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Court of Appeals
Division II
State of Washington
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NO. 50972-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY P. WALSH,

Appellant.

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

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

The people of Washington entrust their legislature with classifying the culpability of criminal offenses under state law. When the legislature determines that the culpability and punishment for a particular offense is set too high and enacts legislation to remedy that defect, it declares that there is no purpose in imposing the previous, harsher punishments for those who will be convicted and sentenced for the offense going forward. The Washington Supreme Court has repeatedly recognized that in these circumstances, the proper course is to apply the amended law currently in force to pending prosecutions that have not yet been adjudicated.

Barely a week before the governor signed a bill into law reclassifying and downgrading the seriousness level of felony driving under the influence, Timothy Walsh slipped up in his lifelong battle with alcoholism and was arrested for driving under the influence of alcohol. The state charged him with felony driving while under the influence of intoxicants (hereinafter “felony DUI”) based on a conviction twenty-three years earlier for vehicular assault. Mr. Walsh chose to plead guilty.

In the time between his arrest and plea, the new law the legislature enacted went into effect, but at his sentencing, the court imposed a sentence eleven months longer than the high end of the standard range allowable under the law at the time of his conviction and sentencing. This sentence defied both legislative will and rulings of our Supreme Court. Without relief from this erroneous sentence, Mr. Walsh will lose nearly an additional year of his life to incarceration after he has completed the proper sentence under the law.

II. ASSIGNMENT OF ERROR

The trial court imposed an erroneous sentence in excess of statutory authority by sentencing Mr. Walsh to sixty-eight months in prison.

III. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Washington case law articulates that when the legislature reclassifies a criminal offense to downgrade its punishment and culpability, the new effective law should be applied to all pending prosecutions. Mr. Walsh pleaded guilty and was sentenced for felony DUI at seriousness level V after a new law took effect that downgraded the seriousness level and corresponding standard sentencing range of felony DUI from level V to level IV. Is the sentence erroneous?

IV. STATEMENT OF THE CASE

On April 21, 2017, the legislature passed S.B. 5037, amending RCW 9.94A.515 to reclassify and downgrade the seriousness level of the felony driving under the influence offense from a level V to a level IV offense. Laws of 2017, ch. 335, § 4. Sixteen days later, Mr. Walsh was arrested for driving under the influence of alcohol. CP, 246. The state charged him with felony DUI because of a prior conviction for vehicular assault under the influence stemming from a car accident in 1994. CP, 4. The following week, on May 16, 2017, the governor signed the amendment downgrading the seriousness level of seriousness of felony DUI, with the law going into effect on July 23, 2017. Laws of 2017, ch. 335, § 4.

After the effective date of the lowered penalty, Mr. Walsh pleaded guilty as charged on August 9, 2017. CP, 8–18. At a sentencing hearing that followed in October, the trial court calculated Mr. Walsh's offenders score at seven, based on two points for the vehicular assault conviction, and one point each for prior convictions for misdemeanor DUI, rape in the second degree, possession of a controlled substance, felony DUI, and failure to register as a sex offender. CP, 257–58. Although the amended 9.94A.515 lowered the seriousness level of the

offense to IV, the court imposed a sentence of 68 months in prison, the high end of the standard range, based on seriousness level V. CP, 248–49; *see* RCW 9.94A.510.

V. ARGUMENT

B. The court sentenced Mr. Walsh based upon the incorrect seriousness level under 9.94A.515.

“When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered.” *In re Goodwin*, 146 Wn.2d 861, 869, 50 P.3d 618 (2002) (*citing In re Pers. Restraint of Carle*, 93 Wn.2d 31, 604 P.2d 1293 (1980)). Illegal sentences may be challenged for the first time on appeal. *State v. Ford*, 137 Wn.2d. 472, 477, 973 P.2d 452 (1999), *superseded on other grounds by statute*.

Determining the proper sentence under the SRA is a three-step process. First, the court determines a person’s criminal history. RCW 9.94A.500. Second, the court determines the person’s offender score under RCW 9.94A.525. Finally, based upon the offender score and the seriousness level that the legislature has classified the offense set forth in RCW 9.94A.515, the court determines the standard range sentence from the grid in RCW 9.94A.510.

