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Division II
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NO. 53870-9-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

DAMON BLANCHARD,

Appellant.

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

SUPPLEMENTAL BRIEF OF APPELLANT

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A. INTRODUCTION

Damon Blanchard was charged with possession of a stolen vehicle. He was found not guilty of this offense in a jury trial. While the charge was pending, Mr. Blanchard missed a court date because he was incarcerated in another state. The prosecutor added a bail jumping charge and Mr. Blanchard was convicted of this charge at trial.

However, the Legislature has determined the culpability and punishment for bail jumping offenses was set too high; its remedial legislation establishes there is no purpose in imposing the previous, harsher punishment. In these circumstances, the amended law applies to cases pending on appeal.

B. ASSIGNMENTS OF ERROR

1. Due to legislative changes in the bail jumping statute that apply to Mr. Blanchard, his conviction does not meet the essential elements of the felony offense.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In March 2020, Washington passed Engrossed Substitute House Bill 2231. This law became effective on June 11, 2020 – well before this Court will consider this case. Due to the change in law, an individual's failure to appear at a court proceeding, other than a failure to appear for trial or in a case involving a violent felony or sex offense, is now a gross misdemeanor or no crime whatsoever. In light of this change, is Mr. Blanchard's felony conviction no longer valid?

D. STATEMENT OF THE CASE

Damon Blanchard was charged with one count of possession of a stolen vehicle after he was stopped by police in a car he had recently purchased. RP 104-06; CP 1-2.

While his case was pending, Mr. Blanchard missed court on March 7, 2019. Supp. CP __ (sub. nos. 10, 11). The warrant was quashed five days later, and Mr. Blanchard appeared in court two days later. Ex. 7. The record is unclear as to why Mr. Blanchard was not in court on March 7. The prosecutor did not file a bail jumping charge for this date.

Mr. Blanchard missed court again on April 18, 2019, while he was held in a different jurisdiction. RP 170-71; Ex. 10. The warrant was quashed five days later, after he was transported to Lewis County; he appeared in court the following day. RP 177, 183; CP 5, 60-61. Following this missed date, the prosecutor charged him with bail jumping.

At trial, the jury acquitted Mr. Blanchard of the original charge, but convicted him of bail jumping. CP 47-48. After Mr. Blanchard was sentenced, the Legislature determined such failures to appear should be either gross misdemeanors or no crime at all. Laws of 2020, ch. 19, § 2.

E. ARGUMENT

The Legislature determined missing court should only be a misdemeanor offense or no crime at all and thus amended the statute. This Court should vacate Mr. Blanchard's felony bail jumping conviction and remand for further proceedings under the current law.

1. The Legislature downgraded bail jumping in cases like this to misdemeanors or no crime at all.

On March 7, 2020, Washington passed Engrossed Substitute House Bill 2231, changing the definition and classification of bail jumping. The Governor signed the bill on

March 18, 2020. Laws of 2020, ch. 19, §§ 1-2. The new legislation became effective on June 11, 2020. *Id.*

By statute, a failure to appear for a court date other than a trial now is either not a crime or is only a gross misdemeanor. *Id.*[1] Under the new law, failing to appear for court in a case like Mr. Blanchard's drug possession charge results in no crime if the person moves to quash the warrant within 30 days and has not had a prior warrant for failing to appear in the case. Laws of 2020, ch. 19, § 2(1)(a-b). If the person fails to appear promptly to quash the warrant, or has a prior failure to appear in the case, then failing to appear may result in a gross misdemeanor charge, though an affirmative defense of "uncontrollable circumstances" applies to such failures to appear. Laws of 2020, ch. 19, § 2(1-3).

