

FILED
Court of Appeals
Division I
State of Washington
4/27/2022 4:33 PM

FILED
SUPREME COURT
STATE OF WASHINGTON
4/28/2022
BY ERIN L. LENNON
CLERK

Supreme Court No. 100885-6
Court of Appeals No. 83434-7-I

**Supreme Court
of the State of Washington**

State of Washington,

Respondent,

v.

Eric Barnett,

Petitioner.

Petition for Review

Kevin Hochhalter
WSBA # 43124
Attorney for Petitioner

Olympic Appeals PLLC
4570 Avery Ln SE #C-217
Lacey, WA 98503
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Identity of Petitioner	1
2. Court of Appeals Decision.....	1
3. Issues Presented for Review.....	1
4. Statement of the Case	2
4.1 There is a conflict in the firearm enhancement statute over whether an enhancement may run consecutive to the sentence for a firearm possession offense.	2
4.2 The trial court held that the enhancement must run consecutive to the possession counts. The Court of Appeals affirmed.....	4
5. Argument	7
5.1 The Court should accept review because this issue is a matter of substantial public interest.....	7
6. Conclusion.....	14

Table of Authorities

Cases

<i>In re Charles</i> , 135 Wn.2d 239, 955 P.2d 798 (1998)	10
<i>Olympic Healthcare Services II LLC v. Dep't of Social & Health Servs.</i> , 175 Wn. App. 174, 304 P.3d 491 (2013)	12
<i>State v. Berrier</i> , 110 Wn. App. 639, 41 P.3d 1198 (2002)	8
<i>State v. Conover</i> , 183 Wn.2d 706, 355 P.3d 1093 (2015)	10
<i>State v. Engel</i> , 166 Wn.2d 572, 210 P.3d 1007 (2009)	12
<i>State v. Pedro</i> , 148 Wn. App. 932, 201 P.3d 398 (2009)	8, 10

Statutes

Laws of 1995, ch. 129	7, 8, 9, 14
Laws of 1998, ch. 235	11
RCW 9.94A.533(3)	3

Rules

RAP 13.4(b).....	7
------------------	---

1. Identity of Petitioner

Eric Barnett, Appellant at the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

State v. Barnett, No. 83434-7-I (March 28, 2022).

A copy of the Opinion is provided in the appendix.

3. Issues Presented for Review

1. RCW 9.94A.533(3) contains conflicting provisions regarding whether a firearm enhancement may run consecutive to the sentence for a firearm possession offense listed in RCW 9.94A.533(3)(f). **Did the trial court and Court of Appeals err in interpreting the statute to allow a firearm enhancement to run consecutive to a firearm possession sentence?**

4. Statement of the Case

4.1 There is a conflict in the firearm enhancement statute over whether an enhancement may run consecutive to the sentence for a firearm possession offense.

Eric Barnett committed an assault while possessing a firearm. Because he had previously been convicted of a serious offense, his possession of the firearm was unlawful. He also knew that the firearm was stolen. Barnett was convicted of Second Degree Assault, Possession of a Stolen Firearm, and First Degree Unlawful Possession of a Firearm.¹

The assault conviction (Count 1) carried with it a 36-month firearm enhancement. Counts 2 and 3, being firearm possession crimes, were exempt from enhancement, under RCW 9.94A.533(3)(f):

¹ The underlying facts of the incident that led to the charges in this case are immaterial to the statutory interpretation question presented, but if the Court is curious, those facts are set forth in the Brief of Appellant at 2-5.

The firearm enhancements in this section shall apply to all felony crimes except the following: ... possessing a stolen firearm, ... unlawful possession of a firearm in the first and second degree...

However, another part of the statute provides,

If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.

RCW 9.94A.533(3). In other words, an enhancement generated by one offense may actually run consecutive to the sentence for another offense, if that other offense's sentence is longer.

Here, the question before the trial court and the Court of Appeals was what happens to a firearm enhancement when the "total period of confinement for all offenses" is defined by the sentence for firearm possession crimes that are exempt from enhancement? In such a case, the statutory provisions conflict: one

says the possession crimes cannot be enhanced, while another says they must.

4.2 The trial court held that the enhancement must run consecutive to the possession counts. The Court of Appeals affirmed.

The standard range sentences for Barnett's convictions were 33-43 months for Possession of a Stolen Firearm; 41-54 months for First Degree Unlawful Possession of a Firearm; and 43-57 months for Second Degree Assault, which also carried an additional 36-month firearm enhancement. CP 65-66. The trial court imposed 43 months for each of the two firearm charges and 57 months for the assault. CP 68.

