FILED
JANUARY 10, 2017
Court of Appeals
Division III
State of Washington

No. 33790-1-III

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III**

STATE OF WASHINGTON,

Respondent-Cross-Appellant,

v.

RIGOBERTO IVAN VAZQUEZ,

Appellant-Cross-Respondent.

REPLY BRIEF OF RESPONDENT-CROSS-APPELLANT

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I. STATEMENT OF THE CASE

No additional statement of the case is necessary.

II. ARGUMENT

Mr. Vazquez does not dispute there has been no material change in the law regarding unranked offenses and deadly weapon enhancements since the enactment of the "Hard Time for Armed Crimes Act" (HTACA), Laws of 1995 Ch 129. Nor does Mr. Vazquez dispute that if *State v. Soto*, 177 Wn. App. 706, 309 P.3d 596 (2013), misinterpreted the SRA, the misinterpretation was harmful within the meaning of the "incorrect and harmful" test. Thus the only issue remaining is whether the HTACA applied deadly weapon enhancements to unranked offenses in the first place.

"Our fundamental purpose in construing a criminal statute is to ascertain and carry out the intent of the legislature." *State v. Barnes*, 196 Wn. App. 261, __ P.3d __ (2016). While the literal language of the statute is the most important clue, it is not the end all and be all of statutory interpretation. In *Barnes* the court concluded that a riding lawn mower is not a 'motor vehicle' within the meaning of the theft of a motor vehicle statute, despite fitting the literal language. In the HTACA the legislature could not have been clearer in its intent statement. They stated in the intent section of the session law that deadly weapon enhancements should

apply to all felonies. The term 'all felonies' is not ambiguous, and clearly includes unranked felonies. In addition the plain language of the body of the statute, properly read in accordance with dictionary definitions, applies deadly weapon enhancements to all felonies. In case there was any confusion, the drafters specifically mentioned an unranked felony as one they want deadly weapon enhancements to apply to. The State does not argue that the HTACA was unconstitutional, or that it could not address deadly weapon enhancements under its title, instead it clearly applied them to all felonies.

A. Presumptive sentence

Mr. Vazquez mis defines the term 'presumptive sentence' and in doing so creates several ambiguities in the statutory language, then attempts to use the storm trooper waive to make them disappear. (These aren't the ambiguities you are looking for.) See *Star Wars, Episode IV, A New Hope* (Lucas Film 1977). A proper definition of the term "presumptive sentence" makes all ambiguities disappear in the HTACA, and only leaves ambiguities inserted into RCW 9.94A.533 in later legislation, which are resolved by reference to legislative intent and the application of Wash Cons't Art II §19.

Mr. Vazquez defines the term 'presumptive sentence' to mean precisely the same thing as 'standard range sentence computed for ranked

offenses' in the SRA, no more, no less. This violates the cannon of statutory construction that says when the legislature uses different words it means different things. It also creates ambiguities where none exist and conflicts with the wording of the SRA, specifically RCW 9.94A.505.

The term "presumptive sentence" is not formally defined in the SRA. Black's Law Dictionary defines a presumptive sentence as "an average sentence for a particular crime (esp. provided under sentencing guidelines) that can be raised or lowed based on the presence of mitigating or aggravating circumstances." *Black's Law Dictionary*, 9th ed. 1485 (9th ed. 2009). The SRA has a section that precisely fits this definition. RCW 9.94A.505, titled "sentences" describes the presumptive sentences for ranked and unranked felonies. In §.505(2)(a) the presumptive sentence for ranked felonies is described. It includes a term of months consistent with the crime and criminal history, a term of community custody in appropriate crimes, certain indeterminate sentences for sex offenders, certain mandatory minimums, provisions for persistent offenders and provisions related to various alternative sentencing programs. For unranked offenses §.505(2)(b) provides a presumptive sentence of 0 to 12 months, community service work and community custody. Both provisions allow departure from the presumptive sentence for mitigating and aggravating circumstances under RCW 9.94A.535. Thus a term of

months under the standard range is one part of a presumptive sentence for a ranked offense. It is not the totality of what falls under the term "presumptive sentence." Unranked felonies have a presumptive sentence as well, generally 0 to 12 months, along with the possibility of community custody and community service work in appropriate cases.

