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SUPREME COURT
STATE OF WASHINGTON
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No. 102352-9-II
COA No. 56533-1-II

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALYSE MARIE WAGNER,

Appellant.

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

The Honorable James J. Dixon, Judge
Cause No. 19-1-02229-34

ANSWER TO PETITION FOR REVIEW

Joseph J.A. Jackson
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO REVIEW

1. Whether review is warranted under RAP 13.4(b), where prior precedent of this Court is consistent with the decision of the Court of Appeals which found that the law at the time of commission of Wagner's offense applied to her case.

B. STATEMENT OF THE CASE

On December 2, 2019, the State charged Alyse Wagner, among other charges, with one count of criminal impersonation in the first degree, a class C felony. RP 196–97; CP 3. At a preliminary appearance, November 27, 2019, the trial court noted that Wagner was before the Court in this cause number for suspicion of identity theft and unlawful possession of a controlled substance and also before the Court due to a warrant in cause number 19-1-01071-34, issued for failure to appear. RP 4-5. The trial court noted that Wagner had been on warrant status for

“approximately four months.” RP 5. The trial court set conditions which included bail. RP 7.

After release under these conditions, Wagner failed to appear for the omnibus hearing and as a result, the court ordered a no bail no walk bench warrant on January 23, 2020. RP 209-16. On February 13, 2020, the State amended the charges and added one count of bail jumping under RCW 9A.76.170; CP 4. A second amended information was filed on March 18, 2021, which removed a possession of controlled substance charge following the decision of our State Supreme Court in State v. Blake, 197 Wn.2d 170, 481 P.3d 521 (2021). CP 5.

On June 11, 2020, while Wagner was awaiting trial, the legislature adopted Engrossed Substitute House Bill 2231, which narrowed the crime of bail jumping. LAWS OF 2020, ch. 19, § 1. Under the new law, the crime of bail jumping applies only to persons who receive written notice of a required personal appearance *for trial*. Id. (emphasis

added). For other failures to appear, the 2020 legislation created a new crime of “failure to appear or surrender,” a lesser included offense of bail jumping. LAWS OF 2020, ch. 19, § 2 (codified at RCW 9A.76.190).

In motions in limine at trial, defense counsel asked the trial court to consider the effective date of the new legislation. RP 35. The prosecutor cited to State v. Brake, 15 Wn.App.2d 740, 476 P.3d 1094 (2020). RP 35. Defense counsel acknowledged Brake and stated, “I just want to make a record that we do move to dismiss that count because the law has changed since Ms. Wagner was charged with bail-jumping. However, the appeal courts disagree with my opinion.” RP 35-36. The trial court denied the motion to dismiss. RP 36.

Officer Matthew Berry, formerly of the Lacey Police Department, testified that on November 26, 2019, he assisted with a suspicious vehicle investigation. RP 168-170. He contacted a female who was in the passenger

seat of the vehicle who identified herself as Charlie Wagner and provided a date of birth of September 26, 1991. RP 172-173. Officer Berry noted that she paused and looked up when asked for a date of birth which caused him concern. RP 173. Officer Berry looked up Charlie Wagner and requested that dispatch send a DOL photo for him to look at. RP 173. The female he was speaking with told him that her weight had changed since the photo was taken and also said that her eye color had changed since the photo was taken. RP 173-174. Officer Berry looked up associates of Charlie Wagner and found the name Alyse Marie Wagner, date of birth January 20, 1988. RP 175. A photo resembled the female he was speaking with and a tattoo on one of her wrists matched the description of the Alyse Wagner. RP 176. Officer Berry indicated that he was able to identify Wagner at the scene and identified her in the courtroom. RP 176-177. He indicated that during

his investigation, he found an outstanding warrant for Alyse Wagner. RP 177.

Sergeant Kevin Landwehrle of the Lacey Police Department testified that he utilized a fingerprint scanner and confirmed that the person Officer Berry had contacted was Alyse Marie Wagner. RP 186-188. Thurston County Senior Deputy Prosecuting Attorney, Wayne Graham, testified at trial regarding the bail jumping charge. RP 193. Graham testified regarding the charging and release conditions in Wagner's case. RP 196-197, 198-201. He testified regarding the trial continuance that occurred on December 11, 2019, which set a hearing for January 21, 2020. RP 202-203. Graham also testified that he was present for the hearing on January 21, 2020, and signed as a witness to the fact that Wagner failed to appear at the hearing. RP 209-211.