The new law does not contain a formal statement of intent. *See* Laws of 2020, ch. 19. However, the statements of legislative members show agreement between supporters and

[1] Bail jumping in cases involving certain serious underlying offenses is punished differently under the new law, but Mr. Blanchard's conviction is not of that type. *See* Laws of 2020, ch. 19, § 1.

opponents that the then-current scheme was overly harsh and not used as originally planned, which was to deter people from intentionally evading justice to cause significant delays either to improve their cases or avoid prosecution entirely. *See Hearing on HB 2231*, H. Pub. Safety Comm. (Jan. 14, 2020) (statements of Rep. Pellociotti, Sponsor, 41:50-46:57, 47:43-48:21) (statement of opponent Rep. Klippert, Member, 46:57-47:34);[2] *Hearing on ESHB 2231*, S. Law & Just. Comm. (Feb. 25, 2020) (statements of Rep. Pellociotti, Sponsor, 31:26-35:08, 39:16-40:25, 41:42-42:15) (statement of Sen. Holy, Member, 40:25-41:42).[3]

Under the new law, Mr. Blanchard's conviction is for a date that may qualify as being no crime at all, or otherwise certainly qualifies as a gross misdemeanor rather than a felony. *See* Ex. 7, 10; CP 5, 60-61; Supp. CP __ (sub. nos. 10, 11). His appeal has not yet been litigated and he should

[2] Available at https://www.tvw.org/watch/?eventID=2020011091.
[3] Available at www.tvw.org/watch/?eventID=2020021343.

benefit from the legislature's decision to downgrade and partially decriminalize failures to appear.

2. The downgrading and decriminalization of bail jumping applies prospectively to cases on appeal.

"[A] newly enacted statute or court rule generally applies to all cases pending on direct appeal and not yet final." *State v. Jefferson*, 192 Wn.2d 225, 246, 429 P.3d 467 (2018) (plurality opinion) (citing *State v. Pillatos*, 159 Wn.2d 459, 470, 150 P.3d 1130 (2007); *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997)) (holding the event in question defied this general rule); *see State v. Ramirez*, 191 Wn.2d 732, 747, 426 P.3d 714 (2018).

In *Ramirez*, the Court applied this standard to statutory changes enacted after a person committed their offense and held that an amendment that took effect while an appeal is pending, and that is relevant to the issues on appeal, applied to that appeal. *Ramirez*, 191 Wn.2d at 747-49. In that case, the Court ruled that certain costs and interest charges that were properly imposed at the time of sentencing were no longer permissible when statutory amendments took

effect before the appeal was final. *Id.* Because that statute took effect while his appeal was pending, the Court ruled that because the conviction was not yet final, the new statute applied to Mr. Ramirez's case. *Id.* Thus, the court directed that the sentence be changed to omit the newly improper costs. *Id.* at 749-50.

Statutes "operate prospectively when the precipitating event for operation of the statute occurs after enactment." *Pillatos*, 159 Wn.2d at 471; *Ramirez*, 191 Wn.2d at 749. Statutes may apply prospectively "even when the precipitating event originated in a situation existing prior to enactment." *Pillatos*, 159 Wn.2d at 471. Thus, a statute may apply prospectively even when it "relates to prior facts or transactions" or "some of the requisites for its actions are drawn from a time antecedent to its passage." *Blank*, 131 Wn.2d at 248 (quoting *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973)). In *Ramirez*, the precipitating event for the penalty imposed upon conviction was when the conviction was final under RAP 12.7 at the conclusion of the appeal, thus

the application of the statue affecting the penalty was prospective. *Ramirez*, 191 Wn.2d at 749.

Recently, the Court of Appeals ruled changes in the law regarding the vacation of misdemeanor offenses applied to cases pending on appeal. *State v. Huxel*, 36191-8-III, 2020 WL 1656464, at 1-2 (March 19, 2020) (unpublished cited pursuant to GR 14.1). In *Huxel*, the trial court had concluded the prior offense was statutorily ineligible for vacation, and the appellant challenged this denial of his motion to vacate. *Id.* at 1. While the appeal was pending, the Legislature expanded a trial court's ability to vacate offenses. *Id.* Based upon *Ramirez*, and because his appeal was pending when the statutory amendment was enacted, the Court concluded this change in the law applied to the appellant's case. *Id.* at 2. This Court remanded with direction for the trial court to vacate the conviction. *Id.* Thus, the Court understood *Ramirez* to have application beyond legal financial obligations. *Id.*

Here, Mr. Blanchard's case is pending on appeal. As his conviction is not final, the changes brought by the new law

can apply to his case, as his judgment is not final until his direct appeal is final. *See Ramirez*, 191 Wn.2d at 749; *Blank*, 131 Wn.2d at 248. The change in the bail jumping law should apply to his case. *See Ramirez*, 191 Wn.2d at 747-49.

