

FILED
Court of Appeals
Division III
State of Washington
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No. 35696-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

ENRIQUE MURILLO, JR.,

Appellant.

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

The Honorable Judges Samuel Swanberg and Cameron Mitchell

APPELLANT'S SUPPLEMENTAL BRIEF

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A. BACKGROUND

Enrique Murillo argues on appeal, in relevant part (Issue 2 in his opening brief), that the jury's verdict does not support the sentence for possession of methamphetamine, where the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence. This Court heard oral argument on June 10, 2019. Subsequently, on June 13, 2019, this Court requested supplemental briefing from the parties on the following question:

If the court concludes that the trial court must resentence Mr. Murillo to the lowest possible sentence for possession of a controlled substance, given that marijuana possession is now generally legal in Washington, would treating the offense as an unranked felony be appropriate?

As requested, Mr. Murillo address this question below.

B. SUPPLEMENTAL ARGUMENT:

If this Court concludes that the trial court must resentence Mr. Murillo to the lowest possible sentence for possession of a controlled substance, given that possession of one ounce of marijuana for individuals over 21 years of age is now legal in Washington, treating the offense as an unranked felony would not be appropriate.

Washington legalized marijuana for recreational use, decriminalizing the possession of one ounce of marijuana (or less) for individuals over 21 years of age. Rather than being "generally legal in Washington," marijuana possession is legal under narrow circumstances, set forth in RCW chapter 69.50. Possession of marijuana is still a misdemeanor for possession of amounts in excess of one ounce, but up to 40 grams. Thus, even after the legalization of marijuana for

recreational use, the lowest possible sentence for possession of a controlled substance remains misdemeanor possession of marijuana. Remand for resentencing is required here, to impose a misdemeanor sentence. Furthermore, Mr. Murillo's crime is not an unranked felony.

Initiative 502, effective December 6, 2012, legalized marijuana for recreational use, decriminalizing the possession of small amounts of marijuana for individuals over 21 years of age. Law of 2013, ch. 3, § 20; *see also* RCW 69.50.4013(3); *State v. Rose*, 191 Wn. App. 858, 862, 365 P.3d 756 (2015) (acknowledging this change in the law). Since this effective date, an individual can now legally possess one ounce of useable marijuana:

The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law.

RCW 69.50.4013(3)(a).

RCW 69.50.360(3) sets forth the following limits:

Delivery, distribution, and sale, on the premises of the retail outlet, of any combination of the following amounts of marijuana concentrates, useable marijuana, or marijuana-infused product to any person twenty-one years of age or older:

- (a) *One ounce of useable marijuana*;
- (b) Sixteen ounces of marijuana-infused product in solid form;
- (c) Seventy-two ounces of marijuana-infused product in liquid form; or
- (d) Seven grams of marijuana concentrate[.]

RCW 69.50.360(3) (emphasis added).

It is also now a civil infraction to open a package containing useable marijuana “in view of the general public or in a public place.” Laws of 2013, ch. 3, § 21; *see also* RCW 69.50.445.

Following the effective date of Initiative 502, possession of marijuana can still be a felony or misdemeanor offense, under specific circumstances. *See* RCW 69.50.4013 (felony possession); RCW 69.50.4014 (misdemeanor possession).

Possession of marijuana is a misdemeanor under the following circumstances:

Except as provided in RCW 69.50.401(2)(c) or as otherwise authorized by this chapter, any person found guilty of possession of forty grams or less of marijuana is guilty of a misdemeanor.

RCW 69.50.4014 (emphasis added).

RCW 69.50.401(2)(c) makes it a Class C felony to manufacture, deliver, or possess with intent to manufacture or deliver marijuana. RCW 69.50.401(2)(c); *see also* RCW 69.50.204(c)(22) (listing marijuana as a schedule I controlled substance). And, possession of one ounce of useable marijuana is “otherwise[d] authorized by this chapter.” *See* RCW 69.50.4013(3)(a); RCW 69.50.360(3)(a). Therefore, possession of marijuana, in excess of one ounce (28.3 grams) but up to 40 grams, is a misdemeanor. RCW 69.50.4014; RCW 69.50.4013(3)(a); RCW 69.50.360(3)(a); *see also, e.g., State v. Rea*, No. 48329-7-II, 2017 WL 2954704, at *5 (Wash. Ct. App. July 11, 2017) (recognizing that in order for the defendant to be entitled to a jury instruction for a lesser-included

offense of misdemeanor possession of marijuana, there had to be evidence that he possessed more than one ounce, but less than 40 grams of marijuana).¹

