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Court of Appeals  
Division II  
State of Washington  
6/1/2018 4:41 PM

NO. 50972-5-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY P. WALSH,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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BRENDAN O'NEILL  
Licensed Legal Intern

GREGORY LINK  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, WA 98101  
(206) 587-2711

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I. ARGUMENT IN REPLY

The Supreme Court has repeatedly recognized that when the legislature determines the culpability and punishment for a particular offense is set too high and enacts legislation to fix it, courts should apply the amended law to pending prosecutions, because there is no purpose in imposing the previous, harsher punishments. Last year, the legislature reclassified and downgraded felony driving while under the influence of intoxicants (hereinafter “felony DUI”) in RCW 9.94A.515 from seriousness level V to seriousness level IV. Timothy Walsh’s subsequent conviction and sentencing under the old, harsher penalty defied both legislative will and rulings of our Supreme Court.

In response, the State nests its argument in an inapplicable precedent and misinterprets the Supreme Court’s articulation of the circumstances when the application of current, amended law should be applied to pending prosecutions. Mr. Walsh should be resentenced for his offense at seriousness level IV in accordance with the legislative declaration prior to his conviction and sentencing.

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

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 to his pending prosecution.

Enacted declarations of legislative will that reclassify and downgrade the culpability of criminal offenses should be applied 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).

The State cites to *Rivard v. State*, 168 Wn.2d 775, 777, 231 P.3d 186 (2010), as an essential rule and argues that Mr. Walsh's case "falls squarely within that precedent." Brief of Respondent, at 4, 10. The State mischaracterizes *Rivard* and misapplies it to Mr. Walsh's case. In *Rivard*, the court rejected the retroactive application of the legislative reclassification of a crime to *increase* its culpability, enhancing vehicular homicide from a class B to a class A felony. *Rivard*, 168 Wn.2d at 777.

On the contrary, our Supreme Court has consistently articulated that in particular circumstances like Mr. Walsh's, when the legislative reclassification *downgrades* a crime's culpability, the amended law

should be applied to pending prosecutions. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198.

In *Heath*, Justice Utter first articulated this rule on the understanding 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.” *Heath*, 85 Wn.2d at 198. In *Wiley*, the court looked at the *Heath* rule and 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” (as is the case with the legislature’s downgrading of the felony DUI offense prior to Mr. Walsh’s sentencing). *Wiley*, 124 Wn.2d at 687. In *Ross*, the court reasserted the principle in its analysis of a defendant’s misplaced reliance on it, noting that the appellate court had correctly recognized the rule that a legislative determination *downgrading* culpability would have changed the court’s conclusion from prospective application only to retroactive application. *Ross*, 152 Wn.2d at 240.

Reducing the seriousness level of a crime 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. The reclassification and downgrading of the offense fits neatly within the rule articulated in *Heath, Wiley, and Ross*; thus, Mr. Walsh's conviction and sentencing should have been subject to the effective law at the time based on the legislative will on the seriousness of the offense.<sup>1</sup>

2. The general savings statute does not apply.

Washington's general savings statute, RCW 10.01.040, was enacted over a century ago to prevent modifications to the penal code from causing the outright frustration of prosecutions. It has many

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<sup>1</sup> Alternatively, our Supreme Court has 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). The purpose of amending RCW 9.94A.515 was also patently remedial. Washington law previously punished people more severely for getting a successive, felony-qualifying DUI charge than it did for committing vehicular assault while driving drunk. *See* RCW 9.94A.515. The court must look to *Grant* and the operation of RCW 9.94A.515 and .520 to liberally construe the legislature's remedial purpose here and apply the change retroactively to pending prosecutions.

exceptions and contours, and it is to be narrowly construed and not applicable to declarations of legislative will that reclassify and downgrade the culpability of criminal offenses. *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 Supreme Court has never overruled *Heath* or this principle. On the contrary, the court has continued to reference this rule in analyzing the boundaries and exceptions of the general savings clause. *See Ross*, 152 Wn.2d at 239–40; *Wiley*, 124 Wn.2d at 687.