This understanding of the term presumptive sentence fits perfectly into the HTACA, and resolves the alleged ambiguities created by the use of the term "any felony." All felonies, including unranked ones, have presumptive sentences. Former RCW 9.94A.310 tells the court how to calculate the incarceration time for presumptive sentences for ranked offenses. Thus the term presumptive sentence in former RCW 9.94A.310(1) was discussing the presumptive sentence for ranked offenses, but said absolutely nothing about the presumptive sentence for unranked offenses. Nothing in former RCW 9.94A.310(1) indicates the term presumptive sentence is to be exclusively applied to incarceration time for ranked offenses. If the term presumptive sentence was as limited as Mr. Vazquez says it is, then the term presumptive sentence would not include community custody, *see State v. Hudnall*, 116 Wn. App. 190, 64 P.3d 687 (2003) (court could impose exceptional community custody terms), an indeterminate plus sentence for certain sex offenders under RCW 9.94A.507, mandatory minimums under RCW 9.94A.540 or three

strikes sentences under the POAA. In some cases these provisions, not included in the standard range calculation, are not only presumptive, but mandatory. Former RCW 9.94A.310 told the court how to calculate the presumptive range for a certain class of offenders and offenses. It in no way indicated that the term 'presumptive sentence' was strictly limited to referencing that calculation, and by common usage and the structure of the SRA, it was not.

The State cited plenty of authority to conclude that the as originally enacted initiative 159 applied to unranked offenses. The intent statement makes clear it was intended to apply to all felonies. Laws of 1995 Ch 129 §1. The legislature expressly listed the unranked offense of child luring as one that it intended deadly weapon enhancements to apply to. Mr. Vazquez dismisses this as an anomaly, and concludes that it was simply an oversight the legislature could have corrected if they meant luring to be eligible for a deadly weapon enhancement. However, the legislature's clear intent cannot be so lightly disregarded.

B. Changes to the SRA

Unfortunately a couple of changes to the statute, made for reasons wholly unrelated to unranked offenses, created the ambiguities that led to *Soto*. Fortunately the legislature is protected against such unintentional changes by clear intent statements and Art II §19 of the State Constitution.

The first change that caused confusion was made in Laws of 2000 Ch 28 §11, where the legislature changes the term 'presumptive sentence' to 'standard range.' However, with one exception not relevant here, Laws of 2000 Ch 28 was not intended to make substantive changes to the SRA, but was instead intended and titled as a technical correction and reorganization. Laws of 2000 Ch 28 §1. Thus it must be concluded that as far as Laws of 2000 Ch 28 is concerned, unranked offenses have a 'standard range' of 0-12 months.

The second change took place in the Laws of 2002 Ch 290. Here the legislature added that enhancements and aggravators applied to the ranges determined in the sentencing tables contained in RCW 9.94A.515 and .517. Again, the intent of this amendment was clear. The legislature wanted to be sure enhancements applied to crimes under the newly created drug sentencing grid. There was no indication this was intended to affect unranked offenses. Again, the legislature is protected from unintentional amendments by clear intent statements and Art II §19.

Mr. Vazquez argues that the legislature intentionally added weapons enhancements to unranked drug offenses in the Laws of 2002 Ch 290 §9, and thus proved they knew about the issue. This is a bizarre interpretation of the statute. If the intent of this statute was to add deadly weapon enhancements to unranked crimes they certainly could have made

that clear by simply saying so. The clear intent and effect of that part of the legislation is to increase the seriousness level of unranked, level I and level II drug offenses to level III if a deadly weapon enhancement is involved. The deadly weapon enhancements were already attached to those offenses prior to Laws of 2002 Ch 290. Laws of 2002 Ch 290 §9 simply increased the standard range penalties for them.

C. Exclusions from the deadly weapon enhancement

Mr. Vazquez also argues that because riot/criminal mischief while armed inherently involves a deadly weapon it would have been expressly excluded in RCW 9.94A.533(3) and (4) if the legislature thought it was subject to a deadly weapon enhancement. This argument completely ignores the statutory scheme and misapplies the *Workman*[1] test. The crimes excluded under §.533 are crimes that inherently involve firearms, not crimes that inherently involve the broader category of deadly weapons. There are many crimes in the criminal code that involve deadly weapons as an element, but are not included in the exclusion list under §.533. These include Assault 1, RCW 9A.36.011(1)(a); Assault 2, RCW 9A.36.021(1)(c); Burglary 1, RCW 9A52.020(1)(a); Robbery 1, RCW 9A56.200(1)(a)(i) and Kidnapping 1 and 2, RCW 9A.40.010, .020, .030. It would be inconsistent to include riot/criminal mischief while armed on

[1] *State v. Workman*, 90 Wn.2d 443, 584 P.2d 382 (1978).

the exclusion list while not including all the other crimes that have use of a deadly weapon as an element.