The trial court determined that the firearm counts must run consecutive to each other. RP (Prante) 103.² The trial court initially stated that the firearm

² Barnett will continue the style of citation established in the Brief of Appellant at p.2 n.1. "RP (Prante)" refers to the VRP prepared by Carman Prante, which includes the sentencing hearing.

enhancement would run consecutive to Count 1 (assault). RP (Prante) 103. But ultimately the trial court concluded that the firearm enhancement should run consecutive to Counts 2 and 3 (the firearm possession charges), for a total of 122 months confinement (43 for Count 2, plus 43 for Count 3, plus 36 for the firearm enhancement). RP (Prante) 104; CP 68.

On appeal, Barnett argued that the exemptions in RCW 9.94A.533(3)(f) prohibited running a firearm enhancement consecutive to the sentence for a firearm possession crime. Br. of App. 8-13, Reply Br. 2-9. He argued that the logic of this legislative intent was simple: Because a person committing one of these exempt crimes is already being punished for possessing a firearm, the addition of an enhancement based on the same underlying act—possessing a firearm—would be an unfair and unnecessary double punishment. Br. of App. 8-9.

Barnett argued that this logic was built into the original language of the statute. *E.g.*, Reply Br. 5-6.

While the 1998 amendments in reaction to *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998), clarified that multiple firearm enhancements must run consecutive to each other, the amendments did not indicate any intent to change the original logic of exempting firearm possession crimes from enhancement. *E.g.*, Reply Br. 6.

The Court of Appeals disagreed. In its published opinion on this question of first impression, the court concluded that the current language of the statute unambiguously required Barnett's firearm enhancement to run consecutive to the possession counts. Opinion at 3-4. The court reasoned,

The plain language of RCW 9.94A.533(3) specifies that if any firearm enhancement is imposed for an eligible crime, it must be added “to the total period of confinement for all offenses.” (emphasis added). It does not say that the firearm enhancement is to be

added to the total period of confinement for all “eligible offenses.”

Opinion at 4. The court held that there was no conflict in the statutory language and affirmed Barnett’s sentence.

5. Argument

A petition for review should be accepted when the case involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b).

5.1 The Court should accept review because this issue is a matter of substantial public interest.

The statute at issue originated as part of the “Hard Time for Armed Crime” initiative. *See Laws of 1995*, ch. 129 (Initiative Measure No. 159). The purpose of the initiative was “to ‘punish armed offenders more harshly to discourage the use of firearms,’ except when the ‘possession or use of a firearm is a necessary element of the underlying crime

itself.” *State v. Pedro*, 148 Wn. App. 932, 946, 201 P.3d 398 (2009) (quoting *State v. Berrier*, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002)). The public has a substantial interest in the integrity and proper interpretation and implementation of the initiative they enacted. This Court should accept review, reverse, and remand for resentencing.

The original language of the initiative made a clear distinction between the exempt crimes, which could not be enhanced because they already punished possession of a firearm, and other crimes, which could be enhanced. An offender “being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements,” which was committed while “armed with a firearm,” would have a firearm enhancement “added to the standard sentence range” for the offense. **Laws of 1995**, ch. 129, sec. 2(3). The firearm enhancements “are mandatory, shall be served in total confinement, and shall not run concurrently

with any other sentencing provisions.” **Laws of 1995**, ch. 129, sec. 2(3)(e). However, “The firearm enhancements in this section shall apply to all felony crimes except the following: ... possessing a stolen firearm, ... unlawful possession of a firearm ...” **Laws of 1995**, ch. 129, sec. 2(3)(f).

The courts understood the inherent logic in this distinction between the exempt crimes and non-exempt crimes:

The clear distinction between the exempt and nonexempt crimes is as the *Berrier* court articulated: all of the exempt crimes involve use or possession of a firearm as the underlying crime. Persons committing the exempt crimes receive sentences specifically for use or possession of a firearm—the use or possession is a necessary element of the exempt crimes. Without the use or possession of a firearm, there would be no sentence.

In contrast, persons committing first degree assault receive a sentence for intentional infliction of great bodily harm, which can be committed various ways—use of a firearm or deadly weapon, exposure or transmission

of HIV, or the infliction of great bodily harm without a weapon. Use of a firearm is only one way assault is elevated to first degree. The sentence for first degree assault is the same regardless of whether the defendant uses a firearm. The enhancement under RCW 9.94A.533(3)(a) recognizes the additional threat that first degree assault with a firearm poses—consistent with the statute’s purpose of punishing armed offenders more harshly.

Pedro, 148 Wn. App. at 946-47. Following this logic reveals the intent behind the statutory distinction, that a firearm enhancement should not be applied to enhance the sentence for an offense that is on the exempt list.

The statutory language on which the trial court and Court of Appeals relied was added by the legislature in 1998 in response to this Court’s decision in *In re Charles*, 135 Wn.2d 239, 955 P.2d 798 (1998), which had held that multiple firearm enhancements could run concurrent with each other. *See State v. Conover*, 183 Wn.2d 706, 713-14, 355 P.3d 1093 (2015).

