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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Appellant,

vs.

**JOHNNY RAY CYR,**

Respondent.

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Appeal from the Superior Court of Washington for Lewis County  
Case No. 17-1-00220-21

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**Appellant's Opening Brief**

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it found the doubling provision of RCW 69.50.408 did not apply to RCW 69.50.410 in Cyr's case.
2. The trial court erred when it ruled the statutory maximum sentence for Cyr for his conviction under RCW 69.50.410 was five years.
3. The trial court erred when it ruled the standard range for Cyr's sentence was 60 months.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. In a sentence for a conviction under RCW 69.50.410, does the doubling provision of RCW 69.50.408 apply?
- B. Do the underlying facts and circumstances of a specific case change the analysis of whether RCW 69.50.408 would apply to convictions under RCW 69.50.410?
- C. Does the Sentencing Reform Act (SRA) apply to RCW 69.50.410, and if so, what is the appropriate standard range?

## **III. STATEMENT OF THE CASE**

On or between January 1, 2017 and April 4, 2017 confidential informants contacted Detective Holt three separate times about being able to purchase heroin from Cyr. CP 1-4, 6-7. Controlled buys were set up each time and the confidential informants were able to purchase heroin from Cyr each time. CP 6-7. Cyr was arrested for delivery of heroin. CP 7.

On April 5, 2017 the State charged Cyr with three counts of Delivery of a Controlled Substance – Heroin. CP 1-4. On July 24,

2017 the State filed a Second Amended Information which amended the charges to three counts of Sale of a Controlled Substance for Profit – Heroin. CP 1-3. The 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.

On July 24, 2017 Cyr entered a plea of guilty to the Second Amended Information. RP 2-9, CP 12-22. Cyr's attorney had the trial court sign an order for a DOSA (Drug Offender Sentencing Alternative) evaluation. RP 14. On July 24, 2017 Cyr signed a Stipulation on Prior Record and Offender Score. RP 23-25. The document, which was prepared by the State, listed Cyr's criminal history, the standard range for each offense, and the maximum term for each offense. *Id.* The form listed the Standard Range as 68+ to 100 months and the Maximum Term as 120 months. CP 24. There is a notation on the form that the Standard Range and Maximum Term are argued by the defense. *Id.*

The sentencing hearing occurred on August 23, 2017. RP 14-15. The State filed a sentencing memorandum, opposing Cyr's request for a DOSA sentence and arguing Cyr's 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 sentencing

brief arguing the doubling provision of RCW 69.50.408 did not apply. CP 35-38. The trial court heard argument by the State and Cyr's attorney regarding whether the doubling provision applied to Cyr. RP 15-28. The trial court took the arguments under advisement and rendered a decision a short time later in the day regarding the appropriate sentence. RP 28-39. The trial court held the doubling provision did not apply, denied the request for a DOSA, and sentenced Cyr to five years in prison. RP 30-42.

The State timely appealed the trial court's rulings regarding the applicability of the doubling statute, the Defendant's standard range, and the Judgment and Sentence. CP 58-70.

The State will further supplement the facts in the argument section below.

#### **IV. ARGUMENT**

##### **A. THE DOUBLING PROVISION OF RCW 69.50.408 APPLIES TO CONVICITONS FOR OFFENSES CHARGED UNDER RCW 69.50.410.**

The trial court erred when it found the doubling provision of RCW 69.50.408 did not apply to Cyr's conviction under RCW 69.50.410. The trial court's statutory interpretation was incorrect. The trial court should have imposed a 10-year statutory maximum sentence. This Court should reverse the trial court's ruling and

remand for resentencing.

### **1. Standard Of Review.**

Statutory interpretation is reviewed by this Court under a de novo standard. *In re Postsentence Review of Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (2013).

### **2. The Plain Language Of RCW 69.50.408 Applies To All Convictions Of Offenses Under Chapter 69.50, With The Exception Of Offenses Under RCW 69.50.4013.**

The plain language of RCW 69.50.408 states it applies to all offenses under chapter RCW 69.50. This Court gives the plain meaning of the statute the effect of an expression of the intent of the legislature when that meaning is plain on the statute's face. *In re Combs*, 176 Wn. App. at 117.

