No. 46386-5-II

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

STATE OF WASHINGTON,

Appellant,

v.

BRIAN A. ROBERTS, II,

Respondent.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

No. 13-1-03522-9

The Honorable Jack Nevin (plea) and
the Honorable Frank E. Cuthbertson (sentencing),
Judges

OPENING BRIEF OF APPELLANT

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2. The sentencing court acted outside its statutory authority in ordering forfeiture of property as a condition of the sentences.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In RCW 9.94A.525(21), the Legislature set forth a method for increasing the offender score and thus the resulting punishment for some offenders whose crimes involve "domestic violence" and meet specific requirements. One of those requirements is that, for both the current and prior offenses, domestic violence as defined in RCW 9.94A.030(20) must have been "plead and proved."

   RCW 9.94A.030(20) defines "domestic violence" as having the meaning set forth in "RCW 10.99.020 and RCW 26.50.010." Despite that plain language, the trial court held it was sufficient under the statute if the prosecution met the burden of proving that **either** "domestic violence" as defined in RCW 10.99.020 **or** "domestic violence" as defined in RCW 26.50.010 was "plead and proved," as required for the increased penalties of RCW 9.94A.525(21) to apply.

   Did the trial court err in "interpreting" the plain language of the statute contrary to its clear meaning and effectively rewriting the language of RCW 9.94A.030(20) in violation of fundamental rules of statutory construction?

   Did the trial court further err in failing to properly apply other basic rules of statutory construction, including the requirement that a penal statute must be strictly and narrowly construed against the state and in favor of criminal defendants if there is any ambiguity?

2. A sentencing court is limited to imposing only those sentences supported by statute. Did the trial court act without authority in ordering forfeiture of property as a condition of the sentences even though there was no statute authorizing such an order?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Brian A. Roberts, II, was originally charged with four counts of violation of a domestic violence court order and one count of fourth-degree assault, charged as "domestic violence" offenses. CP 1-3; RCW 10.99.020; RCW 26.50.110(5); RCW 9A.36.041(1).

On March 11, 2014, the Honorable Jack Nevin accepted Roberts' plea to an amended information charging only three counts of violation of a domestic violence court order. CP 8-9, 11-20; RP 1-5.[1] Sentencing was held before the Honorable Frank Cuthbertson on May 29, 2014, after which Roberts was ordered to serve a standard-range sentence based upon the offender score calculation advocated by the state. See CP 95-106; SRP 1-10.

Roberts appealed and this pleading follows. See CP 107-20.

2. Facts relating to entry of pleas

In the Statement of Defendant on Plea of Guilty, Roberts stated that he "unlawfully, willfully and feloniously had contact with Christina Roushey when such contact was prohibited by a court order," and that he "had actual notice of the existence of the court order," between February 10-16, 2013 (count I), February 17-23, 2013 (count II), and February 24, 2013, and March 2, 2013 (count III). CP 19. He also said that, "with respect to each" count, he had "at least 2 prior convictions for violating no

[1]The two volumes of the verbatim report of proceedings will be referred to as follows: the proceedings of March 11, 2014, as "RP," and the proceedings of May 29, 2014, as "SRP."

contact orders[.]" CP 19. Roushey was Roberts' ex-girlfriend. CP 19; see RP 5-8.

The specific allegations as to these counts were that Roberts had called Roushey on the phone multiple times from jail. CP 4-5.

D. ARGUMENT

1. THE SENTENCING COURT ERRED IN FAILING TO PROPERLY INTERPRET THE RELEVANT SENTENCING STATUTES IN LIGHT OF FUNDAMENTAL RULES OF STATUTORY CONSTRUCTION

In general, a court's decision to impose a standard range sentence cannot be appealed. See State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986). Where, however, the court calculated the standard range based on an error of law, that issue may be raised on appeal. Id. The remedy for an improperly calculated offender score is remand for resentencing with a corrected score. See State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010). Further, this Court applies a de novo standard of review in determining whether the trial court erred. See State v. Roche, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

In this case, this Court should reverse and remand for resentencing, because the sentencing court erred in failing to properly calculate the offender score below, based upon its improper interpretation and application of the law.

