

COA III No. 34349-9
Consolidated with COA III No. 34454-1
Benton County Superior Court No. 10-1-00088-1

FILED

NOV 08, 2016

Court of Appeals
Division III
State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

vs.

MARGARET GRINSTEAD,
Appellant.

APPELLANT'S OPENING BRIEF

Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. ASSIGNMENT OF ERROR

 A. The Trial Court Erred In Denying Ms. Grinstead’s Motion To Amend The Sentence In This Matter.....1

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

 A. Did The Trial Court Abuse Its Discretion By Denying Ms. Grinstead Motion To Have Her Sentence Imposed In This Matter Reduced From A Maximum Of 365 Days To A Maximum Of 364 Days??.....1

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....2

 A. The Trial Court Should Not Have Denied Ms. Grinstead's Motion To Amend Her Sentence

IV. CONCLUSION.....7

CERTIFICATE OF SERVICE8

TABLE OF AUTHORITIES

Washington Cases

Haddenham v. State, 87 Wn.2d 145, 148, 550 P.2d 9 (1976)..... 5
In re Personal Restraint of Matteson, 142 Wn.2d 298, 307, 12 P.3d 585 (2000) 6
Pape v. Department of Labor & Industries, 43 Wn.2d 736, 741,264 P.2d 241 (1953)..... 5
State v. Bunker, 144 Wn. App. 407, 417, 183 P.3d 1086 (2008)..... 6
State v. Grant, 89 Wn.2d 678, 683, 575 P.2d 210 (1978)..... 4
State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975) 5
State v. Kane, 101 Wn.App. 607 (2000)3
State v. MacKenzie, 114 Wn. App. 687, 60 P.3d 607 (2002) 6
State v. Zornes, 78 Wn.2d 9, 13,475 P.2d 109 (1970) 4
Tellier v. Edwards, 56 Wn.2d 652, 653, 354 P.2d 925 (1960) 5

Statutes

RCW 9A.28.040(1)..... 1
RCW 9A.56.020(1)(a) 1, 2
RCW 9A.56.030(1)(a) 1
RCW 9A.56.040(1)(a) 1, 2
RCW 9A.56.065..... 1
RCW 10.01.040 3, 4
RCW 10.99.020 1, 2
RCW 48.30.230 (1)(B) 1
RCW 48.30.230 (2)(B) 1

Federal Cases

Calder v. Bull, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798)..... 2

Constitutional Provisions

U.S. Const. art. 1 § 10..... 2
Wash. Const. art. 1 § 23..... 2

Other Authorities

SB 5168..... passim

I. ASSIGNMENT OF ERROR

- A. The Trial Court Erred In Denying Ms. Grinstead's Motion To Amend The Sentence In This Matter

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Did The Trial Court Abuse Its Discretion By Denying Ms. Grinstead Motion To Have Her Sentence Imposed In This Matter Reduced From A Maximum Of 365 Days To A Maximum Of 364 Days?

II. STATEMENT OF THE CASE

On October 21, 2009, the Defendant, Margaret Grinstead, was charged with Possession of Stolen Property in the First Degree in the Benton County District Court. On November 6, 2009, Ms. Grinstead was arraigned on that charge, pleaded not guilty, and was appointed counsel, Ryan Swinburnson.

The State then elected to dismiss the charges in the District Court and instead to file in the Superior Court. Ms. Grinstead was then charged with six counts in the Benton County Superior court: *Count 1*: Theft in the Second Degree with a Domestic Violence Allegation, RCW 9A.56.020(1) (a), RCW 9A.56.040(1) (a), & RCW 10.99.020; *Count 2*: Conspiracy to Commit Theft Of A Vehicle with a Domestic Violence Allegation, RCW 9A.28.040(1) & RCW 9A.56.065 & RCW 10.99.020; *Count 3*: Presenting A False Insurance Claim, RCW 48.30.230 (1) (B) and RCW 48.30.230 (2)(B); *Count 4*: Theft in the First Degree with a Domestic Violence Allegation, RCW 9A.56.020(1)(a) and RCW 9A.56.030(1)(a) and RCW 10.99.020; *Count 5*: Theft in the Second Degree with a Domestic Violence Allegation, RCW 9A.56.020(1)(a)and RCW 9A.56.040(1)(a) and RCW 10.99.020; and *Count 6*: Theft in the Second Degree with a Domestic Violence

Allegation, RCW 9A.56.020(1)(a) and RCW 9A.56.040(1)(a) and RCW 10.99.020. (CP 17-18) Ms. Grinstead entered a plea of guilty to one count of Theft in the Third Degree on February 18, 2010. (CP 8-13)

Sentencing took place on February 25, 2010. Ms. Grinstead was sentenced on that charge to serve 365 days with 360 days suspended. (CP 19-23)

On April 29, 2015, Ms. Grinstead brought a motion to amend the sentence in this matter from 365 days with 360 days suspended to 364 days with 359 days suspended. (CP 28-34) The motion to amend did not alter the number of days of actual confinement served by Ms. Grinstead.

