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Court of Appeals
Division III
State of Washington
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NO. 36010-5-III

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

STATE OF WASHINGTON,

Respondent,

v.

MIKHAIL BARBAROSH,

Appellant.

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

The Honorable Shea Brown, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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A. SUPPLEMENTAL ARGUMENT

BARBAROSH'S OFFENSE SHOULD BE SENTENCED AS A MISDEMEANOR, BUT TO THE EXTENT FURTHER CLASSIFICATION IS NECESSARY FOR IMPOSITION OF THE LOWEST POSSIBLE SENTENCE, IT CAN BE TREATED AS UNRANKED.

The jury's finding that Barbarosh possessed "an unidentified 'controlled substance' authorized the court to impose only the lowest possible sentence" for that crime. State v. Clark-EI, 196 Wn. App. 614, 624, 384 P.3d 627 (2016). That sentence is 90 days, applicable to the unlawful possession of 40 grams or less of marijuana under RCW 69.50.4014.¹ State v. Gonzalez, 2 Wn. App. 2d 96, 109-110, 113-114, 408 P.3d 743, review denied, 190 Wn.2d 1021, 418 P.3d 790 (2018).

The question now presented by this Court is whether it would be appropriate to treat Barbarosh's offense as unranked. To the extent this Court must further classify the crime to ensure he receives the lowest possible sentence, Barbarosh's offense could qualify for that designation.

"Unranked offense" is the term commonly applied to offenses that have not been assigned a seriousness level and

¹ Barbarosh's 12-month sentencing enhancement under RCW 9.94A.533(5)(c) "for offenses committed under RCW 69.50.4013" no longer applies, since Barbarosh will be resentenced for an offense under RCW 69.50.4014.

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, 309 P.3d 596 (2013). Under RCW 9.94A.505,

If a standard sentence range has not been established for the offender’s crime, the court shall impose a determinate sentence which may include not more than one year of confinement; community restitution work; a term of community custody under RCW 9.94A.702 not to exceed one year; and/or other legal financial obligations. . . .

RCW 9.94A.505(2)(b).

Barbarosh’s offense for sentencing – possession of 40 grams of marijuana or less under RCW 69.50.4014 – has not been assigned a seriousness level. See RCW 9.94A.518 (seriousness levels for other drug offenses). In fact, under RCW 69.50.4014 and Gonzalez, Barbarosh must be sentenced as if he committed a misdemeanor. The felony drug offense sentencing grid (RCW 9.94A.517) simply does not address the current situation or establish a range for Barbarosh’s crime. Therefore, if further classification is necessary for resentencing, Barbarosh’s offense could be treated as unranked.²

² Unranked status further precludes imposition of the 12-month sentencing enhancement under RCW 9.94A.533(5)(c). See Soto, 177 Wn. App. at 714 (RCW 9.94A.533 does not apply to unranked offenses); see also State v.

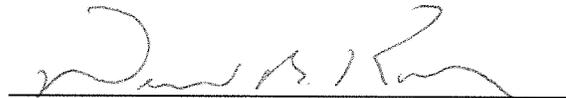
B. CONCLUSION

At resentencing, Barbarosh should receive a misdemeanor sentence. His offense also could be treated as unranked to the extent necessary for imposition of the lowest possible sentence for unlawful possession of a controlled substance.

DATED this 27th day of June, 2019.

Respectfully Submitted,

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Rainford, 86 Wn. App. 431, 441 n.6, 936 P.2d 1210 (“RCW 9.94.041 [possession of controlled substances by prisoners] is an unranked felony . . . and is not subject to enhancement for possession within a correctional facility under [RCW 9.94A.533(5)(c)].”), review denied, 133 Wn.2d 1019, 948 P.2d 387 (1997).

NIELSEN, BROMAN & KOCH P.L.L.C.

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