At the conclusion of the trial, the jury found Wagner guilty of criminal impersonation in the first degree and bail-

jumping. RP 274. At the sentencing hearing, the trial court imposed a standard range sentence of 9 months on each charge with the option of electronic home monitoring. RP 304, CP 74-84.

In the direct appeal, the Court of Appeals held that the changes to RCW 9A.76.170 do not apply retroactively to Wagner's bail jumping charge. State v. Wagner, No 56533-1-II (Unpublished Opinion) at 1. Wagner seeks review of that holding.

C. ARGUMENT

A petition for review will be accepted by this Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). Wagner argues that the decision of the Court of Appeals conflicts with this Court's decisions in State v. Jefferson, 192 Wn.2d 225, 429 P.3d 467(2018) and State v. Ramirez, 191 Wn.2d 732, 426 P.3d 714 (2018). For the reasons below, there is no basis upon which review should be accepted.

2. The decision of the Court of Appeals is correct and does not conflict with prior precedent of this Court.

A statute operates prospectively, rather than retroactively, if the precipitating event under the statute occurred after the date of enactment." State v. Jenks, 197 Wn.2d 708, 715, 487 P.3d 482 (2021) (*quoting*, In re Pers. Restraint of Carrier, 173 Wn.2d 791, 809, 272 P.3d 209 (2012) (internal quotations omitted)). See Jefferson, 246 (noting a newly enacted statute will only be applied to proceedings if the "triggering event" to which the new

enactment might apply has not yet occurred). “To determine what event precipitates or triggers application of the statute, we look to the subject matter regulated by the statute.” Jenks, at 715.

The general rule is that a defendant’s sentence is meted out in accordance with the law in effect at the time of the offense. Jenks, at 714. This rule derives from the application of two sources: (1) RCW 9.94A.345, a provision of the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW; and (2) RCW 10.01.040, the general saving statute. Id. First, RCW 9.94A.345 states, “Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.” Second, RCW 10.01.040, the general saving statute, states:

No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repealed, whether such repeal be express or implied, shall be affected by such repeal, unless a

contrary intention is expressly declared in the repealing act Whenever any criminal or penal statute shall be 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, notwithstanding such amendment or repeal, unless a contrary intention is expressly declared in the amendatory or repealing act, and every such amendatory or repealing statute shall be so construed as to save all criminal and penal proceedings, and proceedings to recover forfeitures, pending at the time of its enactment, unless a contrary intention is expressly declared therein.

“The savings statute creates an easily administered, bright-line rule.” State v. Kane, 101 Wn.App.2d. 607, 618, 5 P.3d 741 (2000). Under the savings statute, “courts must sentence a defendant in accordance with the law in effect on the date he or she committed the crime.” State v. Ross, 152 Wn.2d 220, 236–37, 95 P.3d 1225 (2004).

E.S.H.B. 2231 effectively amends RCW 9A.76.170 to create a new offense of failure to appear. However, nothing in the bill indicates a desire that the amendments be applied retroactively. See Brake, at 747

(holding that because there is no clear legislative intent that the 2020 amendments to former RCW 9A.76.170 apply retroactively, “the version of the statute in effect on the date of . . . [the] offense is the one that applies.”); State v. Larsen, No. 54353-2-II, 2021 WL 5903327, at *5 (Div. II Dec. 14, 2021)¹ (concluding former RCW 9A.76.170 applies to the date of defendant’s bail jumping offense).

In Ramirez, this Court held that amendments to the statutes which govern legal financial obligations applied prospectively to Ramirez’s case because the LFO statutes “pertain to costs imposed on criminal defendants following conviction, and Ramirez’s case was pending on direct review and thus not final when the amendments were enacted.” The court concluded that as the “precipitating event” was the termination of the defendant’s case and as “Ramirez’s case was not yet final when the amendments

¹ Unpublished Opinion offered under GR 14.1.

were enacted, Ramirez is entitled to benefit from this statutory change.” Id. at 749.