The State argues that both Justice Utter’s reasoning in *Heath* and the *Ross* court’s articulation of the rule were merely dicta. Brief of Respondent, at 8–9. The State relies heavily on Division I’s treatment of *Heath* in *State v. Kane*, 101 Wn. App. 607, 614–19, 5 P.3d 741 (2000), *as amended* (Aug. 4, 2000). *Kane* is itself an opinion in which the reasoning applies to a different set of law and facts than present in Mr. Walsh’s case (while also mischaracterizing *Heath* as dicta).<sup>2</sup> *Heath*, *Wiley*, and *Ross* all discuss the rule in the context of legislative will reclassifying the culpability of a criminal act with a lower sentence

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<sup>2</sup> The *Heath* court reasoned that the legislative will in penalty reduction was one of two 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.

as an exception to the general savings clause.<sup>3</sup> *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 State also misinterprets the analysis in *Ross* and its treatment of *Wiley*. The *Ross* defendants argued that they were entitled to retroactive application when the “legislature merely directs sentencing courts to count certain prior felony convictions differently when calculating offender scores.” *Ross*, 152 Wn.2d at 239–40; *see also* RCW 9.94A.525. The Court’s reasoning in this paragraph demonstrates that had the changes to the law in question in *Ross* instead “reflect[ed] a legislative determination that the offenses are less culpable,” than the court could have been required to “reach a contrary result.” *Id.* at 239–40. This articulation is a crucial element of the analysis and not dicta.

*Heath*, *Wiley*, and *Ross* clearly and consistently contemplate circumstances like Mr. Walsh’s, and distinguish them from those where

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<sup>3</sup> The Supreme Court’s continued analysis of the rule (including the post-*Kane* case *Ross*) refutes the State’s claim that it has been repeatedly held as dicta and inapplicable.

the savings clause applies, like amendments changing the calculation procedures in offender scoring. The savings clause does not apply to the legislature's amendment of the RCW 9.94A.515 to downgrade the offense for which Mr. Walsh was later convicted and sentenced.

3. The Sentencing Reform Act's timing clause does not apply.

The State argues that the explicit statement of legislative intent at RCW 9.94A.345 should be ignored. Brief of Respondent, at 9. In 2000, the legislature enacted a timing clause into the Sentencing Reform Act "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. RCW 9.94A.345; Laws of 2000, ch. 26, § 1–2; *see generally State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999) *superseded by statute*. The legislature elaborated:

"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.

The legislature employed this plain language to apply this statute only to offender score calculation and eligibility for sentencing alternatives. As a derogation of the common law, it should be strictly construed. Calculating an offender score is an individualized determination for sentencing, wholly unlike a static decree of law about the relative culpability of a particular offense. *See Ross*, 152 Wn.2d at 239–40. On the contrary, seriousness level is precisely such a legislative decree about the appropriate penalty level of specific criminal actions; it is not individualized to the offender or captured by this statute, which, furthermore, predates the analysis in *Ross*. As with the general savings clause, RCW 9.94A.345 does not apply to the legislature’s amendment of the RCW 9.94A.515 to downgrade the offense for which Mr. Walsh was later convicted and sentenced.

## II. CONCLUSION

The legislature reclassified and downgraded the punishment inflicted for felony DUI, and the amended law should have been applied to Mr. Walsh’s pending prosecution in accordance with Supreme Court precedent. His 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 31 day of May 2018.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Brendan O'Neill". The signature is fluid and cursive.

BRENDAN O'NEILL  
Washington Appellate Project (9818199)  
Licensed Legal Intern

A handwritten signature in black ink, appearing to read "Gregory Link". The signature is fluid and cursive.

GREGORY LINK  
Washington Appellate Project (91052)  
Attorney for Appellant

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

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

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**Washington Appellate Project**  
1511 Third Avenue, Suite 610  
Seattle, Washington 98101  
Phone (206) 587-2711  
Fax (206) 587-2710

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June 01, 2018 - 4:41 PM

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