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No. 97323-7

THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JOHNNY RAY CYR,

Petitioner.

Review from Court of Appeals, Division Two, Case No. 50912-1-II

Respondent's Supplemental Brief

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I. ISSUE

- A. Did the trial court abuse its discretion by misinterpreting the statute, Selling Heroin for Profit, to preclude the court from applying the doubling provision of RCW 69.50.408, thereby restricting the trial court to a 60 month sentence?

II. STATEMENT OF THE CASE

Cyr pleaded guilty to three counts of Selling a Controlled Substance for Profit - Heroin. CP 9-22. Cyr had an offender score of five (5). CP 23-25. Cyr had prior convictions for drug offenses within RCW 69.50, which triggered the doubling provision of RCW 69.50.408, which the State argued made Cyr's standard range 68+ to 100 months for his level III drug offense. RP 2-5, 16-20; CP 23-25. Cyr disputed his standard range, arguing it was not more than 60 months. RP 3, 22-25; CP 35-38.

The trial court, after receiving briefing and hearing argument from the parties, held the doubling provision of RCW 69.50.408 did not apply to RCW 69.50.410 and that the legislature gave a directive regarding how Cyr must be sentenced. RP 28-39; CP 35-38, 50-57. The trial court sentenced Cyr to 60 months. CP 63-64.

III. ARGUMENT

A. THE SENTENCING COURT'S DISCRETION IS LIMITED BY THE STATUTORY PROVISIONS OF THE SENTENCING REFORM ACT AND THE UNIFORM CONTROLLED SUBSTANCES ACT, WHICH REQUIRE IT TO SENTENCE A DEFENDANT WITHIN THE STANDARD RANGE FOR THE CRIME CHARGED UNLESS OTHERWISE AUTHORIZED.

The trial court erroneously interpreted the sentencing provisions, finding the statutes “directed” the trial court to limit Cyr’s sentence to the confines of RCW 69.50.410, thereby disregarding the doubling statute, RCW 69.50.408, and the entirety of the Sentencing Reform Act (SRA). Cyr’s prior conviction under Chapter 69.50 triggers the doubling provision found in RCW 69.50.408(1). Once Cyr’s maximum allowable sentence became 120 months, the standard range for his offense, 68+ to 100 months, was within the statutory limits and the trial court was obligated to sentence Cyr within the standard range, absent an exceptional sentence. The trial court abused its discretion when it failed to apply the correct statutory interpretation and sentence Cyr within the standard range of the level III drug offense. This Court should affirm the Court of Appeals and remand the matter back to the trial court for resentencing.

1. Standard Of Review.

This Court reviews issues regarding statutory interpretation de novo. *State v. Dennis*, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). A trial court's misinterpretation of a statute is an abuse of discretion. *Diaz v. State*, 175 Wn.2d 457, 462, 285 P.3d 873 (2012).

2. The Trial Court Failed To Correctly Apply The Doubling Provision Of RCW 69.50.408, Which Caused The Trial Court To Erroneously Conclude The Standard Range From The Sentencing Reform Act Did Not Apply.

The issue here is the harmonization of statutes contained within different titles of the Revised Code of Washington and what statute controls the sentencing of a felony drug offense. The issue is compounded by the fact that the Uniform Controlled Substances Act predated the SRA by a decade. To further complicate matters, the legislature decided to enact a separate drug offense sentencing grid, within the SRA, 19 years after it codified the first sentencing grid for felony offenses, including drug offenses. Therefore, while each statute in question, RCW 9.94A.505, RCW 9.94A.518, RCW 69.50.408, and RCW 69.50.410, is unambiguous in its own right, it must be harmonized with the other statutes at question. It is this harmonization that led to the ambiguity.

When the courts conduct statutory interpretation the purpose “is to determine and give effect to the intent of the legislature.” *Dennis*, 191 Wn.2d at 172 (internal quotations and citations omitted).¹ When interpreting a criminal statute, the court “gives it a literal and strict interpretation.” *Id.* To determine the legislative intent, the court looks to the plain language in the statute by considering four things related to the provision at question: 1) the provision’s actual text, 2) “the context of the statute where the provision is found,” 3) any related provisions, and (4) the entire statutory scheme. *Id.* at 172-73. A statute is ambiguous if, after conducting the inquiry, “there is more than one reasonable interpretation of the plain language.” *Id.* at 173. More than one conceivable interpretation does not make a statute ambiguous. *Id.* If a statute is ambiguous the court “may rely on principle of statutory construction, legislative history, and relevant case law to discern legislative intent.” *Id.*

The crime, Selling Any Controlled Substance for Profit (Selling Heroin for Profit),² was created by the legislature two years after it enacted the Uniform Controlled Substances Act in 1971. Laws of

¹ The other citations to *Dennis* in this paragraph will also have internal quotations and citations omitted.

² The State will refer to the crime as Selling Heroin for Profit unless otherwise stated in its briefing, as throughout the SRA until the drug sentencing was adopted the crime was listed as Selling Heroin for Profit and Cyr was charged with and pleaded guilty to Selling Heroin for Profit.