On March 24, 2016, Benton County Superior Court Judge Ekstrom denied Ms. Grinstead's motion to amend sentence in this matter. *See* Motion for Discretionary Review - Appendix A – Order Denying Motion to Amend Sentence.

On June 6, 2016, Ms. Grinstead timely filed her Motion for Discretionary Review in this court.

III. ARGUMENT- SB 5168

A. The Trial Court Should Not Have Denied Ms. Grinstead's Motion To Amend Her Sentence

SB 5168, signed into law by Governor Gregoire in April 2011, became effective on July 22, 2011, and reduced the maximum penalty for a gross misdemeanor from 365 days to 364 days.

Generally, retroactive application of a criminal law violates the *ex post facto* doctrine. The United States Constitution declares that "[n]o State shall ... pass any ... ex

post facto law." *U.S. Const. art. 1 § 10*. The Washington State Constitution similarly declares that "[n]o ... ex post facto law ... shall ever be passed." *Wash. Const. art. 1 § 23*.

In *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the Supreme Court divided ex post facto laws into four categories:

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Calder, 3 U.S. (3 Dall.) at 390.

SB 5168 fits none of the four categories. It criminalizes no behavior that was previously non-criminal. It does not aggravate an existing crime, nor does it make punishment for any existing crime greater. SB 5168 does not change any rule of evidence. In fact, SB 5168 *reduces* criminal penalty. Therefore, the retroactive application of SB 5168 is not barred by either the State or Federal constitution.

From the purpose of SB 5168, which was to "cure [an] inequity" caused by a dissonance between the State's definition of a gross misdemeanor and the Federal definition of an aggravated felony" for purposes of immigration. It appears logical that the Legislature intended SB 5168 to apply retroactively.

Under RCW 10.01.040, the courts must sentence a defendant according to the law in effect on the date the crime was committed, unless a change in the law was accompanied by evidence that the Legislature intended that the change in the law be

retroactive. RCW 10.01.040.¹ See also, *State v. Kane*, 101 Wn.App. 607 (2000).

Legislative intent need not be explicit. So long as the Legislature includes language that "fairly conveys" their intention, the courts will honor the Legislature's intentions.

Because RCW 10.01.040 is in derogation of the common law, it is strictly construed. The saving force of the statute is applied narrowly and its exception - "unless a contrary intention is expressly declared in the amendatory or repealing act" - is interpreted broadly. Thus our Supreme Court has not insisted that a legislative intent to affect pending litigation be declared in express terms in a new statute. Rather, such intent need only be expressed in "words that fairly convey that intention." *State v. Zornes*, 78 Wn.2d 9, 13,475 P.2d 109 (1970); *State v. Grant*, 89 Wn.2d 678, 683, 575 P.2d 210 (1978).

Here, the Legislature's intent is stated in Sec. 1.

The legislature finds that a maximum sentence by a court in the State of Washington for a gross misdemeanor can, under federal law, result in the automatic deportation of a person who has lawfully immigrated to the United States, is a victim of domestic violence or a political refugee, even when all or part of the sentence to total confinement is suspended. The legislature further finds that this is a disproportionate outcome, when compared to a person who has been convicted of certain felonies which, under the State's determinate sentencing law, must be sentenced to less than one year and hence, either have no impact on that

¹ "No 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*, and no prosecution for any offense, or for the recovery of any penalty or forfeiture, pending at the time any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, but the same shall proceed in all respects, as if such provision had not been repealed, *unless a contrary intention is expressly declared in the repealing act*. Whenever any criminal or penal statute shall be amended or repealed, all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force, notwithstanding such amendment or repeal, *unless a contrary intention is expressly declared in the amendatory or repealing act*, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, *unless a contrary intention is expressly declared therein*." RCW 10.01.040 (Emphasis added).

person's residency status or will provide that person an opportunity to be heard in immigration proceedings where the court will determine whether deportation is appropriate. Therefore, *it is the intent of the legislature to cure this inequity by reducing the maximum sentence for a gross misdemeanor by one day.*

SB 5168, Sec. 1 (Emphasis Added)

Here, the Legislature "fairly conveyed" that it intended to right a current wrong. It makes no sense, therefore, that the Legislature would intend its 'fix' to apply only for going forward.

