NO. 46297-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

RANDY RICHTER,

Appellant.

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

The Honorable Michael Evans, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. IT VIOLATES DUE PROCESS WHEN A STATEMENT MADE TO POLICE IS ADMITTED WITHOUT FIRST DETERMINING ITS VOLUNTARINESS.

Richter argues the trial court erred in denying his motion for a mistrial when Detective Epperson testified to statements Richter made without the requisite CrR 3.5 hearing. Br. of Appellant 8-13. In response, the State claims Richter "makes two false assumptions." Br. of Resp't 3. The State first contends Richter "consistently mischaracterizes the statements as a 'confession,'" but the State misses the point. Br. of Resp't 4.

The crux of the issue is not whether Richter made a "statement" or a "confession," but whether it was voluntary. This is the purpose of every CrR 3.5 hearing—to determine the voluntariness of a statement made to law enforcement. CrR 3.5 ("When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible." (Emphasis added)); State v. Kidd, 36 Wn. App. 503, 509, 674 P.2d 674 (1983).

Failure to hold a CrR 3.5 hearing requires reversal unless the record demonstrates there is no issue regarding voluntariness. Kidd, 36 Wn. App. at 509; In re Detention of Strand, 167 Wn.2d 180, 203, 217 P.3d 1159 (2009) ("[W]here a defendant ha[s] not received such a voluntariness hearing, the

conviction which relied upon the statements must be reversed."). The record here is insufficient to determine the circumstances under which Richter told Epperson the automotive tools on the front seat belonged to him. The State's attempt to distinguish between "statement" and "confession" is a red herring that should be rejected.

The State next claims Richter's "argument assumes that the State had no other evidence of [his] constructive possession of the methamphetamine." Br. of Resp't 4. But Richter's statement to Epperson was particularly damning because it came from his own mouth. See Br. of Appellant 12-13. No other evidence was admitted regarding Richter's acknowledgment that the items in the vehicle were his. See State v. Escalona, 49 Wn. App. 251, 254-55, 742 P.2d 190 (1987) (in determining whether a trial irregularity prejudiced the jury, requiring a mistrial, courts consider whether the improper evidence was cumulative). This Court should accordingly reverse Richter's convictions because no CrR 3.5 hearing was held to determine the statement's voluntariness. Strand, 167 Wn.2d at 203.

2. THE UNCONSTITUTIONAL "REASON TO DOUBT" INSTRUCTION IS STRUCTURAL ERROR THAT REQUIRES REVERSAL.

The State argues that Richter's challenge to WPIC 4.01 fails because the Washington Supreme Court expressly approved of the instruction in State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). Br. of Resp't

13-14. However, WPIC 4.01's articulation requirement was not at issue in Bennett. See In re Electric Lightwave, Inc., 123 Wn.2d 530, 541, 869 P.2d 1045 (1994) ("[Courts] do no rely on cases that fail to specifically raise or decide an issue."). Therefore, Bennett does not need to be overruled for Richter to challenge the articulation requirement.

The State also argues Washington courts have already considered and rejected the reason to doubt argument, citing State v. Thompson, 13 Wn. App. 1, 533 P.2d 395 (1975), and State v. Tanzymore, 54 Wn.2d 290, 340 P.2d 178 (1959). Br. of Resp't 14-15. The Thompson court concluded it was "constrained to uphold" the instruction, even though it "has its detractors." 13 Wn. App. at 5. This is hardly a ringing endorsement.

Furthermore, Thompson and Tanzymore were decided over 40 years ago and can no longer be squared with Emery and the fill-in-the-blank cases. The Emery court held that an articulation requirement "impermissibly undermine[s] the presumption of innocence." State v. Emery, 174 Wn.2d 741, 759, 278 P.3d 653 (2012). WPIC 4.01 requires the jury to articulate a reason for its doubt, which "subtly shifts the burden to the defense." Id. at 760. Because the State will avoid supplying reasons to doubt in its own case, WPIC 4.01 suggests either the jury or the defense should supply them, "undermining the presumption of innocence." Kalebaugh, 179 Wn. App. at 426 (Bjorgen, J., dissenting). "The logic and policy of the decision in

[Emery] impels the conclusion" that the articulation requirement in WPIC 4.01 is "constitutionally flawed." Id. at 424. Thus, in light of Emery and its progeny, Thompson and Tanzymore no longer control.

