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Court of Appeals
Division II
State of Washington
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No. 52183-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

JERRY L. PETERSON

AMENDED BRIEF OF RESPONDENT

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A. Counterstatement of the Issues Presented

1. Should this Court apply the rule of lenity in interpreting RCW 69.50.410 when its sentencing provisions are contradictory to and incompatible with the sentencing reform act?

2. Does the doubling provision of RCW 69.50.408 apply either factually or legally to Ms. Peterson who has no prior drug offenses other than possession of a controlled substance?

B. Statement of Facts

Jerry Peterson pleaded guilty to a second amended information, controlled substance (heroin) sale for profit in violation of RCW 69.50.410 and possession of heroin. CP, 11, 13. Ms. Peterson has prior convictions for two counts of possession of controlled substance and one count of residential burglary, all in 2011. CP, 24.

At sentencing, Ms. Peterson argued the "mandatory sentence" was two years. CP, 6. The State disagreed, arguing he should be sentenced pursuant to the SRA. Because he was convicted of a Level III drug offense and has an offender score of "4," the State believed his standard range was 68 to 100 months. CP, 26. The Court agreed with the defense and found that his standard range was 24 months. CP, 52. The Court imposed a determinate sentence of 24 months. CP, 53. The State filed a notice of appeal. CP, 60.

C. Argument

1. When the Court is confronted with sentencing provisions that are contradictory to and incompatible with the sentencing reform act, the rule of lenity requires the Court to impose the sentence most beneficial to the defendant.

This case provides an opportunity to review the interplay between the specific sentencing provisions RCW 69.50.410 and the general sentence provisions of the sentencing reform act (SRA), chapter 9.94A RCW. It is not an easy task. It is also, surprisingly given that the statute has existed for nearly five decades, an issue of first impression for the appellate courts. In the end, this Court should conclude that the statutes are ambiguous and, applying the rule of lenity, affirm the trial court. The rule of lenity requires the courts to apply ambiguous statutes in a manner most beneficial to defendants. *In re Personal Restraint of Mahrle*, 88 Wn. App. 410, 945 P.2d 1142 (1997).

RCW 69.50.410 reads, in its entirety:

> (1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified in Schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana.
> For the purposes of this section only, the following words and phrases shall have the following meanings:
> (a) "To sell" means the passing of title and possession of a controlled substance from the seller to the buyer for a price whether or not the price is paid immediately or at a future date.

(b) "For profit" means the obtaining of anything of value in exchange for a controlled substance.
(c) "Price" means anything of value.
(2)(a) Any person convicted of a violation of subsection (1) of this section shall receive a sentence of not more than five years in a correctional facility of the department of social and health services for the first offense.
(b) Any person convicted on a second or subsequent cause, the sale having transpired after prosecution and conviction on the first cause, of subsection (1) of this section shall receive a mandatory sentence of five years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for the second or subsequent violation of subsection (1) of this section.
(3)(a) Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation.
(b) Any person convicted on a second or subsequent sale of heroin, the sale having transpired after prosecution and conviction on the first cause of the sale of heroin shall receive a mandatory sentence of ten years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for this second or subsequent violation: PROVIDED, That the indeterminate sentence review board under 9.95.040 shall not reduce the minimum term imposed for a violation under this subsection.
(4) Whether or not a mandatory minimum term has expired, an offender serving a sentence under this section may be granted an extraordinary medical placement when authorized under RCW 9.94A.728(4).
(5) In addition to the sentences provided in subsection (2) of this section, any person convicted of a violation of subsection (1) of this section shall be fined in an amount calculated to at least eliminate any and all proceeds or profits directly or indirectly gained by such person as a result of sales of controlled substances in violation of the laws of this or other

> states, or the United States, up to the amount of five hundred thousand dollars on each count.
> (6) Any person, addicted to the use of controlled substances, who voluntarily applies to the department of social and health services for the purpose of participating in a rehabilitation program approved by the department for addicts of controlled substances shall be immune from prosecution for subsection (1) offenses unless a filing of an information or indictment against such person for a violation of subsection (1) of this section is made prior to his or her voluntary participation in the program of the department of social and health services. All applications for immunity under this section shall be sent to the department of social and health services in Olympia. It shall be the duty of the department to stamp each application received pursuant to this section with the date and time of receipt.
> (7) This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through 69.50.4015.

The statute was first enacted in 1973 and has since been amended twice, in 1999 and 2003. Until 2003, unlike most felonies in Washington which are classified as Class A, B. or C, the statute contained no sentencing provisions other than those contained in subsections (2) and (3). The original understanding in 1973 was that violations of RCW 69.50.410 would result in intentionally "harsh mandatory sentences." *State v. McGinley*, 18 Wn.App. 862, 868, 573 P.2d 30 (1977). In *McGinley*, the Court of Appeals concluded, "RCW 69.50.410 establishes mandatory prison sentences for persons convicted of selling certain drugs" and prosecutors have discretion whether to charge defendants with RCW 69.50.410 or 69.50.401 (delivery of a controlled substance). *McGinley* at

868. The prosecutor in Ms. Peterson's case, having elected to charge him with RCW 69.50.410 instead of 69.50.401, cannot now complain that the "harsh mandatory sentence" is now too lenient.

