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No. 51728-1-II

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

JESSICA A. DENYS,

Appellant/Plaintiff,

v.

THE STATE OF WASHINGTON,

Respondent/Defendant.

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant/Plaintiff Jessica Denys, now know as JESSICA DENYS STYMACKS, appeals the court's sentence herein finding her not eligible for First Time Offender Waiver Sentencing Alternative on plea of guilty to one count of Vehicular Homicide by Operating a Motor Vehicle with Disregard for the Safety of Others and one count of bail jumping for her failure to appear on November 21, 2018 when she appeared on November 22, 2018 instead.

II. ASSIGNMENTS OF ERROR

- A. The trial court err in finding defendant Jessica Denys was not eligible for the First Time Offender Waiver Sentencing Alternative.
- B. The trial court erred in giving greater weight, not "great weight" to the victim's family's opinion over all other facts in denying the defendant the First Time Offender Waiver Sentencing Alternative.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- A. Did the trial court erred in determining that the charge of Vehicular Homicide by Operating a Motor Vehicle with Disregard for the Safety of Others, a Class A felony but not a violent crime, was excluded in

the legislative intent for First Time Offender Waiver Sentencing Alternative?

- B. Did the trial court err in giving not “great weight” but greater weight to the victim’s family’s opinion than all the other facts that support a First-time Offender Waiver sentencing option for this offender, which may put the community at greater risk because the offender was denied the opportunity to remain at home with her husband and parent her children?

IV. STATEMENT OF THE CASE

On October 26, 2014, the defendant drove a motor vehicle that had previously been involved in a motor vehicle accident. She was aware that the frame had been bent sufficiently to cause the vehicle to veer sideways occasionally. The defendant’s vehicle veered to the side and struck a vehicle driven by the victim, Crystal Allmendinger, causing her death. (CP at pages 4 - 6.)

On December 26, 2017, the defendant entered a plea of guilty to one count of charge of Vehicular Homicide by Operating a Motor Vehicle with Disregard for the Safety of Others and one count of bail jumping for her failure to appear on November 21, 2017. She appeared on November 22, 2017 instead. (CP at page 161.) It is important to note that the bail-jumping charge was not originally filed by the prosecution until it was utilized to encourage the defendant’s plea to the third prong of vehicular homicide (disregard for safety), rather than proceeding to trial on the

second prong of vehicular homicide (operating a vehicle in a reckless manner). (CP at pages 18, 192 and 193.)

On March 6, 2018, at 9:00 a.m. Judge Toni Shelton, after hearing presentations from counsel for the State and Robert Brungardt, Co-Counsel for Defendant, and having heard the statements from the family of the victim of this offense who's statements were based on the prior information charging Vehicular Homicide on the second prong of operating a vehicle in a reckless manner. Those statement described the defendant's actions of speeding, and passing in a no-passing lane rather than a mechanical defect of the defendant's vehicle that morning. The court, having given considerable weight to those allegations, denied the defendant's request for First-Time Offender Waiver, stating that she didn't qualify because she didn't have criminal history, alcohol abuse or drug abuse history that would require community services. The defendant was then sentenced to a term of twenty-four (24) months. (CP at pages 194-204 and 281-282.) No formal findings were entered as to why the First-time Offender Waiver sentencing option was immediately disregarded and not considered. The court denied plaintiff's post-sentencing motion for reconsideration. (CP at pages 279-280.)

V. ARGUMENT

A. The court in the case at bar erred in granting Jessica Denys a First Time Offender Waiver Sentencing Alternative. The court opined that a “proportionateness of a sentence to the criminal act” (Verbatim Report of Proceedings, Volume 1, page 92, lines 20 through 23) as important without providing any connection to the case at bar.

The court further opined that it was looking at what issues a person has that can be assisted through the Department of Corrections, including a six-month period of community service without treatment obligations. Yet the court determined that Ms. Denys did not have a chemical or alcohol dependency issue or mental health diagnosis. (Verbatim Report of Proceedings, Volume 1, pages 92, line 23 through Page 93, line 6.)

The trial court failed to weigh the legislative intent when they excluded Vehicular Homicide by Operating a Motor Vehicle with Disregard for the Safety of Others as a violent offense, and therefore making the defendant eligible for the First Time Offender Waiver Sentencing Alternative, but gave greater weight to the demands of the victim’s family that the defendant had “abused the system.”

The court looked to a standard range sentence starting in the middle at the midpoint of the standard range and looked for reasons to go

in either direction. This court elected the midrange sentence. (Verbatim Report of Proceedings, Volume 1, page 93, line 7 through page 11.)

The legislature determined in RCW 9.94A.650 that

First-time offender waiver.

(1) This section applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony that is not:

(a) Classified as a violent offense or a sex offense under this chapter;

(b) Manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance classified in Schedule I or II that is a narcotic drug or flunitrazepam classified in Schedule IV;

(c) Manufacture, delivery, or possession with intent to deliver a methamphetamine, its salts, isomers, and salts of its isomers as defined in RCW 69.50.206(d)(2);

(d) The selling for profit of any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marijuana; or

(e) Felony driving while under the influence of intoxicating liquor or any drug or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug.

