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NO. 50972-5-II

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

STATE OF WASHINGTON, Respondent

v.

TIMOTHY PATRICK WALSH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.17-1-01089-8

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

I. Walsh was sentenced under the correct seriousness level.

STATEMENT OF THE CASE

Timothy Walsh (hereafter “Walsh”) was charged by information with Felony Driving under the Influence (hereafter “Felony DUI”) and Driving while License Suspended in the Third Degree for an incident that occurred on May 7, 2017. CP 4.

At the time Walsh committed these offenses, the seriousness level under the SRA for Felony DUI was V. Former RCW 9.94A.515 (June 9, 2016). RCW 9.94A.515 was amended by the legislature on July 23, 2017, and the seriousness level was reduced to IV. Laws of 2017, ch. 335.

Walsh pleaded guilty to these charges on August 8, 2017. CP 8-21. He was sentenced on October 5, 2017 to a sentence within the standard range at seriousness level V. CP 246-69. This timely appeal follows.

ARGUMENT

I. Walsh was sentenced under the correct seriousness level.

Walsh argues that the trial court erred when it sentenced him to a Felony DUI conviction at a seriousness level of V instead of IV. He claims that when RCW 9.94A.515 was amended to lower the seriousness level it

should have been applied retroactively to his offense. However, the amendment to RCW 9.94A.515 does not have retroactive effect, because the legislature had no intent for it to apply retroactively. Walsh was properly sentenced under the law that was in effect at the time he committed the crime. His claim fails.

“A sentencing court's statutory authority under the SRA is a question of law reviewed de novo.” *State v. Parmelee*, 172 Wn. App. 899, 292 P.3d 799 (2013) (citing *State v. Mann*, 146 Wn. App. 349, 189 P.3d 843 (2008)). Any sentence imposed under the SRA is determined in accordance with the law in effect at the time the current offense was committed. RCW 9.94A.345; *State v. Medina*, 180 Wn.2d 282, 324 P.3d 682, 685 (2014). This is the rule absent any clear legislative intent to the contrary. *Parmelee*, 172 Wn. App. at 909. There is a potential exception to this rule for remedial statutes, because they are generally enforced as soon as they are effective and can be enforced retroactively. *Id.* (citing *State v. Pillatos*, 159 Wn.2d 459, 150 P.3d 1130 (2007)).

However, Washington has adopted the saving statute that preserves a pending prosecution from being abated by the legislature's later repealing or amending the substantive law defining a crime or setting its penalty. *State v. Kane*, 101 Wn. App. 607, 5 P.3d 741 (2000), *as amended*

(Aug. 4, 2000). The saving statute is codified in RCW 10.01.040, and reads in pertinent part:

Whenever 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. If there is no language indicating a contrary intent, an amendment to a criminal statute, even a patently remedial statute, must apply prospectively under the saving statute. *State v. McCarthy*, 112 Wn. App. 231, 48 P.3d 1014 (2002) (citing *Kane*, 101 Wn. App. at 610-15; RCW 10.01.040). “[T]he saving force of the statute is applied narrowly and its exception – ‘unless a contrary intention is expressly declared in the amendatory or repealing act’ – is interpreted broadly.” *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015) (quoting *Kane*, 101 Wn. App. at 612). A ‘contrary intent’ “need only be expressed in ‘words that fairly convey that intention.’” *Kane*, 101 Wn. App. at 612 (internal quotations omitted). Determining whether or not an amendment to a criminal statute is remedial is only necessary if the new statute contains words of intent that fall under the exception to the saving statute. *Id.* at 613.

Courts “have long held that under the saving clause, amendments to criminal statutes (which include reclassification of crimes) do not apply

retroactively to offenses committed before the effective dates of those amendments.” *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186, (2010) (citing *State v. Ross*, 152 Wn.2d 220, 95 P.3d 1225 (2004); *McCarthy*, 112 Wn. App. at 236–37; *Kane*, 101 Wn. App. at 610–12)).

Walsh was properly sentenced to the law that was in effect at the time he committed this offense. Walsh committed the offense of Felony DUI on May 7, 2017, and at that time RCW 9.94A.515 punished this crime under seriousness level V. This was the law in effect at the time Walsh committed the offense, so his sentence must be determined under that level. RCW 9.94A.345. Therefore, the trial court properly sentenced Walsh at seriousness level V.