The courts should apply SB 5168 retroactively to all defendants facing sentencing after the effective date of SB 5168.

Also, under well-established rules of statutory construction, any remedial statute is meant to be applied retroactively. "A statute is remedial and has a retroactive application when it relates to practice, procedure, or remedies, and does not affect a substantive or vested right." (Italics deleted.) *Tellier v. Edwards*, 56 Wn.2d 652, 653, 354 P.2d 925 (1960).

A remedial statute is presumed to apply retroactively. *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976); *Pape v. Department of Labor & Industries*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953). This is especially true when the remedial statute favorably reduces punishment laws applied to previously-convicted criminal defendants.

An additional reason for holding ... legislation to operate retroactively is that it, in effect, reduced the penalty for a crime. When this is so, the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity.

State v. Heath, 85 Wn.2d 196, 198, 532 P.2d 621 (1975).

Also in support of retroactive application, the Supreme Court has stated, "Subsequent enactments that only clarify an earlier statute can be applied retrospectively." Indeed, "it is not necessary that a statute expressly state that it is intended to operate retrospectively if such an intention can be obtained by viewing its purpose and the method of its enactment." The Court has previously found legislation to have retroactive, curative effect when "it clarifies or technically corrects an ambiguous statute." *In re Personal Restraint of Matteson*, 142 Wn.2d 298, 307, 12 P.3d 585 (2000).

In *Matteson*, the Court quoted a legal treatise for its definition of curative legislation:

A curative act is a statute passed to cure defects in prior law, or to validate legal proceedings, instruments, or acts of public and private administrative authorities. In the absence of such an act the statute would be void for want of conformity with existing legal requirements.

Except as it may invade some substantive interest which enjoys specific constitutional protection, a curative act may validate any past action which the legislature might have authorized beforehand....

Generally, curative acts are made necessary by inadvertence or error in the original enactment of a statute or in its administration. Action under the statute is usually taken in good faith and no rights are jeopardized by the validation of the prior good faith action. Because of the positive policy thus served by curative legislation, to sustain the reliability of official actions and secure expectations formed in reliance thereon, they are entitled to liberal construction in order to achieve full fruition of their remedial purposes.

Matteson at 308-09, citing 2 Norman J. Singer, *Statutes and Statutory Construction* § 41.11 (5th ed. 1993) (footnotes omitted).

The Supreme Court also recently applied these principles to interpret an amendment to a criminal statute as clarifying existing law and applied it retroactively. *State v. Bunker*, 144 Wn. App. 407, 417, 183 P.3d 1086 (2008). See also *State v. MacKenzie*, 114 Wn. App. 687, 60 P.3d 607 (2002) (applying retroactively a statute clarifying rules for admission of breath tests).

SB 5168 is certainly remedial in nature. Its stated purpose is to "cure [an] inequity" caused by the difference in the laws of the State of Washington and Federal law. *SB 5168, Sec. 1*. SB 5168 also favorably reduces punishment - reducing the maximum penalty of a gross misdemeanor by one day. Under the rules of statutory construction, SB 5168 should apply retroactively to Ms. Grinstead's sentence in the instant matter.

IV. CONCLUSION

Based upon the foregoing facts and argument, Ms. Grinstead's Motion for Discretionary Review should be granted and her matter remanded to the Benton County Superior Court for action to grant her Motion to Amend her sentence to a maximum of 364 days.

RESPECTFULLY SUBMITTED this 8th day of November, 2016.

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff/Respondent,
vs.
MARGARET GRINSTEAD,
Defendant/Appellant.

APPELLANT'S OPENING BRIEF
CERTIFICATE OF SERVICE

I certify that on this 8th day of November, 2016, I caused a copy of the
APPELLANT'S OPENING BRIEF to be sent by electronic mail to:

Benton County Prosecuting Attorney
prosecuting@co.benton.wa.us
7122 W Okanogan Place, Bldg A
Kennewick, WA 99336

and by U.S. Mail, first-class postage prepaid to:

Margaret Grinstead
P.O. Box 4486
West Richland, WA 99353

s/ Brent A. De Young
WSBA #27935
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837
(509) 764-4333 tel
(888) 867-1784 fax
deyounglaw1@gmail.com

Attorney for Appellant