The trial court interpreted subsection (3) as requiring a determinate sentence of two years, regardless of criminal history or other factors. The State argues subsection (3) is superseded by the SRA. Although the State's Brief takes great pains to argue what subsection (3) does not mean, it makes no effort to explain what it does mean.

The trial court interpreted the phrase "mandatory sentence of two years in a correctional facility of the department of social and health services" as requiring a sentence of exactly two years. In partial rebuttal, the State responds by positing how someone in the defendant's position could possibly serve his incarceration time "in a correctional facility of the department of social and health services." See Brief of Petitioner, 6. The statute also contemplates review by the indeterminate sentence review board (ISRB), the old parole board, now largely defunct except in pre-SRA cases and a small number of sex offenses. See RCW 9.94A.507. The question is worth addressing.

RCW 69.50.410(3) appears to be a vestigial remain from a pre-SRA world. At the time RCW 69.50.410 was passed in 1973, the legislature apparently contemplated creating a drug treatment program for drug addicts run by the Department of Social and Health Services (DSHS) as an alternative to prison. See former 69.32.090. In a situation not unlike the current attempts to get DSHS to comply with statutory and judicial requirements for incompetent people, the requirement that drug addicts receive treatment in a DSHS facility turned out to be an unfunded mandate. In *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*), the Washington Supreme Court held DSHS in contempt for failure to provide the necessary services. The legislature responded by repealing RCW 60.32.090 entirely, a decision acquiesced in by the Supreme Court after constitutional review. *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*). Therefore, there being no properly funded DSHS treatment facility from 1973 to 1975 and no statutory provision for such a facility thereafter, all of the sentencing provisions of subsections (2) and (3) requiring incarceration "in a correctional facility of the department of social and health services" were defunct from the beginning. Despite the fact the statute calls for mandatory sentences in a non-existent DSHS treatment facility, trial courts continued to prosecute defendants for violating its provisions, sentencing

them to prison terms, and the appellate courts affirmed. See *State v. Leek*, 26 Wn. App. 651, 614 P.2d 209 (1980) (affirming judgment of sentence for violation of RCW 69.50.410); *State v. Kinsey*, 20 Wn.App. 299, 579 P.2d 1347 (1978) (same).

The SRA was passed in 1981. RCW 9.94A.020. In an early incarnation of the SRA, delivery of controlled substance (RCW 69.50.401) and controlled substance sale for profit (RCW 69.50.410) were both classified as Level VI offenses, except controlled substance (heroin) sale for profit (RCW 69.50.410) was classified as Level VIII. Former RCW 9.94A.320; see Session Laws, Chapter 209, 1984. Although the level of offense has changed over the years, controlled substance sale for profit has remained in the SRA Offense Table continuously since 1984 and is currently classified as a Level III Drug Offense. RCW 9.94A.518. It would appear at first blush, therefore, that the legislature intended the statute to be treated like any other Washington felony, with sentences dictated by the SRA.

But that conclusion is undermined by the 1999 Amendment to the statute. In that year, the legislature amended the statute to add subsection (4). Subsection (4) makes clear that defendants serving mandatory minimum terms pursuant to the statute may still apply for extraordinary

medical placement pursuant to RCW 9.94A.728(4). Not to state the obvious, but RCW 9.94A.728 is a part of the SRA. Therefore, the legislature contemplated "an offender serving a sentence under this section" should still eligible for early release due to extraordinary medical issues. This then, begs the question: if the legislature intended defendants to be sentenced pursuant to the SRA, who are these "offender[s] serving a [mandatory] sentence under this section?"

The 1999 amendment raises another question: to whom does "an offender serving a sentence under this section" apply for extraordinary medical placement. Pursuant to RCW 9.94A.728, the application is to the secretary of the "department." The "department" is the Department of Corrections, not the Department of Social and Health Services. RCW 9.94A.030(17). This is, therefore, a de facto acknowledgment by the legislature that the mandatory minimum provisions of subsections (2) and (3) were intended to be served in Department of Corrections facilities and not in DSHS facilities.

In 2003, the legislature amended subsection (3) to state for the first time that violations of the statute are Class C felonies. This is the first and only time the penalty provisions of the statute have been amended.

The Legislature is presumed to know the existing state of the case law in those areas in which it is legislating. *Price v. Kitsap Transit*, 125 Wn.2d 456, 886 P.2d 556 (1994). In the case of RCW 69.50.410, the legislature has chosen twice to amend the statute since the enactment of the SRA, both times reinforcing the pre-SRA sentencing provisions, knowing that the DSHS treatment facility was non-existent, but that trial courts were continuing to enforce the mandatory sentence provisions.