The Washington Supreme Court has consistently recognized that enacted declarations of legislative will that reclassify the culpability of criminal offenses should be applied retroactively to pending prosecutions. *See State v. Ross*, 152 Wn.2d 220, 239–40, 95 P.3d 1225 (2004); *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994); *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Additionally, the court has separately recognized that a remedial measure passed by the legislature is liberally construed in order to effectuate the remedial purpose for which the statute was enacted, and may be interpreted to affect pending cases when expressed in words that fairly convey that intention. *State v. Grant*, 89 Wn.2d 678, 683, 575 P.2d 210 (1978); *see also State v. Zornes*, 78 Wn.2d 9, 13, 475 P.2d 109 (1970), *overruled on other grounds by United States v. Batchelder*, 442 U.S. 114, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979).

1. Because the legislature determined that Mr. Walsh's offense of conviction was less culpable in amending RCW 9.94A.515 than under the old law, the effective law should have been applied in pending prosecutions.

When the legislature reclassifies and downgrades a crime, it has judged the specific criminal conduct less culpable, concluding the conduct at issue is deserving of more lenient treatment. *Wiley*, 124 Wn.2d at 687. It is “a fundamental reappraisal of the value of

punishment” and “therefore highly relevant to a sentencing judge's estimation of a defendant's overall culpability and dangerousness.” *Id.* at 687–88. Newly effective law applies in pending prosecutions where there has been a legislative determination that the offense is less culpable. *See Ross*, 152 Wn.2d at 239–40.

- a. There is no purpose in imposing the harsher punishment of outdated law on a defendant whose case is currently before a court.

A legislative reduction in the penalty for a crime creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *See Heath*, 85 Wn.2d at 198. In announcing the principle, the *Heath* court unanimously affirmed that a newly enacted statute granting a judge authority to stay a license revocation penalty imposed post-conviction applied retroactively. *Id.* at 196. The court considered whether the new law allowed it to grant a habitual traffic offender a stay of his driver’s license revocation order, even though the law went into effect after the precipitating offense and revocation order. *Id.* After his conviction, Mr. Heath began a course of treatment for alcoholism; the following year, the legislature amended RCW 46.65.060 to permit such stays if the offender was obtaining treatment for alcoholism after alcohol-related offenses. *Id.* at 197.

Justice Utter articulated two reasons for the ruling. First, the statute was remedial, creating a presumption of retroactivity. *Id.* Second, and more pertinently, the statute, in effect, reduced the penalty for a crime. *Id.* at 197–98. The court then declared that when the legislature reduces the penalty for a crime, it “is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one.” *Id.* at 198. In creating this precedent, the court imported reasoning from state supreme court declarations in California and New York that plainly articulated that states’ savings statutes did not override the application of this principle favoring the new law in all pending cases. *Id.* at 198 (citing *In re Estrada*, 63 Cal.2d 740, 408 P.2d 948 (1965); *People v. Oliver*, 1 N.Y.2d 152, 134 N.E.2d 197 (1956)).

- b. Legislative enactments reclassifying and downgrading the seriousness level of an offense require a sentencing court to give retroactive effect to the legislative will in pending prosecutions.

The court expounded on the *Heath* rule and its application to criminal statutes in *Wiley*. See *Wiley*, 124 Wn.2d at 679. The court decided that prior convictions remained felonies for the purpose of calculating offender score, even though the offenses in question would have been misdemeanors at the time of the sentencing in the then-

current offense. *See id.* However, the court distinguished between when the legislature merely modified the elements of a crime to refine its underlying characteristics but not its culpability (as was the case in *Wiley*), and when the legislature downgrades the seriousness of an offense, after which “a sentencing court must give retroactive effect to the legislature's decision.” *Id.* at 687. The legislature’s downgrading of the felony DUI offense prior to Mr. Walsh’s plea and sentencing fits this latter characterization, requiring retroactive effect.

Ross covers the court’s latest articulation of when pending prosecutions are affected by a change in law because of a legislative determination that a particular offense is less culpable. *Ross*, 152 Wn.2d at 240. The court rejected the defendant’s argument (which relied on *Heath* and *Wiley*) that favorable amendments to Washington’s offender score calculation statute should retroactively apply to the calculation of his offender score. *See id.* at 235. However, the court also distinguished that the case at hand was different from circumstances and relevant rule articulated in *Wiley*. *Id.* at 239–40.

The court reasoned offender scores are highly individualized, and legislative modifications to them do not reflect a legislative statement about the culpability of a crime, whereas downgrading the

punishment for an offense constitutes a reclassifying of that offense as less culpable. *Id.* The court clearly stated that legislative declarations reducing the penalty for a crime was determined in *Wiley* to mean that repeal or amendment should affect pending prosecutions. *Id.* The court reasserted that principle, noting that the Court of Appeals had correctly recognized that a legislative determination downgrading culpability would have changed the conclusion from prospective application only to retroactive application. *Id.* at 240.