The legislature clarified that multiple firearm enhancements must run consecutive to each other, by adding language such as, “If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement,” and that enhancements “shall run consecutively to all other sentencing provisions, including other firearm or other deadly weapon enhancements, for all offenses sentenced under this chapter.” **Laws of 1998**, ch. 235, sec. 1(3) and 1(3)(e). The legislature did not change the language of the exempt list or its underlying logic.

“The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Engel*, 166

Wn.2d 572, 578, 210 P.3d 1007 (2009). Here, the context of the statute, related provisions, and the statutory scheme as a whole support the underlying logic expressed in *Pedro*, that the standard sentences for crimes in the exempt list already sufficiently punishes the use of firearms inherent in those crimes, and that adding an enhancement on top of that would be an unnecessary and unjust double punishment.

While undertaking a plain language analysis, the court will still avoid a literal reading if it would result in “unlikely, absurd, or strained consequences because we presume that the legislative body did not intend absurd results.” *Olympic Healthcare Services II LLC v. Dep’t of Social & Health Servs.*, 175 Wn. App. 174, 187-88, 304 P.3d 491 (2013). It is unlikely that the legislature, in responding to *Charles*, also intended to contradict the sound logic that animated the exemption of some crimes from being subject to firearm enhancements. Thus, the Court of Appeals’ literal

reading of the amended language should be rejected because it results in strained consequences—the enhancement of the punishment for a firearm possession crime based on possession of a firearm. This result defies logic and should be avoided.

Rather, this Court should hold that the legislature intended that the crimes listed in RCW 9.94A.533(3)(f) should remain exempt from having their sentences enhanced by running a firearm enhancement consecutive to the sentence for the exempt crime. In this case, that would mean that the firearm enhancement for Count 1 could not run consecutive to the sentence for Counts 2 and 3. Instead, the enhancement could only run consecutive to Count 1, the longest remaining non-exempt offense. This would shorten Barnett's total period of confinement from 122 months under the Court of Appeals' interpretation to 93 months under Barnett's

interpretation (57 months for Count 1 plus 36 months for the enhancement).

6. Conclusion

The legislative findings enacted in the original initiative demonstrate the substantial public interest in ensuring appropriate punishment of crimes committed with firearms. *See Laws of 1995*, ch. 129, sec. 1. That substantial interest has not diminished over the years, as firearm crimes have continued to plague our communities. The initiative as a whole, even as amended, also demonstrates the underlying, sound logic of exempting firearm possession crimes from further enhancement. The Court of Appeals decision in this case throws that logic out the window in favor of a literal reading of amendments that were intended for a completely different purpose. This Court should accept review and reverse the Court of Appeals.

I certify that this document contains 2,051 words.

Submitted this 27th day of April, 2022.

/s/ Kevin Hochhalter

Kevin Hochhalter, WSBA #43124

Attorney for Petitioner

kevin@olympicappeals.com

Olympic Appeals PLLC

4570 Avery Ln SE #C-217

Lacey, WA 98503

360-763-8008

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	No. 83434-7-I
)	
Respondent,)	DIVISION ONE
)	
v.)	PUBLISHED OPINION
)	
ERIC BARNETT,)	
)	
Appellant)	
_____)	

ANDRUS, A.C.J. — Eric Barnett appeals the duration of his prison sentence imposed after a jury convicted him of second degree assault with a firearm, first degree unlawful possession of a firearm, and possession of a stolen firearm. He argues the trial violated RCW 9.94A.533(3)(f) when it imposed a 36-month firearm enhancement to run consecutively to the sentences he received for the firearms offenses. We disagree and affirm.

FACTS

On April 5, 2019, Barnett assaulted his friend, Dylan Hjelm, with a stolen .22 caliber revolver. The State charged Barnett with second degree assault with a firearm enhancement, possession of a stolen firearm, and because he had a prior serious felony conviction, first degree unlawful possession of a firearm. The jury found Barnett guilty as charged.

The trial court imposed a high end standard range sentence of 57 months for the second degree assault conviction and a high end standard range sentence of 43 months for each of the two firearm offenses. The court ordered that the firearm offense sentences be served concurrently to the second degree assault sentence but, pursuant to RCW 9.94A.589(1)(c),¹ ordered that they be served consecutively as to each other, for a period of confinement of 86 months. The court also ordered that the 36-month firearm enhancement, imposed under RCW 9.94A.533(3)(b) as a result of the assault conviction, run consecutive to Barnett's total period of confinement, resulting in a total sentence of 122 months. Barnett appeals the duration of his sentence.

ANALYSIS

Barnett argues that the trial court violated RCW 9.94A.533(3)(f) when it ordered the firearm enhancement to run consecutive to the firearm possession offenses. We disagree.