In the Amended Information, Roberts charged with three counts of violating a court order, all alleged using the same language but different time periods, as follows:

That BRIAN ALLEN ROBERTS, II, in the State of

> Washington, during the period [listed]. . .did unlawfully and feloniously violate the terms of a court order issued pursuant to RCW 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 9.95A.110, 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34, by willfully having contact with Christina Roushey when such contact was prohibited by a court order, to wit: Pierce County Superior Court order 12-1-03344-9 and/or Pierce County District Court order 2ZC000201, and after having had actual notice of the existence of the court order, and that further, the defendant has two previous convictions for violating orders issued under chapter 7.90, 9.94A, 10.99, 26.09, 26.10, 26.26, 26.50, 74.34, or a valid foreign protection order as defined in RCW 26.52.020, thereby invoking the provisions of RCW 26.50.110(5) and increasing the classification of the crime, contrary to RCW 10.99.020, and against the peace and dignity of the State of Washington.

CP 8-9.

The allegations were that he had violated a court order by calling his girlfriend on the phone while he was in jail. CP 4-5. As part of the plea Roberts entered to these charges, the parties signed a "Stipulation on Prior Record" which listed the current and prior convictions but indicated no agreement as to how those convictions should be counted in calculating the offender score. CP 21-23. At the time, the prosecution was arguing that the offender score was 9+, based on calculations it submitted for each of the current offenses, as follows:

Date of crime	Type	Crime	Point	F/M
2007	Juvenile	Robbery 2	1	Felony
2012	Adult	Theft 1	1	Felony
2012	Adult	Mal.Misch.1	1	Felony
2012	Adult	Att. Aslt.2 DV	2	Felony
2012	Adult	Aslt.4 DV	1	Misd.
2012	Adult	Viol. Sent. NCO DV	1	Misd.

Current	Adult	Viol. No contact	1	Felony
Current	Adult	Viol. No contact	1	Felony

See CP 21-23. The offender score would thus have been 9 for each of the three current offenses. See id.

After that time, however, the prosecution indicated an intent to argue for an even higher offender score. CP 34-38. By the time of sentencing, the prosecution was advocating for the current offenses to count as 2 points each against eachother, for a total of 11 points rather than the 9 the prosecution had initially proposed. CP 82-93.

The dispute between the points was over which sentencing statute should apply to the calculation of the offender score - RCW 9.94A.525(21) or RCW 9.94A.525(7). Roberts argued that subsection (7) applied and the offender score was a "6" under that general scoring section, because the prosecution had failed to show that the enhanced, higher score provisions of subsection (21) should apply. CP 34-41; SRP 8-12. Under subsection (21), however, the offender score was increased to an 11, based upon certain findings that the current and/or prior offenses met requirements relating to "domestic violence." SRP 3-7; CP 82-93. The prosecution argued that it had met all of the requirements and, in ruling, the sentencing court adopted the prosecution's calculation of the offender score, finding that subsection (21) applied and the offender score was an 11. SRP 16-17; see CP 98-102.

More specifically, the sentencing court used the following calculations in reaching the offender score proposed by the prosecution applying RCW 9.94A.525(21):

Date of crime	Type	Crime	Point	F/M
2007	Juvenile	Robbery 2	1	Felony
2012	Adult	Theft 1	1	Felony
2012	Adult	Mal.Misch.1	1	Felony
2012	Adult	Att. Aslt.2 DV	2	Felony
2012	Adult	Aslt.4 DV	1	Misd.
2012	Adult	Viol. Sent. NCO DV	1	Misd.
Current	Adult	Viol. No contact	2	Felony
Current	Adult	Viol. No contact	2	Felony

See CP 98-102.

The sentencing court erred in making those calculations. The question is the proper interpretation of RCW 9.94A.525(21), which provides, in relevant part,

> If the present conviction is for a felony domestic violence offense **where domestic violence as defined in RCW 9.94A.030 was pled and proven**, count priors as in subsections (7) through (20) of this section, however, count points as follows. . .
>
> (a) Count two points for each adult prior conviction **where domestic violence as defined in RCW 994A.030 was plead and proven** after August 1, 2011, for the following offenses: A violation of a no-contact order that is a felony offense, [or] a violation of a protection order that is a felony offense[.]
>
> (b) Count one point for each second and subsequent juvenile conviction **where domestic violence as defined in RCW 9.94A.030 was plead and proven** after August 1, 2011, for the offenses listed in (a) of this subsection; [and]
>
> (c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, **where domestic violence as defined in RCW 9.94A.030 was plead and proven** after August 1, 2011.