1973, 2nd Ex. Sess., ch. 2, § 2; Laws of 1971, Ex. Sess., ch. 308, § 69.50.101.³ The statute, RCW 69.50.410, has remained essentially in its original form with a few minor modifications such as: adding authorization for extraordinary medical placement; changing titles of individuals listed from director to secretary and institution to department; changing the text to make the statute gender inclusive; and referencing the classification of the crime. RCW 69.50.410; Laws of 2003, ch. 53, § 342; Laws of 1999, ch. 324, §6; Laws of 1975-'76 2nd Ex. Sess., ch. 103, §1; Laws of 1973, 2nd Ex. Sess., ch. 2, § 2.⁴ In 1984, the year after the creation of the SRA sentencing grid and Table 2, which contains the crimes included in each seriousness level, Selling Heroin for Profit, was added as a level VIII offense. RCW 69.50.410; Laws of 1984, ch. 209, § 17; Laws of 1983,

³ Laws of 1973, 2nd Ex. Sess., ch. 2 is available on the Code Reviser's website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1973ex2c2.pdf>) (last visited 12/4/19)); Laws of 1971, Ex. Sess., ch. 308 is available on the Code Reviser's website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c308.pdf>) (last visited 12/4/19).

⁴ Laws of 2003, ch. 53 is available on the Code Reviser's website at (<http://lawfilesexxt.leg.wa.gov/biennium/2003-04/Pdf/Bills/Session%20Laws/Senate/5758.sl.pdf>) (last visited 12/4/19)); Laws of 1999, ch. 324 is available on the Code Reviser's website at (<http://lawfilesexxt.leg.wa.gov/biennium/1999-00/Pdf/Bills/Session%20Laws/House/1299.sl.pdf>) (last visited 12/4/19)); Laws of 1975-'76 2nd Ex. Sess., ch. 103 is available on the Code Reviser's website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1975ex2c103.pdf>) (last visited 12/4/19)).

ch. 115, § 3.⁵ The standard range for a level VIII offense in 1984 was the same as it is today: for the low end sentence, 21 to 27 months with an offender score of one; a mid-range sentence, 46 to 61 months with an offender score of five; and topping out at 108 to 144 with an offender score of nine or more. RCW 9.94A.510; Laws of 1984, ch. 209, § 16.

Selling Heroin for Profit was also enacted prior to the classification of felony crimes found in RCW 9A.20.020. Laws of 1975, 1st Ex. Sess., ch. 260, § 9A.20.020.⁶ Selling Heroin for Profit contained the language, “Except as authorized by this chapter it shall be unlawful for any person to sell for profit...” until 2004, when the 2003 technical reorganization bill became effective and the language was modified to state, “Except as authorized by this chapter it is a Class C felony[.]” RCW 69.50.410(1); Laws of 2003, ch. 53, § 342. The requirement originally written into the statute, and maintained there until 2004, that a person shall not receive a sentence of more

⁵ Laws of 1984, ch. 209 is available on the Code Reviser’s website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1984c209.pdf> (last visited 12/4/19)); Laws of 1983, ch. 115 is available on the Code Reviser’s website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1983c115.pdf> (last visited 12/4/19)).

⁶ Laws of 1975, 1st Ex. Sess., ch. 260 is available on the Code Reviser’s website at (<http://leg.wa.gov/CodeReviser/documents/sessionlaw/1975ex1c260.pdf> (last visited 12/4/19)).

than five years is consistent with the maximum penalty of a Class C felony. RCW 9A.20.020(1)(c); RCW 69.50.410.

When the legislature created a separate sentencing grid for drug offenders in 2002 it made its intent clear, there was a need for effective treatment for substance abuse, reduced recidivism for drug crimes, and a more appropriate sentencing structure. Laws of 2002, ch. 290, § 1.⁷

The legislature intends that the sentences for drug offenses accurately reflect the adverse impact substance abuse and addiction on public safety, that the public must have protection from violent offenders, and further intends that such sentences be based on polices that are supported by research and public policy goals established by the legislature.

Id. The legislature placed Selling for Profit Any Controlled Substance (Selling Heroin for Profit) as a level III offense, the highest level, on the new three-tiered seriousness level structure for drug offenses. RCW 9.94A.518; Laws of 2002, ch. 290, § 9. On the new sentencing grid, which is still in effect today, a level III offense was punished as follows: 51 to 68 months for an offender score of 0-2; 68+ to 100 months for an offender score of 3-5; and 100+ to 120 months for an offender score of 6-9 or more. RCW 9.94A.517; Laws of 2002, ch.

⁷ Laws of 2002, ch. 290 is available on the Code Reviser's website at (<http://lawfilesexternal.wa.gov/biennium/2001-02/Pdf/Bills/Session%20Laws/House/2338-S2.sl.pdf> (last visited 12/4/19)).