(2) In sentencing a first-time offender the court may waive the imposition of a sentence within the standard sentence range and impose a sentence which may include up to ninety days of confinement in a facility operated or utilized under contract by the county and a requirement that the offender refrain from committing new offenses.

(3) The court may impose up to six months of community custody unless treatment is ordered, in which case the period of community custody may include up to the period of treatment, but shall not exceed one year.

(4) As a condition of community custody, in addition to any conditions authorized in RCW 9.94A.703, the court may order the offender to pay all court-ordered legal financial obligations

and/or perform community restitution work. (Emphasis added.)

The language is not ambiguous, but is clear as to what the legislative intent was in setting out the qualifications for a First Time Offender Waiver Sentencing Alternative.

The legislature further defines Vehicular Homicide in RCW 46.61.520 as

Vehicular homicide—Penalty.

(1) When the death of any person ensues within three years as a proximate result of injury proximately caused by the driving of any vehicle by any person, the driver is guilty of vehicular homicide if the driver was operating a motor vehicle:

(a) While under the influence of intoxicating liquor or any drug, as defined by RCW [46.61.502](#); or

(b) In a reckless manner; or

(c) With disregard for the safety of others.

(2) Vehicular homicide is a class A felony punishable under chapter [9A.20](#) RCW, except that, for a conviction under subsection (1)(a) of this section, an additional two years shall be added to the sentence for each prior offense as defined in RCW [46.61.5055](#).

And further defines what constituted a violent offense in RCW 9.94A.030 as:

(55) "Violent offense" means:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(ii) Criminal solicitation of or criminal conspiracy to commit a class A felony;

(iii) Manslaughter in the first degree;

(iv) Manslaughter in the second degree;

(v) Indecent liberties if committed by forcible compulsion;

- (vi) Kidnapping in the second degree;
- (vii) Arson in the second degree;
- (viii) Assault in the second degree;
- (ix) Assault of a child in the second degree;
- (x) Extortion in the first degree;
- (xi) Robbery in the second degree;
- (xii) Drive-by shooting;
- (xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner; and
- (xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW [46.61.502](#), or by the operation of any vehicle in a reckless manner;

The court found in *State vs. Yaunna L. Stately*, 162 Wn.App. 604, 216 P.3d 1102 (2009) that:

¶ 3 ...Accordingly, the only question before us is whether the sentencing court properly applied the law when it determined that Stately was qualified for a first-time offender waiver. Specifically, we must answer whether the trial court correctly ruled that Stately's crime of vehicular homicide by disregard is a nonviolent offense and therefore qualifies for a first-time offender sentencing waiver. We hold that the legislature defined the crime of vehicular homicide by disregard, RCW 46.61.520(1)(c), as a nonviolent offense under former RCW 9.94A.030 (2006) and, therefore, the sentencing court had

authority to impose a first-time offender sentencing waiver. (Emphasis added.) ¶ 4 We review questions of statutory construction de novo. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Our “purpose in construing a statute is to ascertain and give effect to the intent and purpose of the Legislature.” *State v. Van Woerden*, 93 Wash.App. 110, 116, 967 P.2d 14 (1998), review denied, 137 Wash.2d 1039, 980 P.2d 1286 (1999). When faced with an unambiguous statute, we discern the legislature's intent from the plain language alone. *Jacobs*, 154 Wash.2d at 600, 115 P.3d 281. And we derive the plain meaning from “the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Jacobs*, 154 Wash.2d at 600, 115 P.3d 281. We also presume that the legislature does not include superfluous language. *State v. Roggenkamp*, 153 Wash.2d 614, 624-25, 106 P.3d 196 (2005). We turn to legislative history and relevant case law to discern the legislature's intent only if the plain meaning analysis fails to resolve the question before the court. *Christensen v. Ellsworth*, 162 Wash.2d 365, 373, 173 P.3d 228 (2007).

¶ 5 A sentencing court may apply a first-time offender waiver only if sentencing an offender who has “never been previously convicted of a felony in this state, federal court, or another state, and who ha[s] never participated in a program of deferred prosecution for a felony, and who [is] convicted of a felony that is not,” as relevant here, “[c]lassified as a violent offense . under [ch. 9.94A RCW].” Former RCW 9.94A.650(1)(a). At issue here is whether the Sentencing Reform Act of 1981(SRA), ch. 9.94A RCW, defines the crime of vehicular homicide by disregard for the safety of others as a violent offense. Chapter 9.94A RCW, in turn, defines “violent offense” as:

(a) Any of the following felonies:

(i) Any felony defined under any law as a class A felony or an attempt to commit a class A felony;

(xiii) Vehicular assault, when caused by the operation or driving of a vehicle by a person while under the influence of intoxicating liquor or any drug or by the operation or driving of a vehicle in a reckless manner;

and

(xiv) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner. (Emphasis added.)

