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STATE OF WASHINGTON
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No. 97323-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 50912-1-II)

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNY RAY CRY,

Appellant.

RESPONSE TO PETITION FOR REVIEW

On review from the Court of Appeals, Division One,
And the Superior Court of Lewis County

JONATHAN MEYER
Lewis County Prosecuting Attorney



By:

Deputy Prosecuting Attorney
WSBA No. 35564

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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A. COURT OF APPEALS DECISION

The Petitioner, Johnny Ray Cyr, seeks review of the published opinion in *State v. Cyr*, Court of Appeals, Division II, cause number 50912-1-II, filed May 14, 2019, attached for the Court's convenience as Appendix A.¹

B. COUNTERSTATEMENT OF THE ISSUES:

1. Did the Court of Appeals error when it determined the doubling provision of RCW 69.50.408(1) automatically doubled the maximum sentence of Cyr's conviction for Selling Heroin for Profit, RCW 69.50.410, due to Cyr's prior qualifying conviction?

C. STATEMENT OF FACTS

After an investigation, using confidential informants, Cyr was charged with multiple counts of Delivery of a Controlled Substance – Heroin. CP 1-7. The State later filed a second amended information, charging Cyr with three counts of Sale of a Controlled Substance for Profit – Heroin. CP 9-11. The second amended information included notice that if Cyr had been previously convicted under Chapter 69.50 the maximum punishment would be 10 years and a \$20,000 fine. *Id.*

Cyr entered a plea of guilty to the crimes as charged in the second amended information. RP 2-9; CP 12-22. Cyr also signed a

¹ The official reporter citation for Cyr's case is: *State v. Cyr*, 8 Wn. App. 2d 834, 441 P.3d 1238 (2019). This is the version of the opinion the State has attached.

Stipulation on Prior Record and Offender Score, which listed Cyr's criminal history, the standard range for each offense, and the maximum term for each offense, including the standard range as 68+ to 100 months and the Maximum Term as 120 months. CP 23-25. There was a notation on the form the standard range and maximum term were not agreed to the defense. CP 24.

Cyr requested a Drug Offender Sentencing Alternative (DOSA) evaluation. RP 14. The State opposed the DOSA and argued correct sentencing range was 68+ to 100 months in prison due to the doubling provision found in RCW 69.50.408. CP 30-34. Cyr's attorney filed a memorandum arguing the doubling provision did not apply. CP 35-38. After hearing arguments, the trial court ruled the doubling provision did not apply. RP 28-39.

The State appealed the trial court's determination regarding the applicability of the doubling statute, Cyr's standard range, and Cyr's judgment and sentence. CP 58-70. The Court of Appeals reversed the trial court, finding the doubling provision did automatically double the maximum sentence, which in this case increased the standard range, and remanded the matter for the trial court to use its discretion in resentencing Cyr within the standard

range. *State v. Cyr*, 8 Wn. App. 2d 834, 844, 441 P.3d 1238 (2019) (Appendix A).

D. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

The Court should not accept review in this case. The Court of Appeals properly construed the statutes at issue and determined the doubling statute does apply to a first conviction of Selling Heroin for Profit, RCW 69.50.410. This case does not raise an issue of substantial public interest. RAP 13.4(b)(4).

E. ARGUMENT.

The Court of Appeals correctly decided Cyr's case, holding the doubling provision of RCW 69.50.408 applies to convictions under RCW 69.50.410, increasing the statutory maximum sentence. Cyr argues this Court should accept review pursuant to RAP 13.4(b)(4), which allows for this Court to accept review only if, "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). Cyr asserts the trial court properly exercised its discretion when it sentenced Cyr to five years and declined to apply the doubling provision of RCW 69.50.408(1). See Petition 2-4. Cyr argues this Court should accept review because the statutory structure is such that it is unclear

whether the doubling provision of RCW 69.50.408 applies when it is a first conviction under RCW 69.50.410. *Id.* at 6.

