.3d 78 (2007)).

The trial court had the discretion to not apply doubling provision in RCW 69.50.408 under RCW 69.50.410.

RCW 69.50.408 provides in permissive language as follows:

(1) Any person convicted of a second or subsequent offense under this chapter **may** be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(Emphasis added) Id. RCW 69.50.410 provides in relevant part the following mandatory language:

(1) Except as authorized by this chapter it is a class C

felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana.

(2)(a) Any person convicted of a violation of subsection (1) of this section **shall** receive a sentence of not more than five years in a correctional facility of the department of social and health services for the first offense.

(Emphasis added) Id.

The terms “shall” and “may” are not ambiguous. “Shall” is mandatory and “may” is permissive”. *State v. Gonzalez*, 198 Wn. App. 151, 155, 392 P.3d 1158 (2017). “The word ‘shall’ in a statute ... imposes a mandatory requirement unless a contrary legislative intent is apparent.” *State v. Krall*, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994) (quoting *Erection Co. v. Dep’t. of Labor and Indus.*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993)).

The Court of Appeals interpreted RCW 69.50.408 (1) to automatically double the defendant’s statutory maximum term for a conviction under RCW 69.50 when the defendant has a prior conviction under that chapter. *In re Pers. Restraint of Hopkins*, 89 Wn. App. 198, 201, 203, 948 P.2d 394 (1997), *rev’d on other grounds by In re Hopkins*, 137 Wn.2d 897, 976 P.2d 616 (1999); *In*

re Cruz, 157 Wn.2d 83, 86, 134 P.3d 1166 (2006). However, doubling the **possible** statutory maximum does not deprive the trial court of the discretionary authority to determine any sentence within that maximum. *Hopkins*, 89 Wn. App. at 201. The Court in *Hopkins* enunciated this principle:

when a defendant is convicted under RCW 69.50 and has a prior conviction under that chapter, his statutory maximum term automatically becomes twice as long as would otherwise be authorized for his crime. The sentencing court **may** impose any sentence within that maximum term so long as it complies with other applicable provisions of the Sentencing Reform Act (SRA).

(Emphasis added) *Id.*

The State Supreme Court in *Cruz*, affirmed this portion of *Hopkins*, holding that RCW 69.50.408 doubles the statutory maximum sentence for certain repeat controlled substance convictions, but the trial court retains the discretion to determine any sentence within that maximum. *Cruz*, 157 Wn.2d at 89-90; *Roy*, 147 Wn. App. at 315.

RCW 69.50.410(2) also supports the trial court's decision to limit Cyr's sentence to five years. This provision limits a second

conviction to a five year sentence. The trial court's decision to impose a five year term was legally correct and the state has not demonstrated that the decision was or could have been an abuse of discretion. *State v. Wood*, 117 Wn. App. 207, 210, 70 P.3d 151 (2003).

A trial court abuses its discretion only if the court's decision is manifestly unreasonable or based on untenable grounds or reasons. *Wood*, 117 Wn. App. at 210. A decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Horn*, 2018 WL 1918236, 415 P.3d 1225, 1230 (2018).

The trial court applied the correct legal standard by sentencing Cyr to a term that falls within the statutory maximum and within the mandatory language of RCW 69.50.410. *Roy*, 147 Wn. App. at 315. The trial court also correctly applied the facts of Cry's case to appropriately exercise its discretion in sentencing Cyr to 60 months under both RCW 69.50.408 and .410. Cyr has no prior conviction for the sale of a controlled substance for profit, and neither of the three counts to which he pled guilty involved a sale

which transpired after prosecution and conviction of the first sale. CP 21, 23-24. These facts support a sentence of five years under the plain mandatory language of RCW 69.50.410(2)(a) and (b).

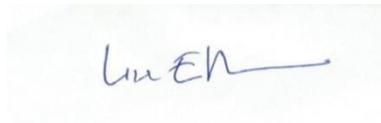
Because the trial court did not abuse its discretion, this court should affirm.

D. CONCLUSION

Johnny Ray Cyr respectfully requests this Court affirm the sentence imposed by the trial court.

DATED this 4th day of May 2018.

Respectfully submitted,

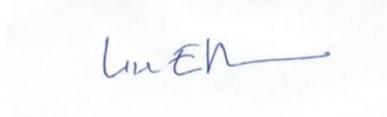
A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

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A handwritten signature in blue ink, appearing to read "Erin Sperger", is written over a light blue rectangular background.

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I, Lise Ellner, a person over the age of 18 years of age, served the Lewis County Prosecutor's Office appeals@lewiscountywa.gov and sara.beigh@lewiscountywa.gov and Johnny Cyr/DOC#385057, Coyote Ridge Corrections Center, PO Box 769, Connell, WA 99326 a true copy of the document to which this certificate is affixed on June 4, 2018. Service was made by electronically to the prosecutor and Johnny Cyr by depositing in the mails of the United States of America, properly stamped and addressed.

A handwritten signature in blue ink that reads "Lise Ellner" followed by a horizontal line.

Signature

LAW OFFICES OF LISE ELLNER

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