NO. 43523-3-II

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

STATE OF WASHINGTON, Respondent

v.

ROBERT CARL WHITEASH, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.11-1-02061-4

BRIEF OF RESPONDENT

Attorneys for Respondent:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney
1013 Franklin Street
PO Box 5000
Vancouver WA 98666-5000
Telephone (360) 397-2261

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

A. RESPONSE TO ASSIGNMENTS OF ERROR

I. **WHITEASH'S TWO PRIOR FEDERAL CONVICTIONS FOR IMPORTING HEROIN (COUNTS V AND VI FROM SUPERSEDING INDICTMENT CR77-81S) SHOULD NOT HAVE BEEN COUNTED IN HIS OFFENDER SCORE.**

II. **WHITEASH'S TWO PRIOR FEDERAL CONVICTIONS FOR POSSESSION OF HEROIN WITH THE INTENT TO DELIVER WERE PROPERLY INLCUDED IN HIS OFFENDER SCORE AS THEY DIRECTLY COMPARE TO THE WASHINGTON CRIME OF POSSESSION OF HEROIN WITH THE INTENT TO DELIVER, A CLASS B FELONY, AND THEY WERE CORRECTLY CLASSIFIED.**

B. STATEMENT OF THE CASE

The issues presented in this case are purely legal and Respondent accepts Whiteash's statement of the case.

C. ARGUMENT

III. **WHITEASH'S TWO PRIOR FEDERAL CONVICTIONS FOR IMPORTING HEROIN (COUNTS V AND VI FROM SUPERSEDING INDICTMENT CR77-81S) SHOULD NOT HAVE BEEN COUNTED IN HIS OFFENDER SCORE.**

Whiteash argues that his two prior convictions for importing heroin should not have been included in his offender score because they have washed out. The State agrees with Whiteash. His two convictions for importing heroin under the superseding indictment number CR77-81s are

not clearly comparable to any Washington offense and are offenses that are normally subject to exclusive federal jurisdiction. See RCW 9.94A.525 (3). As such, they should have been treated as class C felonies for scoring purposes. The State concedes this assignment of error. Two points must be removed from Whiteash's offender score and he must be resentenced.

IV. WHITEASH'S TWO PRIOR FEDERAL CONVICTIONS FOR POSSESSION OF HEROIN WITH THE INTENT TO DELIVER WERE PROPERLY INCLUDED IN HIS OFFENDER SCORE AS THEY DIRECTLY COMPARE TO THE WASHINGTON CRIME OF POSSESSION OF HEROIN WITH THE INTENT TO DELIVER, A CLASS B FELONY, AND THEY WERE CORRECTLY CLASSIFIED.

Whiteash argues that his two prior convictions for possession of heroin with the intent to deliver (also committed in 1977) should have washed out of his offender score rather than be treated as the equivalent of class B felonies in Washington. The State disagrees.

As an initial matter, it must be noted that Whiteash does not argue in this appeal, nor did he argue below, that the federal crime of possession of heroin with the intent to deliver is not comparable—elements-wise—to the Washington crime of possession of heroin with the intent to deliver (a class B felony), or that it wasn't comparable in 1977 (see, e.g., *State v. Weiand*, 66 Wn.App. 29, 33, 831 P.2d 749 (1992) ("[W]hen comparing the elements of an out-of-state crime with the elements of potentially

comparable Washington crimes, Washington courts must use the Washington elements in effect on the date that the out-of-state crime was committed.") Instead, Whiteash argues in this appeal that because at the time he committed his comparable federal crime (1977) the Washington crime of possession of heroin with the intent to deliver was not yet classified as a class B felony, it cannot now (or ever) be classified as such. The State disagrees. He argues that RCW 9.94A.525 (3) is ambiguous. It is not.

RCW 9.94A.525 (3) provides:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

Questions of statutory interpretation are reviewed de novo. *State v. Gonzalez*, 168 Wn.2d 256, 263, 226 P.3d 131, *cert. denied* 131 S.Ct. 318 (2010); *State v. Evans*, 164 Wn.App. 629, 633, 265 P.3d 179 (2011); *State v. Aziparte*, 140 Wn.2d 138, 140-41, 995 P.2d 31 (2000). The first step a reviewing court takes in interpreting a statute is to examine the plain language of the statute. *Gonzalez* at 236.