(Emphasis added).

Thus, for RCW 9.94A.525(21) to apply and increase the offender score and resulting punishment, the present conviction must be for "a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pled and proven." RCW 9.94A.525(21).
If that first hurdle is overcome, subsections (a), (b) and (c) then provide for increases in offender scores based on prior convictions when the requirements of each subsection are met.

And all of those subsections (a), (b) and (c) share the same requirement as for the current conviction - that the prior conviction must be one "where domestic violence as defined in RCW 9.94A.030 was plead and proven." RCW 9.94A.525(21)(a), (b) and (c).

As a result, the question in this case is whether the current or prior offenses were offenses for which "domestic violence as defined in RCW 9.94A.030 was plead and proved." RCW 9.94A.030(20) provides, "'[d]omestic violence' has the same meaning as defined in RCW 10.99.020 and 26.50.010."

In interpreting statutes, the role of the appellate court is to determine and implement the legislature's intent, with the plain meaning of the language as the starting point. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If a statute is plain on its face, this Court will give effect to that language, giving meaning to the words. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The plain language is the starting point of the analysis because the goal is to give "content and force to the language used by the Legislature." J.P., 149 Wn.2d at 450.

Further, "[p]lain language does not require construction." State v.

Wilson, 125 Wn.2d 212, 216, 883 P.2d 320 (1994). And of course, the Court will assume the Legislature "means exactly what it says." See, State v. Warfield, 103 Wn. App. 152, 156, 5 P.3d 1280 (2000), quoting, Morgan v. Johnson, 137 Wn.2d 887, 891-92, 976 P.2d 619 (1999).

In addition, in interpreting a criminal statute, "a literal and strict interpretation must be given." Wilson, 125 Wn.2d at 216-17.

The language of RCW 9.94A.030(20) could not be more plain. It specifically provides that "'[d]omestic violence' has the same meaning as defined in RCW 10.99.020 **and** 26.50.010." RCW 9.94A.030(2) (emphasis added). The Legislature thus clearly chose to require that both the requirements of RCW 10.99.020 **and** RCW 26.50.010 were met before the enhanced offender score provisions and resulting increased punishment of RCW 9.94A.525(21) applied.

RCW 10.99.020 and RCW 26.50.010, do not provide the same definition of "domestic violence." Under RCW 10.99.020(5):

> Domestic violence includes but is not limited to any of the following crimes when committed by one family or household member against another:
>
> (a) Assault in the first degree (RCW 9A.36.011);
>
> (b) Assault in the second degree (RCW 9A.36.021);
>
> (c) Assault in the third degree (RCW 9A.36.031);
>
> (d) Assault in the fourth degree (RCW 9A.36.041);
>
> (e) Drive-by shooting (RCW 9A.36.045);
>
> (f) Reckless endangerment (RCW 9A.36.050);
>
> (g) Coercion (RCW 9A.36.070);
>
> (h) Burglary in the first degree (RCW 9A.52.020);

(i) Burglary in the second degree (RCW 9A.52.030);

(j) Criminal trespass in the first degree (RCW 9A.52.070);

(k) Criminal trespass in the second degree (RCW 9A.52.080);

(l) Malicious mischief in the first degree (RCW 9A.48.070);

(m) Malicious mischief in the second degree (RCW 9A.48.080);

(n) Malicious mischief in the third degree (RCW 9A.48.090);

(o) Kidnapping in the first degree (RCW 9A.40.020);

(p) Kidnapping in the second degree (RCW 9A.40.030);

(q) Unlawful imprisonment (RCW 9A.40.040);

(r) Violation of the provisions of a restraining order, no-contact order, or protection order restraining or enjoining the person or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location (RCW 10.99.040, 10.99.050, 26.09.300, 26.10.220, 26.26.138, 26.44.063, 26.44.150, 26.50.060, 26.50.070, 26.50.130, 26.52.070, or 74.34.145);

(s) Rape in the first degree (RCW 9A.44.040);

(t) Rape in the second degree (RCW 9A.44.050);

(u) Residential burglary (RCW 9A.52.025);

(v) Stalking (RCW 9A.46.110); and

(w) Interference with the reporting of domestic violence (RCW 9A.36.150).