The Court of Appeals correctly held the doubling provision contained in RCW 69.50.408(1) mandates the maximum sentence is doubled, but affords trial courts the discretion where in the standard range to sentence a defendant. *Cyr*, 8 Wn. App. 2d at 839-41. 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.” RCW 69.50.408(1). The Court of Appeals, after reviewing applicable case law and applying the plain language of the statute, held the RCW 69.50.408(1) doubles the statutory maximum, and the language “may be imprisoned” relates to the trial court’s discretion in determining the appropriate sentence within the standard range of that statutory maximum. *Cyr*, 8 Wn. App. 2d 840-41.²

Cyr’s assertion that the use of “may” in RCW 69.50.408(1) meant the provision is discretionary in regards to doubling the

² The Court of Appeals reviewed, *State v. Roy*, 147 Wn. App. 309, 195 P.3d 967 (2008); *State v. O’Neal*, 126 Wn. App. 935, 109 P.3d 429 (2005), *aff’d*, 159 Wn.2d 500, 150 P.3d 1121 (2007); *In re Personal Restraint Hopkins*, 89 Wn. App. 198, 948 P.2d 394 (1997), *rev’d on other grounds*, 137 Wn.2d 897, 976 P.2d 616 (1999).

maximum sentence is contrary to the plain reading of the statute. Petition at 3-5. The courts will not employ judicial interpretation if a statute is unambiguous. *State v. Steen*, 155 Wn. App. 243, 248, 228 P.3d 1285 (2010). “A statute is ambiguous when the language is susceptible to more than one interpretation. *Steen*, 155 Wn. App. at 248. The court looks to the plain language in the statute, the context of the statute, and the entire statutory scheme to determine the legislative intent. *Steen*, 155 Wn. App. at 248; *State v. Stratton*, 130 Wn. App. 760, 764, 124 P.3d 660 (2005) (citation and quotations omitted). Selling Heroin for Profit is a Class C Felony, punishable up to five years in prison, the doubling provision allows for the maximum penalty to be 10 years. RCW 9A.20.021(1)(c); RCW 69.50.408; RCW 69.50.410(1). Without a ten year statutory maximum upon a second offense, the provision requiring a second offense for selling heroin for profit to be a mandatory 10 year sentence would not be possible. *Id.*

Further, RCW 69.50.408 also specifically indicates which section of RCW 69.50 it does not apply to, RCW 69.50.4013, therefore, the plain language of the statute necessarily makes the doubling provision apply to RCW 69.50.410. The Court of Appeals did not error when it held the doubling provision of RCW 69.50.408

applied to offenses charged under RCW 69.50.410. This is not a matter of substantial public interest. RAP 13.4(b)(4).

F. CONCLUSION

The State respectfully requests this Court not accept review on the issue Cyr raised in his petition for review.

If this Court were to accept review, the State would respectfully request an opportunity to submit supplemental briefing.

RESPECTFULLY submitted this 10th day of October, 2019.

JONATHAN MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

Appendix A

State v. Cyr, 8 Wn. App. 2d 834, 441 P.3d 1238 (2019)



Cited
As of: October 6, 2019 6:47 PM Z

State v. Cyr

Court of Appeals of Washington, Division Two

May 14, 2019, Filed

No. 50912-1-II

Reporter

8 Wn. App. 2d 834 *; 441 P.3d 1238 **; 2019 Wash. App. LEXIS 1255 ***; 2019 WL 2096674

Substances > Delivery, Distribution & Sale > Penalties

THE STATE OF WASHINGTON, *Appellant*, v. JOHNNY RAY CYR,
Respondent.

HN1 Delivery, Distribution & Sale, Penalties

Prior History: [***1] Appeal from Lewis County Superior Court. Docket No: 17-1-00220-2. Judge signing: Honorable Joely A O'Rourke. Judgment or order under review. Date filed: 08/23/2017.

The sale of a controlled substance for profit, the crime defined in Wash. Rev. Code § 69.50.410(1), has a seriousness level of three. Wash. Rev. Code § 9.94A.518. Under the drug sentencing grid, a defendant with an offender score of 5 who is convicted of an offense with a seriousness level of three has a standard sentence range between 68+ and 100 months. Wash. Rev. Code § 9.94A.517(1).

Core Terms

sentence, doubling, maximum sentence, trial court, convicted, statutory maximum, offender, grid, automatically, maximum, statutory maximum sentence, controlled substance, confinement, for profit, felony, twice, subsequent offense, score

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution & Sale > Penalties

HN2 Delivery, Distribution & Sale, Penalties

Case Summary

Overview

HOLDING: [1]-Under the Sentencing Reform Act drug sentencing grid in Wash. Rev. Code § 9.94A.517(1) defendant's standard sentence range was between 68+ and 100 months, because under § 69.50.408(1), the doubling of the statutory maximum sentence was automatic, and the 60-month maximum under § 69.50.410(2)(a) was doubled under § 69.50.408 for a second conviction under chapter 69.50.