We determine the statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. Absent specialized statutory definition, we give a term its plain and ordinary meaning ascertained from a standard dictionary. We interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous.

*Id.* (internal citations omitted). Wn.2d at 517-18.

Statutes that are unambiguous "should not be subjected to judicial construction." *State v. Tarabochia*, 150 Wn.2d 59, 63, 74 P.3d 642 (2003). If, after examining the statutory provision it "is still

subject to more than one reasonable interpretation, it is ambiguous.”  
*In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 88, 134 P.3d 1166  
(2006). The rule of lenity requires courts to interpret an ambiguous  
statute in favor of a defendant without legislative intent to the  
contrary. *In re Cruz*, 157 Wn.2d at 88.

With the exception of RCW 69.50.4013, RCW 69.50.408  
applies to all second or subsequent offenses under chapter RCW  
69.50.

(1) 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.

(2) For purposes of this section, an offense is  
considered 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.

(3) This section does not apply to offenses under  
RCW 69.50.4013.

RCW 69.50.408. The language, “imprisoned for a term up to twice  
the term otherwise authorized” refers to the statutory maximum  
sentence of the charged offense. *In re Cruz*, 157 Wn.2d at 89.

It is a Class C felony for a person to sell any controlled  
substance for profit that is classified as a Schedule I substance,

except for the flowering tops and leaves of marijuana. RCW 69.50.410. Therefore, in a matter charged under RCW 69.50.410, if it is a defendant's second or subsequent offense, the maximum penalty is 10 years. RCW 69.50.408.

There is nothing in RCW 69.50.410 that would exempt it from the doubling provision in RCW 69.50.408. The only portion of RCW 69.50 which is exempt from the doubling provision is 69.50.4013, Possession of a Controlled Substance. RCW 69.50.408(3). The legislature specifically excluded this crime from the doubling provision. *Id.* The plain language of the statute is unambiguous. If legislature wished other sections of Chapter 69.50 to be excluded from the doubling provision it would have explicitly stated which sections, such as it did with RCW 69.50.4013. RCW 69.50.408(3). Therefore, because RCW 69.50.408 is unambiguous, it is not subject to judicial construction. *Tarabochia*, 150 Wn.2d at 63. The rule of lenity is not applied. *In re Cruz*, 157 Wn.2d at 88. RCW 69.50.408, the doubling provision for second or subsequent drug related offenses, applies to convictions under RCW 69.50.410, Sale of a Controlled Substance for Profit.

**3. The Underlying Facts And Circumstances Of Cyr's Case Have No Bearing On The Statutory Interpretation Of RCW 69.50.408 With The Exception Of Determining If Cyr Has A Prior Conviction Which Triggers The Doubling Provision Of RCW 69.50.408.**

In Cyr's matter, the trial court originally stated, "[W]hen you look at [RCW] 69.50.410(1), which says it's a Class C felony, I believe that that section can be doubled." RP 31. The trial court then stated that the specific facts of Cyr's case and the language of RCW 69.50.410(2) and (3) "gives the courts directives as the sentences that would apply in these facts." RP 31. Later the deputy prosecutor asked "So the doubling provision [of RCW 69.50.408] did not apply to this as far as the statutory maximum either?" RP 37. The trial court responded, "No, I don't believe that it does apply to this case. I think it can apply to cases that are similar to this, but when you - - when you look at the SRA with five points, you get 60 to 60." RP 37-38. The trial court appeared to be conflating a standard range with the statutory maximum. This is incorrect.

The trial court's statutory interpretation of the doubling provision of RCW 69.50.408 and how it pertained to RCW 69.50.410 is simply wrong. The trial court again stated that the doubling provision does apply to RCW 69.50.408, "but not under these facts." RP 38. The only facts that matter are the ones that pertain to Cyr's

prior criminal history. These facts are the ones that make RCW 69.50.408 relevant to Cyr and whether his statutory maximum sentence for his conviction under RCW 69.50.410 doubles. It does not matter which subsection of RCW 69.50.410 the State is proceeding under, or what the required minimum sentence is. These are factors separate from the statutory maximum sentence.

