

FILED
Court of Appeals
Division II
State of Washington
2/12/2020 2:58 PM
NO. 53408-8-II

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

STATE OF WASHINGTON, Petitioner

v.

ALEM SKROBO, Respondent

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.18-1-03404-06

REPLY BRIEF OF APPELLANT

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ARGUMENTS IN REPLY

I. Under RCW 10.05 *et seq.* as a whole, a trial court has authority to terminate deferred prosecution during the entire five-year period.

a. Standard of Review

Questions of statutory interpretation are reviewed *de novo*. In construing a statute, the court's objective is to determine the legislature's intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281, 283 (2005). Further, the court gives effect to the plain meaning as an expression of legislative intent. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *Id.* See also *Washington Pub. Ports Ass'n v. State, Dep't of Revenue*, 148 Wn.2d 637, 62 P.3d 462 (2003)(holding that "plain meaning" rule includes not only the ordinary meaning of the words, but the underlying legislative purposes and closely related statutes to determine the proper meaning of the statute). If after examination of a statute, the court finds that it is subject to more than one reasonable interpretation, the statute is ambiguous. *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 454, 219 P.3d 686 (2009). However, a statute is not ambiguous merely because more than one interpretation is

conceivable. *Id.* The Supreme Court presumes the legislature does not use superfluous words in a statute. *Id.* at 457. If after applying rules of statutory construction a court concludes that a statute is ambiguous, the “rule of lenity” requires a court to interpret the statute in favor of the defendant *absent legislative intent to the contrary*; the rule states that an ambiguous criminal statute cannot be interpreted to increase the penalty imposed. *State v. Coucil*, 170 Wn.2d 704, 706-707, 245 P.3d 222 (2010) (emphasis added). A penal statute is strictly construed in favor of a defendant during statutory construction. *State v. Evans*, 177 Wn.2d 192, 193, 298 P.3d 724 (2013) (quoting *State v. Hornaday*, 105 Wn.2d 120, 127 (1986)). However, a penal code will be construed adversely against a defendant *when the statutory construction clearly establishes the legislature intended such an interpretation. Id.* (quoting *Winebrenner*, 167 Wn.2d at 462) (emphasis added). Further, a reading of a statute that produces absurd results should be avoided because courts presume the legislature does not intend to legislate absurdly. *State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009).

- b. “Deferred Prosecution” and “Deferred Prosecution Program” are used interchangeably and refer to the entire five-year period.

Deferred prosecution refers to the entire five-year period, which includes a two-year treatment program and a period of court imposed

conditions following successful completion of the treatment program. RCW 10.05.140 and 10.05.150. When the court reviews a statute, the court derives the meaning from the “plain meaning” to determine the legislature’s intent. The “plain meaning” includes the language at issue as well as the context of where the provision is found and statutory scheme as a whole. *Winebrenner*, 167 Wn.2d at 454.

Deferred prosecution under RCW 10.05 includes a two-year treatment program as well as up to three additional years of conditions. The trial court has authority to impose conditions “to help ensure continued sobriety and reduce the likelihood of reoffense” under RCW 10.05.140.¹ The five-year period is described further under RCW 10.05.120, which specifies when a court shall dismiss pending charges against the petitioner:

Three years after receiving proof of successful completion of the two-year treatment program, and following proof to the court that the petitioner has complied with the conditions imposed by the court following successful completion of the two-year treatment program, but not before five years following entry of the order of deferred prosecution pursuant to a petition brought under RCW 10.05.020(1), the court shall dismiss the charges pending against the petitioner.

¹ Under RCW 10.05.140, the trial court has the authority to order “reasonable conditions” “during the period of deferred prosecution including, but not limited to, attendance at self-help recovery support groups for alcoholism or drugs, complete abstinence from alcohol and all nonprescribed mind-altering drugs, periodic urinalysis or breath analysis, and maintaining law-abiding behavior.” These conditions are not unreasonable given the expectations of a petitioner.