Selling a controlled substance for profit under Wash. Rev. Code § 69.50.410(1) is a class C felony. Wash. Rev. Code § 69.50.410(1). The maximum penalty for a class C felony under the Sentencing Reform Act (SRA) is five years confinement. Wash. Rev. Code § 9A.20.021(1)(c). The SRA accounts for the situation in which the standard sentence range exceeds the statutory maximum. If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence. Wash. Rev. Code § 9.94A.599.

Outcome

Sentence vacated and case remanded.

Criminal Law & Procedure > ... > Sentencing
Guidelines > Adjustments & Enhancements > Criminal
History

LexisNexis® Headnotes

HN3 Adjustments & Enhancements, Criminal
History

Criminal Law & Procedure > ... > Controlled

Wash. Rev. Code § 69.50.408(1) doubles only the maximum sentence that can be imposed for a second violation of Wash. Rev. Code ch. 69.50, not the standard sentence range.

8 Wn. App. 2d 834, *834; 441 P.3d 1238, **1238; 2019 Wash. App. LEXIS 1255, ***1

Criminal Law & Procedure > Appeals > Standards of Review > De Novo Review

Governments > Legislation > Interpretation

HN4 Standards of Review, De Novo Review

Statutory interpretation is a question of law that the appellate court reviews de novo.

Governments > Legislation > Interpretation

HN5 Legislation, Interpretation

The primary goal of statutory interpretation is to determine the legislature's intent. To determine the legislature's intent, a court first looks to the plain language of the statute, considering the language of the provisions in question, how the provisions fit within the context of the statute, and the statutory scheme as a whole.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Criminal History

HN6 Adjustments & Enhancements, Criminal History

The plain language of Wash. Rev. Code § 69.50.408(1) compels the conclusion that the doubling of the statutory maximum sentence is automatic rather than discretionary. If a defendant may be imprisoned for a term up to twice the term otherwise authorized, Wash. Rev. Code § 69.50.408(1), by definition twice the term otherwise authorized is the maximum sentence for a second violation of Wash. Rev. Code ch. 69.50. And use of the term "may" in Wash. Rev. Code § 69.50.408(1) means that the trial court has discretion whether to impose a sentence equal to the new maximum, not that the trial court has discretion whether to double the maximum sentence.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Criminal History

HN7 Adjustments & Enhancements, Criminal History

Wash. Rev. Code § 69.50.408(1) is not discretionary and instead automatically doubles the maximum sentence. Wash. Rev. Code § 69.50.408 is neither discretionary nor a sentence enhancement but rather a provision that automatically doubles the statutory maximum sentence for convictions under Wash. Rev. Code § 69.50 when the defendant had a prior conviction under that statute.

Criminal Law & Procedure > ... > Sentencing Guidelines > Adjustments & Enhancements > Criminal History

HN8 Adjustments & Enhancements, Criminal History

Under Wash. Rev. Code § 69.50.408(1), the doubling of the statutory maximum sentence is automatic. The trial court is not required to impose the maximum sentence. The trial court's discretion involves what sentence to actually impose within the doubled maximum and the standard range.

Criminal Law & Procedure > ... > Controlled Substances > Delivery, Distribution & Sale > Penalties

HN9 Delivery, Distribution & Sale, Penalties

Wash. Rev. Code § 69.50.410(2)(a) states that a person convicted of a violation of Wash. Rev. Code § 69.50.410(1) shall receive a sentence of not more than five years in a correctional facility for a first offense.

Criminal Law & Procedure > Sentencing > Ranges

HN10 Sentencing, Ranges

The Sentencing Reform Act (SRA) provides that when a person is convicted of a felony, the court shall impose punishment as provided in the chapter. Wash. Rev. Code § 9.94A.505(1). The trial court generally must impose a sentence within the standard sentence range established by the SRA's sentencing grids. Wash. Rev. Code § 9.94A.505(2)(a)(i).

Governments > Legislation > Interpretation

HN11 Legislation, Interpretation

8 Wn. App. 2d 834, *834; 441 P.3d 1238, **1238; 2019 Wash. App. LEXIS 1255, ***1

When two statutes appear to conflict, the rules of construction direct a court to, if possible, reconcile them so as to give effect to both provisions.

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution & Sale > Penalties

Criminal Law & Procedure > Sentencing > Ranges

HN12 [📄] Delivery, Distribution & Sale, Penalties

Wash. Rev. Code § 9.94A.505 contains an exception to the application of the Sentencing Reform Act sentencing grids. Wash. Rev. Code § 9.94A.505(2)(a)(i) states that the trial court must apply the sentencing grids unless another term of confinement applies. Wash. Rev. Code § 69.50.410(2)(a) constitutes another term of confinement under Wash. Rev. Code § 9.94A.505(2)(a)(i) for first time convictions under Wash. Rev. Code § 69.50.410(1).