However, in Jenks, this Court declined to expand Ramirez to all cases where appeals were not yet finalized, but rather limited Ramirez’s holding to “costs imposed on criminal defendants following conviction.” Ramirez, at 585 (quoting, Ramirez, at 747); see, e.g. State v. Molia, 12 Wn. App. 2d 895, 903, 460 P.3d 1086 (2020), review denied, 198 Wn.2d 1010, 495 P.3d 829 (2021) (concluding that Ramirez does not require the triggering event to be the termination of Molia’s appeal because of its procedural posture and because [Ramirez] concerned only costs and fees attendant to a sentence rather than the sentence itself). The distinction is the triggering event. For Wagner, the triggering event is the date of the offense, not the sentencing hearing. Ramirez is not inconsistent with the decision of the Court of Appeals. Similarly, in Jefferson, this Court noted that the triggering event for GR 37 was

voir dire and declined to apply GR 37 to a *Batson* challenge. Jefferson, at 225. Because the triggering event of the statutory amendment in this case was the commission of the offense, the statute does not apply to offenses committed before the effective date of the statute.

Wagner's citation to State v. Wiley, 124 Wn.2d 679, 687, 880 P.2d 983 (1994), does not provide a basis upon which review should be accepted. In Wiley, this Court held that when a statutory amendment merely changes the elements of a crime the original classification of the crime must be used when calculating an offender score, however, the reclassification of an entire crime to lower a punishment level applies retroactively to the calculation of an offender score. Wiley, at 682, 685-686. In Ross, the Supreme Court acknowledged that Wiley did not address the savings clause of RCW 10.01.040. Id., at 239. See Jenks, at 725 (concluding that Wiley does not apply for the same reason listed in Ross as it did not "address the effect

of the savings clause”). Like the court concluded in Jenks and Ross, the decision in Wiley does not support Wagner’s claim that the amendments effective June 11, 2020, should apply to her case.

Here, the 2020 amendments to RCW 9A.76.170 do not apply retroactively. As concluded in Brake, E.S.H.B. 2231 does not contain words that fairly convey the intention that it apply retroactively, and this is not a situation where the legislature reclassified the entire crime. The application of RCW 10.01.040 and RCW 9.94A.345 require that the provisions apply only to acts which occur on or after the effective date of June 11, 2020, and thus Wagner is not entitled to retroactive application of the 2020 amendments.

Finally, Wagner cites to State v. Grant, 89 Wn.2d 678, 682, 575 P.2d 210 (1978) and Dorsey v. United States, 567 U.S. 260, 275, 132 S. Ct. 2321, 183 L. Ed. 2d 250 (2012), to argue that the decision of the Court of Appeals is incorrect. In Dorsey, the United States

Supreme Court stated that Congress remains free to express any intention to repeal an earlier statute either expressly or by implication. Dorsey, at 274. In Grant, this court concluded that the expression of intention must be sufficient to overcome the presumption included in RCW 10.01.040. 89. Grant, at 684. More recently in Jenks, this Court clarified that if a statute is unambiguous, its plain language provides the beginning and end of the analysis. Jenks, at 714.

The Court of Appeals correctly followed its prior decision in Brake, which looked at the plain language of the statute and determined that the statute was unambiguous and that there was no clear legislative intent that the 2020 amendments to the bail jumping statute apply retroactively. Brake, at 747. The legislature was free to express their intention to repeal the earlier statute. However, there was no evidence in the language of the statute that it was meant to apply retroactively. As stated in the decision, the court

does not “have the power to read into a statute that which we may believe the legislature has omitted.” Brake, at 747.

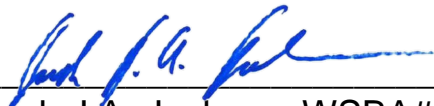
There is no basis under RAP 13.4(b) upon which this Court should accept review.

D. CONCLUSION

For the reasons stated above, the Court of Appeals correctly determined that the amendment to the bail jumping statute neither applied retroactively nor prospectively to Wagner’s case because Wagner committed the crime of bail jumping prior to the enactment and effective date of the amendment. The State respectfully requests that this Court deny review.

I certify that this document contains 2,358 words, not including those portions exempted from the word count, as counted by word processing software, in compliance with RAP 18.17.

Respectfully submitted this 4th day of October
2023.



Joseph J.A. Jackson, WSBA# 37306
Attorney for Respondent

DECLARATION OF SERVICE

I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, in The Supreme Court, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Dated this 4th day of October 2023.

Signature: Stephanie Johnson

THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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