Thus, even after the legalization of marijuana for recreational use in 2012, the lowest possible sentence for possession of a controlled substance remains misdemeanor possession of marijuana. *See* RCW 69.50.4014. The appropriate remedy here, where the to-convict instruction did not specify which controlled substance Mr. Murillo possessed, is remand for resentencing to impose a misdemeanor sentence. *See State v. Gonzalez*, 2 Wn. App. 2d 96, 113-14, 408 P.3d 743 (2018), *review denied*, 190 Wn.2d 1021 (2018) (Division II case imposing this remedy, for an unlawful possession of a controlled substance offense that occurred in September 2015, after the effective date of Initiative 502); *State v. Jackson*, No. 76657-I-III, 2018 WL 4860190, at *6 (Wash. Ct. App. October 8, 2018)², *review denied*, 192 Wn.2d 1027 (2019) (Division I case imposing this remedy, for an unlawful possession of a controlled substance offense that occurred in February 2016, after the effective date of Initiative 502).

Mr. Murillo requests this Court follow Division I and II remand for resentencing to imposed a misdemeanor sentence, the lowest possible sentence for

¹ This case is unpublished, and therefore, nonbinding authority. *See* GR 14.1(a) (authorizing citation to unpublished opinions of the Court of Appeals filed on or after March 1, 2013, as nonbinding authority).

² *See* footnote 1 above.

possession of a controlled substance. *See Gonzalez*, 2 Wn. App. 2d at 113-14; *Jackson*, 2018 WL 4860190, at *6.³

Finally, treating Mr. Murillo’s crime of unlawful possession of a controlled substance as an unranked felony would not be appropriate. *See RCW 69.50.4013(1)* (unlawful possession of a controlled substance); *see also CP 1-2, 112-124*. “‘Unranked offense’ is the term commonly applied to offenses that have not been assigned a seriousness level and whose standard sentencing range therefore cannot be determined on the Table 1 sentencing grid or the drug offense sentencing grid.” *State v. Soto*, 177 Wn. App. 706, 711, 309 P.3d 596, (2013), *as amended* (Jan. 14, 2014). Unlawful possession of a controlled substance has been assigned a seriousness level of I, and its standard range can be determined on the drug offense sentencing grid. *See RCW 9.94A.518* (Table 4 – Drug offenses seriousness level); *RCW 9.94A.517* (Table 3 – Drug offense sentencing grid).

In addition, Mr. Murillo is not aware of any cases treating the crime of unlawful possession of a controlled substance as an unranked felony for the type of error that occurred in this case.

C. CONCLUSION

Even after the legalization of marijuana for recreational use in December 2012, the lowest possible sentence for possession of a controlled substance remains misdemeanor possession of marijuana. Remand for resentencing is

³ *See* footnote 1 above.

required here, to impose a misdemeanor sentence. Mr. Murillo's crime is not an unranked felony.

Respectfully submitted this 3rd day of July, 2019.


Jill S. Reuter, WSBA #38374

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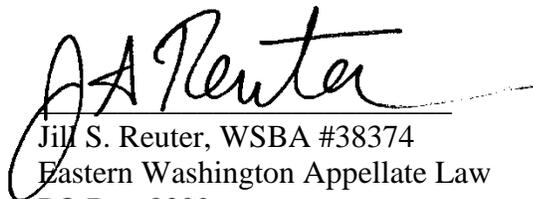
STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 35696-5-III
vs.) Benton Co. No. 17-1-00987-7
)
ENRIQUE MURILLO, JR.) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on July 3, 2019, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's supplemental brief to:

Enrique J. Murillo, Jr.
2905 Bosch Ct
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Having obtained prior permission, I also served a copy on the Benton County Prosecutor's Office at prosecuting@co.benton.wa.us using the Washington State Appellate Courts' Portal.

Dated this 3rd day of July, 2019.



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