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

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent

v.

ENRIQUE MURILLO, JR.,

Appellant

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

NO. 17-1-00987-7

SUPPLEMENTAL BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The Court has requested additional briefing on the below issue. Two facts are relevant to the court's inquiry. First, the forensic scientist testing the methamphetamine at trial testified that it weighed 0.2 gram. RP 10/30/2017 at 50. Second, the defendant's date of birth is June 28, 1981, making him 36-years-old on the date of offense. CP 1.

II. ISSUE

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?

III. ARGUMENT

- A. Issue: Should the offense be considered an unranked felony? Answer: No, because all scheduled controlled substances, except marijuana, listed in the Controlled Substances Schedules I-V, are included as ranked offenses in RCW 9.94A.518.**

The controlled substance schedules are from Schedule I, which includes drugs with a high potential for abuse, RCW 69.50.203 (a)(1) to Schedule V, which includes drugs with a low potential for abuse, RCW 69.50.211 (a)(1). If there were a difference in the ranking for a Schedule I drug as opposed to a Schedule V drug, the Court should impose a sentence

for a Schedule V drug. However, RCW 9.94A.518 ranks all Possession of a Controlled Substance offenses as a Level I, regardless of which schedule the substance is on.

**B. Response to defendant’s supplemental brief:
sentencing the defendant as if the drug was marijuana
is not authorized by the verdict.**

“[A] sentence must be authorized by a jury’s verdict.” *State v. Clark-El*, 196 Wn. App. 614, 624, 384 P.3d 627 (2016), citing *State v. Morales*, 196 Wn. App. 106, 383 P.3d 539 (2016). Marijuana is treated differently than other controlled substances. “Marijuana” has a legal definition requiring a THC concentration greater than 0.3 percent of a dry weight basis. RCW 69.50.101 (x). No other controlled substance has a requirement for purity. Further, possession of marijuana for individuals over 21 is legal as long as the amount possessed does not exceed the limits stated in RCW 69.50.360 (3). RCW 69.50.4013 (3)(a).

A jury’s verdict, stating that the defendant was found guilty of “Possession of a Controlled Substance as charged in Count I” would not allow a sentence for marijuana unless the jury was instructed that they could only convict if the purity of the marijuana met the 0.3 percent of THC concentration and the defendant was either under 21 years old or the defendant was over 21 and possessed more than the amounts listed in

RCW 69.50.360 (3). CP 97; See RCW 69.50.4013 (3)(a). Possession of marijuana must be specifically charged and specifically found by a jury.

Here, Mr. Murillo's date of birth is June 28, 1981. CP 1. He was 36 years old on the date of the offense. The forensic scientist stated it weighed 0.2 gram. For both reasons—the age of the defendant and the lack of testing of the THC concentration—the defendant cannot be convicted of possession of marijuana. There were no instructions stating that the jury had to conclude the substance had a THC purity of 0.3 percent or that the defendant was under 21 or, if over 21, that the defendant possessed more marijuana than allowed in RCW 69.50.360 (3). Therefore, the verdict does not authorize a sentence for Possession of Marijuana.

State v. Gonzalez, 2 Wn. App. 2d 96, 109, 408 P.3d 743 (2018) considered these statutes and concluded, “The effect of RCW 69.50.4013 (2)'s reference to RCW 69.50.4014 is to establish that the unlawful possession of 40 grams or less of marijuana is considered a misdemeanor, with a statutory maximum sentence of 90 days” With all due respect to the *Gonzalez* court, this analysis overlooks RCW 69.50.4013 (3), which states that possession of marijuana is legal for 21-year-olds. That was one purpose of Initiative 502, which became effective in 2013. It would have been accurate if the *Gonzalez* court had written, “The effect of RCW

69.50.4013 (2)'s reference to RCW 69.50.4014 is to establish that the *if an individual is under 21 years of age, unlawful possession of 40 grams or less of marijuana which has a THC concentration of 0.3 percent by dry weight* is considered a misdemeanor, with a statutory maximum sentence of 90 days”

The defendant argues that not all crimes involving marijuana are legalized and points to RCW 69.50.4013 (3), making possession of marijuana in an amount over the limits in RCW 69.50.360 (3) by a 21-year-old a felony, and RCW 69.50.4014, making possession less than 40 grams by a person under 21 a misdemeanor. However, these are not lesser included offenses of Possession of a Controlled Substance. No other controlled substance has restrictions on the defendant's age, the purity of the substance, and the weight of the substance. Because there were no jury instructions stating that the jury had to make a decision about the defendant's age, the purity of the substance, and the amount, the jury verdict does not allow a sentence on marijuana.