Lastly, the State argues Richter's challenge to the reasonable doubt instruction is hypertechnical. Br. of Resp't 18-19. The State is correct that jurors apply a "'commonsense understanding of the instructions.'" Br. of Resp't 16 (quoting Boyde v. California, 494 U.S. 370, 380-81, 110 S. Ct. 1190, 108 L. Ed. 2d 316 (1990)). That is precisely the problem with WPIC 4.01. The difference between "reason" and "a reason" is common sense and obvious to any lay person. The first requires logic and the second requires a specific explanation or justification. The plain language of WPIC 4.01 instructs jurors they must articulate the reason for their doubt.

Contrary to the State's argument, Richter's challenge is not hypertechnical merely because use of the article "a" invokes a different meaning in the English language. For instance, an instruction like, "a reasonable doubt is one that is based in reason," means something entirely different than "a reasonable doubt is one for which a reason exists." The former does not require jurors to articulate their doubt. It requires only that their doubt be based on reason and logic, which comports with U.S. Supreme Court precedent. See e.g., Jackson v. Virginia, 443 U.S. 307, 317, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); Johnson v. Louisiana, 406 U.S. 356, 360, 92

S. Ct. 1620, 32 L. Ed. 2d 152 (1972); In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970).

The articulation requirement in WPIC 4.01 undermined the presumption of innocence, and is therefore structural error. Sullivan v. Louisiana, 508 U.S. 275, 281-82, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993); see also State v. McHenry, 88 Wn.2d 211, 214, 558 P.2d 188 (1977) (error in defining reasonable doubt is "a grievous constitutional failure"). This Court should accordingly reverse and remand for retrial before a jury that is accurately instructed on the meaning of reasonable doubt.

3. THE PLAIN LANGUAGE OF RCW 9.94A.533(6) REQUIRES THE SCHOOL ZONE ENHANCEMENTS TO RUN CONCURRENTLY.[1]

In response to Richter's argument that the school zone sentencing enhancements must run concurrently, not consecutively, the State argues the House Bill Report from the Jacobs[2] amendment makes it "clear that the intent of the change was to ensure all such enhancements under that provision run consecutive to each other and everything else." Br. of Resp't 8. However, the House Bill Report does nothing more than reference Jacobs and summarize its holding. Br. of Resp't 8 (quoting H.B. Rep. on Second Substitute H.B. 6239, 59th Leg., Reg. Sess. at 7, 13-14 (2006)).

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[1] This issue is currently pending before the Washington Supreme Court. State v. Conover, No. 44175-6-II, noted at 183 Wn. App. 1011 (2014), review granted 182 Wn.2d 1007, 344 P.3d 688 (2015). Argument was held on May 21, 2015.

[2] State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005).

There is no dispute that the legislature amended the school zone enhancement provision in response to Jacobs. Br. of Appellant 17-18; In re Post Sentence Review of Gutierrez, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008). But that does not end the inquiry. This Court must still review the amendment's actual language. See, e.g., State v. Varga, 151 Wn.2d 179, 191-92, 86 P.3d 139 (2004); State v. Smith, 144 Wn.2d 665, 672-73, 30 P.3d 1245 (2001) ("[W]e look to the language of RCW 9.94A.030 alone to determine whether the 1997 amendment applies retroactively to revive appellants' previously washed out juvenile adjudications.").

In Smith, the supreme court considered whether a 1997 amendment to the juvenile "wash-out" provisions of the Sentencing Reform Act applied retroactively. 144 Wn.2d at 668-69. There is a presumption against retroactive application. Id. at 673. In a prior case, State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999), the court held a 1990 wash-out amendment did not apply retroactively. Id. at 671. The legislature amended the wash-out provision in 1997, noting its general discontent with the Cruz holding. Id. at 672. But the Smith court found no statutory language "demonstrating an intent for retroactive application of the 1997 amendment." Id. The court explained: "Had the Legislature intended to make the 1997 amendment retroactive, it should have stated that intention directly and unambiguously."