The Second Amended Information alleges Ms. Peterson is subject to a "mandatory minimum sentence" pursuant to RCW 69.50.410(3). CP, 11. But this is not accurate. The statute does not say "mandatory minimum sentence," it simply says "mandatory sentence." When the Washington legislature wishes to create a mandatory minimum sentence, it does so using terms like "mandatory minimum sentence," "confinement shall not be fixed at less than," or "imprisonment may not be suspended." RCW 9.95.040; RCW 46.61.5055. On the other hand, there are times when the legislature intends to create a fixed, mandatory term. One example is the deadly weapon and firearm enhancements of RCW 9.94A.533, which states "the following additional times shall to be added" to the sentence, such as five years for a Class A felony. RCW 69.50.410 is a fixed, mandatory sentence, not a mandatory minimum sentence.

RCW 69.50.408 immediately precedes RCW 69.50.410 and like RCW 69.50.410 was passed prior to the enactment of the SRA, causing disagreement in the lower courts about its interpretation. RCW 69.50.408 doubles the maximum sentence when an offender has a prior drug offense. The State argued it doubles both the maximum penalty and the standard range while the defendant argued it doubles only the maximum penalty. In *In re the PRP of Cruz*, 157 Wn.2d 83, 134 P.3d 1166 (2006), the Court harmonized RCW 69.50.408, which was passed in 1971, with the SRA, passed in 1981. Citing the rule of lenity, the Court said that applying a pre-SRA sentence provision in a post-SRA world may at times lead to ambiguity. If a statute is ambiguous, the rule of lenity requires the Court to interpret the statute in favor of the defendant absent legislative intent to the contrary. *Cruz* at 88.

After reviewing the legislative history and changes over the past fifty years, sentencing a defendant for violation of RCW 69.50.410 is akin to putting a round peg in a square hole. The statutory provisions are inconsistent, incongruous, and contradictory. This creates ambiguity. And where there is ambiguity, there is lenity. The rule of lenity requires the court to apply the sentencing provision in favor of the defendant. And

in this case, that means two years. The judgment and sentence should be affirmed.

2. Ms. Peterson's sentence is not doubled by RCW 69.50.408 either factually or legally.

The State also argues Ms. Peterson's sentence is governed by RCW 69.50.408, the doubling statute referenced above. The State correctly notes that RCW 69.50.410 is a Class C felony with a presumptive maximum sentence of five years. When the standard range sentence exceeds the maximum penalty, the maximum penalty becomes the standard range. RCW 9.94A.599. The State argues that the doubling provisions of RCW 69.50.408 apply to this statute and that his maximum penalty is ten years and the correct standard range is 68-100 months. *In re the PRP of Cruz*, 157 Wn.2d 83, 134 P.3d 1166 (2006); *State v. Clark*, 123 Wn.App. 515, 94 P.3d 335 (2004). The State is incorrect both factually and legally.

Factually, RCW 69.50.408 does not apply to violations of RCW 69.50.4013, possession of a controlled substance. RCW 69.50.408(3). Ms. Peterson has two prior drug convictions, both of them possession charges. CP, 24. Because he has no prior drug offenses other than

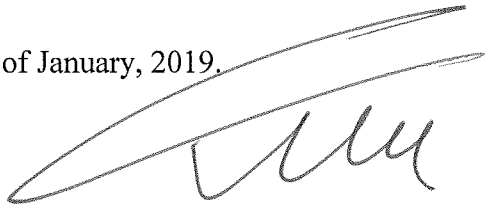
possession charges, RCW 69.50.408 does not apply. Therefore, his prior drug convictions do not operate to double his maximum penalty.

Second, the doubling provisions of RCW 69.50.408 should not be applied to RCW 69.50.410 because RCW 69.50.410 has a self-contained doubling provision. A person convicted of a first controlled substance (heroin) sale for profit offense receives a mandatory sentence of two years and, upon conviction for a second or subsequent offense, a mandatory sentence of ten years. It is, therefore, redundant to apply the doubling provisions of RCW 69.50.408. RCW 60.50.408 does not apply.

D. Conclusion

The Judgment and Sentence should be affirmed.

DATED this 10th day of January, 2019.



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

STATE OF WASHINGTON, Appellant, vs. JERRY L. PETERSON, Respondent.	Court of Appeals No.: 52183-1-II AMENDED DECLARATION OF SERVICE

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On January 10, 2019, I e-filed the Amended Brief of Respondent in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to the Lewis County Deputy Prosecuting Attorney Sara I Beigh via email to: sara.beigh@lewiscountywa.gov through the Court of Appeals transmittal system.

On January 10, 2019, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Amended Brief of Respondent to the defendant/respondent:

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////

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: January 10, 2019, at Bremerton, Washington.

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