Cyr had prior convictions for Attempted Possession of an Imitation Controlled Substance in August 2015 and Possession of Marijuana in September 2004. CP 23-25. These convictions are considered prior convictions for purposes of determining whether the current offense is a second or subsequent conviction. RCW 69.50.408(2). These convictions trigger the doubling provision, authorizing the trial court to imprison Cyr for up to twice the term otherwise authorized. RCW 69.50.408. Cyr was charged with and pleaded guilty to Sale of a Controlled Substance for Profit – Heroin. CP 9-22; RCW 69.50.410. Cyr stated in his plea statement, “In lewis county [sic] on 3-22-17, 3-28-17 and 3-29-17 I sold heroin to another and received some money each time.” CP 21. Cyr stipulated to his prior convictions, which included the prior controlled substance violations. CP 23-25. These are the only facts that matter when considering if RCW 69.50.408 apply.

The unspecified, “more specific facts in this case” the trial court alludes to in its decision are of no consequence in regards to the statutory interpretation of RCW 69.50.408’s application to a conviction under RCW 69.50.410. The trial court invoked the rule of lenity when the plain language of the statute was unambiguous. RP 31. This is an improper application of the rule of lenity. *In re Cruz*, 157 Wn.2d at 88. The only facts that matter in a RCW 69.50.408 analysis is, (1) is this a second or subsequent charge, (2) is this conviction under chapter 69.50, and (3) is the conviction for a crime other than RCW 69.50.4013? If the answer to these three questions is yes, then the doubling provision of RCW 69.50.408 applies to the statutory maximum sentence. The trial court erred in finding RCW 69.50.408 did not apply in Cyr’s case. The Court should remand for resentencing.

**B. THE SENTENCING REFORM ACT APPLIES TO RCW 69.50.410, SALE OF CONTROLLED SUBSTANCE FOR PROFIT – HEROIN.**

The Sentencing Reform Act (SRA) applies to all felonies, thereby felony convictions under the Uniform Controlled Substances Act, RCW 69.50, are controlled by the SRA. The trial court erred when it found that while the SRA applied to RCW 69.50.410, in Cyr’s case, the specific provisions of RCW 69.50.410(2) and (3) and the

rule of lenity required a 60-month sentence. Further, the trial court's ruling appears to state that the facts of Cyr's case limit the application of the SRA in his case. The trial court's rulings are in error. The SRA is applicable in Cyr's case, the standard range should have been 68 months to 100 months, and this Court should reverse and remand for resentencing.

### **1. Standard Of Review.**

Statutory interpretation is reviewed by this Court under a de novo standard. *In re Combs*, 176 Wn. App. at 116.

### **2. The Sentencing Reform Act Applies To Felony Convictions Of The Uniform Controlled Substances Act, RCW 69.50.**

The Sentencing Reform Act prescribes the authority sentencing courts are awarded in Washington State when sentencing persons convicted of felony offenses. *In re Combs*, 176 Wn. App. at 117. "When a person is convicted of a felony, the court shall impose punishment as provided in this chapter." RCW 9.94A.505(1).

The SRA was enacted in 1981 by the legislature to create a sentencing structure with standard ranges for offenses, but still offer some discretion when it came to crafting and imposing sentences. RCW 9.94A.010; *State v. Clark*, 123 Wn. App. 515, 521-22, 94 P.3d

335 (2004). The Uniform Controlled Substances Act was enacted in 1971, predating the SRA and determinate sentencing ranges. Laws of 1971, Ex. Sess., ch. 308, § 69.50.101; *State v. Williams*, 70 Wn. App. 567, 570, 853 P.2d 1388 (1993).

In 2002 the Legislature made RCW 69.50.410, Selling a Controlled Substance for Profit a Level III Drug Offense under a new seriousness table in the SRA. Laws of 2002, ch. 290, § 9; RCW 9.94A.518. The Legislature also created a Drug Offense Sentencing Grid, which created standard sentencing ranges for different drug offense seriousness levels. Laws of 2002, ch. 290, § 8; RCW 9.94A.517. Under the Drug Offense Sentencing Grid, a Level III Offense has standard range of 51 to 68 months for an offender score of zero to two, 68+ to 100 months for an offender score of three to five, and 100+ to 120 months for an offender score of six to nine or more. *Id.* Therefore, for someone like Cyr, with five points, the standard range for Sale of a Controlled Substance for Profit – Heroin, would be 68+ to 100 months. RCW 9.94A.505; RCW 9.94A.517; RCW 9.94A.525; RCW 69.50.410.