RCW 10.05.120. In order for the court to dismiss the pending charges, two things must be received by the court: (1) proof of successful completion of the two-year treatment program and (2) proof to the court that the petitioner has complied with the conditions imposed by the court *following successful completion of the two-year treatment program*. The legislature is clear that charges shall not be dismissed until these two requirements are met, which includes court imposed conditions that follow the two-year treatment program. Respondent asserts that a “deferred prosecution program” is strictly defined under RCW 10.05.150 – Alcoholism program requirements. Respondent further argues that where RCW 10.05 *et seq.* references “deferred prosecution,” the term must be analogous to “deferred prosecution program” as defined in RCW 10.05.150. However, this deviates from normal statutory construction.²

To interpret the statute, the court looks to the ordinary meaning³ as well as the context of the statute, related provisions, and the statutory

² Use of “deferred prosecution” and “deferred prosecution program” is observed interchangeably throughout RCW 10.05 *et seq.* The title of the chapter is “Deferred Prosecution – Courts of Limited Jurisdiction.” RCW 10.05.010, RCW 10.05.015, and RCW 10.05.155 use “deferred prosecution program” only. RCW 10.05.020, RCW 10.05.055, RCW 10.05.060, RCW 10.05.120, RCW 10.05.160, RCW 10.05.170, and RCW 10.05.180 use “deferred prosecution” only. RCW 10.05.090, RCW 10.05.100, RCW 10.05.140, and RCW 10.05.150 use both “deferred prosecution program” and “deferred prosecution.”

³ In *State v. Hahn*, “deferred prosecution program” as used in RCW 10.05 would mean the petition for deferred prosecution, the order granting deferred prosecution, and the approved treatment plan based on the definition of “program” in Webster’s Third New International Dictionary 1812 (1969). 83 Wn.App. 825, 832, 924 P.2d 392 (1996).

scheme as a whole. *Id.* Respondent reviews RCW 10.05.150 and stops there. However, when reviewing RCW 10.05.150 in relation to RCW 10.05.140 and RCW 10.05.120, the legislature’s intent is clear that deferred prosecution is meant to be at least a five-year program. Further, when looking at the statutory scheme as a whole, RCW 10.05 is titled “Deferred Prosecution – Courts of Limited Jurisdiction” which encompasses “Deferred Prosecution,” the term in which this Court is asked to determine. RCW 10.05.150 simply refers to the minimum requirements for the alcoholism treatment program to enter deferred prosecution.⁴ Respondent ignores the context of the section referring to the “program for alcoholism” which is for a two-year period.⁵ While the Respondent is correct that there is no real distinction with the common use of “deferred prosecution” and “deferred prosecution program,” deferred prosecution is at least a five-year program that includes a two-year treatment program as defined in RCW 10.05.150 and court ordered conditions following the treatment program as shown in RCW 10.05.140 and RCW 10.05.150.

⁴ Specifically, RCW 10.05.150 – Alcoholism program requirements states “[a] deferred prosecution program for alcoholism shall be for a two-year period and shall include, but not be limited to, the following requirements. . .”

⁵ This is distinguished by RCW 10.05.155, which outlines the minimum requirements for a treatment “program for domestic violence behavior.”

- c. Reasonable conditions following successful completion of the two-year treatment program may be imposed by a trial court.

Following the two-year treatment program, a petitioner must comply with “reasonable conditions” imposed by the court during the deferred prosecution period. RCW 10.05.140. The period for which these conditions are imposed would typically be three years based on when a court shall dismiss pending charges under RCW 10.05.120. A court shall dismiss pending charges when proof of successful completion of the two-year treatment program and proof that the petitioner complied with the conditions imposed by the court; RCW 10.05.120 states the court cannot dismiss until “[t]hree years after receiving proof” but not “before five years following the entry of the order of deferred prosecution.” Assuming full compliance under a standard timeline, a petitioner would complete the two-year treatment program in the first two years of deferred prosecution, leaving three years left in the five-year minimum before the court shall dismiss pending charges. RCW 10.05.120. During this time, a trial court has authority to order reasonable conditions⁶ under RCW 10.05.140, and a