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution & Sale > Penalties

Criminal Law & Procedure > Sentencing > Ranges

HN13 [📄] Delivery, Distribution & Sale, Penalties

Reading Wash. Rev. Code § 9.94A.505 and Wash. Rev. Code § 69.50.410(2)(a) together, an offender convicted for the first time under Wash. Rev. Code § 69.50.410(1) must be sentenced within the Sentencing Reform Act statutory range except that the sentence cannot exceed 60 months.

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution & Sale > Penalties

Criminal Law & Procedure > Sentencing > Ranges

HN14 [📄] Delivery, Distribution & Sale, Penalties

Wash. Rev. Code § 69.50.408(1) states that an offender convicted of a second or subsequent offense under Wash. Rev. Code ch. 69.50 may be imprisoned for a term up to twice the term otherwise authorized. Wash. Rev. Code § 69.50.410(2)(a) authorizes a sentencing court to impose a sentence of no more than 60 months on an offender convicted for the first time under Wash. Rev. Code § 69.50.410(1)

Criminal Law & Procedure > ... > Controlled
Substances > Delivery, Distribution & Sale > Penalties

Criminal Law & Procedure > Sentencing > Ranges

HN15 [📄] Delivery, Distribution & Sale, Penalties

The maximum sentence established in Wash. Rev. Code § 69.50.410(2)(a) is a term otherwise authorized subject to doubling under Wash. Rev. Code § 69.50.408. There is no reason to treat the maximum sentence in Wash. Rev. Code § 69.50.410(2)(a) differently than any other statutory maximum. Wash. Rev. Code § 9.94A.030(50). The 60-month maximum under Wash. Rev. Code § 69.50.410(2)(a) is doubled under Wash. Rev. Code § 69.50.408 for a second conviction under Wash. Rev. Code ch. 69.50.

Headnotes/Summary

Summary

WASHINGTON OFFICIAL REPORTS SUMMARY

Nature of Action: Prosecution for three counts of the sale of a controlled substance for profit.

Superior Court: The Superior Court of Lewis County, No. 17-1-00220-21, Joely A. O'Rourke, J., on August 23, 2017, entered a judgment on a plea of guilty. The court sentenced the defendant to 60 months imprisonment on each count, to run concurrently.

Court of Appeals: Holding that the trial court erred in ruling that the defendant's maximum sentence was 60 months and in failing to sentence him within the standard sentencing range of 68+ to 100 months because the 60-month maximum sentence was automatically doubled, the court *vacates* the sentence and *remands* the case for resentencing.

Headnotes

WASHINGTON OFFICIAL REPORTS HEADNOTES

WA111 [📄] [1]

Controlled Substances > Punishment > Enhancement > Second or Subsequent Offense > Doubling of Maximum Penalty or Standard Range.

RCW 69.50.408(1) doubles only the statutory maximum sentence, not the standard sentence range, for a second violation of ch. 69.50 RCW.

WA/2/ [2]

Controlled Substances > Punishment > Enhancement > Second or Subsequent Offense > Doubling of Maximum Penalty > Automatic or Discretionary.

Under RCW 69.50.408(1), the statutory maximum sentence that may be imposed on an offender convicted of violating ch. 69.50 RCW is automatically doubled if the offender has a previous conviction under the statute. Use of the term “may” in RCW 69.50.408(1) means that the trial court has discretion to impose a sentence equal to the new maximum, not discretion to double the maximum sentence.

WA/3/ [3]

Criminal Law > Punishment > Sentence > Within Standard Range > Necessity.

In general, unless an exception applies, a trial court must impose a sentence within the standard range established by the sentencing grids in the Sentencing Reform Act of 1981, ch. 9.94A RCW.

WA/4/ [4]

Statutes > Construction > Conflicting Provisions > Resolution.

When two statutes appear to conflict, the rules of construction direct a court to, if possible, reconcile them so as to give effect to both provisions.

WA/5/ [5]

Controlled Substances > Sale > For Profit > First Time Offense > Penalties > Within Standard Range > 60-Month Maximum Sentence.

Under RCW 9.94A.505(1) (2)(a)(i) and RCW 69.50.410(2)(a), an offender convicted for the first time of the sale of a controlled substance for profit under RCW 69.50.410(1) must be sentenced within the Sentencing Reform Act of 1981's statutory range, except that the sentence cannot exceed 60 months.