Id. Because the legislature did not do so, the court did not apply the statute retroactively. Id. at 673-75.

Just like retroactivity in Smith, there is a presumption in favor of concurrent sentences. RCW 9.94A.589(1)(a); Jacobs, 154 Wn.2d at 603. With the Jacobs amendment, the legislature specified only that school zone enhancements "shall run consecutively to all other sentencing provisions." RCW 9.94A.533(6) (emphasis added). This is unlike firearm and deadly weapon enhancements, which "shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." RCW 9.94A.533(3)(e), (4)(e) (emphasis added). Even with the Jacobs amendment, the legislature did not specify that school zone enhancements run consecutively to *other school zone enhancements*.

Perhaps most probative of the legislature's intent is its amendment to the sexual motivation enhancement the same year as the Jacobs amendment. Compare Laws of 2006, ch. 123, § 1 (sexual motivation enhancement), with Laws of 2006, ch. 339, § 301 (school zone enhancement). The legislature specified "all sexual motivation enhancements . . . shall run consecutively to all other sentencing provisions, including other sexual motivation enhancements." Laws of 2006, ch. 123, § 1; accord RCW 9.94A.533(8)(b). Again unlike the school zone enhancement, the legislature expressly required all sexual motivation enhancements to run consecutively to one another.

A canon of construction is important here. The legislature is presumed to know the law in the area in which it is legislating and is presumed to enact laws with full knowledge of existing laws. Jametsky v. Olsen, 179 Wn.2d 756, 766, 317 P.3d 1003 (2014); Wynn v. Earin, 163 Wn.2d 361, 371, 181 P.3d 806 (2008). Given the firearm and deadly weapon enhancements, as well as the sexual motivation enhancement, this Court can presume the legislature knows how to ensure that one type of enhancement runs consecutively to the same type of enhancement. But the legislature did not do so with the school zone enhancements.

The State offers no response for this inconsistency. Bill reports "do not represent binding pronouncements of the state of the law existing before the enactment." Dep't of Labor & Indus. v. Landon, 117 Wn.2d 122, 127, 814 P.2d 626 (1991); accord Smith, 144 Wn.2d at 672-74. But the plain language of the statute does. This Court should accordingly vacate the consecutive school zone enhancements and remand for resentencing. Jacobs, 154 Wn.2d at 604.

This result is further dictated by the Washington Supreme Court's decision in In re Postsentence Review of Charles, 135 Wn.2d 239, 955 P.2d 798 (1998). There, the court reviewed a prior version of the firearm enhancement that looked more like the current school zone enhancement: "Notwithstanding any other provision of law, any and all firearm

enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions." Id. at 247 (quoting former RCW 9.94A.310(3)(e)). The court concluded this meant firearm enhancements did *not* run consecutively to each other, but only to the base sentence. Id. at 253-54. The only time enhancements run consecutively to each other is if the underlying sentences themselves were consecutive. Id. at 254. This makes sense, because "[a]n enhancement is not a separate sentence; rather, it is a statutorily-mandated increase to an offender's sentence range because of a specified factor in the commission of the offense." Id. at 253.

In response to Charles, the legislature amended the statute to add the language, "shall run consecutively to all other sentencing provisions, including other firearm or deadly weapon enhancements." State v. DeSantiago, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003) (quoting RCW 9.94A.510(3)(e) (firearm); RCW 9.94A.510(4)(e) (deadly weapon); Laws of 1998, ch. 235, § 1). Following the amendments, "all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements." Id. at 416.

Critically, the legislature did *not* add this language to the provision at issue here. Although RCW 9.94A.533(6) mandates a school zone

enhancement run consecutively to the base sentence, it does not state that it runs consecutively to enhancements on other counts. "Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted." State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002). Thus, as to the school zone enhancement, the reasoning of Charles controls.