290, § 8. Therefore, the legislature made a policy decision to increase the standard range punishment of Selling Heroin for Profit, starting the low end of a standard range sentence 30 months later than it had been under the previous grid when it was classified as a level VIII offense. RCW 9.94A.510; RCW 9.94A.517; RCW 9.94A.518; Laws of 2002, ch. 290, §§ 7, 8, 9, 10. This decision was indicative of the legislature's purpose in enacting a separate sentencing grid for drug offenses, that the sentences for each crime are based upon the public policy goals of the legislature and accurately reflect the crime's adverse impact on both addiction and public safety. Laws of 2002, ch. 290, § 1.

A person who has been previously convicted under Chapter 69.50, and is convicted of a subsequent offense under Chapter 69.50 "may be imprisoned for a term up to twice the term otherwise authorized..." RCW 69.50.408(1). The doubling provision applies to all of Chapter 69.50, with the exception of RCW 69.50.4013, which is specifically excluded. RCW 69.50.408(3). A person convicted of Selling a Controlled Substance for Profit – Heroin, pursuant to RCW 69.50.410(1), "shall receive a sentence of not more than five years in a correctional facility of the department of social and health services for the first offense." RCW 69.50.410(2)(a). The maximum

penalty authorized by law for a first offense of RCW 69.50.410 is 60 months, therefore the doubling provision found in RCW 69.50.408 allows for the maximum sentence to become 120 months.

The legislative intent of the doubling provision and Selling Heroin for Profit can be derived from their plain language. *Dennis*, 191 Wn.2d at 172-73. If any ambiguity is found, the statutory construction and legislative history are instructive. This Court has previously noted the doubling range statute was enacted in 1971, when Washington State still employed indeterminate sentences, prior to the concept of a standard range sentence. *In re Pers. Restraint of Cruz*, 157 Wn.2d 83, 88-89, 134 P.3d 1166 (2006). Selling Any Controlled Substance for Profit was not listed as a class C felony until the 2003 amendment, but the 60 month maximum sentence language has been contained within the statute since its inception, thus supporting the interpretation that “otherwise authorized” refers to the 60 months specifically stated in RCW 69.50.410(2)(a). RCW 69.50.408; Laws of 2003, ch. 53, § 342; Laws 1971, Ex. Sess., ch. 308, § 69.50.408. Therefore, the legislative construction and history makes it simple to harmonize the two statutes, and find the doubling provision applies to Selling Heroin for Profit.

The SRA, which is the controlling chapter of the RCWs for the sentencing of felony crimes, establishes the standard range sentence for Selling Any Controlled Substance for Profit. RCW 9.94A.505; RCW 9.94A.517; RCW 9.94A.518; RCW 9.94A.530; RCW 69.50.410. “The intersection of the column defined by the offender score and the row defined by the offense seriousness score determines the standard range sentence[.]” RCW 9.94A.530. Selling Heroin for Profit, a level III offense, has a standard range of 68+ to 100 months when a person’s offender score is three to five. RCW 9.94A.517; RCW 9.94A.518; RCW 69.50.410. The statutory maximum sentence allowed for a first offense would normally be 60 months. RCW 69.50.410. “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, the presumptive sentence for a person with five points is 60 months.

This Court has previously held the doubling provision of RCW 69.50.408 does not double the standard range, only the statutory maximum sentence allowable. *In re Cruz*, 157 Wn.2d at 90. Once the doubling provision is applied to Selling Heroin for Profit, RCW 69.50.410(2)(a), the presumptive sentence of 60 months no longer

applies as the statutory maximum allowable sentence is now 120 months. Therefore, with the doubled statutory maximum, a person with an offender score of three to five becomes subject to a standard range sentence of 68+ to 100 months.

The trial court abused its discretion when it erroneously interpreted the statutes to require only a 60 month sentence. The doubling provision contained in RCW 69.50.408 requires the maximum penalty to be doubled, but grants the trial court the discretion to impose whatever sentence it deems appropriate within the standard range. *See, In re Cruz*, 157 Wn.2d at 88-90. The trial court was required to sentence Cyr within a standard range sentence, per the sentencing grid contained within the SRA, unless the trial court found an exceptional sentence was warranted and made the requisite findings.

If Selling Any Controlled Substance for Profit is limited to the sentencing structure contained within RCW 69.50.410, regardless of the statutory maximum sentence, it renders the placement of the crime on the SRA's drug offense sentencing grid meaningless. This Court "must interpret a statute so as to render no portion meaningless or superfluous." *Dennis*, 191 W.2d at 173. Therefore, this Court should affirm the Court of Appeals and remand this matter

back for resentencing to allow the trial court to use its discretion to determine an appropriate sentence for Cyr within the SRA's standard range.

IV. CONCLUSION

The trial court incorrectly interpreted the Selling Heroin for Profit statute to preclude the doubling provision of the RCW 69.50.408 from applying to it. This incorrect application led the trial court to the faulty conclusion that it was directed to limit Cyr's sentence to 60 months and the standard range contained within the Sentencing Reform Act did not apply. Therefore, the trial court abused its discretion because it incorrectly applied the law and sentenced Cyr to a term outside the standard range. This Court should reverse the sentence and remand the matter back to the trial court, with the directive that Cyr be sentenced within the standard range contained in the drug offense sentencing grid.

RESPECTFULLY submitted this 9th day of December, 2019.

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