WA/6/ [6]

Controlled Substances > Punishment > Enhancement > Second or Subsequent Offense > Doubling of Maximum

Penalty > Applicability > First Time Conviction of Sale For Profit.

The 60-month maximum sentence under RCW 69.50.410(2)(a) for an offender convicted for the first time of the sale of a controlled substance for profit under RCW 69.50.410(1) is doubled under RCW 69.50.408 when the conviction is the offender's second conviction under ch. 69.50 RCW.

MAXA, C.J., delivered the opinion for a unanimous court.

Counsel: *Jonathan L. Meyer, Prosecuting Attorney*, and *Sara I. Beigh, Deputy*, for appellant.

Lise Ellner; and *Erin C. Sperger (of Erin Sperger PLLC)*, for respondent.

Judges: Authored by Bradley Maxa. Concurring: Rebecca Glasgow, Lisa Worswick.

Opinion by: Bradley Maxa

Opinion

[*835] [**1239]

¶1 MAXA, C.J. — The State appeals Johnny Ray Cyr's 60-month sentence for his convictions under [**1240] RCW 69.50.410(1) of three counts of sale of a controlled substance for profit, heroin.

¶2 Under the drug sentencing grid in the Sentencing Reform Act of 1981 (SRA), the standard range sentence for Cyr's conviction ordinarily would be 68+ to 100 months. RCW 9.94A.517(1). But the violation of RCW 69.50.410(1) is a class C felony with a maximum sentence of 60 months. The State argues that the maximum sentence must be automatically doubled to 120 months under RCW 69.50.408(1), [*836] which states, “Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized.” The State claims that because Cyr had a previous conviction under chapter 69.50 RCW, the trial court was required to sentence him within the [***2] SRA standard range.

¶3 Cyr argues that the trial court had discretion whether to treat 60 months as the maximum sentence or to double the maximum sentence under RCW 69.50.408. In addition, RCW 69.50.410(2)(a) provides that a person convicted under RCW 69.50.410(1) “shall receive a sentence of not more than five

years.” Cyr claims that RCW 69.50.410(2)(a) limited Cyr's sentence to 60 months regardless of the RCW 69.50.408 doubling provision. The trial court agreed with Cyr that its sentencing authority was limited to 60 months.

¶4 We hold that (1) because Cyr had a previous conviction under chapter 69.50 RCW, RCW 69.50.408 automatically doubled the maximum sentence and the trial court did not have discretion to treat 60 months as the maximum sentence; (2) the provision in RCW 69.50.410(2)(a) that the maximum sentence for Cyr's conviction was 60 months places a limitation on application of the SRA sentencing grid, but RCW 69.50.408 applies to double that maximum 60-month sentence; and (3) the trial court erred in ruling that Cyr's maximum sentence was 60 months and in failing to sentence Cyr within the SRA standard range. Accordingly, we vacate Cyr's sentence and remand for the trial court to exercise its discretion in sentencing Cyr within the standard range in light of the doubled statutory maximum of 120 months.

FACTS

¶5 The State charged [***3] Cyr with three counts of sale of a controlled substance for profit, heroin, in violation of RCW 69.50.410(1). Cyr pleaded guilty to all three counts. Cyr [*837] stipulated to an offender score of 5 and a criminal history that included a 2015 conviction for attempted possession of an imitation controlled substance, a violation of chapter 69.50 RCW.¹ Both parties apparently agreed that the SRA drug sentencing grid set the standard range for Cyr's offender score at 68+ to 100 months. But if the doubling provision of RCW 69.50.408 did not apply, the statutory maximum sentence for Cyr's convictions was 60 months. This is because violation of RCW 69.50.410(1) is a class C felony with a maximum sentence of 60 months and because RCW 69.50.410(2)(a) limited the sentence to 60 months.

¶6 The trial court acknowledged that the maximum sentence for Cyr's convictions under RCW 69.50.410(1) could be doubled under RCW 69.50.408. But the court determined that RCW 69.50.410(2)(a) directs courts to impose no more than 60 months for a first conviction of sale of a controlled substance for profit.² Therefore, on the judgment and

sentence the court stated that the sentencing range for Cyr's convictions was 60 to 60 months and the maximum sentence was 60 months. The court sentenced Cyr to 60 months on each count, to run concurrently.

¶7 The State appeals [***4] Cyr's sentence.

[**1241] ANALYSIS

A. STANDARD SENTENCE RANGE UNDER THE SRA

¶8 The SRA contains sentencing grids that calculate a sentence range for offenders according to their offender score and the “seriousness level” of their offense. RCW 9.94A.510, .517. But “[t]he maximum term of confinement [*838] in a range may not exceed the statutory maximum for the crime as provided in RCW 9A.20.021.” RCW 9.94A.506(3).