Conversely, if this Court concludes the statute is ambiguous, then the rule of lenity applies, and the statute must be interpreted in Richter's favor. Id. at 601-04. Division One recently noted the potential ambiguity in the school zone enhancement language. State v. Mohamed, No. 72328-6-I, slip op. at 12-13 (Wash. Ct. App. May 18, 2015). The issue in Mohamed was whether trial courts have authority to waive school zone enhancements when they impose a mitigated sentence pursuant to a parenting sentencing alternative or a drug offender sentencing alternative. Id. at 1-4. The State argued the language, "consecutively to all other sentencing provisions," negated trial courts' ability to waive school zone enhancements. Id. at 11.

The appellate court rejected this argument. Id. at 11. In doing so, the court recognized the Jacobs amendment was intended to cure the ambiguity in the school zone enhancement statute. Id. at 11-12. The court nevertheless noted it was "plausible that the amendment does not address whether enhancements are to run 'consecutively to each other.'" Id. at 13. Based on

"more than one reasonable reading of this amendment . . . an ambiguity would exist," triggering the rule of lenity. Id. at 12-13.

This demonstrates the Jacobs amendment is, at best, ambiguous. The rule of lenity therefore requires this Court to vacate the consecutive school zone enhancements and remand for resentencing. Jacobs, 154 Wn.2d at 604.

4. RICHTER'S EXCEPTIONAL SENTENCE IS CLEARLY EXCESSIVE.

The State cites State v. McCollum, 88 Wn. App. 977, 947 P.2d 1235 (1997), to argue the Sanchez[3] rule does not apply in Richter's case. McCollum pleaded guilty to three counts of delivery and two counts of possession with intent to deliver. McCollum, 88 Wn. App. at 980-81. Richter's case is distinguishable for several reasons.

First, McCollum's three drug sales involved 4.0, 2.5, and 2.3 grams of methamphetamine, significantly more than the controlled buys here. Id. at 985. Second, the three buys in McCollum took place in different locations with different buyers, one including an undercover officer, whereas Richter's case involved the same buyer, seller, and location. Id. at 986. Finally, one of the possession charges in McCollum arose from a traffic stop a year before the controlled buys. Id. This significant time span drew "a picture of an active drug dealer," and so imposition of an exceptional sentence was not

[3] State v. Sanchez, 69 Wn. App. 255, 848 P.2d 208 (1993).

an abuse of discretion. Id. at 986-87. By contrast, the three buys here occurred over a 21-day span in June and July 2013, with the arrest following shortly thereafter in August 2013.

Richter does not, as the State claims, ignore the fact that he also has a separate conviction for possession with intent to deliver. Br. of Appellant 23-24 (discussing delayed arrest that led to possession with intent charge). Instead Richter points out that the State strategically waited to arrest him until the month following the controlled buys, despite having probable cause after the first buy. Br. of Appellant 23-24. There was no purpose in delaying arrest except to increase Richter's sentence.

The State also asserts, "most importantly, the investigation into the Appellant cannot be considered as a means to increase his offender score." Br. of Resp't 11. Based on Richter's already high offender score, the State argues his sentence range would be the same regardless of the number of current controlled buys. Br. of Resp't 12. In so arguing, the State misapprehends the basis for Richter's exceptional sentence.

A standard range sentence reaches it maximum limit at an offender score of "9 or more." RCW 9.94A.510. Based on Richter's prior convictions, his offender score was "9 or more." The trial court therefore imposed an exceptional sentence based on the "free crimes" aggravator, which is permissible when "[t]he defendant has committed multiple current

offenses and the defendant's high offender score results in some of the current offenses going unpunished." RCW 9.94A.535 (2)(c). Richter had four current offenses. Based on his offender score of "9 or more," three of those current offenses would go unpunished if he received a sentence within the standard range.

The State appears to contend that the Sanchez rule applies only if multiple controlled buys increase the offender score between one and nine. However, the problem is not with Richter's offender score, but with the additional current offenses. By initiating the second and third controlled buys, and then waiting to arrest Richter, the State purposefully subjected Richter to the free crimes aggravator and an exceptional sentence. Put another way, Richter's already high offender score did not result in his exceptional sentence—the multiple current offenses did. Just like in Sanchez, the police had control over the number of controlled buys and Richter's delayed arrest. As such, Sanchez applies, contrary to the State's assertions.

