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Court of Appeals
Division III
State of Washington
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NO. 36482-8-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

ROBERT RAY ABBETT,

Defendant/Appellant.

BRIEF OF APPELLANT

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CONSTITUTIONAL PROVISIONS

Fourteenth Amendment to the United States Constitution 1, 5, 7
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ASSIGNMENT OF ERROR

1. Robert Ray Abbett's constitutional right to due process under the Fourteenth Amendment to the United States Constitution and Const. art I, § 3 was violated when the State failed to provide notice that an exceptional sentence would be sought under the provisions of RCW 69.50.408.

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Is the doubling provision of RCW 69.50.408 (1) equivalent to an enhanced sentence and/or aggravated circumstance requiring the State to give an offender notice that it will seek a sentence above the standard range (including the maximum penalty for the particular offense), and, if so, does the failure to give notice amount to a violation of an offender's due process rights?

STATEMENT OF THE CASE

Officer Rosenow of the Toppenish Police Department stopped Mr. Abbett on April 6, 2017 for a speeding infraction and an obstructed license plate. (RP 33, ll. 22-23; RP 35, ll. 15-22; RP 36, ll. 3-13)

While running a driver's license check through the Department of Licensing (DOL) Officer Rosenow was advised of a no-contact order out of

Marysville Municipal Court where Brenda Istvan was the protected party and Mr. Abbett was the respondent. (RP 44, l. 16 to RP 45, l. 7)

Officer Rosenow requested backup. Officer Quantrell arrived. He contacted the passenger for identification. It was determined that the passenger in Mr. Abbett's pickup (PU) was Ms. Istvan. (RP 42, ll. 1-2; RP 44, ll. 6-12; RP 45, ll. 9-19)

The officers decided to arrest Mr. Abbett. He was uncooperative. When Officer Rosenow opened the driver's door of the PU Mr. Abbett pulled it closed. He tried to get the PU into gear numerous times. Eventually he was tased, pepper sprayed, and removed from the PU. (RP 46, ll. 3-9; ll. 11-15; RP 47, ll. 1-18; RP 47, l. to RP 48, l. 8)

During a patdown search of Mr. Abbett a firearm and extra magazines were located in a shoulder holster. Mr. Abbett is a convicted felon. (RP 56, ll. 2-8; ll. 14-15; RP 61, ll. 14-22)

On April 7, 2017 a search warrant was executed on the PU. Two small scales, baggies, and \$690.00 in cash were seized. A K-9 later alerted to the cash. The baggies, which contained a white substance, were tested at the Washington State Patrol Crime Lab (WSPCL). (RP 62, ll. 1-2; Rp 64, ll. 4-14; RP 65, ll. 14-15; RP 67, ll. 3-9; RP 73, ll. 2-11; RP 139, ll. 7-8; RP 141, ll. 9-14)

The WSPCL determined that the baggies contained methamphetamine. When the substances were returned to the Toppenish Police Department they were inadvertently destroyed. (RP 68, l. to RP 72, l. 12; RP 134, l. 20 to RP 135, l. 8; RP 167, ll. 4-16; RP 168, ll. 17-25; RP 169, ll. 7-14)

Documentary evidence was preserved. This included the transmittal documents to WSPCL, the lab report, and a log maintained by Toppenish Police Department. (RP 126, ll. 15-24; RP 136, ll. 1-3; ll. 14-23)

An Information was filed on April 11, 2017 charging Mr. Abbett with third degree assault; attempted second degree assault; unlawful possession of a firearm second degree; and violation of a no-contact order. (CP 6)

An Amended Information was filed on April 25, 2017. It added a count of possession with intent to deliver a controlled substance and use of drug paraphernalia. (CP 10)

A second Amended Information was filed on July 20, 2018. It added multiple prior convictions for Count III (unlawful possession of a firearm second degree). (CP 25)

On August 23, 2018 a Third Amended Information was filed. It removed one of the named officer and the attempt designation from Count II, included only one prior conviction under Count III; deleted the use of drug

paraphernalia count; and added a firearm enhancement to Count V (possession with intent to deliver). (CP 30)

Multiple continuances were granted and trial eventually commenced on September 11, 2018. (CP8; CP 12; CP 17; CP 18; CP 19; CP 21; CP 22; CP 23; CP 24; CP 27; CP 35)

Defense counsel moved to dismiss the drug evidence on the basis that it had been destroyed. The trial court denied the motion based upon *State v. Scriver*, 20 Wn. App. 388, 580 P.2d 265 (1978). (RP 177, l. 24 to RP 179, l. 4)

Prior to the case being submitted to the jury for deliberation the trial court dismissed Count I – third degree assault. (RP 188, ll. 12-18)

The jury determined that Mr. Abbett was not guilty of second degree assault. (CP 110)

The jury found Mr. Abbett guilty of Counts III, IV, and V. Count VI- possession of methamphetamine was dismissed. (CP 111; CP 112; CP 114)

Special verdicts were rendered by the jury that the no-contact order violation involved a household member, and on Count V as to the firearm enhancement.