⁶ In the case in hand, the trial court imposed conditions at the time the petitioner entered deferred prosecution in the “Order for Deferred Prosecution.”

petitioner must show compliance with the conditions imposed by the court following successful completion of the two-year treatment program.⁷

The three-year period following successful completion of the two-year treatment program is not a “waiting period” that simply must elapse before pending charges must be dismissed. When this Court interprets a statute, it presumes that the legislature does not use superfluous words in the statute. *Winebrenner*, 167 Wn.2d at 457. The Respondent asserts that the period following completion of the two-year treatment program is merely a “waiting period”⁸ and once that time has elapsed, the court must dismiss under RCW 10.05.120. However, this interpretation would make portions of RCW 10.05.140 and RCW 10.05.120 superfluous and redundant.

If after successful completion of the two-year treatment program only a “waiting period” existed as the Respondent asserts, a significant portion of RCW 10.05.140 is superfluous and simply pointless. Under

⁷ Respondent argues that the trial court in this case never imposed any conditions after the completion of the two-year treatment program. However, the trial court ordered conditions in the “Order for Deferred Prosecution,” which included the defendant to “[m]aintain total abstinence from alcohol and all other non-prescribed mind-altering drugs for the duration of the Deferred Prosecution” and to “[r]emain law abiding for the duration of the Deferred Prosecution.” CP 16-17.

⁸ Respondent analogizes this “waiting period” to waiting periods defined in the vacation and firearm restoration statutes – RCW 9.94A.640(2), RCW 9.96.060(2), and RCW 9.41.040(4). However, the Respondent also ignores another requirement that may extend that “waiting period” – convictions of a new crime in this state, another state, or federal court. Effectively, the time bar is a waiting period, but the “waiting period” is contingent on law-abiding behavior.

RCW 10.05.140, the court may order reasonable conditions “during the period of the deferred prosecution.” However, if the period after successful completion of the two-year treatment program was simply a “waiting period,” that court could not order conditions as RCW 10.05.140 clearly permits. It is abundantly clear the legislature intended for a court to have authority to impose conditions during the entirety of deferred prosecution, especially the period following the successful completion of the two-year treatment program.

Further, if only a “waiting period” existed, the second of the two requirements for dismissal under RCW 10.05.120 is unnecessary. As discussed previously, there are two requirements before dismissal must be entered: (1) proof of successful completion of the two-year treatment program, and (2) proof to the court that the petitioner has complied with the conditions imposed by the court following successful completion of the two-year treatment program. However, if the period following treatment was simply a “waiting period,” the second condition would not be required in order for a trial court to dismiss, rendering the language superfluous. This is an improper and illogical conclusion when reading the plain language of RCW 10.05.120; the legislature clearly required proof of successful treatment and proof of compliance with court ordered conditions before a trial court could dismiss the pending charges.

Finally, amendments made specifically to RCW 10.05.120 show clear legislative intent to permit a court to impose conditions and not just create a “waiting period.” The legislature has made amendments to RCW 10.05.120 in 1983, 1985, 1994, 1998, and 2003.⁹ In 1998, the legislature made changes to RCW 10.05.120 that extended the period before a court must dismiss pending charges¹⁰ (additions indicated by *text*; deletions indicated by ~~text~~):

~~Upon~~ *Three years after receiving* proof of successful treatment program, *but not before five years following entry of the order of deferred prosecution*, the court shall dismiss the charges pending against the petitioner.

Laws of 1998, ch. 208, § 3. Effectively, the court extended the period that a petitioner would be under supervision. However, as it was written the legislature appeared to have created a “waiting period” with these amendments, which caused inconsistent application throughout jurisdictions. As such, the legislature made additional changes in 2003, which added language and specified requirements for a trial court to dismiss (additions indicated by *text*; deletions indicated by ~~text~~):

(1) Three years after receiving proof of successful completion of the two-year treatment program, *and following proof to the court that the petitioner has complied with the conditions imposed by the court*

⁹ The legislature has made changes to RCW 10.05 *et seq.* generally in more years than listed. The years listed specifically refer to changes to RCW 10.05.120.