Thus, for the purposes of title 10.99, the definition of "domestic violence" is extremely expansive, with the list "non-exclusive" and the only real requirement that the crime occur between "family or household members." RCW 10.99.020(5).

In contrast, RCW 26.50.010(1) provides:

> "Domestic violence" means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

This definition is far more limited than RCW 10.99.020(5), requiring assault, stalking, or sexual assault between family members, although not requiring that the violent acts amount to a specific crime if there is physical harm, bodily injury, assault or the infliction of fear of imminent such harm.

As a result, for the enhanced penalties of RCW 9.94A.525(21) to apply, the Legislature has chosen the most serious crimes involving domestic violence - those which 1) involve commission of a crime between family or household members (under RCW 10.99.020(5)) **and** 2) also involve either physical harm of some kind or infliction of "fear of imminent physical harm," regardless whether that was part of the charged crime, **or** sexual assault **or** the specific version of stalking defined in RCW 9A.46.110 (under RCW 26.50.010(1)). This smaller subset of offenders who commit the worst domestic violence offenses repeatedly were thus singled out for greater sentences through the higher offender score resulting from application of RCW 9.94A.525(21), when it applies.

In this case, the trial court found that the current offenses and prior offenses met the standard of and were "domestic violence" convictions under RCW 9.94A.525(21) as a matter of law, if **either** the definition of "domestic violence" contained in RCW 10.99.020 **or** the separate definition of "domestic violence" contained in RCW 26.50.010 were

"plead and proved," despite the plain language of RCW 9.94A.030(20). SRP 17-18. But this interpretation ignores the plain language of the statute and changes it.

Put simply, the trial court's reasoning amounts to a finding that, although the Legislature specifically chose, in RCW 9.94A.030(20), to define "domestic violence" to have "the same meaning as defined in RCW 10.99.020 **and** 26.50.010," what the Legislature really *meant* to say was "RCW 10.99.020 **or** 26.50.110." See SRP 17-18. As a result, the trial concluded, it was enough that the current and prior convictions met the definition of "domestic violence" of RCW 10.99.020 regardless whether they also met the definition of "domestic violence" in RCW 26.50.010 as well.

But a statute is not subject to "interpretation" or statutory construction if its language is "plain." See, State v. Keller, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), cert. denied, 534 U.S. 1130 (2002). Where a statute is "plain and unambiguous, its meaning must be derived from the wording of the statute itself." Id.

And this is so regardless whether the appellate court agrees with the result, finds it distressing or even thinks it is illogical. See, e.g., J.P., 149 Wn.2d at 457; State v. Groom, 133 Wn.2d 679, 689, 947 P.2d 240 (1997). Thus, in J.P., where the plain language of the statute deprived a victim of restitution, the Court was compelled to give effect to the Legislature's choice, however regrettable the Court thought it. J.P., 149 Wn.2d at 457. Similarly, in Groom, the Court refused to "interpret" plain language of a statute, which provided that it was "unlawful for any policeman or other

peace officer to enter and search any private dwelling house or place of residence without the authority of a search warrant." 133 Wn.2d at 688-89. The Court rejected the idea that it should add a "bad faith" requirement and construe the language to ensure that only those officers acting without good faith could be found guilty, despite the obvious emotional pull of the argument. Id. Specifically, the Court warned, "however much members of this court may think a statute should be rewritten, it is imperative that we not rewrite statutes to express what we think the law should be," even if the appellate court does not like, disagrees with or finds the results "unduly harsh." 133 Wn.2d at 668-69.

Put simply, an appellate court "cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." State v. Delagardo, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). And this is true even if the court disagrees with the result as a matter of policy, or thinks the Legislature probably meant to say something else. Washington courts must "resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a judicial, function." State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). Further, a Washington court may not "add or subtract from the clear language of a statute even if we believe the legislature intended something else but did not adequately express it," unless the statute is so irrational as to be virtually nonsensical. See State v. Watson, 146 Wn.2d 947, 51 P.3d 66 (2002).