¶9 RCW 9.94A.517 provides a special sentencing grid for drug offenders. The parties agreed that Cyr's offender score was 5. HN1 [¶] The sale of a controlled substance for profit, the crime defined in RCW 69.50.410(1), has a seriousness level of three. RCW 9.94A.518. Under the drug sentencing grid, a defendant with an offender score of 5 who is convicted of an offense with a seriousness level of three has a standard sentence range between 68+ and 100 months. RCW 9.94A.517(1).

¶10 However, HN2 [¶] selling a controlled substance for profit under RCW 69.50.410(1) – for which Cyr was convicted – is a class C felony. RCW 69.50.410(1). The maximum penalty for a class C felony under the SRA is five years' confinement. RCW 9A.20.021(1)(c). The SRA accounts for the situation in which the standard sentence range exceeds the statutory maximum. See State v. Clark, 123 Wn. App. 515, 521, 94 P.3d 335 (2004). “If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory [***5] maximum sentence shall be the presumptive sentence.” RCW 9.94A.599. Therefore, Cyr's presumptive sentence under the SRA would be 60 months rather than within the standard range of 68+ to 100 months.

B. APPLICABILITY OF RCW 69.50.408 DOUBLING PROVISION

¶11 The parties agree that Cyr had a previous conviction under chapter 69.50 RCW and therefore that RCW 69.50.408 potentially applies. The State argues that RCW 69.50.408 automatically doubles the statutory maximum when the defendant is convicted of a subsequent offense under chapter 69.50 RCW, and therefore that Cyr must be sentenced within the standard range. Cyr contends that the trial court has discretion to decide whether to double the statutory

¹ Cyr also had a misdemeanor conviction for possession of marijuana in municipal court. The State claims that this conviction was under chapter 69.50 RCW, but the record does not state the statutory basis of the conviction. Therefore, we do not treat the marijuana possession conviction as a previous conviction under chapter 69.50 RCW.

² Cyr had no prior conviction of sale of a controlled substance for profit in violation of RCW 69.50.410(1).

maximum. We agree with the State.

[*839] 1. Legal Principles

¶12 RCW 69.50.408(1) states, “Any person convicted of a second or subsequent offense under [chapter 69.50 RCW] may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.” An offense is a second or subsequent offense if, “prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.” RCW 69.50.408(2).³

WAI1 [†] [1] ¶13 HN3 [†] RCW 69.50.408(1) doubles [***6] only the maximum sentence that can be imposed for a second violation of chapter 69.50 RCW, not the standard sentence range. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 90, 134 P.3d 1166 (2006).

¶14 Resolution of this issue depends upon the interpretation of RCW 69.50.408. HN4 [†] “Statutory interpretation is a question of law that we review de novo.” *State v. Van Noy*, 3 Wn. App. 2d 494, 497, 416 P.3d 751 (2018). HN5 [†] The primary goal of statutory interpretation is to determine the legislature’s intent. *Id.* at 498. To determine the legislature’s intent, we first look to the plain language of the statute, considering the language of the provisions in question, how the provisions fit within the context of the statute, and the statutory scheme as a whole. *Id.*

[**1242] 2. Automatic Doubling

¶15 The issue here is whether RCW 69.50.408 automatically doubles the maximum sentence for a second violation [*840] of chapter 69.50 RCW or whether it is within the trial court’s discretion to apply the statute to double the maximum sentence.

WAI2 [†] [2] ¶16 HN6 [†] The plain language of RCW 69.50.408(1) compels the conclusion that the doubling of the statutory maximum sentence is automatic rather than

discretionary. If a defendant “may be imprisoned for a term up to twice the term otherwise authorized,” RCW 69.50.408(1), by definition twice the term otherwise authorized is the maximum sentence for a second violation of chapter 69.50 RCW. And use of the term “may” in RCW 69.50.408(1) means that the trial court has discretion [***7] whether to impose a sentence equal to the new maximum, not that the trial court has discretion whether to double the maximum sentence.

¶17 In *In re Personal Restraint of Hopkins*, Division One of this court expressly held that HN7 [†] RCW 69.50.408(1) is not discretionary and instead automatically doubles the maximum sentence. 89 Wn. App. 198, 201, 201-03, 948 P.2d 394 (1997), rev’d on other grounds, 137 Wn.2d 897, 976 P.2d 616 (1999). The court stated,

[W]e hold that RCW 69.50.408 is neither discretionary nor a sentence enhancement but rather a provision that automatically doubles the statutory maximum sentence for convictions under RCW 69.50 when the defendant has a prior conviction under that statute.

