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

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION III

STATE OF WASHINGTON, RESPONDENT

v.

ROBERT RAY ABBETT, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY

RESPONDENT'S BRIEF

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I. ISSUE PRESENTED FOR REVIEW

1. The State is not required to provide notice of sentencing factors activated solely by the existence of prior convictions. Abbett was not informed of RCW 69.50.408(1)'s applicability which, by virtue of a prior conviction under chapter 69.50 RCW, doubled Abbett's statutory maximum sentence for possession of a controlled substance with intent to deliver. Were Abbett's due process rights violated by the failure to mention RCW 69.50.408(1) in the information?

II. STATEMENT OF THE CASE

On April 11, 2017, Abbett was charged with assault in the third degree, attempted assault in the second degree, unlawful possession of a firearm in the second degree, and violation of an order of protection. Clerk's Papers (hereinafter "CP") at 6–7.

An amended information was filed on April 25, 2017. *Id.* at 10–11. Counts five and six were added charging Abbett with possession of a controlled substance, methamphetamine, with intent to deliver and use of drug paraphernalia. *Id.* The amended information stated that the maximum penalty for possession of a controlled substance with intent to deliver was "10 years imprisonment and/or a \$25,000.00 fine." *Id.* at 11.

On July 20, 2018, a second amended information was filed changing the attempted assault in the second degree allegation to assault in the second degree. *Id.* at 25. Further, unlawful possession of a firearm in the second degree was amended to allege additional underlying felony convictions. *Id.*

On August 23, 2018, a third amended information was filed narrowing the allegations concerning both assault in the second degree and unlawful possession of a firearm in the second degree. *Id.* at 30. Further, a firearm enhancement was added to count five alleging that Abbett possessed a controlled substance with intent to deliver while armed with a firearm. *Id.* at 31. As with the prior documents, the third amended information stated that the maximum penalty on count five was ten years imprisonment. *Id.* Count six was changed from use of drug paraphernalia to possession of a controlled substance, methamphetamine. *Id.*

The case proceeded to a jury trial on September 11, 2018. VRP 9/11/18 at 3. Count 1, assault in the third degree, was dismissed on Abbett's motion after the State had rested. VRP 9/13/18 at 188. Abbett was convicted of unlawful possession of a firearm in the second degree, violation of an order of protection, and possession of a controlled substance with intent to deliver. CP at 110–116. The jury answered “yes”

as to whether Abbett was armed with a firearm while possessing a controlled substance with intent to deliver. *Id.*

Abbett was sentenced on October 26, 2018. The trial court found that Abbett's maximum sentence on count five, possession of a controlled substance with intent to deliver, was twenty years due to Abbett's prior conviction under chapter 69.50 RCW. *Id.* at 129. Abbett was sentenced to 43 months for unlawful possession of a firearm in the second degree, 364 days for violation of an order of protection, and 146 months for possession of a controlled substance with intent to deliver. *Id.* at 130. Abbett was also ordered to serve twelve months on community custody. *Id.* at 131.

Abbett timely filed a notice of appeal. *Id.* at 137.

III. ARGUMENT

A. The State was not required to provide notice of the RCW 69.50.408(1) doubling provision in the information as the statute's applicability is based solely on the existence of a prior conviction

Abbett claims that "[t]he trial court's use of the doubling provision contained in RCW 69.50.408(1) . . . violates Mr. Abbett's due process right to notice." Brief of Appellant at 5.

Under RCW 69.50.408(1), "[a]ny 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.” RCW 69.50.408(1). The doubling provision is activated if the offender has previously “been convicted under [chapter 69.50 RCW].” RCW 69.50.408(2).

RCW 69.50.408(1) doubles the maximum sentence of the underlying charge, not the sentencing range calculated under the Sentencing Reform Act. *In re Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006). The doubling provision operates automatically, and any discretion vested in the sentencing court pertains to the actual sentence within the doubled maximum penalty. *State v. Cyr*, No. 50912-1-II, 2019 Wash. App. LEXIS 1255, at *8 (May 14, 2019).

An information must “inform the defendant of the nature and cause of the accusation against him.” *State v. Williams*, 133 Wn. App. 714, 718, 136 P.3d 792 (2006). The State must provide a “written statement of the essential facts constituting the offense charged.” CrR 2.1(a)(1).

“‘[E]ssential elements’ include *only those* facts that must be proved beyond a reasonable doubt to convict a defendant of the charged crime.” *State v. Merritt*, 193 Wn.2d 70, 76, 434 P.3d 1016 (2019) (quoting *State v. Powell*, 167 Wn.2d 672, 683, 223 P.3d 493 (2009)) (emphasis in original).