¹⁰ Prior to the 1998 amendments, a court was required to dismiss after successful completion of the two-year treatment program.

following successful completion of the two-year treatment program, but not before five years following entry of the order of deferred prosecution pursuant to a petition brought under RCW 10.05.020(1), the court shall dismiss the charges pending against the petitioner.

Laws of 2003, ch. 220, § 1. With this change, the legislature unambiguously expressed there are two conditions that must be met before a court shall dismiss.

In house discussions, the judiciary committee expressly stated the statute authorized a court “to impose additional requirements and restrictions on persons who are granted a deferred prosecution” and that in order for dismissal, “the person must show proof not only that he or she has successfully completed the required two-year treatment program, *but also that he or she has complied with any other conditions imposed by the court.*” Washington Senate Bill Report, 2003 Reg. Sess. S.B. 5396, Mar. 20, 2003 (emphasis added). Additionally, the testimony heard by the legislature explained how the amendment to the “bill clarifies the court’s authority to impose conditions during the entire five-year period of deferred prosecution.” Washington Senate Bill Report, 2003 Reg. Sess. S.B. 5396, Apr. 14, 2003. It was determined that most courts had already assumed conditions may be imposed during the entire five-year period, “but a few have ruled that additional conditions can be imposed only during the two-year treatment program.” *Id.* In short, the amendments

clarified (1) deferred prosecution is a five-year period, (2) a trial court's authority to set conditions during the entire five-year deferred prosecution period, and (3) a trial court's authority to revoke if *either* completion of the two-year treatment program or compliance with the trial court's conditions were not met.

II. RCW 10.05 *et seq.* grants a trial court clear authority when it has discretion to terminate, when it must terminate, and when it must dismiss charges after entry of deferred prosecution.

- a. A trial court has authority to terminate deferred prosecution under RCW 10.05.090, RCW 10.05.100, and RCW 10.05.140.

RCW 10.05 *et seq.* provides various ways a trial court may revoke or terminate deferred prosecution. A trial court has authority to revoke a deferred prosecution under RCW 10.05.090, RCW 10.05.100, and RCW 10.05.140.

Under RCW 10.05.090, a trial court may terminate deferred prosecution upon proof the petitioner breached the ordered treatment plan. This authority is discretionary to the court; upon review, the court shall “either order that the petitioner continue on the treatment plan or be removed from deferred prosecution.” RCW 10.05.090. Under RCW 10.05.100, the court must terminate deferred prosecution if a petitioner is convicted of a “similar offense” that was committed while the petitioner

was in deferred prosecution program. A trial court lacks discretion and must remove a petitioner upon notice of a conviction of a “similar offense.”¹¹ *State v. Kuhn*, 74 Wn.App. 787, 791-792, 875 P.3d 1225 (1994).

Under RCW 10.05.140, a trial court has authority to terminate deferred prosecution “upon violation of the deferred prosecution order.” As discussed, a trial court has authority to impose “reasonable conditions during the period of the deferred prosecution” to “ensure continued sobriety and reduce the likelihood of reoffense.” RCW 10.05.140. The plain language of the section is clear that a trial court has discretionary authority to terminate deferred prosecution based upon a violation of a deferred prosecution order that orders treatment and sets conditions. The Respondent argues the language in RCW 10.05.140 only permits a trial court to terminate during the “deferred prosecution program,” relying on the use of the term “deferred prosecution program” in RCW 10.05.150.¹² However, this interpretation is inconsistent with the purpose of RCW 10.05 *et seq.* and would render RCW 10.05.140 superfluous. Under RCW 10.05.090, the court must terminate if the petitioner violates terms of the treatment plan, which include similar conditions referred to in RCW

¹¹ “Similar offense” is not defined in RCW 10.05 *et seq.* but is commonly interpreted to be the same offenses that are pending at the time of entry into deferred prosecution.

