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Court of Appeals
Division III
State of Washington

No. 34349-9-III
Consolidated with 34454-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

MARGARET J. GRINSTEAD,

Appellant

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

NO. 10-1-00088-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Terry J. Bloor, Deputy
Prosecuting Attorney
BAR NO. 9044
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. The trial court did not abuse its discretion by denying the defendant's Motion to Amend the Sentence: the amendment to the statute was not meant to be retroactive, and it certainly was not retroactive to cases which were final.

II. STATEMENT OF FACTS

The following is the relevant timeline:

- February 18, 2010: Defendant pleads guilty to an amended charge of Theft in the Third Degree. CP 8-16.
- February 25, 2010: Defendant is sentenced to 365 days with 360 days suspended. CP 19-23.
- July 22, 2011: RCW 9A.20.021(2) is amended to provide for a maximum sentence on gross misdemeanor convictions of 364 days.
- April 29, 2015: Defendant files a "Motion to Amend Record of Conviction" asking that the Judgment and Sentence from February 25, 2010 be amended from "365 days with 360 days suspended" to "364 days with 359 days suspended." CP 28-34.
- March 24, 2016: Benton County Superior Court Judge Alex C. Ekstrom denies the defendant's motion. CP 110-12.

III. APPEAL ARGUMENT

- A. If this Court finds the statute should be applied retroactively, it should only be applied retroactively to cases that are pending or on direct review when the statute was amended.**

Retroactive application of a statute or new case law has never been applied to cases which were final on the date the statute was enacted or new case law was decided. The defendant's case was final when she pleaded guilty on February 25, 2010. She may have had an argument if her case had been still pending when RCW 9A.20.021(2) was amended on July 22, 2011, but it was not.

For example, the retroactive application of Initiative 502 decriminalizing possession of small amounts of marijuana for persons over 21 was discussed in *State v. Rose*, 191 Wn. App. 858, 365 P.3d 756 (2015), and *State v. Gradt*, 192 Wn. App. 230, 366 P.3d 462 (2016).

Both courts held that the intent of the voters was to make this new law effective to *pending* prosecutions. As stated in *Gradt*: "Therefore, an intention to affect *pending* litigation need not be declared in explicit terms in the repealing act." 192 Wn. App. at 234 (emphasis added). As stated in *Rose*:

At issue in this case is whether Initiative 502 . . . fairly conveys a legislative intent—in this case, the *voters'* intent—that its decriminalization of possession by persons age 21 and older of marijuana related drug paraphernalia

and small amounts of marijuana applies to *pending* prosecutions. We hold that this is one of the rare cases where such an intent is fairly conveyed.

181 Wn. App. at 861 (emphasis added).

This is consistent with major changes in case law; the new case law will apply retroactively to cases which are pending or are on direct review. For example, the rule announced in *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), was a major change in search and seizure law: it prohibited the police from searching a vehicle incident to an occupant's arrest. Courts held it would apply retroactively, but only to cases pending or on direct appeal. *State v. McCormick*, 152 Wn. App. 536, 216 P.3d 475 (2009).

This is further illustrated by *State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975), which the defendant cited. The defendant quoted the below passage, but left off the last portion, emphasized with italics:

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 *and the new penalty applied in all pending cases.*

Id.

The other cases cited by the defendant also do not help her position. *Haddenham v. State*, 87 Wn.2d 145, 550 P.2d 9 (1976), involved a lawsuit by families of individuals murdered by an escaped inmate at Western State Hospital. While the lawsuit was pending, the Crime Victims Compensation Act was passed. 87 Wn.2d at 147. The State argued that the Crime Victims Compensation Act provided the exclusive remedy and that the plaintiffs' lawsuit under RCW 4.92.090 should be dismissed. *Id.* The Court granted the motion to dismiss. *Id.* However, the lawsuit was pending at the time the Crime Victims Compensation Act was passed. The outcome would have been different if the lawsuit had proceeded to a trial or settlement followed by enactment of the Crime Victims Compensation Act.

In *Tellier v. Edwards*, 56 Wn.2d 652, 354 P.2d 925 (1960), the issue was whether an amendment to RCW 46.64.040, regarding service of a nonresident driver involved in an auto accident. The statute was amended two months after the accident. 56 Wn.2d at 653. Any lawsuit had not been finalized.

If the defendant's argument was accepted, any conviction for a gross misdemeanor, even those before the millennium, could be challenged. Any Marijuana Possession conviction final before Initiative 502 was passed could be challenged.

B. The statute should not be applied retroactively, even if a case was pending or on direct review.

In addition, the amendment to RCW 9A.20.021(2) should not be deemed retroactive, even to cases which were pending or on direct appeal when it became effective.

There is a strong presumption that a statutory amendment is prospective, not retroactive. That presumption can be overcome only if it is shown that 1) the legislature intended the amendment to apply retroactively, 2) the amendment is curative, or 3) the amendment is remedial. *In re Pers. Restraint of Stewart*, 115 Wn. App. 319, 75 P.3d 521 (2003). None of those apply here.