In addition the crimes that include a deadly weapon element are legally different than the deadly weapon enhancement, and thus do not meet the legal prong of the *Workman* test. A deadly weapon, when defined as an element of a crime, is, in relevant part, any weapon or device, under the circumstance in which it is used, is readily capable of causing death *or substantial bodily harm*. RCW 9A.04.110 (emphasis added). A deadly weapon, for the purposes of an enhancement, is any implement or instrument that is likely to produce or may easily and readily produce death. RCW 9.94A.825. Vehicles are, by judicial definition, deadly weapons for the purposes of an element, but not for the purposes of an enhancement. *State v. Shepherd*, 95 Wn. App. 787, 977 P.2d 635 (1999). Substantial bodily harm means, in part, bodily injury which causes a temporary but substantial loss or impairment of the function of any bodily part or organ. RCW 9A.04.110(4)(b). Thus incapacitating weapons, such as tasers or pepper spray, are deadly weapons for the purposes of the element of a crime because they cause substantial bodily harm, but are not deadly weapons for the purposes of an enhancement, because they do not cause death. Thus the *Workman* test is not met, because a crime including a deadly weapon element is different at law

than one including a deadly weapon enhancement. Thus the failure of the legislature to include riot while armed in the exclusion list in §.533(3) and (4) makes perfect sense, is consistent with other statutes, and is completely meaningless in this discussion.

D. Legislative acquiescence

Legislative acquiesce does support Mr. Vazquez's position, but only very weakly. "Evidence of legislative acquiescence is not conclusive, but is merely one factor to consider." *Fast v. Kennewick Pub. Hosp. Dist.*, __ Wn.2d __, __ P.3d __ (2016) (Slip op. at 17) (*Citing Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 392, 687 P.2d 195 (1984)). First, the length of time the legislature has acquiesced goes to the strength of the evidence. *See State v. Bryant*, 3 Wn. App. 15, 472 P.2d 408 (1970). *Soto* is not longstanding precedent. It was decided after the events giving rise to this case occurred, and has not been extensively relied upon. Second, the legislature has not readdressed the topic of either unranked offenses or deadly weapon enhancements. While the legislature has addressed §.533 in the last three years, it was in the context of juvenile offenses, Laws of 2015 Ch 134; and impaired driving, Laws of 2016 Ch 203. Given that statutory changes have to be topically related under Art II §19, not just involve the same RCW, the legislature has not had the occasion to address deadly weapon enhancements since *Soto* was decided.

Thus while there is some argument for legislative acquiesce, it is weak, and does not overcome the plain language of the HTACA.

Mr. Vazquez argues that legislative acquiesce somehow affirms *Soto*'s holding that unranked felonies do not become "most serious offenses" under RCW 9.94A.030(t). However, *Soto* never held that. As counsel correctly points out, the *Soto* court never considered the issue. It was never raised or even hinted at in the opinion. It is hard to believe the legislature is acquiescing to something the court never talked about. The plain language of §.030(t) is simple, unambiguous and consistent with the HTACA.

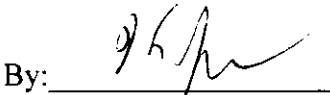
CONCLUSION

The HTACA is unambiguous. The plain language of the statute and the intent statement make it clear the deadly weapon enhancements apply to all felonies. The drafters could have placed the line where deadly weapons enhancements applied anywhere along the continuum of criminal behavior, from applying to all crimes including misdemeanors to only applying to class A felonies or serious violent offenses. A reasonable policy argument could be made for placing the line in many places along this continuum. If the drafters wanted them to not apply to unranked felonies they would have said "all ranked felonies" in the HTACA intent statement. This is consistent with other portions of the SRA, such as

RCW 9.94A.030(t). Ambiguities have crept into §.533 over the years as the statute was amended for other reasons, but not even Mr. Vazquez contends those were intended to remove deadly weapon enhancements from unranked felonies. *Soto* was clearly incorrect. There is no debate that it was harmful. *Soto* should be overruled, the trial court reversed and the case remanded back for the full imposition of the firearm enhancement on the riot while armed charge. At an absolute minimum the case should be remanded back to include the firearm enhancement on the judgement and sentence, even if no time is imposed.

Dated this 9th day of January, 2017.

GARTH DANO
Prosecuting Attorney

By: 
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STATE OF WASHINGTON, Respondent – Cross-Appellant, vs. RIGOBERTO IVAN VAZQUEZ, Appellant- Cross-Respondent.	))))))))))))	COA No. 33790-1-III DECLARATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Reply Brief of Respondent-Cross-Appellant in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan M. Gasch
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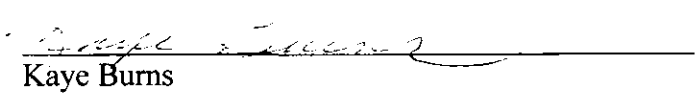
Dated: January 10, 2017.



Kaye Burns