Id. at 203.⁴

¶18 Subsequent cases include language that is consistent with this holding. In *State v. O’Neal*, this court stated that “RCW 69.50.408 doubles the maximum length of time for which the offender may be confined, thereby defining a new statutory maximum.” 126 Wn. App. 395, 429, 109 P.3d 429 (2005) (emphasis added), aff’d, 159 Wn.2d 500, 150 P.3d 1121 (2007). In *State v. Roy*, Division Three stated, “A judge [*841] is not required to impose a double sentence, but the option is available to him or her under RCW 69.50.408(1).” 147 Wn. App. 309, 315, 195 P.3d 967 (2008).⁵ And the Supreme Court in *Cruz* stated that the legislature meant RCW 69.50.408 to have “the effect of doubling the statutory maximum sentence.” 157 Wn.2d at 90.

¶19 However, after noting that RCW 69.50.408 creates a new statutory maximum sentence, this [***8] court in *O’Neal* stated, “A trial court has discretion to utilize the doubling provision of RCW 69.50.408.” 126 Wn. App. at 429. The court

⁴On review in *Hopkins*, the Supreme Court reversed on other grounds. 137 Wn.2d 897. The court noted that because of its disposition, it did not need to address Division One’s characterization of RCW 69.50.408. *Id.* at 900 n.2.

⁵The court in *Roy* did not address whether the doubling was automatic because a court commissioner already had ruled as the law of the case that the trial court did not have discretion to decide whether to double the maximum sentence. 147 Wn. App. at 315.

³RCW 69.50.408(3) states, “This section does not apply to offenses under RCW 69.50.4013,” which statute involves possession of controlled substances. But although RCW 69.50.408(3) states that current possession offenses cannot be doubled, that subsection does not prevent prior possession convictions from providing the basis for doubling of the maximum sentence under RCW 69.50.408(1). *State v. McGrew*, 156 Wn. App. 546, 556-57, 234 P.3d 268 (2010).

acknowledged that this statement was contrary to Division One's holding in *Hopkins*. *Id.* at 429 n.27.

¶20 It appears that the court in *O'Neal* conflated the trial court's discretion to impose a particular sentence within the doubled statutory maximum with the trial court's lack of discretion regarding the automatic doubling of the statutory maximum. The court in *O'Neal* cited as authority *State v. Mayer*, 120 Wn. App. 720, 727, 86 P.3d 217 (2004). *O'Neal*, 126 Wn. App. at 429. But *Mayer* did not hold that the trial court had discretion whether to double the statutory maximum fine. Instead, the court in *Mayer* held that the trial court had discretion whether to actually impose the doubled fine as opposed to a lesser fine. 120 Wn. App. at 727.

¶21 We adopt the holding in *Hopkins* and disregard the court's statement in *O'Neal*. We hold that *HN8* under *RCW 69.50.408(1)*, the doubling of the statutory maximum sentence is automatic. But as the court stated in *Roy*, [**1243] the trial court is not required to impose the maximum sentence. 147 Wn. App. at 315. The trial court's discretion involves what sentence to actually impose within the doubled maximum and the standard range.

[*842] C. EFFECT OF *RCW 69.50.410(2)(A)* LIMITATION

¶22 *HN9* *RCW 69.50.410(2)(a)* states that a person convicted of a violation of *RCW 69.50.410(1)* "shall receive a sentence of [***9] not more than five years in a correctional facility" for a first offense. Cyr argues that regardless of the standard range derived from the SRA sentencing grid and regardless of any doubling under *RCW 69.50.408*, *RCW 69.50.410(2)(a)* controls his sentence and establishes that he cannot be sentenced to more than 60 months. We disagree.

1. Conflict Between the SRA and *RCW 69.50.410(2)(a)*

WA/3-5/ [3-5] ¶23 *HN10* The SRA provides that "[w]hen a person is convicted of a felony, the court shall impose punishment as provided in this chapter." *RCW 9.94A.505(1)*. Further, the trial court generally must impose a sentence within the standard sentence range established by the SRA's sentencing grids. *RCW 9.94A.505(2)(a)(i)*. As noted above, the drug sentencing grid establishes a standard range of 68+ to 100 months for Cyr's offense. *RCW 9.94A.517(1)*. These provisions appear to conflict with the 60-month limitation in *RCW 69.50.410(2)(a)*, which is outside the SRA.

