

FILED  
Court of Appeals  
Division II  
State of Washington  
9/3/2019 4:31 PM

No. 98496-4

No. 52450-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

ALAN JENKS,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

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SECOND SUPPLEMENTAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ARGUMENT ..... 1

    1. The legislature has removed second degree robbery as a “strike” for persistent offenders. This Court should vacate Mr. Jenks’s life sentence and remand for a standard range sentence to be entered.. 1

        a. Under Ramirez, this change in law applies to cases on direct appeal..... 2

        b. Because the legislature has determined a penalty short of life imprisonment is adequate to punish this type of persistent offender, retroactive application of the new law is presumed, and it would be unjust not to apply the law equally to all similar offenders ..... 3

    2. Because Mr. Jenks’s first strike offense, committed when he was 18 years old, is no longer considered a strike in Washington, this Court should vacate his life sentence..... 8

B. CONCLUSION ..... 9

TABLE OF AUTHORITIES

**Washington Supreme Court**

*Matter of Gronquist*, 192 Wn.2d 309, 429 P.3d 804 (2018);..... 5

*State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999) ..... 5

*State v. Heath*, 85 Wn.2d 196, 532 P.2d 621 (1975) ..... 3, 4, 6

*State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018)..... 2, 3

*State v. Ross*, 152 Wn.2d 220, 95 P.3d (2004)..... 4, 6, 7

*State v. Wiley*, 124 Wn.2d 679, 880 P.2d 983 (1994)..... 6, 7

**Washington Court of Appeals**

*State v. Kane*, 101 Wn. App. 607, 5 P.3d 741 (2000)..... 4, 7

**Statutes**

LAWS of 2019, ch. 187, § 1 ..... 1, 3, 5

RCW 10.01.040 ..... 6

RCW 9.94A.345..... 4, 5

RCW 9.94A.555(2)..... 1

**Other Authorities**

Tom James, Inmates Left Out of Washington’s “Three Strikes” Reforms,  
*The Columbian* (May 21, 2019)..... 2

## A. ARGUMENT

- 1. The legislature has removed second degree robbery as a “strike” for persistent offenders. This Court should vacate Mr. Jenks’s life sentence and remand for a standard range sentence to be entered.**

On April 29, 2019, Washington passed Senate Bill 5288, eliminating second degree robbery as a “three strikes” offense. LAWS of 2019, ch. 187, § 1. This law became effective on July 28, 2019. *Id.* This new legislation is entitled “Persistent Offenders – Removing Robbery in the Second Degree.” Due to the change in law, a second degree robbery is no longer considered a “strike” for purposes of persistent offender sentencing. LAWS OF 2019, ch. 187, § 1. Mr. Jenks, whose direct appeal was pending at the time the law became effective, should benefit from this change in law.

Washington’s Persistent Offender Accountability Act (POAA) requires a court to sentence three-time, most serious offenders to prison for life without the possibility of parole. RCW 9.94A.555(2) (“three strikes” provision). Washington passed the POAA in 1994, along with approximately 24 other states in the mid-1990s, in an effort to curtail violent crime. This year, Washington scaled back those laws, as did a number of other states, in an attempt to remedy unfairly harsh

outcomes. Tom James, *Inmates Left Out of Washington’s “Three Strikes” Reforms*, The Columbian (May 21, 2019).<sup>1</sup>

- a. Under *Ramirez*, this change in law applies to cases on direct appeal.

The Washington Supreme Court recently explained that changes in the law apply prospectively to cases on appeal. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). In other words, the fact that SB 5288 was not in effect at time of Mr. Jenks’s sentencing does not matter. *See id.* In applying the change in the law as to legal financial obligations, the *Ramirez* Court found the critical issue was that Ramirez’s case “was on appeal as a matter of right and thus was not yet final under RAP 12.7” at the time the legislation was passed. *See id.* at 749.