Furthermore, the July 23, 2017 amendment to RCW 9.94A.515 does not apply retroactively to Walsh’s conviction. This was an amendment to a criminal statute, so it is subject to the savings clause. RCW 10.01.040; *McCarthy*, 112 Wn. App. at 237 (citing *Kane*, 101 Wn. App. at 610-15). Under the savings clause, RCW 9.94A.515 can only apply retroactively before July 23, 2017 if a contrary intention is expressly declared in the amendatory act. RCW 10.01.040. However, the act amending RCW 9.94A.515 is completely absent of any language that would indicate an intent to apply the amendment retroactively. Laws of 2017, ch. 335 amended RCW 9.94A.515, and the legislature described it

as: “[an act] [r]elating to making a fourth driving under the influence offense a felony; amending RCW 46.61.502, RCW 46.61.504, and RCW 46.61.5054; reenacting and amending RCW 46.61.5055 and RCW 9.94A.515; and prescribing penalties.” Laws of 2017, ch. 335. The relevant amendment to RCW 9.94A.515 was moving the crime of Felony DUI from seriousness level V and placing it in seriousness level IV. *Id.* at sec. 4. This amendment to RCW 9.94A.515 was solely characterized as “reenacting and amending” the statute, and there is no language indicating any intent for the reduction in seriousness level to apply retroactively. Therefore, there was no intent for RCW 9.94A.515 to apply retroactively, and Walsh’s Felony DUI committed while the former statute was in effect “shall be punished or enforced as if it were in force.” RCW 10.01.040.

Amendments to statutes that have been found to include language that trigger the exception to the savings clause are markedly different from the language found in Laws of 2017, ch. 335. An amendment to a narcotics statute that stated “the provisions of this chapter shall not ever be applicable to any form of cannabis” was found to be evidence of retroactive intent, because the use of “shall not ever...be applicable” indicated intent to apply in any case, past or future. *State v. Zornes*, 78 Wn.2d 9, 475 P.2d 109 (1970), *overruled on other grounds by City of Kennewick v. Fountain*, 116 Wn.2d 189, 802 P.2d 1371 (1991). The

language in an amendment to the statute decriminalizing being intoxicated on a public highway that stated “intoxicated persons may not be subjected to criminal prosecution solely because of their consumption of alcoholic beverages” had retroactive effect to all pending cases, because this language showed the legislature intended that no one shall go to trial on this charge after the effective date of the act. *State v. Grant*, 89 Wn.2d 678, 575 P.2d 210, 213 (1978). There is no such language in the amendment at issue in this case. The legislature did not say Felony DUI “shall not ever” be punished under seriousness level V, nor did it say that a person “may not be subjected to” punishment under seriousness level V for a Felony DUI. All the legislature did here was move Felony DUI from seriousness level V to IV, without any comment or language to indicate any retroactive effect. Laws of 2017, ch. 335 does not include any contrary intention triggering the exception to the savings clause. This shows the amendment to RCW 9.94A.515 does not apply retroactively.

Walsh’s argument that retroactive application is necessary whenever the culpability of a criminal offense is reclassified is without support. *See* Brief of Appellant, pg. 5. Relying on *State v. Heath*, 85 Wn.2d 196, 532 P.2d 621 (1975), Walsh claims that when the legislature reduces the penalty for a crime it creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases.

See Brief of Appellant pg. 6. However, this language from *Heath* has been repeatedly held to be dicta and inapplicable in criminal cases. In *Ross*, the Supreme Court held that *Heath* did not require an amendment reducing an offender score for prior drug offenses to apply retroactively, because *Heath* dealt with a civil statutory amendment and the civil statute did not implicate the savings clause. 152 Wn.2d at 239. The Supreme Court explicitly stated that: “we refuse to extend this language in *Heath* to cases where the savings clause clearly requires this court to enforce statutory amendments to the penal code prospectively”. *Id.* at 240, n. 11. Here, the savings clause applies to RCW 9.94A.515, so the presumption from *Heath* is inapplicable.

The presumption language from *Heath* was further disavowed in *Kane*, where Division One of this Court held *Heath* did not apply to amendments governed by the savings clause, and that this presumption was only dicta. 101 Wn. App. at 615-16. *Kane* also held that the out of state cases cited in *Heath*, and also relied upon by Walsh¹, are inapplicable in Washington, because those state’s saving statutes are different from Washington’s. *Id.* at 616-18. The Court in *Kane* also stated that the argument raised by Walsh had been dispelled by the enactment of RCW 9.94A.345. *Id.* at 618. *Ross* and *Kane* show that when a penalty for a

¹ *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).

crime is reduced there is no presumption of retroactivity. *Heath* does not apply to this case, and Walsh's argument is meritless.