> A statute's "[p]lain meaning '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.'" *Gonzalez*, 168 Wn.2d at 263 (quoting *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the statute is unambiguous, upon reviewing its plain meaning, our inquiry is at an end.

Evans at 633, citing *Gonzlazez*, supra, at 263. See also *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations, not "merely because different interpretations are *conceivable*." *Evans* at 633 (emphasis added), citing *Gonzalez* at 263. "An unambiguous statute does not become ambiguous merely because it disfavors a person in a particular situation. Courts may not construe unambiguous statutes." *State v. Teitzel*, 109 Wn.App. 791, 793, 37 P.3d 1236 (2002), citing *Aziparte*, supra, at 141.

It is only when a statute is deemed ambiguous that the reviewing court "may rely on the standard aids to statutory construction." *State v. Cooper*, No. 86733-0 (Supreme Court of Washington, February 14, 2013), slip opinion at 5; *Roggenkamp*, supra, at 621. The rule of lenity is not available until such time as the reviewing court finds the statute in question to be ambiguous. *In re Personal Restraint of Stenson*, 153 Wn.2d 137, 149 n.7, 102 P.3d 151 (2004); *Evans*, supra, at 637.

Whiteash argues that RCW 9.94A.525 is ambiguous because it doesn't instruct sentencing courts how to determine the washout periods for unclassified crimes—"that is, offenses that are not designated as A, B, or C felonies." See Brief of Appellant at 8. However, this issue is controlled by case law. Crimes which occurred before 1975, at which time RCW 9A.20.020 (supra) was enacted to reclassify felonies, are scored according to their current classification. *State v. Breedlove*, 79 Wn.App. 101, *State v. McCorkle*, 88 Wn.App. 485, 495, 945 P.2d 736 (1997); *State v. Weiand*, 66 Wn.App. 29, 34 n.10, 831 P.2d 749 (1992); *State v. Johnson*, 51 Wn.App. 836, 759 P.2d 459, *review denied*, 111 Wn.2d 1008 (1988). After 1975, crimes which were classified according to RCW 9A.20.020 are given the classification in effect for the crime at the time the offense was committed. *McCorkle*, supra, at 495. RCW 9A.20.020, by its terms, applies only to "classified" felony crimes, which possession of heroin with intent to deliver was not at the time of Whiteash's prior federal offense.[1] Thus, violations of RCW 69.50.401 that occurred in 1977 were "unclassified," just as felony convictions under Title 9A prior to 1975 were. Applying the rule in *Johnson, McCorkle* and *Weiand*, supra, those convictions should be treated the same as Title 9A convictions

[1] RCW 9.94A.035, enacted in 1995, provides that all crimes not under Title 9A, not otherwise classified, shall be treated as a class B felony if they are punishable by more than eight but less than twenty years imprisonment.

occurring prior to 1975--by classifying them according to their current classification.

Even if the statute is ambiguous, the rule of lenity does not automatically control disposition of the case. If a statute is ambiguous, the reviewing court may look to legislative history for insight into legislative intent. *State v. Kazeck*, 90 Wn.App. 830, 833, 953 P.2d 832 (1998). Moreover, statues must be construed so that all language is given effect and the court must avoid constructions "that yield unlikely, strange, or absurd consequences." *State v. Keller*, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001).

As noted above, the plain language of RCW 9.94A.525 (3) requires the trial court to assign classification to a comparable foreign conviction "according to the comparable offense definitions *and sentences* provided by Washington law." (emphasis added). But even looking to the legislative history of RCW 69.50.401, it is clear that the legislature, at the time of Whiteash's comparable federal crime, intended possession of heroin with the intent to deliver to be treated as the equivalent of a class B felony. The statute provided that any person who violates that section with respect to a Schedule I or Schedule II narcotic drug was guilty of a felony punishable by not more than ten years imprisonment and a fine of not

more than twenty-five thousand dollars[2]. See former RCW 69.50.401 (a) (1) (i), (1974 Revised Code of Washington). This sentencing provision appeared in the statute at the time of its original codification in 1971. See 1971 ex.s c 308 § 69.50.401. The legislature clearly intended that possession of heroin with the intent to deliver be treated, at that time, as the equivalent of a class B felony. Notably, in Title 9A, the legislature has said that for classified crimes committed prior to 1984, the maximum punishment for a class B felony is imprisonment for a term of not more than ten years and/or by a fine of not more than twenty thousand dollars. See RCW 9A.20.020 (b). It would be absurd to suggest that the legislature, at any time following the codification of RCW 69.50.401, intended for possession of heroin with the intent to deliver to be treated as the equivalent of a class C felony.[3] As the *Breedlove* Court observed:

---

[2] Indeed, the punishment available under former RCW 69.50.401 was harsher than is currently available, in that the maximum fine was higher.