Through *Heath* (1975), *Wiley* (1994), and *Ross* (2004), our Supreme Court case law has consistently contemplated circumstances like Mr. Walsh's and articulated that a retroactive application of the new law should apply. Amending the seriousness level of a crime is not a change that merely impacts individualized calculations dependent on prior convictions or change the elements of a crime. The seriousness level is a legislative declaration of the level of culpability for a class of criminal acts, set against an appropriate standard sentencing range and relative to other criminal offenses. By lowering the seriousness level of felony DUI, the legislature could reasonably only intend that the offense is of lesser culpability than a level V offense. Prior to the amendment in this case, felony DUI carried a higher seriousness level

and culpability than vehicular assault while under the influence. *See* RCW 9.94A.515; RCW 46.61.522(1)(b). This legislative reclassification means that Mr. Walsh's conviction and sentencing, entered via guilty plea after the new law came into effect, should have been subject to the effective law at the time based on the legislative will on the seriousness of the offense. His sentencing under the old law imposing higher culpability was erroneous. The lawful high end of Mr. Walsh's sentencing range based on RCW 9.94A.515 and precedent is fifty-seven months.

2. *Additionally, the law should have applied retroactively to Mr. Walsh's sentencing because the legislature's amendment of RCW 9.94A.515 was patently remedial and should have been liberally constructed to effectuate the remedial purpose.*

“[R]emedial statutes are liberally construed in order to effectuate the remedial purpose for which the statute was enacted.” *Grant*, 89 Wn.2d at 685. Furthermore, “[a]s a general rule,” amendments that are “clearly curative or remedial[] will be applied retroactively” even if they are “completely silent as to legislative intent for retroactive application.” *State v. Kane*, 101 Wash. App. 607, 613, 5 P.3d 741 (2000), *as amended* (Aug. 4, 2000).

The purpose of amending RCW 9.94A.515 in S.B. 5037 was patently remedial. As discussed above, Washington law used to punish people more severely for getting a successive DUI that qualified them for the felony charge than it did for committing vehicular assault while driving drunk. *See* RCW 9.94A.515. The legislation brought the seriousness level into accord with vehicular assault while intoxicated under RCW 46.61.522(1)(b) (level IV).

Grant is instructive here. The court held that the language in RCW 70.96A.010 stating “intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages” was an express declaration of legislative intent for retroactive application. *Grant*, 89 Wn.2d at 682. The phrase “may not be subjected to criminal prosecution” sufficiently evinced for the court an intent that pending prosecutions were included in new law’s reach. *Id.* at 684.

This court distinguished *Grant*’s application in *State v. Lombardo*, but the latter case is not on point to Mr. Walsh’s case. *See generally State v. Lombardo*, 32 Wn. App. 681, P.2d 151 (1982). *Lombardo* did not involve a clearly remedial amendment to a statute. *Id.* In assessing language similar to that found in *Grant*, the court

zeroed in on a phrase in “RCW 46.63.020 providing that a violation of any act prohibited by Title 46 is ‘designated as a traffic infraction and may not be classified as a criminal offense.’” *Id.* at 684. This court distinguished this language from *Grant* by reasoning it made no mention of prosecutions and “only focuse[d] on the proper classification of the underlying violation after its effective date” without reference to pending prosecutions. *Id.* Indeed, *Lombardo* contains no discussion whatsoever of whether the statute at issue was remedial. *See id.* at 152–53. Thus, the facts and ruling of *Lombardo* are inapposite to the circumstances in Mr. Walsh’s case, where downgrading the seriousness level of the offense was a clearly remedial measure.

Grant is more instructive here than *Lombardo* because the Supreme Court looked to the operation of the statutory language with a liberal construction to effect its remedial purpose, rather than demanding an express declaration about retroactivity. Here, the court must similarly look to *Grant* and the operation of the statutory scheme to liberally construe the legislature’s remedial purpose here and apply the change retroactively.

RCW 9.94A.515 sets the level of seriousness for criminal offenses and the legislature's interpretation of the culpability for offenses. RCW 9.94A.520 provides the operative language for the courts to determine to which offense section .515 applies. Legislative modifications to section .515 have no legal effect without section .520. It requires that the "offense seriousness level is determined by the offense of *conviction*." RCW 9.94A.520 (*emphasis added*). The required liberal construction of the legislature's remedial purpose here necessitates an understanding that the legislature enacted its amendment to .515 knowing that it would correct the seriousness level of all future *convictions*. This includes pending prosecutions that have not reached a conviction by the effective date, like Mr. Walsh's case. An "offense of conviction" is only identifiable at the point of conviction through a guilty plea or a trial verdict. It is legally unidentifiable at the point of the commission of the underlying act.