Walsh's reliance on *State v. Wiley*, 124 Wn.2d 679, 880 P.2d 983 (1994), for the argument that reducing a statute's culpability requires retroactive application is also misplaced. In *Ross*, the Supreme Court stated that because *Wiley* did not address the savings clause, it did not affect the Court's holding that reducing an offender score for prior drug convictions did not apply retroactively. 152 Wn.2d at 240. *Wiley* does not stand for the broad proposition that reducing the culpability of a statute requires automatic retroactivity, because there was no application of the savings statute to the law in that case. Furthermore, the determination of whether or not an amendment is remedial is only necessary if the new statute contains words of intent that fall under the exception to the savings statute, so there is no automatic retroactivity in this case. *Kane*, 101 Wn. App. at 613.

Contrary to Walsh's argument, the Supreme Court in *Ross* did not "clearly stat[e] that legislative declarations reducing the penalty for a crime... mean[s] that repeal or amendment should affect pending prosecutions." See Brief of Appellant, pg. 9 (emphasis added). The Court in *Ross* only went so far as to hold that under the saving statute, there was no intent for the amendment before it to apply retroactively, and that *Wiley*

did not apply because it did not address the saving statute. 152 Wn.2d at 239-40. The Court's quotation of the Court of Appeals that "reliance on *Wiley* is misplaced because the amendments in this case do not reflect a legislative determination that the offenses are less culpable" is dicta. *Id.* at 240. This distinction was only made in passing by the Court and it is not binding precedent. *Ross* did not hold that *Wiley* requires retroactive application when the seriousness level of an offense is lowered.

Furthermore, *Wiley* was decided before the enactment of RCW 9.94A.345, which further undermines its applicability to the current case. RCW 9.94A.345 explicitly states that any sentence imposed under the SRA is to be determined in accordance with the law in effect at the time the current offense was committed². Applying this statute in conjunction with the saving statute requires a sentencing court to sentence under the law in effect at the time it was committed, absent legislative intent to the contrary. These statutes, which were not analyzed in *Wiley*, show that

² Walsh's argument that RCW 9.94A.345 does not apply in this case is also misplaced. His argument that the legislative intent of the statute was for it to only apply to offender score calculations and sentencing alternatives is incorrect. *See* brief of appellant p.19-20. To determine legislative intent, if the language of the statute is plain and unambiguous this Court need not go further. *State v. Pierce*, 78 Wn. App. 1, 895 P.2d 25 (1995) (internal citations omitted). This Court should only look to other sources of legislative intent when a statute is ambiguous on its face. *Id.* at 4. Here, the language in the statute is plain and unambiguous, because it applies to "any sentence" imposed under the SRA. Therefore, it applies in this case.

there is no automatic retroactivity when the culpability of an offense is reduced.³ Therefore, *Wiley* does not apply to this case.

Courts in Washington are uniformly clear that when a criminal statute is amended, including reclassification of a crime, those amendments do not apply retroactively. *Rivard*, 168 Wn.2d at 781 (citing *Ross*, 152 Wn.2d at 237–39; *McCarthy*, 112 Wn. App. at 236–37; *Kane*, 101 Wn. App. at 610–12). This case falls squarely within that precedent, because the lowering of the seriousness level in RCW 9.94A.515 was an amendment to a criminal statute. Furthermore, there was no intent by the legislature for this amendment to apply retroactively, so under the saving statute and RCW 9.94A.345, Walsh was properly sentenced under the law in effect at the time he committed the offense. His claim fails.

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³ The culpability discussed in *Wiley* was reducing a crime from a felony to a misdemeanor. That reduction in culpability is markedly different from the alleged reduction in culpability before this Court, because Felony DUI was not reduced to a misdemeanor or even to a Class C Felony. The only thing reduced was the seriousness level. This fact further cuts against *Wiley's* applicability to this case.

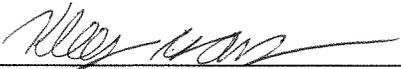
CONCLUSION

The State respectfully asks this Court to affirm Walsh's sentence.

DATED this 4th day of MAY, 2018.

Respectfully submitted:

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