[3] It is worth noting what Whiteash does *not* argue in this appeal. Even assuming that possession of heroin with the intent to deliver was treated as the equivalent of a class C felony in Washington at the time he committed his comparable federal offense (which it wasn't), he does not argue that he has a vested right to have his prior conviction be treated that way in perpetuity. He does not argue that treating his prior conviction as a class B felony in a current sentencing proceeding would be an ex post facto violation. See e.g. *In re Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988) (holding that the use of a defendant's pre-SRA convictions to determine his offender score for an SRA crime does not increase punishment for the prior offenses or violate either state or federal ex post facto provisions). He implicitly acknowledges that the legislature can direct trial courts to treat prior offenses in a particular way without regard to how they were treated at the time they were committed. See e.g. *State v. Keller*, 143 Wn.2d 267, 19 P.3d 1030 (2001). See also RCW 9.94A.525 (2), which codifies "wash-out" periods for prior offenses. The "wash-out" principle is a post-SRA construct, yet it applies to pre-SRA crimes.

> Finally, our ruling comports with the stated purpose of the SRA to treat defendants uniformly by making sentences "commensurate with the punishment imposed on others committing similar offenses." Clearly, if Breedlove had committed the crime at issue in Washington in 1971, the *Johnson* rule would apply and the crime would be reclassified under the classifications set forth in 1975. It would contravene the purpose of the SRA to give Breedlove a lesser sentence merely because in 1971 he committed the crime in another jurisdiction.

Breedlove at 117.

RCW 9.94A.525 is not ambiguous and reliance on principles of statutory construction is unwarranted. The trial court correctly concluded that Whiteash's two prior federal convictions for possession of heroin with the intent to deliver should be treated as class B felonies for scoring purposes at his current sentencing. Even applying principles of statutory construction, it is clear that the legislature intended for possession of heroin with the intent to deliver to be treated as the equivalent of a class B felony at the time Whiteash committed his comparable federal offense.

The trial court properly included these two convictions in Whiteash's offender score.

D. CONCLUSION

The trial court properly included the defendant's two prior federal convictions for possession of heroin with the intent to distribute in his offender score as they did not wash out. The trial court erred in including

his two prior federal convictions for importing heroin in his offender score because they washed out. Although Whiteash's standard range will not change, he must be resented under the correct offender score of six.

DATED this 1st day of February, 2013.

Respectfully submitted:

ANTHONY F. GOLIK
Prosecuting Attorney
Clark County, Washington

By: _____
ANNE M. CRUSER, WSBA #27944
Deputy Prosecuting Attorney

CLARK COUNTY PROSECUTOR

February 21, 2013 - 3:59 PM

Transmittal Letter

Document Uploaded: prp2-435233-Respondent's Brief.pdf

Case Name: State v. Robert Carl Whiteash

Court of Appeals Case Number: 43523-3

Is this a Personal Restraint Petition? (●) Yes ( ) No

The document being Filed is:

( ) Designation of Clerk's Papers [ ] Supplemental Designation of Clerk's Papers

( ) Statement of Arrangements

( ) Motion: ____

( ) Answer/Reply to Motion: ____

(●) Brief: Respondent's

( ) Statement of Additional Authorities

( ) Cost Bill

( ) Objection to Cost Bill

( ) Affidavit

( ) Letter

( ) Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

( ) Personal Restraint Petition (PRP)

( ) Response to Personal Restraint Petition

( ) Reply to Response to Personal Restraint Petition

( ) Petition for Review (PRV)

( ) Other: _____

Comments:

No Comments were entered.

Sender Name: Barbara L Melton - Email: barbara.melton@clark.wa.gov

A copy of this document has been emailed to the following addresses:

stilloutraged@gmail.com
backlundmistry@gmail.com