Former RCW 9.94A.030(50) (emphasis added).⁶

¶ 6 Stately's crime of vehicular homicide by disregard for the safety of others is a class A felony. RCW 46.61.520. Thus, it satisfies the statutory definition of violent offense under subsection (i). Former RCW 9.94A.030(50)(a)(i).

¶ 7 But Stately's crime is not included as a violent offense under subsection (xiv). There are three types of vehicular homicide, all currently class A felonies. RCW 46.61.520. Subsection (xiv) lists the first two types, homicide by intoxication and recklessness, but does not include the third type, homicide by disregard. Former RCW 9.94A.030(50)(a)(xiv). “ ‘Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio*

alterius-specific inclusions exclude implication.’ ” Landmark Dev., Inc. v. City of Roy, 138 Wash.2d 561, 571, 980 P.2d 1234 (1999) (quoting Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish County, 77 Wash.2d 94, 98, 459 P.2d 633 (1969)). If we read the statute to define vehicular homicide by disregard as a violent offense simply because it is a class A felony, then subsection (xiv) would be superfluous. We presume, however, that the legislature does not include superfluous language and we interpret statutes to give meaning to each section. Roggenkamp, 153 Wash.2d at 624-25, 106 P.3d 196.

¶ 8 More importantly, when there is “an ‘inescapable conflict’ between a statute's general and specific terms, the specific terms prevail.” City of Spokane v. Taxpayers of City of Spokane, 111 Wash.2d 91, 102, 758 P.2d 480 (1988) (quoting 2A N. Singer, Statutory Construction § 46.05 (4th ed.1984)); see also State v. Austin, 59 Wash.App. 186, 199, 796 P.2d 746 (1990) (applying same rule to criminal procedure). Here, it is impossible to harmonize the statute's terms in subsection (i) with its terms in subsection (xiv). The later subsection, relating specifically to vehicular homicide, is more specific than

subsection (i), which relates generally to all class A offenses. Applying the specific-general doctrine, the specific terms of subsection (xiv) prevail and Stately's vehicular homicide by disregard conviction is not a violent offense. See *Austin*, 59 Wash.App. at 199, 796 P.2d 746. Accordingly, the trial court had authority to invoke the first-time offender waiver when it sentenced Stately on her conviction for vehicular homicide by disregard under RCW 46.61.520(1)(c).

¶ 9 We affirm. (Emphasis added.)

And confirmed by the court in *Bromstrom v. Tripp*, 189 Wn.2d 379, 402 P.3d 831 (2017) that

The crimes cannot be meaningfully distinguished for CrRLJ 3.2 purposes—the impaired diver’s disregard for foreseeable harm makes DUI a violent crime, not the resultant harm. [30] See also *State v Stately*, 152 Wn.App. 604, 609, 216 P.3d 1102 (2009) (vehicular homicide by intoxication and homicide by recklessness are violent offenses, while vehicular homicide by disregard is not.) (Emphasis added.)

B. The court erred when it considered gave greater weight, not “great weight” to the victim’s family’s opinions than all the other facts that support a First Time Offender Waiver Sentencing Alternative for this

offender. This puts the community at greater risk because the defendant was denied the opportunity to remain at home with her minor children. (Verbatim Report of Proceedings Volume 1, page 92, lines 13-25, and page 93, lines 1-76.) It should be noted that the defendant has since given birth to a daughter and that child is now dependent on the community for care and support rather than on her mother as the defendant has been denied access to parenting programs in prison that would have allowed her baby to remain with her.

Although the court has broad discretion in making the determination for an alternative sentence and the ability to impose an alternative sentence as long as the court sets out its findings to support its decision, the trial court herein did not enter any Findings, nor was it able to disqualify the defendant's eligibility based on the specific prongs of provided in RCW 9.94A.650.

RCW 9.94A.010 sets out the purposes of the Sentencing Reform Act as follows:

The purpose of this chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to:

(1) Ensure that the punishment for a criminal offense is

- proportionate to the seriousness of the offense and the offender's criminal history;
- (2) Promote respect for the law by providing punishment which is just;
 - (3) Be commensurate with the punishment imposed on others committing similar offenses;
 - (4) Protect the public;
 - (5) Offer the offender an opportunity to improve himself or herself;
 - (6) Make frugal use of the state's and local governments' resources; and
 - (7) Reduce the risk of reoffending by offenders in the community. (Emphasis added.)

The trial court erred in not giving any consideration to the effects of the denial of First Time Offender Waiver Sentencing Option for the appellant in light of the legislative intent under RCW 9.94A.010.

VI. CONCLUSION

The plaintiff is eligible and entitled to the First Time Offender Waiver Sentencing Alternative as set out by the legislative intent.

RESPECTFULLY SUBMITTED this 15th day of November 2018.



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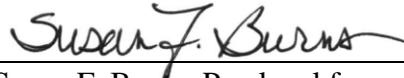
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And that I arranged for a copy of the preceding Appellant's Brief to be personally delivered to Respondent by service on Mason County Prosecutor Office, counsel for Respondent at:

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DATED this 15th day of November, 2018 at Shelton, Washington.



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