“[P]roof of a prior conviction does not require trial-like procedures or proof beyond a reasonable doubt.” *State v. Allen*, 192 Wn.2d 526, 537, 431 P.3d 117 (2018). Consequently, a prior conviction that increases the

penalty for an offense does not have to be submitted to a jury. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). As a result, the RCW 69.50.408(1) doubling provision is not an “essential element” of an offense and does not need to be specifically alleged in an information. *See State v. McNeal*, 142 Wn. App. 777, 786, 175 P.3d 1139 (2008) (finding that, due to “neither *Apprendi* nor *Blakely* requir[ing] the State to allege prior convictions used to support and increase McNeal’s penalty,” “the lack of a ‘doubling provision’ related allegation in the information did not violate McNeal’s due process right to notice of the charges against him”); *see also State v. Roy*, 147 Wn. App. 309, 316, 195 P.3d 967 (2008) (adopting same reasoning as *McNeal*).

Accordingly, Abbett’s due process rights were not violated when the information failed to provide notice of the RCW 69.50.408(1) doubling provision’s applicability. As noted above, the doubling provision operates automatically and is not dependent upon judicial or prosecutorial discretion. *See Cyr*, 2019 Wash. App. LEXIS 1255, at *8. Further, as the doubling provision is activated solely on the basis of a defendant’s prior

conviction under chapter 69.50 RCW, the State is not constitutionally obligated to provide notice. *See McNeal*, 142 Wn. App. at 786, *Roy*, 147 Wn. App. at 316.

Abbett argues that the RCW 69.50.408(1) doubling provision is akin to an aggravating circumstance under RCW 9.94A.537(1). Brief of Appellant at 7–8. RCW 9.94A.537(1) requires the State to provide notice when seeking an aggravated sentence above the standard range. *See* RCW 9.94A.537(1). However, the doubling provision modifies the statutory maximum for the offense, not the sentencing range. *See Cruz*, 157 Wn.2d at 90. Abbett was sentenced to a base sentence within the calculated sentencing range of 100+ to 120 months. *See* CP at 129–30. The thirty-six month firearm enhancement was then imposed consecutively to the base sentence for a total term of 146 months. *Id.* at 130. As the RCW 69.50.408(1) doubling provision had no effect on Abbett’s sentencing range, RCW 9.94A.537(1) does not require the State to provide notice of the doubling provision’s applicability.

Further, Abbett contends that, if the doubling provision does not constitute an aggravating circumstance, the statute creates an enhanced sentence. Brief of Appellant at 8. Abbett cites *State v. Theroff*, 95 Wn.2d 385, 392–93, 622 P.2d 1240 (1980), comparing the doubling provision to

enhanced penalties such as firearm and deadly weapon enhancements.

Brief of Appellant at 8.

The doubling provision, however, is merely a “sentencing factor.” *See Allen*, 192 Wn.2d at 539 (noting that “a ‘sentencing factor’ is defined as a fact that can increase the sentence for a crime but does not need to be proved to a jury beyond a reasonable doubt, such as proof of a prior conviction”). As noted in *Allen*, “sentencing factors” are distinguishable from “essential elements” which must both be alleged in the information and found by a jury beyond a reasonable doubt. *See id.* at 544 (“The aggravating circumstances therefore no longer meet the definition of ‘sentencing factors’ for Sixth Amendment purposes. They are elements.”). Accordingly, as the doubling provision, reliant solely upon a prior conviction, is not an “essential element” of the offense, the State is required to neither allege the statute’s applicability in the information nor prove the fact of the prior conviction beyond a reasonable doubt.

The State urges the Court to follow *McNeal* and *Roy*. As RCW 69.50.408(1) is based solely on the existence of a prior conviction, due process does not require the State to specifically allege the applicability of the doubling provision in the information. Accordingly, the trial court did not err when either automatically doubling Abbett’s

maximum sentence under RCW 69.50.408(1) or sentencing Abbett within that maximum term.

IV. CONCLUSION

Sentencing factors based solely on prior convictions are not subject to the same constitutional requirements as aggravating circumstances and sentencing enhancements. As *McNeal* and *Roy* concluded, the State is not required to notify a defendant of the RCW 69.50.408(1) doubling provision's applicability in the information. The State urges this Court to affirm Abbett's sentence as the sentence fell within both the standard sentencing range and the statutory maximum sentence as calculated under RCW 69.50.408(1).

Dated this 17th day of June, 2019.

STATE OF WASHINGTON

/s/Michael J. Ellis
MICHAEL J. ELLIS, WSBA # 50393
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DECLARATION OF SERVICE

I, Michael J. Ellis, state that on June 17, 2019, I emailed a copy of RESPONDENT'S BRIEF to Mr. Dennis Morgan at nodblspk@rcabletv.com. It is also expected that Mr. Morgan will be served using E-Service via the filing portal.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 17th day of June, 2019, at Yakima, Washington.

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Transmittal Information

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