> *3. As the legislature has determined that a gross misdemeanor or no conviction at all is adequate to punish the failure to appear, retroactive application of the new law is presumed, and it would be unjust not to apply the law equally to all similar offenders.*
>
> *a. The complete downgrading of a crime requires retroactive application.*

"When the Legislature downgrades an entire crime, it has judged the specific criminal conduct less culpable. By reclassifying a crime without substantially altering its elements, the Legislature concludes the criminal conduct at issue deserves more lenient treatment." *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994). This is "a fundamental reappraisal of the value of punishment." *Id.*

Such a reduction in the penalty for an offense creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *See State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). Thus, newly

effective law applies to all cases where there has been a legislative determination that the offender is less culpable. *See State v. Ross*, 152 Wn.2d 220, 239–40, 95 P.3d 1225 (2004); *Heath*, 85 Wn.2d at 198.

This rule rests 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. The Court reasoned the evident legislative will in penalty reduction operated retroactively to pending cases. *Heath*, 85 Wn.2d at 197–98.

In *Wiley*, the Court held that legislation modifying the elements of a crime but not its culpability does not apply to pending cases. *Wiley*, 124 Wn.2d at 682. However, when the Legislature downgrades the seriousness of an offense, courts "must give retroactive effect to the Legislature's decision." *Wiley*, 124 Wn.2d at 687. This is so because "the reclassification of a crime is no mere refinement of elements, but rather a fundamental reappraisal of the value of

punishment." *Id.* at 687. Thus, "the reclassification of an entire crime to a lower level of punishment" applies retroactively in calculating offender scores. *Id.* at 682.

In *Ross*, the Court re-affirmed that *Wiley*'s rule for retroactivity was binding precedent in cases where the Legislature "downgrade[ed] crimes from a felony to a misdemeanor." *Ross*, 152 Wn.2d at 239-40. While the Court held the rule did not apply to offender score calculations, it has never overturned the *Heath* and *Wiley* rule for laws downgrading culpability, which are still binding on this Court today. *Id.*; *Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at 198.

Here, the Legislature downgraded and partially decriminalized bail jumping. This legislative declaration of reduced culpability for certain acts should be applied to Mr. Blanchard's pending case in accordance with Supreme Court precedent. The Legislature's action indicates a determination such conduct "deserves more lenient treatment," *Wiley*, 124 Wn.2d at 687, and there is no purpose in imposing the "older,

harsher" penalty, *Heath*, 85 Wn.2d at 198. Thus, the new law applies in Mr. Blanchard's case. *Wiley*, 124 Wn.2d at 687.

b. Statutes with a remedial effect are to be applied retroactively

Further, remedial statutes require liberal construction "to effectuate the remedial purpose for which the statute was enacted." *State v. Grant*, 89 Wn.2d 678, 685, 575 P.2d 210 (1978) (citing 3 C. Sands, *Statutes and Statutory Construction*, ss. 60.01-.02 (4th ed. 1974); *Personal Restraint Petition of Myers*, 105 Wn.2d 257, 267, 714 P.2d 303 (1986).

Thus, the general rule is that remedial statutes are applied retroactively. *State v. Blank*, 131 Wn.2d 230, 248, 930 P.2d 1213 (1997). This "is especially true when the … statute favorably reduces punishment laws applied to previously convicted criminal defendants." *Heath*, 85 Wn.2d at 198.

Reductions in penalties serve a remedial function. *Grant*, 89 Wn.2d at 685; *Heath,* 85 Wn.2d at 198. In *Grant*, the Supreme Court held that a new statute decriminalizing public intoxication should apply to cases on appeal before the statute's enactment, in part because the statute was remedial

in effect. *Grant*, 89 Wn.2d at 685. Likewise, though *Heath* was a civil case, it similarly held a statute providing treatment alternatives to the penalty of a driving privilege suspension was "patently remedial" and thus should be applied retroactively. *Heath,* 85 Wn.2d at 198.

