

FILED
Feb 25, 2013
Court of Appeals
Division III
State of Washington

NO. 31180-5-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HEATHER L. MERCADO,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF,

Dennis W. Morgan WSBA #5286
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ARGUMENT

The State asserts in its brief that the invited error doctrine precludes appellate review of Heather L. Mercado's case.

Ms. Mercado takes the position that the invited error doctrine is inapplicable in cases where there is a question of the trial court's authority to statutorily act. "A superior court's statutory authority is a question of law that we review *de novo*." *Marriage of Schneider*, 173 Wn.2d 353, 358 (2011).

Ms. Mercado contends that the trial court exceeded the authority granted to it under RCW 70.24.340(1)(c).

The State presents a vague, amorphous analogy with paternity cases, blood draws and DNA samples.

Insofar as DNA samples are concerned, the State's argument fails due to the fact that the statute authorizes the taking of the sample in all felony convictions. *See*: RCW 43.43.754(1)(a).

Blood draws are also authorized under certain limited circumstances pursuant to the implied consent law. *See*: RCW 46.20.308(1), (2).

Paternity testing is subject to the statutory limitations placed upon it. *See*: RCW 26.26.405.

The State's argument is ludicrous in the extreme. It does not address the nexus between drug usage and the presence of needles. Rather, the State relies upon generalizations and imputation of bad character to Ms. Mercado.

The critical phrase under discussion is "associated with."

The Legislature has not seen fit to define that phrase.

The word "associate" means, in part: "... **3.** to unite; combine ...; **4.** to enter into union; unite. ..." WEBSTER'S ENCYCLOPEDIA UNABRIDGED DICTIONARY OF THE ENGLISH LANGUAGE (1996 ed.)

The language of the statute requires the Court to look at the particular offense and the facts and circumstances surrounding that offense. The facts and circumstances must establish that a hypodermic needle was used in union/combo with the particular drug under consideration.

The Legislature did not, in enacting the statute, indicate that all Chapter 69.50 RCW offenses were included in the requirement for HIV testing. Rather, the Legislature limited HIV testing to those situations where it is obvious that a hypodermic needle is involved.

We review an issue of statutory construction *de novo*. [Citation omitted.] Our purpose is to ascertain and carry out the legislature's intent. [Citation omitted.] We determine intent by first looking at the language of the statute. [Citation omitted.] Statutory language is ambiguous if the reader can reason-

ably interpret it in more than one way. [Citation omitted.] If legislative intent is unclear, we may consider legislative history to resolve the ambiguity. [Citation omitted.] **The rule of lenity requires us to resolve ambiguities in criminal statutes in the criminal defendant's favor.** [Citation omitted.] We give criminal statutes a strict and liberal interpretation. [Citation omitted.]

State v. Halsten, 108 Wn. App. 759, 762, 33 P.3d 751 (2001). (Emphasis supplied.)

Ms. Mercado asserts that the language of RCW 70.24.340(1)(c) is plain and clear. It only applies to those drug offenses where a hypodermic needle is actually used.

Alternatively, if an ambiguity exists, then the statute needs to be interpreted in Ms. Mercado's favor.

Finally, returning to the invited error doctrine, Ms. Mercado asserts that she received no advantage in connection with the imposition of HIV testing. As the Court noted in *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587 (1976):

We hold, therefore, that when a defendant in the procedural setting of a criminal trial makes a tactical choice **in pursuit of some real or hoped for advantage**, he may not later urge his own action as a ground for reversing his conviction even though he may have acted to deprive himself of some constitutional right.

(Emphasis supplied.)

The invited error doctrine should only be applied in situations where the individual has received a benefit from the choice made. Moreover, since HIV testing does not constitute a tactical choice by defense counsel or Ms. Mercado, it is clearly an error whereby the trial court exceeded its statutory authority.

The trial court, the prosecuting attorney and the defense attorney were all at fault.

Ms. Mercado otherwise relies upon the brief previously submitted.

DATED this 23rd day of February, 2013.

Respectfully submitted,

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)
) WALLA WALLA COUNTY
 Plaintiff,) NO.12 1 00145 3
 Respondent,)
) **CERTIFICATE OF SERVICE**
)
 v.)
)
 HEATHER L. MERCADO,)
)
 Defendant,)
 Appellant.)
 _____)

I certify under penalty of perjury under the laws of the State of Washington that on this 23rd day of February, 2013, I caused a true and correct copy of the *APPELLANT'S REPLY BRIEF* to be served on:

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