IV. CONCLUSION

All controlled substances, listed in Schedules I through V, are ranked in the Sentencing Reform Act. The direct answer to the Court's question is no, this should not be treated as an unranked offense. Because all controlled substances, from the most serious to the least, have the same

seriousness level in RCW 9.94A.518, it would not matter if the Court considered this a Schedule I or a Schedule V controlled substance.

There is one exception in the statutory scheme in RCW 69.50—marijuana. Given Mr. Murillo’s age and the amount in question, even if the substance was marijuana, it would not have been illegal. Because there were no jury instructions asking the jury to determine the amount of marijuana, its purity, or the defendant’s age, the verdict does not allow a sentence for marijuana possession.

RESPECTFULLY SUBMITTED on July 11, 2019.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "TJ Bloor", written over a horizontal line.

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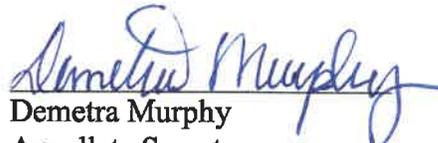
CERTIFICATE OF SERVICE

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:

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was made to the following
parties: admin@ewalaw.com

Signed at Kennewick, Washington on July 11, 2019.


Demetra Murphy
Appellate Secretary

Appendices

Appendix A: RCW 69.50.4013

Appendix B: RCW 69.50.4014

Appendix C: RCW 69.50.360 (3)

Appendix D: RCW 9.94A.518

Appendix A

RCW 69.50.4013

RCW 69.50.4013

Possession of controlled substance—Penalty—Possession of useable marijuana, marijuana concentrates, or marijuana-infused products—Delivery.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

(3)(a) 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.

(b) The possession of marijuana, useable marijuana, marijuana concentrates, and marijuana-infused products being physically transported or delivered within the state, in amounts not exceeding those that may be established under RCW 69.50.385(3), by a licensed employee of a common carrier when performing the duties authorized in accordance with RCW 69.50.382 and 69.50.385, is not a violation of this section, this chapter, or any other provision of Washington state law.

(4)(a) The delivery by a person twenty-one years of age or older to one or more persons twenty-one years of age or older, during a single twenty-four hour period, for noncommercial purposes and not conditioned upon or done in connection with the provision or receipt of financial consideration, of any of the following marijuana products, is not a violation of this section, this chapter, or any other provisions of Washington state law:

- (i) One-half ounce of useable marijuana;
- (ii) Eight ounces of marijuana-infused product in solid form;
- (iii) Thirty-six ounces of marijuana-infused product in liquid form; or
- (iv) Three and one-half grams of marijuana concentrates.

(b) The act of delivering marijuana or a marijuana product as authorized under this subsection (4) must meet one of the following requirements:

- (i) The delivery must be done in a location outside of the view of general public and in a nonpublic place; or
- (ii) The marijuana or marijuana product must be in the original packaging as purchased from the marijuana retailer.

(5) No person under twenty-one years of age may possess, manufacture, sell, or distribute marijuana, marijuana-infused products, or marijuana concentrates, regardless of THC concentration. This does not include qualifying patients with a valid authorization.

(6) The possession by a qualifying patient or designated provider of marijuana concentrates, useable marijuana, marijuana-infused products, or plants in accordance with chapter 69.51A RCW is not a violation of this section, this chapter, or any other provision of Washington state law.

[2017 c 317 § 15; 2015 2nd sp.s. c 4 § 503; 2015 c 70 § 14; 2013 c 3 § 20 (Initiative Measure No. 502, approved November 6, 2012); 2003 c 53 § 334.]

NOTES:

Findings—Application—2017 c 317: See notes following RCW 69.50.325.

Findings—Intent—Effective dates—2015 2nd sp.s. c 4: See notes following RCW 69.50.334.

Short title—Findings—Intent—References to Washington state liquor control board—Draft legislation—2015 c 70: See notes following RCW 66.08.012.

Intent—2013 c 3 (Initiative Measure No. 502): See note following RCW 69.50.101.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Appendix B

RCW 69.50.4014

RCW 69.50.4014

Possession of forty grams or less of marijuana—Penalty.

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.

[2015 2nd sp.s. c 4 § 505; 2003 c 53 § 335.]

NOTES:

Findings—Intent—Effective dates—2015 2nd sp.s. c 4: See notes following RCW 69.50.334.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Appendix C

RCW 69.50.360 (3)

RCW 69.50.360

Marijuana retailers, employees of retail outlets—Certain acts not criminal or civil offenses.