There was no legislative intent for retroactivity: The legislature stated what the problem is—a defendant guilty of a felony may not be subject to deportation while another defendant guilty of a gross misdemeanor may be deported—but did not state that the amendment should be retroactive.

The amendment to RCW 9A.20.021(2) is also not a “curative” amendment. Curative amendments are those that clarify ambiguous statutes and are distinguished from amendments which substantively change an unambiguous statute. *Stewart*, 115 Wn. App. at 339-40.

Finally, while the amendment to RCW 9A.20.021(2) is was meant to cure an inconsistency in the treatment of felons and misdemeanants, the amendment did not relate practice, procedure, or remedies. *See Tellier*, 56 Wn.2d at 653. The amendment only changed the maximum possible sentence for a gross misdemeanor.

C. Conclusion

The denial of the defendant's motion to amend the Judgment and Sentence should be affirmed.

IV. PERSONAL RESTRAINT PETITION ARGUMENT

A. The petition should not be granted because the defendant is under no restraint.

"Restraint" is defined in RAP 16.4(b).

A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

Here, the defendant is not in confinement. The Benton County Superior Court would have lost jurisdiction over her case two years after her sentence on February 25, 2010. RCW 9.95.210. The defendant does not claim that the Benton County Superior Court has jurisdiction over her case. The defendant is not in danger of further confinement and the Court is not limiting her actions.

B. The petition should not be granted because there are no grounds for the petition and the defendant has raised the same issues on direct review.

The defendant does not state any grounds under RAP 16.4(c) alleging how the restraint, if any, is unlawful. Further, the defendant is asking for the same relief in her direct review and this petition should not be granted under RAP 16.4(d). There are also no grounds for the petition under RCW 10.73.100 or 10.73.110.

C. The defendant was not denied effective assistance of counsel.

The defendant's argument is that her defense attorney did not advocate for a sentence of 364 days and therefore, was ineffective. The Superior Court should have accepted this argument, granted her motion, and imposed a sentence which had a maximum of 364 days.

To prevail on a personal restraint petition arguing ineffective assistance, the defendant must show that counsel's performance was deficient and that she was prejudiced by that performance. *In re Crace*, 174 Wn.2d 835, 280 P.3d 1102 (2012). The defendant has not shown that her attorney was deficient. In fact, the defense attorney was able to negotiate a plea for a reduction of a series of felony charges to one count of Theft in the Third Degree. The defense attorney may have decided not to argue against the prosecutor's recommendation in order to not have the prosecutor withdraw the offer.

Further, there is no reason to believe that the court would have sentenced the defendant to 364 days on February 25, 2010, whether or not it was requested by the defense attorney. In virtually every misdemeanor or gross misdemeanor sentencing, the court sentences the defendant to the maximum allowable sentence, suspending a portion of that sentence.

D. The trial court did not abuse its discretion in declining to grant the defendant's motion.

The trial court concluded that it did not have the “authority . . . to amend a Judgment and Sentence that is valid on its face at this late date.” CP 111. The trial court also stated that “*Padilla*¹ and its progeny do not allow the Court to re-open every case, much less sand an edge off of every negotiated disposition long-past.” CP 111. Even if the court had the authority to do so, the trial court was correct not to intervene in the negotiated agreement, now over six years old, between the parties. The trial court was correct that it did not have the authority to amend the Judgment and Sentence and was also correct that it would have been inappropriate to do so even if it had that authority.

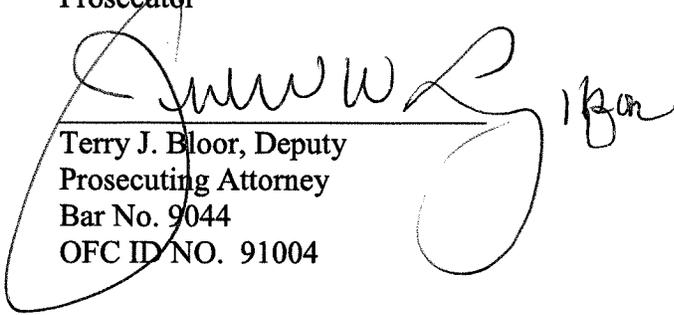
E. Conclusion

For the reasons stated, the personal restraint petition should be denied.

RESPECTFULLY SUBMITTED this 9th day of January, 2017.

ANDY MILLER

Prosecutor



Terry J. Bloor, Deputy

Prosecuting Attorney

Bar No. 9044

OFC ID NO. 91004

¹ *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010),

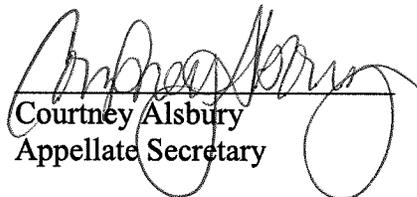
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

Brent De Young
De Young Law Office
P.O. Box 1668
Moses Lake, WA 98837

E-mail service by agreement
was made to the following parties:
Deyounglaw1@gmail.com

Signed at Kennewick, Washington on January 9, 2017.


Courtney Alsbury
Appellate Secretary