¶24 *HN11* When two statutes appear to conflict, the rules of construction direct us to, if possible, reconcile them so as to give effect to both provisions. *State v. Rice*, 159 Wn. App. 545, 571, 246 P.3d 234 (2011), *aff'd on other grounds*, 174

Wn.2d 884, 279 P.3d 849 (2012). Relevant here, *HN12* *RCW 9.94A.505* contains an exception to the application of the SRA sentencing grids. *RCW 9.94A.505(2)(a)(i)* states that the trial court must apply the sentencing grids "[u]nless another term of confinement applies." We reconcile *RCW 9.94A.505(1)* and *RCW 69.50.410(2)(a)* by [***10] concluding that *RCW 69.50.410(2)(a)* constitutes "another term of confinement" under *RCW 9.94A.505(2)(a)(i)* for first time convictions under *RCW 69.50.410(1)*.

¶25 *HN13* Reading *RCW 9.94A.505* and *RCW 69.50.410(2)(a)* together, an offender convicted for the first time under [*843] *RCW 69.50.410(1)* must be sentenced within the SRA statutory range except that the sentence cannot exceed 60 months.⁶

2. Doubling of *RCW 69.50.410(2)(a)* Maximum

WA/6/ [6] ¶26 Cyr appears to assume that the *RCW 69.50.408* doubling provision applies only to the statutory maximum sentence for a class C felony and does not affect the provision in *RCW 69.50.410(2)(a)* that an offender convicted for the first time under *RCW 69.50.410(1)* can be sentenced to no more than 60 months. We disagree.

¶27 As noted above, *HN14* *RCW 69.50.408(1)* states that an offender convicted of a second or subsequent offense under chapter 69.50 RCW "may be imprisoned for a term up to twice the term otherwise authorized." *RCW 69.50.410(2)(a)* authorizes a sentencing court to impose a sentence of no more than 60 months on an offender convicted for the first time under *RCW 69.50.410(1)*.

¶28 The issue here is whether *HN15* the maximum sentence established in *RCW 69.50.410(2)(a)* is a "term otherwise authorized" [**1244] subject to doubling under *RCW 69.50.408*. We conclude that it is. We see no reason to treat the maximum sentence in *RCW 69.50.410(2)(a)* differently than any other statutory maximum. See *RCW 9.94A.030(50)* (stating that the statutory maximum can be prescribed in any statute defining [***11] the maximum penalty for a crime). Accordingly, we hold that the 60-month maximum under *RCW 69.50.410(2)(a)* is doubled under *RCW*

⁶ We recognize that our reading of the two statutes differs from the unpublished opinion of Division One of this court in *State v. Heckl*, No. 73932-8-I (Wash. Ct. App. Nov. 9, 2015) (unpublished), <http://www.courts.wa.gov/opinions/pdf/739328.pdf>. In that case, Division One held that the SRA superseded the earlier enacted *RCW 69.50.410(2)(a)*. *Id.* at 4. However, the court in *Heckl* did not attempt to reconcile *RCW 9.94A.505* and *RCW 69.50.410(2)(a)* and did not address the "[u]nless another term of confinement applies" language in *RCW 9.94A.505(2)(a)(i)*.

69.50.408 for a second conviction under chapter 69.50 RCW.

[*844] D. IMPOSITION OF STANDARD RANGE SENTENCE

¶29 Under RCW 69.50.408, Cyr's maximum sentence was 120 months – double the maximum of 60 months stated in RCW 69.50.410(2)(a). Cyr's standard sentence range under the SRA drug sentencing grid in RCW 9.94A.517(1) was between 68+ and 100 months. Following the automatic doubling, the standard range no longer exceeded the limitation in RCW 69.50.410(2)(a) and 60 months no longer was the presumptive sentence. Therefore, under the SRA the trial court was required to sentence Cyr within that standard range. RCW 9.94A.505(2)(a)(i).

¶30 Here, the trial court sentenced Cyr to 60 months in confinement. That sentence was below the SRA standard range, which was within the doubled statutory maximum. Therefore, the court erred in imposing the sentence. On remand, the court must sentence Cyr within the standard range. The court will have discretion regarding the sentence actually imposed within that range.

CONCLUSION

¶31 We vacate Cyr's sentence and remand for the trial court to exercise its discretion in sentencing Cyr within the standard range in light of the doubled statutory maximum of 120 months.

WORSWICK [***12] and GLASGOW, JJ., concur.

References

LexisNexis Practice Guide: Washington Criminal Law

Annotated Revised Code of Washington by LexisNexis

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