

NO. 66216-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

REGINALD BREAUX,

Appellant.

REC'D
AUG 11 2011
King County Prosecutor
Appellate Unit

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 AUG 11 PM 4:01

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

The Honorable Theresa Doyle, Judge

REPLY BRIEF OF APPELLANT

CHRISTOPHER GIBSON
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENTS IN REPLY</u>	1
1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR.....	1
2. THERE IS NO SUPPORT FOR THE STATE'S NOVEL CLAIM THAT ANTICIPATORY OFFENSES HAVE NO "SERIOUSNESS LEVEL".	1
3. THE RULE OF LENITY APPLIES AND REQUIRES APPLYING THE SENTENCING STATUTES IN THE MANNER MOST FAVORABLE TO BREAUX.	3
B. <u>CONCLUSION</u>	5

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

City of Aberdeen v. Regan
170 Wn.2d 103, 239 P.3d 1102 (2010).....5

State v. Brown
139 Wn.2d 757, 991 P.2d 615 (2000).....5

State v. Mendoza
63 Wn. App. 373, 819 P.2d 387 (1991)
review denied, 841 P.2d 1232 (1992).....2

State v. Salamanca
69 Wn. App. 817, 851 P.2d 1242
review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993)4

RULES, STATUTES AND OTHER AUTHORITIES

D. Boerner,
Sentencing in Washington §§ 5.8(b), 6.20 (1985).....3

RCW 9A.282

RCW 9.94A.4003

RCW 9.94A.5202

RCW 9.94A.5893, 4, 5

RCW 9.94A.5951, 2

Sentencing Reform Act of 19813

A. ARGUMENTS IN REPLY

1. THIS COURT SHOULD ACCEPT THE STATE'S CONCESSION OF ERROR.

The State correctly concedes Breaux's offender scores were miscalculated. Brief of Respondent (BOR) at 7. This Court should accept that concession and remand for resentencing.

2. THERE IS NO SUPPORT FOR THE STATE'S NOVEL CLAIM THAT ANTICIPATORY OFFENSES HAVE NO "SERIOUSNESS LEVEL".

The State argues Breaux's claim he is entitled to have the sentence for the completed first degree rape calculated based on an offender score of zero, "is built on a false premise--that an attempted crime has the same seriousness level as the corresponding completed crime." BOR at 8. The State accuses of Breaux of failing to cite "to any statute or case in support of his contention that crimes of attempts have any seriousness level, much less the identical seriousness level of the corresponding completed crime." BOR at 15.

Ironically, the State attempts to refute Breaux's claim by citing the same authority relied on by Breaux, RCW 9.94A.595, to proclaim the novel concept that "[a]nticipatory offenses do not have a 'seriousness level'", and "[s]trictly speaking, crimes of attempt do not have a

'seriousness level.'" BOR at 9, 15. The text of RCW 9.94A.595 does not support this claim:

For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy under chapter 9A.28 RCW, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent.

RCW 9.94A.595 (emphasis added).

Thus, the standard range sentence for an anticipatory offense requires identifying the appropriate range on the sentencing grid, RCW 9.94A.510, and multiplying it by 75%. The appropriate range is established by intersecting the offender score with the seriousness level for "the crime." RCW 9.94A.595. "The offense seriousness level is determined by the offense of conviction." RCW 9.94A.520. The "offense of conviction" under RCW 9.94A.520, must be the same as "the crime" under RCW 9.94A.595, which logically must be the crime attempted. That is precisely what this Court previously held; "the seriousness level of anticipatory offenses charged under RCW 9A.28 is the seriousness level of the 'completed crime'". State v. Mendoza, 63 Wn. App. 373, 377, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992). The State's unsupported claims to the contrary should be rejected.

3. THE RULE OF LENITY APPLIES AND REQUIRES APPLYING THE SENTENCING STATUTES IN THE MANNER MOST FAVORABLE TO BREAU.

The State claims application of the rule of lenity would conflict with the legislative intent to "maximize" punishment for those offenders sentenced for commission of multiple serious violent offenses. BOR at 15-20. The State's use of the term "maximize" is critical to its claim, and ultimately misleading and inapplicable.

In discussing the predecessor to RCW 9.94A.589(1)(b), this Court noted the legislative intent was to "increase" (not "maximize") punishment for those convicted of multiple serious violent offenses:

Under RCW 9.94A.400(1)(b), prior convictions and other current convictions that are not violent offenses are used to calculate the offender score and sentence range for only one of the serious violent offenses, while the sentence ranges for the other serious violent offenses are calculated by using an offender score of zero. Thus, the sentence ranges of the extra serious violent offenses are shorter than would ordinarily be the case, but the term of incarceration is longer because the sentences are served consecutively instead of concurrently. This scheme avoids double counting of convictions while ensuring increased punishment for multiple violent offenses, a clearly intended result which is consistent with the purposes of the Sentencing Reform Act of 1981. D. Boerner, Sentencing in Washington §§ 5.8(b), 6.20 (1985).

State v. Salamanca, 69 Wn. App. 817, 827-28, 851 P.2d 1242, review denied, 122 Wn.2d 1020, 863 P.2d 1353 (1993) (emphasis added).¹

The wording of RCW 9.94A.589(1)(b) reveals the Legislature intended to eliminate the 'windfall' offenders who commit multiple serious violent offenses would get if the concurrent sentence presumption applied; their overall sentence would only be as long as the longest sentence imposed. Allowing for consecutive sentences for multiple serious violent offenses eliminates this windfall.

As structured, however, the statutory scheme enacted by the Legislature does not "maximize" the sentences imposed. Rather, it provides for a standard range sentence based on the offender's criminal history for the serious violent offense with the highest seriousness level, and then provides for imposition of consecutive sentences for the remaining serious violent offenses that reflect the lowest standard range for that offense on the sentencing grid, i.e., based on an offender score of zero. RCW 9.94A.589(1)(b). Had the Legislature intended to "maximize" sentences for multiple serious violent offenders it would not have provided

¹ The State cites the same part of Salamanca as Breaux, but fails to establish how it supports the claim that the Legislature's intent is to "maximize" punishment for serious violent offenders. BOR at 18-19. The State's discussion of the 2008 Adult Sentencing Guidelines Manual is similarly unhelpful. BOR at 19.

for the sentence range for an offender's other serious violent offenses to be calculated based on an offender score of zero.

As discussed in the opening brief, left unclear under RCW 9.94A.589(1)(b) is what to do in the rare circumstances, as exists here, where there are two or more serious violent offense with the same seriousness level but with different standard ranges. Because there is no basis to conclude what the Legislature intended under these circumstances, the rule of lenity requires it be construed strictly against the State and in favor of Breaux. City of Aberdeen v. Regan, 170 Wn.2d 103, 116, 239 P.3d 1102 (2010); State v. Brown, 139 Wn.2d 757, 769, 991 P.2d 615 (2000).

B. CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse and remand for resentencing based on correct offender scores and standard range sentence calculations.

Respectfully submitted this 14th day of August 2011,

NIELSEN, BROMAN & KOCH PLLC



CHRISTOPHER H. GIBSON,
WSBA No. 25097
Office ID No. 91051
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)

Respondent,)

v.)

REGINALD BREAUX,)

Appellant.)

COA NO. 66216-3-1

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF AUGUST, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] REGINALD BREAUX
DOC NO. 254139
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF AUGUST, 2011.

x Patrick Mayovsky