The State filed a Sentencing Memorandum which included language pertaining to the doubling provision of RCW 69.50.408. No prior notice had been provided to Mr. Abbett concerning the doubling provision. (CP 118)

Mr. Abbett was sentenced on October 26, 2018. The trial court ordered that the sentence on each count run concurrent. The Court imposed 40 months on Count III; 364 days on Count IV; and 146 months on Count V. (CP 128)

The 146 month sentence on Count V included a 36 month firearm enhancement. The Court also imposed 12 months of community custody. A Notice of Appeal was filed on November 21, 2018. (CP 137)

Mr. Abbett then filed a pro se Notice of Appeal (dated November 21, 2018); but not received until December 3, 2018. (CP 149)

SUMMARY OF ARGUMENT

Mr. Abbett's sentence exceeds the maximum sentence for a Class B felony. A Class B felony carries a maximum penalty of 10 years in prison. *See: RCW 9A.20.020 (1)(b).*

The trial court's use of the doubling provision contained in RCW 69.50.408 (1) is erroneous. It violates Mr. Abbett's due process right to notice under the Fourteenth Amendment to the United States Constitution and Const. art. § 3.

The State failed to provide any notice to Mr. Abbett in the Information or otherwise.

The doubling provision is the equivalent of an enhanced sentence or an aggravating circumstance. As such, due process required that notice be given to Mr. Abbett.

ARGUMENT

Mr Abbett's conviction for possession with intent to deliver a controlled substance is subject to the provisions of RCW 9.94A.517 (1) and RCW 9.94A.518.

Under RCW 9.94A.518 Mr. Abbett's offense is a seriousness level III. The reason for the seriousness level is that the jury determined that Mr. Abbett was armed with a firearm at the time the offense was committed.

Based upon Mr. Abbett's offender score, with a seriousness level of III his standard range sentence under RCW 9.94A.517 (1) is 100+ to 120 months.

Mr. Abbett contends that the maximum sentence that the trial court was authorized to impose is 120 months. This is the maximum penalty for a Class B felony.

The State, in its Sentencing Memorandum references RCW 69.50.408 (1). The statute states:

Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

Mr. Abbett has a prior drug conviction. The statute indicates that the maximum term for Mr. Abbett's offense would be 20 years instead of 10 years. However, Mr. Abbett was not notified of this fact in either the Information or by a separate document.

If the provisions of RCW 69.50.408 (1) are the equivalent of either an aggravated circumstance or an enhanced penalty, he was entitled to notice under the due process clause of the Fourteenth Amendment and Const. art. I, § 3.

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.)

The notice provision of RCW 9.94A.537 (1) was violated by the State. No notice was given to Mr. Abbett.

No document exists in the record indicating that appropriate notice was given. Alternatively, Mr. Abbett contends that if RCW 69.50.408 (1)

does not constitute an aggravating circumstance, it does provide for an enhanced sentence.

Notice is required if the State seeks an enhanced sentence. As announced in *State v. Theroff*, 95 Wn.2d 385, 392, 622 P.2d 1240 (1980);

A separate notice of intention to seek an enhanced penalty ... was served and filed with the first information. This was not done with the amended information. ... In *State v. Cosner*, 85 Wn.2d 45, 50-51, 530 P.2d 317 (1975), Justice Hamilton writing for the court, said:

The appellate courts of this state have held that when the State seeks to rely upon either RCW 9.41.025 or RCW 9.95.040 [firearm and or deadly weapons enhancements], or both, due process of law requires that the information contain specific allegations to that effect, thus putting the accused person upon notice that enhanced consequences will flow with a conviction. Failure of the State to so allege precludes reliance upon the statutes by the trial court ...

We do not propose to recede from these holdings. Rather, we again emphasize the necessity of prosecuting attorneys uniformly adhering to the announced rule. Preferably, compliance should take the form of pleading by statutory language and citation of the statute or statutes upon which they are proceeding, *i.e.*, firearms and/or deadly weapons.

(Citations omitted.)

We adopt the above language in this case. It is the rule in this state - clear and easy to follow. When prosecutors seek enhanced penalties, notice of their intent must be set forth in the information.

CONCLUSION

There is no significant difference between the doubling provision of RCW 69.50.408 (1), aggravating circumstances, or an enhanced penalty. They all result in an increased punishment if an offender is found guilty of an offense.

Mr. Abbett urges the Court to follow the logic of his argument and declare that his current sentence exceeds the statutory maximum sentence for a Class B felony.

Mr. Abbett is entitled to be resentenced so that the 36 month firearm enhancement and the 12 month community custody all come within the parameters of the maximum 120 month sentence.

DATED this 18th day of April, 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 18th day of April, 2019, I caused a true and correct copy of the *BRIEF OF APPELLANT* and to be served on:

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April 18, 2019 - 7:39 AM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Robert Ray Abbett
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