Here, Mr. Jenks’s case was on appeal as a matter of right when the April 29, 2019 legislation passed, altering the available punishment. Mr. Jenks’s opening brief was filed on June 20, 2018. Mr. Jenks has received notification from the Clerk of Court that his appeal has been

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<sup>1</sup> <https://www.columbian.com/news/2019/may/21/inmates-left-out-of-washingtons-three-strikes-reforms/> (last accessed September 2, 2019). Mr. Jenks is one of 62 inmates that could be left in prison for the rest of his life “on a sentence that doesn’t even exist anymore.” *Id.*

set for oral argument on September 12, 2019. Mr. Jenks's appeal is not yet final, similar to Mr. Ramirez's.

Mr. Jenks received a sentence of life without the possibility of parole as a persistent offender, based upon a predicate second-degree robbery conviction from 2004. CP 110-11. The second-degree robbery conviction was Mr. Jenks's first strike, when he was 18 years old. CP 110-11; RP 417.

Under the current statute, Mr. Jenks's 2004 conviction for second-degree robbery no longer counts as a strike. LAWS OF 2019, ch. 187, § 1. As in *Ramirez*, the change the law applies to Mr. Jenks's case because it is on direct appeal and is not final. Mr. Jenks, like Mr. Ramirez and others, "is entitled to benefit from this statutory change." *Ramirez*, 191 Wn.2d at 749.

b. Because the legislature has determined a penalty short of life imprisonment is adequate to punish this type of persistent offender, retroactive application of the new law is presumed, and it would be unjust not to apply the law equally to all similar offenders.

A legislative reduction in the penalty for a crime creates a presumption that there is no purpose in executing the harsher penalty of the old law in pending cases. *See State v. Heath*, 85 Wn.2d 196, 198, 532 P.2d 621 (1975). In announcing this principle, the *Heath* Court

unanimously affirmed that a newly enacted statute granting a judge authority to stay a license revocation penalty, imposed post-conviction, applied retroactively. *Id.* at 196.

The *Heath* Court articulated two reasons for the ruling. First, the statute was remedial, creating a presumption of retroactivity in the statute. *Id.* Second, and more pertinently, the statute reduced the penalty for the crime. *Id.* at 197-98. The Court noted that when the legislature reduces the penalty for a crime,

... the legislature is presumed to have determined that the new penalty is adequate and that no purpose would be served by imposing the older, harsher one. This rule has even been applied in the face of a statutory presumption against retroactivity and the new penalty applied in all pending cases.

*Heath*, 85 Wn.2d at 96.

The State may argue *Heath* is not controlling, due to the legislature's subsequent adoption of RCW 9.94A.345 and the saving statute. *See State v. Kane*, 101 Wn. App. 607, 613, 5 P.3d 741 (2000); *State v. Ross*, 152 Wn.2d 220, 239, 95 P.3d (2004). This is not accurate.

First, RCW 9.94A.345, enacted in 2000, does not control. This statute was enacted to apply strictly to the calculation of offender scores and to determine the eligibility for sentencing alternatives. Laws of 2000,

ch. 26, § 1-2. The statute was accompanied by an explicit articulation of legislative intent – the statute was “intended to cure any ambiguity that might have led to the Washington Supreme Court's decision in *State v. Cruz*” the year before, a case about retroactivity in the calculation of offender scores. *See generally State v. Cruz*, 139 Wn.2d 186, 985 P.2d 384 (1999), *superseded by statute*.

By this plain language, RCW 9.94A.345 applies only to offender score calculation and eligibility for sentencing alternatives. The statute is silent about its possible application to a change in the POAA. RCW 9.94A.345, also known as the timing statute, should be strictly construed. The statute explicitly articulates the legislature’s intent about the circumstances to which it should apply. *But see Matter of Gronquist*, 192 Wn.2d 309, 314 n.2, 429 P.3d 804 (2018).

Calculating an offender score is an individualized determination for sentencing, whereas Senate Bill 5288, eliminating second degree robbery as a three strikes offense, is not individualized to the offender or captured by this statute. *Compare RCW 9.94A.345 to LAWS of 2019, ch. 187, § 1.*

Second, as this Court recently acknowledged, “a clearly remedial statutory amendment will be retroactively applied, regardless of whether

it contains language demonstrating legislative intent for retroactive application.” *State v. Walsh*, No. 50972-5-II, 2019 WL 2189473, at \*5 (2019) (citing *Kane*, 101 Wn. App. at 613).<sup>2</sup> The new Senate Bill removing second-degree robbery is “clearly remedial.”