The Legislature chose the word "and" in the definition of "domestic

violence" in RCW 9.94A.030(20). In doing so, it specifically chose to make the increased offender score and resulting greater punishment apply only to the worst domestic violence offenders, whose acts involve not only crimes between family or household members (under RCW 10.99.020) but also include acts, whether they amount to crimes, involving assault, stalking and sexual violence (under RCW 26.50.010). Regardless whether the trial court thought this limitation was good public policy and regardless whether the judge thought that the Legislature *should* have used "or," it was not the function of the sentencing court to rewrite RCW 9.94A.030(20) as it did.

Notably, when it was first proposed, the statute would have defined the increased offender score provisions as applying when "a criminal offense committed between [a] defendant and a victim having a relationship as defined in RCW 10.99.020 *or* 26.50.010." See Washington State Attorney General, Rob McKenna, AG Request Legislation - 2009 Session: Supporting Law Enforcement: Domestic Violence Sanctions, at 1 (2009) (AG Proposal) (emphasis added). As enacted, however, the proposal for using the word "or" was rejected, with "and" in its place. See Laws of 2010, §§ 401, 403.

In any event, even if it could be deemed unclear or ambiguous what the word "and" means, the trial court's conclusion ignores several other rules of statutory construction. When construing the language of a penal statute, the "rule of lenity" requires the Court to resolve any statutory ambiguities in favor of the defendant, absent clear legislative intent to the contrary. See In re Sietz, 124 Wn.2d 645, 652, 880 P.3d 34 (1994). The

policy behind the rule is "to place the burden squarely on the legislature to clearly and unequivocally warn people of the actions that expose them to liability for penalties and what those penalties are." State v. Jackson, 61 Wn. App. 86, 93, 809 P.2d 221 (1991). As a result, where a statute is susceptible to more than one reasonable interpretation, it is deemed "ambiguous," and the Court must construe the statute strictly against the state and in favor of the accused, unless the legislative intent to the contrary is clear. See In re Hopkins, 137 Wn.2d 897, 901, 976 P.2d 616 (1999).

Thus, the rule of lenity is "a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." 137 Wn.2d at 901.

Here, even if it could be unclear that the Legislature specifically chose, in crafting RCW 9.94A.030(20) and using the word "and," to select only those crimes which meet both the requirements of RCW 10.99.020 and RCW 26.50.010, the sentencing court was required to interpret the ambiguity in the favor of the criminal defendant because there is not clear legislative intent that the Legislature meant for the increased penalties to apply broadly.

In response, it is likely that the prosecution will cite State v. Kozey, 189 Wn. App. 692, 334P.3d 1170 (2014), petition for review pending under No. 90892-3 (filed 10/15/14, set for consideration 2/3/15). In that case, the Court held that RCW 9.94A.030(20) does not require proof that both the definitions of "domestic violence" in RCW 10.99.020 and in RCW 26.50.010 are met, even though RCW 9.94A.030(20) uses the word "and" rather than the word "or." 189 Wn. App. at 1174.

But the Kozey Court did not apply the rule of lenity and construe the language strictly, in he light most favorable to the accused. 189 Wn. App. at 1173-75. Instead, it declared that even if it assumed that RCW 9.94A.030(20) was ambiguous, "examination of legislative history and application of the principles of statutory construction clarify how that ambiguity is resolved, leaving no room for application of the rule of lenity." 189 Wn. App. at 1176.

But the rule of lenity *is* a rule of statutory construction. Seitz, 124 Wn.2d at 652. It is not a third step taken only if the appellate court cannot figure out how to interpret an ambiguity after applying rules of statutory construction and legislative history, as the Kozey Court applied it. It is "a basic and required limitation on a court's power of statutory interpretation whenever the meaning of a criminal statute is not plain." Hopkins, 137 Wn.2d at 901. To interpret the statute contrary to its plain language by treating the "and" as an "or," the Court had to find that "and" was ambiguous, otherwise it could not have been subject to "interpretation." See Keller, 143 Wn.2d at 276 (a statute is not subject to "interpretation" or statutory construction if its language is "plain").