We review issues of statutory interpretation de novo. State v. Dennis, 191 Wn.2d 169, 172, 421 P.3d 944 (2018). The purpose of statutory interpretation is to give effect to the intent of the legislature. State v. Sweany, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). To derive legislative intent, we look to the “plain language

¹ RCW 9.94A.589(1)(c) provides

If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole.” State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). If the statute's meaning is unambiguous, our inquiry ends. State v. Armendariz, 160 Wn.2d 106, 110, 156 P.3d 201 (2007).

We conclude RCW 9.94A.533(3)² is unambiguous. It provides in pertinent part:

(3) The following additional times shall be added to the standard sentence range for felony crimes committed after July 23, 1995, if the offender or an accomplice was armed with a firearm as defined in RCW 9.41.010 and the offender is being sentenced for one of the crimes listed in this subsection as eligible for any firearm enhancements based on the classification of the completed felony crime. If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement. . . . :

. . . .
(b) Three years for any felony defined under any law as a class B felony or with a statutory maximum sentence of ten years, or both, and not covered under (f) of this subsection;

. . . .
(e) Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements, for all offenses sentenced under this chapter. . . .

(f) The firearm enhancements in this section shall apply to all felony crimes except the following: Possession of a machine gun or bump-fire stock, possessing a stolen firearm, drive-by shooting, theft of a firearm, unlawful possession of a firearm in the first and second degree, and use of a machine gun or bump-fire stock in a felony . . . (Emphasis added.)

² RCW 9.94A.533 was amended in 2020. LAWS OF 2020, ch. 330, § 1. These amendments do not impact the analysis here. Any reference to the statute in this opinion is to the version in effect at the time.

Barnett contends that RCW 9.94A.533(3) and (3)(f) conflict, requiring us to harmonize these provisions in his favor to preserve the legislative intent and avoid unjust results. We see no conflict. RCW 9.94A.533(3)(f) merely lists crimes which are exempt from the firearm enhancement. This subsection is silent on how firearm enhancements should be served when an offender has multiple convictions, some eligible for an enhancement and some not. RCW 9.94A.533(3), by contrast, explicitly states how courts should calculate the total period of confinement in such a situation. Because these provisions address different operations of the statute, they are not in conflict.

Barnett argues that RCW 9.94A.533(f) is evidence that the legislature did not intend for any firearm enhancement to run consecutively to a sentence for a firearm offense. But this argument would require us to add words not present in the statute. The plain language of RCW 9.94A.533(3) specifies that if any firearm enhancement is imposed for an eligible crime, it must be added “to the total period of confinement for all offenses.” (emphasis added). It does not say that the firearm enhancement is to be added to the total period of confinement for all “eligible offenses.” Our interpretation is consistent with RCW 9.94A.533(3)(e) which states that firearms enhancements “shall run consecutively to all other sentencing provisions.” Again, the legislature did not choose to run the enhancement consecutively only to “all other sentencing provisions, except those relating to firearm offenses.” When we interpret statutes, we will not “add words where the legislature has chosen not to include them.” Rest. Dev., Inc. v. Canawill, Inc., 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Barnett's total period of confinement was 86 months. Thus, the trial court correctly added the 36-month firearm enhancement to his 86-month sentence.

We affirm.

Andrus, A.C.J.

WE CONCUR:

Smith, J.

Appelwick, J.

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on April 27, 2022, I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal and a copy was sent to Eric Barnett, via United States Mail, first class postage prepaid, to the address listed below.

Norma J. Tillotson
Karleen Dorn
Deputy Prosecuting Attorney
Appeals@co.grays-harbor.wa.us

Eric S. Barnett, #417636
Washington State Penitentiary
1313 North 13th Avenue
Walla Walla, WA 99362

SIGNED in Lewis County, WA, this 27th day
of April, 2022.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Appellant
kevin@olympicappeals.com
Olympic Appeals PLLC
4570 Avery Lane SE, #C-217
Lacey, WA 98503
360-763-8008

OLYMPIC APPEALS PLLC

April 27, 2022 - 4:33 PM

Transmittal Information

Filed with Court: Court of Appeals Division I
Appellate Court Case Number: 83434-7
Appellate Court Case Title: State of Washington, Respondent v Eric S. Barnett, Appellant
Superior Court Case Number: 19-1-00208-8

The following documents have been uploaded:

- 834347_Petition_for_Review_20220427163304D1365495_9282.pdf
This File Contains:
Petition for Review
The Original File Name was Petition for Review 2022-04-27.pdf

A copy of the uploaded files will be sent to:

- appeals@co.grays-harbor.wa.us
- ntillotson@co.grays-harbor.wa.us
- wleraas@co.grays-harbor.wa.us

Comments:

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
4570 AVERY LN SE #C-217
LACEY, WA, 98503
Phone: 360-763-8008

Note: The Filing Id is 20220427163304D1365495