The court should follow *Grant*'s instructions on liberal construction and *Kane*'s understanding of the presumptive retroactive application of clearly remedial measures despite silence as to legislative intent. The amendment to RCW 9.94A.515 should be liberally construed as clearly remedial with presumptive retroactive application

to pending cases that had not reached the decisive point of conviction. Applying outdated law that the legislature already remedied defies the required construction and is erroneous.

3. The general savings statute does not apply in circumstances when the legislature downgrades the punishment for an offense. or when it enacts patently remedial legislation.

When the law pertaining to a criminal offense is changed by the legislature, the common law provides that pending cases be decided “according to the law in effect ‘at the time of the decision.’” *State v. Brewster*, 152 Wn. App. 856, 859, 218 P.3d 249 (2009). However, over 100 years ago, Washington enacted a general savings statute that pronounced that “[w]hensoever 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.” RCW 10.01.040 (1901).

The Washington Supreme Court has recognized many exceptions and contours to this declaration for over a century. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687; *Grant*, 89 Wn.2d at 683; *Heath*, 85 Wn.2d at 198. The savings clause was designed to

prevent the outright frustration of ongoing prosecutions, and it is to be narrowly construed and not applicable to declarations of legislative will that reclassify the culpability of criminal offenses. *See Wiley*, 124 Wn.2d at 687; *Grant*, 89 Wn.2d at 683. The Washington Supreme Court has never overruled *Heath* or the presumption that changes to the law demonstrating a legislative determination that an offense is less culpable demand application to pending prosecutions. On the contrary, the court has continued to reference this rule in articulating the boundaries and exceptions of the general savings clause. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687.

Division I offered the most negative critique of *Heath* in *Kane*, 101 Wash. App. at 614–19. The court there held that a new statute amending eligibility criteria under the Drug Offender Sentencing Alternative (DOSA) did not apply retroactively to the defendant, Mr. Kane. *Id.* at 607. The DOSA statute was amended to change the eligibility requirements and went into effect shortly after Mr. Kane pleaded guilty, but prior to his sentencing hearing. He was ineligible for an alternative sentence under the effective law at the time of his offense and guilty plea conviction, but would have been eligible under the amended law. *Id.* at 609. The trial court had relied on *Heath* in ruling

Mr. Kane eligible, which the appellate court deemed erroneous, reasoning that the general savings statute was not at issue in *Heath*. *Id.* at 615–16.

Kane's reasoning applies to a different set of law and facts. *Heath*, *Wiley*, and *Ross* all discuss circumstances of legislative will reclassifying the culpability of a criminal act with a lower sentence as an exception to the general savings clause. *Kane*, quite differently, addresses the expansion of the eligibility of sentencing alternatives for certain drug offenses—it does not involve a declaration of diminished culpability from the legislature, only an expansion of access to treatment options. The case law clearly and consistently contemplates situations like Mr. Walsh's, and distinguishes them from those where the savings clause applies, like amendments changing the calculation procedures in offender scoring.

Kane also mischaracterizes *Heath*'s ruling in relation to the savings clause. Division I rejected *Heath*'s ruling on retroactive application of legislative punishment reduction by calling it dicta and suggesting that the reasoning the Supreme Court imported from other states did not apply in Washington because of differences between the different states' general savings statutes.

While *Heath* does not directly analyze the general savings statute, it clearly contemplates it in its citation to *Oliver* and *Estrada* in formulating its ruling. Both of those cases involved statutes that overcame general savings clauses with the courts concluding in favor of retroactive application of ameliorative changes in penal codes. See generally *Estrada*, 63 Cal.2d 740; *Oliver*, 1 N.Y.2d 152. Absent the common savings clauses, citation to these cases would not have been persuasive or even relevant.

The *Kane* court overstates the significance of what differences there are between the Washington, California, and New York general savings statutes. Whatever differences the respective legislatures had in their choices of words and phrasing, the function and purpose of the savings clauses enacted was substantially the same. New York's savings clause mandates that "[t]he repeal of a statute or part thereof shall not affect or impair any act done, offense committed or . . . penalty, forfeiture or punishment incurred prior to the time such repeal takes effect,' and section 94 provides that all proceedings commenced and pending at the time a statute is repealed 'may be prosecuted . . . to final effect in the same manner as they might if such provisions were not so repealed.'" *Oliver*, 1 N.Y.2d at 159 (citing N.Y.