Even a remedial statute must be squared with RCW 10.01.040, however, also known as the saving statute.<sup>3</sup> Washington’s general saving statute, RCW 10.01.040, was enacted over a century ago to prevent modifications to the penal code from causing the outright frustration of prosecutions. It has many exceptions and interpretations, and is to be narrowly construed; it is not applicable to declarations of legislative will that reclassify and downgrade the culpability of criminal offenses. *See Ross*, 152 Wn.2d at 139-40; *State v. Wiley*, 124 Wn.2d 679, 687, 880 P.2d 983 (1994); *Heath*, 85 Wn.2d at 198. The Supreme Court has never overruled *Heath* or this principle.

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<sup>2</sup> GR 14.1. Unpublished opinions of the Court of Appeals have no precedential value and are not binding on any court.

<sup>3</sup> The saving statute, sometimes referred to as “savings,” states in part that when a criminal statute is amended or repealed, “all offenses committed or penalties or forfeitures incurred while it was in force shall be punished or enforced as if it were in force... unless a contrary intention is expressly declared ...” RCW 10.01.040.

On the contrary, the Court has continued to reference this rule in analyzing the boundaries and exceptions of the general saving clause. *See Ross*, 152 Wn.2d at 239-40; *Wiley*, 124 Wn.2d at 687.

Division I of this Court offered a negative critique of *Heath* in *Kane*, 101 Wn. App. at 614-19. The *Kane* Court held a new statute amending eligibility criteria for a Drug Offender Sentencing Alternative (DOSA) did not apply retroactively to the defendant, Mr. Kane. *Id.* at 607. The trial court had relied on *Heath* when it found Mr. Kane eligible for the DOSA, which the appellate court deemed erroneous, reasoning that the general savings statute was not at issue in *Heath*. *Id.* at 615-16.

*Kane's* reasoning applies to a different set of law and facts. *Heath*, *Wiley*, and *Ross* all discuss circumstances of legislative will reclassifying the culpability of a criminal act with a lower sentence as an exception to the general savings clause. *Kane*, quite differently, addresses the expansion of the eligibility of sentencing alternatives for certain drug offenses – it does not involve a declaration of diminished culpability from the legislature, only an expansion of access to treatment options.

The case law contemplates situations like Mr. Jenks's, and distinguishes them from those where the saving statute applies, like amendments changing the calculation procedures in offender scoring for a particular offender.

**2. Because Mr. Jenks's first strike offense, committed when he was 18 years old, is no longer considered a strike in Washington, this Court should vacate his life sentence.**

This Court should vacate Mr. Jenks's life sentence and remand so that he can be resentenced to a standard range sentence, unless this Court reverses on one of the other grounds raised in the appellate brief.

The sentencing court in this case imposed a life sentence because at the time, a life without parole sentence was mandatory. The court noted its "frustration" with its lack of discretion under the POAA, but stated it had no choice. RP 426-27. The court stated, "I don't agree with this," referring to the "one-size-fits-all sentencing scheme." *Id.* The court sentenced Mr. Jenks to life without parole after finding it had "virtually no authority whatsoever under these circumstances to modify, alter, amend, disregard or change the [POAA] law..." *Id.*

Now the law has changed, and accordingly, Mr. Jenks's sentence should be vacated and the matter remanded so that the court

can exercise its discretion to resentence Mr. Jenks within the standard range.

#### B. CONCLUSION

Unless this Court reverses and orders a new trial on one of the grounds raised in the opening brief, the Court should vacate Mr. Jenks's life sentence and remand for resentencing within the standard range.

Respectfully submitted this 3rd day of September, 2019.

s/ Jan Trasen

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Attorney for Appellant

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DIVISION TWO**

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STATE OF WASHINGTON,	)	
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RESPONDENT,	)	
	)	
v.	)	NO. 52450-3-II
	)	
ALAN JENKS,	)	
	)	
APPELLANT.	)	

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