This Court should reverse Richter's exceptional sentence because it is clearly excessive, and remand for resentencing within the standard range.

5. THIS COURT SHOULD VACATE RICHTER'S LEGAL FINANCIAL OBLIGATIONS AND REMAND FOR RESENTENCING.

The State asks this Court to decline review of the trial court's decision to impose $4,125 in discretionary legal financial obligations (LFOs), without consideration of Richter's current or future ability to pay. Br. of Resp't 12-13. In State v. Blazina, the Washington Supreme Court held that the Court of Appeals "properly exercised its discretion to decline review" under RAP 2.5(a). __Wn.2d__, 344 P.3d 680, 683 (2015). The Blazina court nevertheless concluded that "[n]ational and local cries for reform of broken LFO systems demand that this court exercise its RAP 2.5(a) discretion and reach the merits of this case." Id.

The court went on to stress the "problematic consequences" LFOs inflict on indigent criminal defendants. Id. at 684. LFOs accrue interest at a rate of 12 percent so that even those "who pay[] $25 per month toward their LFOs will owe the state more 10 years after conviction than they did when the LFOs were initially assessed." Id. This, in turn, "means that courts retain jurisdiction over the impoverished offenders long after they are released from prison because the court maintains jurisdiction until they completely satisfy their LFOs." Id. "The court's long-term involvement in defendants' lives inhibits reentry" and "these reentry difficulties increase the chances of recidivism." Id.

To confront these serious problems, the Blazina court emphasized the importance of judicial discretion: "The trial court must decide to impose LFOs and must consider the defendant's current or future ability to pay those LFOs based on the particular facts of the defendant's case." Id. at 683. Only by conducting such a "case-by-case analysis" may courts "arrive at an LFO order appropriate to the individual defendant's circumstances." Id. A boilerplate finding of ability to pay is insufficient. Id. at 685. Instead the "record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay." Id.

The trial court failed to conduct any inquiry into Richter's individual financial circumstances. This is especially problematic given Richter's indigency, his limited education, and his lengthy prison sentence. By asking this Court to decline review, the State asks this Court to ignore the serious consequences of LFOs. This Court should instead confront the issue head on by vacating Richter's discretionary LFOs and remanding for resentencing. Id. at 685.

Even if this Court is disinclined to consider Richter's direct LFO challenge for the first time on appeal, Richter also argues his counsel was ineffective for failing to object to LFOs at sentencing. Br. of Appellant 30-33. Ineffective assistance of counsel is an issue of constitutional magnitude properly considered for the first time on appeal. State v. Kyllo, 166 Wn.2d

856, 862, 215 P.3d 177 (2009). Notably, the State fails to respond to Richter's ineffective assistance argument. In re Det. of Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("Indeed, by failing to argue this point, respondents appear to concede it.").

Blazina demonstrates there is no strategic reason for counsel failing to object. Richter incurs no possible benefit from LFOs. And, given Richter's indigency, there is a substantial likelihood the trial court would have waived discretionary LFOs had it properly considered Richter's current and future ability to pay. Therefore, this Court can also vacate the LFOs and remand for resentencing on this alternative basis.

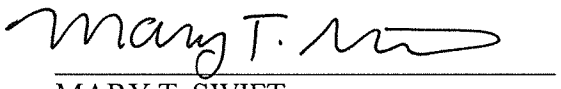
B. CONCLUSION

For the reasons stated above and in the opening brief, this Court should reverse Richter's convictions and remand for a new trial. This Court should also vacate Richter's sentence and LFOs, and remand for resentencing within the standard range, with instructions to run the school zone enhancements concurrently with one another.

DATED this 28th day of May, 2015.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC



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DIVISION TWO

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
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	)	
RANDY RICHTER,	)	
	)	
Appellant.	)	

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 28TH DAY OF MAY, 2015, 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.

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DOC NO. 812747
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

SIGNED IN SEATTLE WASHINGTON, THIS 28TH DAY OF MAY, 2015.

X Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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