Gen. Constr. Law § 94 (McKinney)). California’s penal code¹ and statutory construction code² achieve the same effect. *See* CAL. PENAL CODE § 3; CAL. GOV'T CODE § 9608. Though the wording of RCW 10.01.040 is different, its intent is very much the same—to create the same sort of savings clause aimed at preventing code repeals from undoing criminal convictions and sentences or completely frustrating prosecutions predicated on the previous law before it was amended via repeal.

The *Kane* court further asserted that the California and New York interpretations were out-of-step with Washington’s precedent. *Kane*, 101 Wn. App. at 617. However, it did so without support and, later, citing only to federal authorities criticizing the *Oliver* interpretation of how a savings clause operates in view of penalty reductions. *Id.* at 617.

Furthermore, the rule from *Heath* is not dicta, either by definition or in its ongoing recognition by the court. The *Heath* court reasoned that the legislative will in penalty reduction was one of two

¹ “No part of it is retroactive, unless expressly so declared.” Cal. Penal Code § 3.

² “The termination or suspension (by whatsoever means effected) of any law creating a criminal offense does not constitute a bar to the indictment or information and punishment of an act already committed in violation of the law so terminated or suspended, unless the intention to bar such indictment or information and punishment is expressly declared by an applicable provision of law.” Cal. Gov't Code § 9608.

possible dispositive rationales for finding that legislation operated retroactively to pending cases that had not yet been adjudicated. *Heath*, 85 Wn.2d at 197–98. It was not mere commentary on rules inapplicable to the case. The case may have reached the court as a challenge to a stay of a license revocation order and not as an appeal of the sentence, but the license revocation order was a penalty resulting directly from the defendant’s latest alcohol-related traffic conviction. Furthermore, the Supreme Court has continued to reference the rule *Heath* established regarding the retroactive applicability of legislative penalty reductions to pending cases, including in cases decided after *Kane*’s mischaracterization of the rule’s vitality. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687. These subsequent cases demonstrate the court’s ongoing understanding that the legislature may decide that a punishment is too severe, and that decision is given effect in cases that have not yet been adjudicated.

4. RCW 9.94A.345 applies strictly to offender score calculation and eligibility for sentencing alternatives; it does not apply to enactments of legislative will downgrading the seriousness level of offenses or to patently remedial legislation.

A 2000 amendment to the SRA added a timing clause to the chapter, designating “the law in effect when the current offense was

committed” as the law to apply in the calculation of sentences. RCW 9.94A.345; Laws of 2000, ch. 26, § 1–2. The statute was accompanied by an explicit articulation of legislative intent—the statute was “intended to cure any ambiguity that might have led to the Washington Supreme Court’s decision in *State v. Cruz*” the year before, a case about retroactivity in the calculation of offender scores. *See generally State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999) *superseded by statute*. The legislature went further in defining its intent:

“A decision as to whether a prior conviction shall be included in an individual’s offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing alternatives or modifying the availability of existing alternatives.”

RCW 9.94A.345 (Intent Note); Laws of 2000, ch. 26, § 1.

By this plain language, RCW 9.94A.345 applies only to offender score calculation and eligibility for sentencing alternatives. The statute is silent about application of the reduction in seriousness level for a broad class of offenses. As a derogation of the common law, it should also be strictly construed. The statute explicitly articulates the legislature’s intent about the circumstances to which it should apply. Calculating offender score is an individualized determination for

sentencing, not a static decree of law about the relative culpability of a particular offense. Seriousness level, which involves a legislative decree about the appropriate penalty level of specific criminal actions, is not individualized to the offender or captured by this statute.

VI. CONCLUSION

Mr. Walsh currently stands to remain in prison nearly a year in excess of what the statute at the time of his conviction authorizes. The Washington Supreme Court has articulated repeatedly that the legislature's primacy in designating the culpability of crimes means that when it reclassifies and downgrades the punishment inflicted for a particular offense, the amended law should apply to pending prosecutions. Additionally, clearly remedial legislation should be liberally construed to achieve its curative intent and apply retroactively in pending prosecutions. Mr. Walsh's sentence of sixty-eight months at seriousness level V was erroneous, and he should be resentenced according to the law in effect at the time of his conviction and sentencing.

DATED this 5 day of March 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brendan O'Neill". The signature is fluid and cursive, with the first name being more prominent.

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A handwritten signature in black ink, appearing to read "Gregory I. Link". The signature is cursive and somewhat stylized, with a large initial "G".

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 50972-5-II
v.)	
)	
TIMOTHY WALSH,)	
)	
Appellant.)	

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