The following acts, when performed by a validly licensed marijuana retailer or employee of a validly licensed retail outlet in compliance with rules adopted by the state liquor and cannabis board to implement and enforce chapter 3, Laws of 2013, do not constitute criminal or civil offenses under Washington state law:

(1) Purchase and receipt of marijuana concentrates, useable marijuana, or marijuana-infused products that have been properly packaged and labeled from a marijuana processor validly licensed under this chapter;

(2) Possession of quantities of marijuana concentrates, useable marijuana, or marijuana-infused products that do not exceed the maximum amounts established by the state liquor and cannabis board under RCW 69.50.345(5);

(3) 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; and

(4) Purchase and receipt of marijuana concentrates, useable marijuana, or marijuana-infused products that have been properly packaged and labeled from a federally recognized Indian tribe as permitted under an agreement between the state and the tribe entered into under RCW 43.06.490.

[2015 c 207 § 6; 2015 c 70 § 13; 2014 c 192 § 5; 2013 c 3 § 15 (Initiative Measure No. 502, approved November 6, 2012).]

NOTES:

Reviser's note: This section was amended by 2015 c 70 § 13 and by 2015 c 207 § 6, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Intent—Finding—2015 c 207: See note following RCW 43.06.490.

Short title—Findings—Intent—References to Washington state liquor control board—Draft legislation—2015 c 70: See notes following RCW 66.08.012.

Intent—2013 c 3 (Initiative Measure No. 502): See note following RCW 69.50.101.

Appendix D

RCW 9.94A.518

RCW 9.94A.518**Table 4—Drug offenses seriousness level.**

TABLE 4
DRUG OFFENSES
INCLUDED WITHIN EACH
SERIOUSNESS LEVEL

III	Any felony offense under chapter 69.50 RCW with a deadly weapon special verdict under *RCW 9.94A.602
	Controlled Substance Homicide (RCW 69.50.415)
	Delivery of imitation controlled substance by person eighteen or over to person under eighteen (RCW 69.52.030(2))
	Involving a minor in drug dealing (RCW 69.50.4015)
	Manufacture of methamphetamine (RCW 69.50.401(2)(b))
	Over 18 and deliver heroin, methamphetamine, a narcotic from Schedule I or II, or flunitrazepam from Schedule IV to someone under 18 (RCW 69.50.406)
	Over 18 and deliver narcotic from Schedule III, IV, or V or a nonnarcotic, except flunitrazepam or methamphetamine, from Schedule I-V to someone under 18 and 3 years junior (RCW 69.50.406)
	Possession of Ephedrine, Pseudoephedrine, or Anhydrous Ammonia with intent to manufacture methamphetamine (**RCW 69.50.440)
	Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)
II	Create, deliver, or possess a counterfeit controlled substance (RCW 69.50.4011)

- Deliver or possess with intent to deliver methamphetamine (RCW 69.50.401(2)(b))
- Delivery of a material in lieu of a controlled substance (RCW 69.50.4012)
- Maintaining a Dwelling or Place for Controlled Substances (RCW 69.50.402(1)(f))
- Manufacture, deliver, or possess with intent to deliver amphetamine (RCW 69.50.401(2)(b))
- Manufacture, deliver, or possess with intent to deliver narcotics from Schedule I or II or flunitrazepam from Schedule IV (RCW 69.50.401(2)(a))
- Manufacture, deliver, or possess with intent to deliver narcotics from Schedule III, IV, or V or nonnarcotics from Schedule I-V (except marijuana, amphetamine, methamphetamines, or flunitrazepam) (RCW 69.50.401(2) (c) through (e))
- Manufacture, distribute, or possess with intent to distribute an imitation controlled substance (RCW 69.52.030(1))
- I Forged Prescription (RCW 69.41.020)
- Forged Prescription for a Controlled Substance (RCW 69.50.403)
- Manufacture, deliver, or possess with intent to deliver marijuana (RCW 69.50.401(2) (c))
- Possess Controlled Substance that is a Narcotic from Schedule III, IV, or V or Nonnarcotic from Schedule I-V (RCW 69.50.4013)
- Possession of Controlled Substance that is either heroin or narcotics from Schedule I or II (RCW 69.50.4013)

Unlawful Use of Building for Drug
Purposes (RCW 69.53.010)

[2003 c 53 § 57; 2002 c 290 § 9.]

NOTES:

Reviser's note: *(1) RCW 9.94A.602 was recodified as RCW 9.94A.825 pursuant to 2009 c 28 § 41.

** (2) cf. 2002 c 134 § 1.

Intent—Effective date—2003 c 53: See notes following RCW 2.48.180.

Effective date—2002 c 290 §§ 7-11 and 14-23: See note following RCW 9.94A.515.

Intent—2002 c 290: See note following RCW 9.94A.517.

BENTON COUNTY PROSECUTOR'S OFFICE

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