Thus, the decriminalization and downgrading of bail jumping is similarly remedial and should be applied retroactively to cases pending on appeal, like Mr. Blanchard's case. *See Grant*, 89 Wn.2d at 685; *Heath,* 85 Wn.2d at 198.

c. The savings statute does not apply to decriminalization and downgrading of offenses.

Washington's general savings statute, RCW 10.01.040, was enacted over a century ago and states "[n]o offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a contrary intention is expressly declared in the repealing act."

However, as this statute is in derogation of the common law, it is to be narrowly construed. *State v. Zornes*, 78 Wn.2d

9, 13, 475 P.2d 109, 112 (1970), *overruled on other grounds by City of Kennewick v. Fountain*, 116 Wn.2d 189, 193, 802 P.2d 1371 (1991). Consequently, the statute's interpretation contains exceptions, including that it is not applicable to declarations of legislative will that 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 Court in *Grant* noted the language and intent of a new statute overcame the presumption of the savings clause, noting that any ambiguity about this decision must be resolved in the defendant's favor. *Grant*, 89 Wn.2d at 685.

Additionally, the Supreme Court has held it is unnecessary that the Legislature "expressly state" an intention for retroactive application "if such an intention can be obtained by viewing its purpose and the method of its enactment." *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) (quoting *Snow's Mobile Homes, Inc. v. Morgan*, 80 Wn.2d 283, 291, 494 P.2d 216 (1972)).

Further, when addressing the application of new principles of decisional law, courts have found that new case law can apply "to all cases, state or federal, pending on direct review or not yet final, with no exceptions for cases in which the new rule constitutes a clear break from the past." *State v. Evans*, 154 Wn.2d 438, 444, 114 P.3d 627 (2005) (quoting *Matter of St. Pierre*, 118 Wn.2d 321, 326, 823 P.2d 492 (1992)). "Final" means "a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *St. Pierre*, 118 Wn.2d at 327. Thus, a change in the law can apply to pending cases not yet final, including cases pending on direct review, regardless of the savings statute.

Heath and *Wiley* clearly contemplated circumstances like Mr. Blanchard's, and distinguished them from those where the savings clause applies, like amendments changing the calculation procedures in offender scoring in *Ross*. The

savings clause does not apply to the Legislature's amendment to downgrade and decriminalize the offense of bail jumping.

4. The bail jumping statute now defines Mr. Blanchard's failure to appear in court as a gross misdemeanor or not a crime; this Court should vacate his conviction.

By decriminalizing certain failures to appear, and downgrading others, the Legislature has corrected what was an extremely harsh penalty for being late to or missing court, sometimes with reasonable reasons. The Legislature has concluded the previous penalty was not necessary to serve its penological goals, and adjusted its laws accordingly. *See Wiley*, 124 Wn.2d at 687; *Heath*, 85 Wn.2d at198.

The law applies prospectively to all cases pending on appeal. *See Ramirez*, 191 Wn.2d at 747. Alternatively, decades of binding precedents dictate it must be applied retrospectively to Mr. Blanchard's case, given the Legislature downgraded an offense, deeming sufficient a misdemeanor or no conviction at all, which has a remedial effect and is not barred by the savings statute. *See Wiley*, 124 Wn.2d at 687;

Grant, 89 Wn.2d at 685; *Heath*, 85 Wn.2d at198; *see also Evans*, 154 Wn.2d at 444.

F. CONCLUSION

If not overturning and dismissing Mr. Blanchard's bail jumping conviction in response to his original arguments, this Court should vacate the conviction and sentence and remand for further proceedings to determine whether his actions constituted a gross misdemeanor or no crime at all.

Submitted this 11th day of June 2020.

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 53870-9-II
v.	)	
	)	
DAMON BLANCHARD,	)	
	)	
Appellant.	)	

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