Further, the Kozey Court erred in conducting a lengthy analysis to determine how to "most logically" read the statutes and concluding that requiring conduct to meet "both RCW 10.99.020 and RCW 26.50.010 in order to constitute domestic violence for sentence enhancement purposes" is not logical. 189 Wn. App. at 1174. The Kozey Court noted that "RCW 10.99.020 omits crimes such as third degree rape and child molestation, which would fall under the definition of 'domestic violence' in RCW

26.50.010." The Court was concerned that "reading RCW 9.94A.030(20) conjunctively quickly descends into self-contradiction" because it would mean that only the requirements of RCW 26.50.010 end up controlling when the increased punishments apply and RCW 10.99.020 then becomes "superfluous." Kozey, 189 Wn. App. at 1184.

But the Kozey Court's decision ends up causing the same harm it tries to avoid - and worse. RCW 10.99.020 is a *non-exclusive* list of crimes and ultimately requires only that a crime was committed between "family and household members" for it to qualify as "domestic violence." RCW 10.99.020(1). If only the requirements of RCW 10.99.020 **or** the requirements of RCW 26.50.010 must be met for the increased offender score provisions of RCW 9.94A.525(21) to apply, then the reference to RCW 26.50.010 becomes superfluous, because of the incredibly wide scope of RCW 10.99.020. Under that statute, the prosecution need not show that a crime is even one of those listed but instead need only show that *any crime at all* committed between "family and household members" occurred. See, e.g., State v. Lindahl, 114 Wn. App. 1, 17-18, 56 P.3d 589 (2002), review denied, 149 Wn.2d 1013 (2003) (noting that, although the crime in question was not listed in RCW 10.99.020, because it is a non-exclusive list, unlisted crimes are included).

Thus, the Kozey Court adopted the broadest possible interpretation of RCW 9.94A.030(20), which causes the broadest possible application of a penal statute. Under the Kozey decision, not only does "and" mean "or" but also the enhanced punishment set forth by way of the higher offender score scoring provisions of RCW 9.94A.525(21) will now apply to *every*

case involving *any* crime against a family or household member. That incredibly broad interpretation of RCW 9.94A.030(20), a criminal, penal statute, is in conflict with the fundamental rules of statutory construction, including the rule of lenity.

The Kozey decision ignores several other important considerations, such as that the definition of "domestic violence" crimes covered initially was as "defined in RCW 10.99.020 **or** RCW 26.50.010" but was changed before the statute's enactment to "and." Further, appellate courts in this state usually decline to read "or" into a statute in place of "and," because of the clear difference in meaning. See Ahten v. Barnes, 158 Wn. App. 343, 352 n. 5, 242 P.35 (2010). And our highest court has explained that "rejection of the term 'or' in favor of 'and'" in a statute is "clear evidence of legislative intent" and "[t]he Legislature would have used the word 'or' if it had intended to convey a disjunctive meaning." Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 855-56, 827 P.2d 1000 (1992); see also, Childers v. Childers, 89 Wn.2d 592, 596, 575 P.2d 201 (1978) (the word "and" does not mean "or").

The trial court erred and violated fundamental rules of statutory construction in reading out the "and" in RCW 9.94A.030(20), changing it to an "or," concluding that the Legislature probably meant to say "or" and calculating the offender score as an 11 by applying RCW 9.94A.525(21) when the prosecution failed to show that it applied. This Court should so hold and should reverse.

2. THE TRIAL COURT ERRED IN ORDERING FORFEITURE WITHOUT STATUTORY AUTHORITY

Mr. Roberts is also entitled to relief because the sentencing court acted without statutory authority in ordering forfeiture of property as a condition of the sentences.

A sentencing court's authority to impose conditions of a sentence is limited by statute. See State v. Zimmer, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), review denied, 165 Wn.2d 1035 (2009). Under the Sentencing Reform Act, the Legislature alone has the authority to establish the scope of legal punishment. Id. As a result, a sentencing court has only the authority granted by the Legislature by statute. See State v. Hale, 94 Wn. App. 46, 53, 971 P.3d 88 (1999). When a court acts outside its statutory authority in ordering forfeiture as a condition of a criminal sentence, that issue may be raised for the first time on appeal. See State v. Roberts, __ Wn. App. __, __ P.3d __ (2014 WL 7185111) (ordered published December 17, 2014).

In this case, the sentencing court acted without statutory authority in ordering, as a written condition of the sentence that Roberts "forfeit any items in property" and "[a]ll property is hereby forfeited." CP 101; see SRP 17-19.