The SRA contemplates that the standard range for a sentence could be greater than the statutory maximum allowed for the charged crime. RCW 9.94A.599. “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.” RCW 9.94A.599. Therefore, in a Class C felony, such as RCW 69.50.410, with five points, the maximum sentence will be five years, the statutory maximum, even though it is a Level III offense with a standard range of 68+ to 100 months.

The special provision in the Uniform Controlled Substance Act which allows for the statutory maximum to be doubled changes the maximum standard range. RCW 9.94A.599; RCW 69.50.408. While the doubling provision does not double the standard range of a sentence, it does allow for a standard range that would normally be outside the statutory maximum to now be the standard range due to the enlarged statutory maximum sentence. RCW 9.94A.599; RCW 69.50.408; *Clark*, 123 Wn. App. at 521-22.

The trial court in Cyr’s matter declined to apply the SRA standard range for a Level III Drug Offense to Cyr. RP 38-39. The trial court stated, “I think if we were here under different circumstances, I do believe that it is a level three, and I know under a level three you can potentially have facts that will get you to a 68- to 100-month range, but I don’t think that given the facts here that’s - -“ RP 38-39. The deputy prosecutor asked, “Can I just ask for

clarification as to what the facts are? Is it because its charged under 410 or - -." RP 39. The trial court responded, "Right. Because it's charged under 410. And if you look at 410(2)(a), it gives the court a directive there that cannot sentence him to more than five years." RP 39. The trial court read RCW 69.50.410(2)(a) as requiring the trial court to not sentence Cyr to more than five years in custody upon a violation of RCW 69.50.410(1). The trial court did not explain how the portions of the statute "in a correctional facility of the department of social and health services" was going to be enforced, as all felony sentences of over a year are subject to be served pursuant the SRA. RCW 9.94A.190; RCW 69.50.410(2)(a); RP 35-36.

The SRA applies to all felonies and is controlling when it comes to the sentencing of felony convictions in Washington State regardless of which Title the felony may be codified in. RCW 9.94A.010; RCW 9.94A.505. Cyr was charged and pleaded guilty to three crimes that were Level III Drug Offenses. RCW 9.94A.517; RCW 9.94A.518; RCW 69.50.410; CP 9-22. Cyr had a prior drug offense which elevated his new convictions to second or subsequent offenses. RCW 69.50.408; RCW 69.50.410; CP 9-11, 23-25. Therefore, the statutory maximum for Cyr's three counts of Sale of a Controlled Substance for Profit – Heroin, were elevated from five

years to ten years on each count. RCW 69.50.408; RCW 69.50.410; *Clark*, 123 Wn. App. at 521-22; CP 9-11, 23-25. While RCW 69.50.410(2)(a) states that any person should not have a sentence of more than five years for a first offense, the crime is normally a Class C felony, punishable by up to a statutory maximum of five years in prison. RCW 9A.20.010(1); RCW 69.50.410. The SRA made RCW 69.50.410 a Level III Drug Offense, thereby enacting standard ranges that were far beyond the normal statutory maximum sentence. RCW 9.94A.517; 9.94A.518; RCW 69.50.410. In a case such as this, where the statutory maximum is ten years, the standard range should be 68+ to 100 months.

The trial court erred by finding the SRA did not apply in Cyr's case, that the standard range was five years, and sentencing Cyr to 60 months. Cyr should have been sentenced to a standard range sentence between 68+ to 100 months in the Department of Corrections. This Court should reverse the trial court and remand for resentencing.

**V. CONCLUSION**

The doubling provision of RCW 69.50.408 applies to convictions under RCW 69.50.410. The trial court erred when it concluded the doubling provision of RCW 69.50.408 did not apply to RCW 69.50.410 due to the facts of Cyr's case. The trial court further erred when it determined the SRA applied to RCW 69.50.410, but not in Cyr's case, thereby making Cyr's standard range 60 months. This Court should reverse and remand for resentencing.

RESPECTFULLY submitted this 21<sup>st</sup> day of February, 2018.

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