¹² See footnote 2 regarding the interchangeable use of “deferred prosecution” and “deferred prosecution program” throughout RCW 10.05 *et seq.*

10.05.140. In other words, RCW 10.05.140 would be unnecessary and repetitive to the authority already granted to a trial court under RCW 10.05.090. If this Court were to accept the Respondent's interpretation, this Court would find that RCW 10.05.140 is redundant to RCW 10.05.090. As such, it is clear the legislature intended to grant a trial court discretionary authority to terminate a deferred prosecution based upon a violation of conditions set under RCW 10.05.140.

- b. A trial court must dismiss pending charges when a petitioner shows proof of successful completion of the two-year treatment program and proof of compliance with court-imposed conditions following the two-year treatment program.

A trial court is granted authority to dismiss pending charges against the petitioner under RCW 10.05.120. As amended in 2003, before a trial court shall dismiss charges, two requirements must be met: (1) proof of successful completion of the two-year treatment program and (2) proof to the court that the petitioner has complied with the conditions imposed by the court following successful completion of the two-year treatment program. A trial court can dismiss charges three years after receiving proof of successful completion of the two-year treatment program, but not before five years following entry of deferred prosecution. RCW 10.05.120. Further, the court "shall dismiss the charges pending" if these two elements are met.

The Respondent asserts that a trial court does not have authority under RCW 10.05.120 to terminate a deferred prosecution if these two elements are not met because the section does not expressly state so. If RCW 10.05.120 were reviewed alone, the Respondent would not be incorrect. However, when interpreting a statute, this Court must look to the plain meaning of the pertinent section as well as related statutes. Looking to RCW 10.05 *et seq.* as a whole and, specifically, RCW 10.05.090, RCW 10.05.140, and RCW 10.05.150 along with RCW 10.05.120, it is clear a trial court has authority to terminate deferred prosecution at any point during the five-year period if the treatment plan is breached or the order of deferred prosecution is violated. If this Court were to accept the Respondent's argument that because RCW 10.05.120 alone does not state a trial court may revoke a deferred prosecution, this Court will produce an absurd result.¹³

For example, a trial court cannot dismiss under RCW 10.05.120 because both conditions have not been met (proof of (1) completion of treatment and (2) compliance with court-imposed conditions). However, under the Respondent's interpretation, a court also cannot terminate a deferred prosecution because it is not authorized in RCW 10.05.120

¹³ A reading of a statute that produces absurd results should be avoided because courts presume the legislature does not intend to legislate absurdly. *State v. Engel*, 166 Wn.2d 572, 579, 210 P.3d 1007 (2009).

alone.¹⁴ As such, a petitioner’s pending charges would remain in *judicial limbo* and avoid any final disposition (whether dismissal from a successful deferred prosecution or a conviction following termination). The petitioner’s charges would remain pending indefinitely producing an absurd result, which goes against the presumed intent of the legislature.¹⁵ Thus, it is clear the legislature intends a trial court to have authority to terminate deferred prosecution if the two requirements are not met under RCW 10.05.120.

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¹⁴ Looking at RCW 10.05 *et seq.* as a whole, the legislature grants a trial court authority to terminate deferred prosecution in multiple sections – RCW 10.05.090, RCW 10.05.100, and RCW 10.05.140.

¹⁵ While more than one interpretation of the plain language is reasonable (and therefore ambiguous), the rule of lenity does not apply because of clear legislative intent to the contrary. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013). As discussed in section I, subsection (C), the legislature has made changes to RCW 10.05.120 specifically to clarify a trial court’s authority to impose conditions during the entire five-year deferred prosecution period.

CONCLUSION

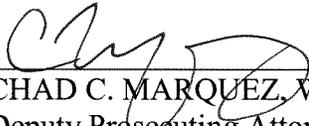
This Court should reverse the Superior Court decision because the trial court did have authority to revoke deferred prosecution based upon a violation of a condition in the order for deferred prosecution set under RCW 10.05.140. The legislature clearly grants this authority to a trial court through the entire five-year deferred prosecution period.

DATED this 12th day of February, 2020.

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February 12, 2020 - 2:58 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
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Superior Court Case Number: 18-1-03404-3

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