"Forfeitures are not favored." City of Walla Walla v. $401.333.44, 164 Wn. App. 236, 237-38, 262 P.3d 1239 (2011). In addition, the authority to order forfeiture is wholly statutory. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998).

As a result, a trial court has no authority to order forfeiture unless there is a specific statute authorizing that order. State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992). And this is true even when a defendant is accused of a crime or there is a belief the items were used to commit it. As this Court noted in Alaway, there is no "inherent authority to order the forfeiture of property used in the commission of a crime." Alaway, 64 Wn. App. at 800-801. It is only with statutory authority and after following the procedures in the authorizing statute that the government may take property by way of forfeiture. Id.; see Espinoza, 87 Wn. App. at 866.

Here, there was no statutory authority cited for the court's order of forfeiture at all. See CP 101. This is not surprising, as there does not appear to be any such support. See, e.g., RCW 10.105.010 (allowing police to take civil steps to forfeit certain property); RCW 69.50.505 (in some controlled substances cases, law enforcement may seek forfeiture of certain items in a civil proceeding); RCW 9A.83.030 (in money laundering cases, attorney general or county prosecutor may seek forfeiture through civil action); RCW 9.46.231 (in gambling cases).

None of these statutes or rules provides any authority for a sentencing court in a criminal case to order forfeiture of the property of a defendant seized by police based solely upon his criminal conviction without at least a modicum of proof that the property was somehow involved in or the fruits of criminal activity. See, e.g., Alaway, 64 Wn. App. at 798 (rejecting the idea that the sentencing court had "inherent power to order how property used in criminal activity should be disposed

of").

Further, as this Court has specifically held, a defendant is not automatically divested of his property interests in even items used to create contraband, simply by means of conviction. Alaway, 64 Wn. App. at 799. Instead, this Court declared, "the State cannot confiscate" a citizen's property "merely because it is derivative contraband, but instead must forfeit it using proper forfeiture procedures." Id.

Thus, there can be no question that forfeiture proceedings must be pursued through the proper means of an authorizing statute, not simply ordered off-the-cuff as part of a criminal conviction. And indeed, to the extent that the trial court assumed it had authority to order the forfeiture based upon the criminal conviction, that assumption runs directly afoul of RCW 9.92.110, which specifically abolished the doctrine of forfeiture by conviction. That statute provides, in relevant part, "[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein." Under the statute, the mere fact that the defendant was convicted of a crime is not sufficient on its own to support an order of forfeiture.

In response, the prosecution may attempt to rely on State v. McWilliams, 177 Wn. App. 139, 311 P.3d 583 (2013), review denied, 179 Wn.2d at 1020 (2014). In that case, the Court refused to strike a forfeiture condition from a judgment and sentence on the grounds that the defendant had not moved for return of property under CrR 2.3(e). Recently, however, in Roberts, this Court has clarified that McWilliams did not require a defendant challenging a sentencing court's order of forfeiture to move for

return of property prior to being able to challenge the statutory authority to order the forfeiture in the first place. Roberts, __ Wn. App. __ (slip Opinion at 2-3). In Roberts, the prosecution argued that McWilliams had created such a requirement but this Court disagreed. Id.

Instead, in Roberts, this Court explained that McWilliams involved only an argument that due process was violated by the procedure used, not a claim that the sentencing court had no statutory authority to impose the order of forfeiture in the first place. Roberts, __ Wn. App. at __ (slip Opinion at 2). The Roberts Court further explained that McWilliams "did not hold that the trial court could order forfeiture in the absence of statutory authority." Roberts, __ Wn. App. at __ (slip Opinion at 2).

In this case, as in Roberts, the sentencing court did not have statutory authority to impose an order of forfeiture as a condition of the sentences. This Court should so hold and should strike the "forfeiture" conditions contained in the judgment and sentence as without statutory support.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for resentencing and should strike the "forfeiture" provisions of the judgment and sentence, which were imposed without statutory authority.

DATED this 17th day of January, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief by this Court's portal upload at pcpatcecf@co.pierce.wa.us and to appellant Brian A. Roberts, II, DOC 346429, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA. 99326.

DATED this 17th day of January, 2015.

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