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Court of Appeals
Division III
State of Washington
7/17/2019 8:00 AM

NO. 36482-8-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT RAY ABBETT,

Defendant/Appellant.

REPLY BRIEF

Dennis W. Morgan WSBA #5286
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ARGUMENT

The interesting aspect of the State's argument is its blind reliance upon RCW 69.50.408 (1), the discretionary doubling provision for second and or subsequent drug offenses, which increases the maximum punishment for an offense. It does not impact the standard sentencing range under the SRA.

RCW 9.94A.537 (1) provides:

At any time prior to trial or entry of the guilty plea if substantial rights of the defendant are not prejudiced, the state may give notice that it is seeking a sentence above the standard sentencing range. The notice shall state aggravating circumstances upon which the requested sentence will be based.

(Emphasis supplied.)

Mr. Abbett has not argued that the doubling provision of RCW 69.50.408 (1) is an essential element that needs to be included in the Information. Rather, his argument pertains to a complete lack of notice by the State that it intended to pursue the doubling provision.

State v. Crawford, 159 Wn.2d 86, 147 P.3d 1288 (2006) relied upon *Olyer v. Boles*, 368 U.S. 448, 82 S. Ct. 501, 7 L. Ed. 2d 446 (1962) when it held, at 95:

The Court ... found ... that where a determination of whether a defendant is an habitual

offender is separate from the criminal charges, due process does require that a defendant receive reasonable notice and an opportunity to be heard relative to the recidivist charge.

Mr. Abbett does not see a difference between an habitual offender charge and the doubling provision of RCW 69.50.408 (1).

The *Crawford* Court went on to note at 96:

...[P]retrial notice of a possible sentence under the POAA is not constitutionally mandated. ... We emphasize, however, that where a possible life sentence is at stake, providing notice is the best practice.

Again, due process requires notice of sentence enhancements, aggravating circumstances, and other statutory adverse sentencing consequences.

The Court in *State v. Siers*, 174 Wn.2d 269, 274 P.3d 358 (2012) determined that Mr. Siers was not denied due process because he had been notified of adverse sentencing consequences separate and apart from the Information. The Court stated at 283: "... [T]he state gave Siers notice prior to trial of its intent to seek an aggravated sentence. Consequently, Siers's due process rights were not violated."

Mr. Abbett otherwise relies upon the argument contained in his original brief and the Additional Statement of Authorities dated July 8, 2019.

DATED this 17th day of July, 2019.

Respectfully submitted,

s/ Dennis W. Morgan

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COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	YAKIMA COUNTY
Plaintiff,)	NO. 17 1 00685 39
Respondent,)	
)	
v.)	CERTIFICATE OF SERVICE
)	
ROBERT RAY ABBETT,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 17th day of July, 2019, I caused a true and correct copy of the *REPLY BRIEF* and to be served on:

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s/ Dennis W. Morgan

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