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Division II
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NO. 51348-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

YANCY WADE RAY,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Timothy Ashcraft, Judge

No. 16-1-03560-0

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. INTRODUCTION

Yancy Ray shot and killed Hyson Sabb over a drug debt. Ray claimed that he acted in self-defense, even though he left the presence of Mr. Sabb, went home, obtained a gun, and returned to the scene to murder Mr. Sabb. The jury was instructed on justifiable homicide but convicted Ray of second-degree murder.

Ray has two prior convictions from Oregon of note: one from 1986 for first-degree manslaughter, and one from 1993 for third-degree robbery. At sentencing in January of 2018, the trial court found that Ray's first-degree manslaughter was a "strike offense," and the court found that Ray's third-degree robbery conviction was comparable to second-degree robbery in Washington, and thus was also a predicate strike under RCW 9.94A.030(33). Ray's murder conviction was his third "strike." As such, Ray was sentenced to life in prison without the possibility of parole under the Persistent Offender Accountability Act.

Ray filed a direct appeal in this case, claiming (1) insufficient evidence supported the jury's conclusion that his murder of Mr. Sabb was not justified, (2) his Oregon conviction for third-degree robbery should not have been calculated as a prior strike offense, and (3) the trial court imposed

certain legal financial obligations that were no longer authorized to be imposed on indigent defendants.

Following the State's Response Brief, Ray moved to stay his appeal pending the outcome of *State v. Moretti*, 193 Wn.2d 809, 446 P.3d 609 (2019). Our Supreme Court decided *Moretti* in August of 2019. Ray moved to lift the stay on his appeal and requested this Court for permission to file a supplemental brief to argue that the Legislature's 2019 removal of second-degree robbery as a "most serious offense," more than a year after Ray was sentenced, should be retroactive, and Ray should be resentenced within the standard range rather than as a Persistent Offender.

The Legislature did not intend to retroactively remit a Persistent Offender's sentence by removing second-degree robbery as a "most serious offense," as the retroactivity language was removed in a prior amendment to the final statute. Our Supreme Court has already evaluated the legislature's intent as to the retroactivity of this amendment in *Moretti*, when the Court recognized that the prior retroactive language had been removed before the statute was codified.

There is no basis for which Ray should be resentenced within the standard range. Ray's three strikes stand, he was properly sentenced as a Persistent Offender, and this Court should affirm Ray's life sentence.

II. RESTATEMENT OF THE ISSUES

- A. Whether the legislature intended for the removal of robbery in the second degree from the list of offenses that may count as a “strike offense” under the Persistent Offender Act to be retroactive?

III. STATEMENT OF THE CASE

The State relies upon the Statement of the Case in its Response Brief.

IV. ARGUMENT

- A. **The legislature did not intend for the change to RCW 9.94A.030 to apply retroactively to those who have already been sentenced to life without the possibility of parole, and our Supreme Court has already recognized the legislature’s intent.**

Under RCW 9.94A.570, a “persistent offender” shall be sentenced to life without possibility of release. RCW 9.94A.030(38) defines “persistent offender” as an offender who has been convicted of a “most serious offense” and has been convicted on at least two separate occasions of most serious offenses. RCW 9.94A.030(33) lists the felonies that are “most serious offenses.” At the time of the Ray’s crimes, that list included second-degree robbery. Former RCW 9.94A.030(33)(o).

During the period in which Ray’s direct appeal was stayed, the Legislature amended the list of “most serious offenses” and removed second-degree robbery from that list. ENGROSSED SUBSTITUTE S.B. 5288 66th Leg., Reg. Sess. (Wash. 2019). The Legislature’s change was

implemented as of July 28, 2019. This change was not intended to be retroactive, thus Ray's sentence stands.

The Legislature has clearly expressed its intent for individuals to be prosecuted and sentenced based on the law in effect at the time the offense was committed. *State v. McCarthy*, 112 Wn. App. 231, 238 n.20, 48 P.3d 1014 (2002); *State v. Kane*, 101 Wn. App. 607, 618, 5 P.3d 741 (2000). And the Supreme Court has repeatedly held that sentencing courts must look to the statute in effect at the time the defendant committed the current crimes when determining a defendant's sentence. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004).

Moreover, if a new law is to have retroactive application, it must say so within the law expressly. *See* RCW 10.01.040; RCW 10.73.100(6) (both requiring express statement). The savings clause determines that no existing sentence shall be affected by a subsequent repeal unless a contrary intention is expressly declared in the amendatory or repealing act.

RCW 10.01.040 "saves" offenses already committed from the effects of amendment or repeal and requires that crimes be prosecuted under the law in effect at the time of the offense, unless an intent to affect pending litigation was expressed in the amending or repealing act.

State v. Gradt, 192 Wn. App. 230, 233, 366 P.3d 462, 463 (2016).

In *State v. Ross*, 152 Wn.2d 220, 234, 95 P.3d 1225 (2004), the Washington Supreme Court considered Laws of 2002, ch. 290, § 3 which

amended RCW 9.94A.525 to alter the scoring of prior drug convictions. The court held the amendment was not retroactive. It came to this conclusion by relying upon the savings clause. *Ross*, 152 Wn.2d at 236-39. The savings clause is deemed a part of every repealing statute “as if expressly inserted therein.” *Ross*, 152 Wn.2d at 237. It “renders unnecessary the incorporation of an individual savings clause in each statute which amends or repeals an existing penal statute.” *Id.*

In the legislative history of SB 5288, we find a specific intent against retroactivity. The original draft had a provision which would have allowed re-sentencing for any persistent offender whose criminal history included a second-degree robbery conviction that counted toward the offender’s persistent offender status. App. at 54-62. In the final version, that provision was removed by amendment in the Senate on March 13, 2019. App. at 63-81. *See State v. Moretti*, 193 Wn.2d 809, 446 P.3d 609, 613 at ¶18 n. 4 (2019) (“Language making this change retroactive was removed by amendment.”). The bill’s silence indicates that the existing law, i.e. the savings clause, applies, and not retroactivity.

The court’s duty in interpreting a statute is to give effect to the legislative intent. *State v. Gray*, 189 Wn.2d 334, 340, 402 P.3d 254 (2017). The Legislature has not expressly stated that the amendment to RCW 9.94A.030(38) removing robbery as a strike offense should be applied

retroactively. And the legislative history indicates there was an express intent that it not apply retroactively.

Ray relies on *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), *State v. Jefferson*, 192 Wn.2d 225, 429 P.3d 467 (2018), and *In re Flint*, 174 Wn.2d 539, 277 P.3d 657 (2012), to argue that the change to RCW 9.94A.525 should apply to his case because it is currently pending on direct appeal. In *Ramirez*, the Supreme Court held that changes to the Legal Financial Obligations applied prospectively because the “‘precipitating event’ for a statute ‘concerning attorneys fees and costs of litigation’ was the termination of the defendant’s case” thus, statutes concerning costs applied prospectively to cases pending on direct appeal when the cost statute was enacted. *Id.* at 749, quoting *State v. Blank*, 131 Wn.2d 230, 249, 930 P.2d 1213 (1997). *Ramirez* has no application to Ray’s case. The Court limited its analysis concerning “precipitating events” to statutes involving costs, not provisions of defendant’s sentences generally. There is no basis to extend the Court’s analysis to Ray’s case.

Similarly, Ray cites *Jefferson* to bolster his argument for prospective application. However, the Court in *Jefferson* held that not all changes in law apply to cases pending on direct appeal. *Id.* at 245-46 (holding that the adoption of General Rule 37 did not apply prospectively to Jefferson’s case because the triggering event occurred before its enactment.) Ray next

argues for retroactive application, relying on *State v. Heath*, 85 Wn.2d 196, 532 P.2d 621 (1975) and *State v. Addleman v. Board of Prison Terms and Paroles*, 107 Wn.2d 503, 730 P.2d 1327 (1986). Each of his arguments ignore the general rule that statutes are presumed to have only prospective application unless contrary intent appears. Such contrary intent was expressly rejected in the amendment of RCW 9.94A.525 and has already been recognized by the Washington Supreme Court.

This analysis is only reached if this Court agrees with the trial court's conclusion that Ray's third-degree robbery conviction from Oregon is comparable with Washington's second-degree robbery statute. It is unclear if Ray is now conceding his comparability argument raised in his Opening Brief. In any respect, Ray's life sentence as a Persistent Offender stands. The Oregon 1993 conviction is comparable to Washington's second-degree robbery statute, and at the time Ray was sentenced, his conviction was properly counted as a strike offense under then-existing law. There is no error, and this Court should affirm.

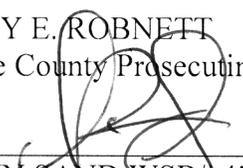
V. CONCLUSION

The Legislature did not intend for its amendment to the list of "most serious offenses" to result in resentencing for each individual who had second-degree robbery conviction as a predicate strike. The Legislature's

intent is clear by the Legislature removing retroactive and resentencing language from the final bill. This Court should affirm Ray's life sentence.

RESPECTFULLY SUBMITTED this 15th day of November, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



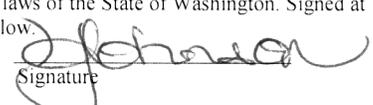
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PIERCE COUNTY PROSECUTING ATTORNEY

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