

No. 97197-8
COA No. 77783-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GUY OSBORN,

Petitioner.

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Robert Osborn asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Robert Guy Osborn*, No. 77783-1-I (April 15, 2019). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. Under RCW 69.50.315 (2), a person suffering from drug-related overdose is immune from prosecution for possession of a controlled substance where the evidence was obtained as a result of a need for medical assistance for a drug overdose. Here, emergency responders were called to assist Mr. Osborn, whose condition was described as a “slumper,” or one who is unconscious and suffering from a drug overdose. Due their actions, Mr. Osborn awoke and handed one of the emergency responders a baggie containing heroin. Nevertheless, the trial court refused to find Mr. Osborn immune under the statute. Under the plain language of the statute, Mr. Osborn

required medical assistance due to a drug-related overdose. Did the trial court err in failing to find Mr. Osborn immune under the statute from prosecution for possession of heroin requiring reversal of his conviction with instructions to dismiss?

2. Assuming the term “drug-related overdose” is ambiguous as to Mr. Osborn’s condition, under the canons of statutory construction, the statute applied to Mr. Osborn. Following an analysis of statutory construction, was the trial court incorrect in its finding that Mr. Osborn was not suffering from a drug-related overdose, and as a result, is Mr. Osborn entitled to reversal and dismissal of his conviction?

D. STATEMENT OF THE CASE

On September 29, 2015, Robert Osborn was reported by a citizen slumped against the steering wheel of his car, unconscious. CP 108; 8/24/2017RP 12. Mr. Osborn was described as a “slumper.” RP 6. A “slumper” is a term used by emergency personnel to describe someone suffering a heroin overdose. 8/24/2017RP 6, 12. Emergency personnel do not make a distinction between a “slumper” and a person suffering a drug overdose. 8/24/2017RP 15. Firefighters/Paramedics responded to the citizen’s 911 call and through their assistance,

awakened Mr. Osborn. 8/24/2017RP 6, 12, 14-15.¹ When awakened, according to fire personnel, Mr. Osborn reached between his legs, retrieved a baggie containing suspected heroin, a needle and cotton, handed it to the firefighter, and asked whose it was. 8/24/2017RP 6, 17.²

Firefighters asked for a police officer to respond. 8/24/2017RP 5-6. Everett Officer Albright responded 45 minutes later, gained possession of the baggie from the firefighter and contacted Mr. Osborn. 8/24/2017RP 6-7. In response to the officer's questions, Mr. Osborn stated he did not know whose baggie it was, but it was not his. 8/24/2017RP 7. Mr. Osborn told the officer the car was his and he was currently living in it. 8/24/2017RP 8-9.

¹ The trial court found that emergency responders did not render aid. CP 108-09. This finding is not supported by the evidence. Officer Albright was the only witness and he was not present when the firefighters arrived and did not know what they did or did not do. 8/24/2017RP 7-8. At best, Officer Albright testified the firefighters did not mention any treatment. 8/24/2017RP 16 ("He didn't mention any medical treatment that they gave him.").

² The trial court also ruled that, according to Firefighter Mann, after speaking to Mr. Osborn for a few minutes, Mr. Osborn was answering questions appropriately. CP 106-07. Firefighter Mann did not testify at the hearing and no evidence was presented that supported this finding.

Mr. Osborn was subsequently charged and convicted of possession of heroin. CP 45, 139; RP 211.³

On appeal, the Court of Appeals ruled there was no evidence Mr. Osborn was given medical aid or that that he had used prior to the interaction between with the first responders. Decision at 5. The Court also ruled the statute was not ambiguous, thus statutory construction was not required. Decision at 6-7.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

Pursuant to RCW 69.50.315 (2), Mr. Osborn was immune from prosecution from the possession of the heroin.

- a. *RCW 69.50.315 (2) provides immunity for prosecution for possession of a controlled substance discovered while needing medical assistance for an overdose.*

Under RCW 69.50.315(2):

A person who experiences a drug-related overdose and is in need of medical assistance shall not be charged or prosecuted for possession of a controlled substance pursuant to RCW 69.50.4013, or penalized under RCW 69.50.4014, if the evidence for the charge of possession of a controlled substance was obtained as a result of the overdose and the need for medical assistance.

³ At Mr. Osborn's request, the jury was instructed on unwitting possession. CP 95.

Here, as required by statute, Mr. Osborn was charged under RCW 69.50.4013 for possessing heroin. CP 139. According to Officer Albright, Mr. Osborn was treated by the Everett Fire Department as a “slumper,” or someone slumped over the steering wheel of a vehicle suffering from a heroin overdose. RP 4-6, 8, 12. Officer Albright also related a conversation he had with a firefighter, who related Mr. Osborn was unconscious when found and they “somehow roused him.” RP 14.⁴

Contrary to the Court of Appeal’s conclusion there was evidence in the record that Mr. Osborn had used drugs prior to the interaction with first responders and that the aid workers had rendered medical attention to him. This is especially true given the discussion about Mr. Osborn being a “slumper,” a term emergency personnel use for people unconscious from a drug overdose, and the fact Mr. Osborn was found by the firefighters unconscious, a reasonable inference was that Mr. Osborn was experiencing a “drug-related overdose” as that term is used in RCW 69.50.315 (2). Thus, under the plain language of the statute, t Mr. Osborn was covered by RCW 69.50.315(2) and thus, immune from prosecution.

⁴ In its written ruling, the trial court found that medical personnel delivered no aid and Mr. Osborn was not using drugs or in need of aid. CP 108.

b. *The plain meaning of RCW 69.50.315 renders it applicable to Mr. Osborn.*

“The purpose of statutory interpretation is ‘to determine and give effect to the intent of the legislature.’” *State v. Evans*, 177 Wn.2d 186, 192, 298 P.3d 724 (2013), quoting *State v. Sweany*, 174 Wn.2d 909, 914, 281 P.3d 305 (2012). When interpreting a statute, the court first looks to the “plain language 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.” *Evans*, 177 Wn.2d at 192.

When examining plain language, courts consider the specific text of the relevant provision, the context of the entire statute, any related provisions, and the statutory scheme as a whole. *Id.* at 192. If the statute is unambiguous after this reading, it requires no construction; courts apply its plain language. *Evans*, 177 Wn.2d at 192. Courts neither add language to nor delete language from an unambiguous statute; instead, all language must be given effect, without rendering any part of the statute meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Questions of statutory construction are reviewed de novo. *Id.* at 191.

As argued *supra*, the plain language of RCW 69.50.315(2) is unambiguous and the statute applied to Mr. Osborn.

c. *If ambiguous, canons of statutory construction render it applicable to Mr. Osborn.*

If more than one interpretation of the plain language is reasonable, the statute is ambiguous, and the Court must then engage in statutory construction. *Evans*, 177 Wn.2d at 193; *City of Seattle v. Winebrenner*, 167 Wn.2d 451, 456, 219 P.3d 686 (2009). In engaging in this statutory construction, courts look to legislative history for assistance in discerning legislative intent. *Evans*, 177 Wn.2d at 193; *State v. Bash*, 130 Wn.2d 594, 601, 925 P.2d 978 (1996).

If a penal statute is ambiguous and thus subject to statutory construction, it must be “strictly construed” in favor of the defendant. *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986). This means that an ambiguous penal statute will be interpreted adversely to the defendant *only if* statutory construction *clearly establishes* that the legislature intended such an interpretation. *Winebrenner*, 167 Wn.2d at 462. And, even when examining the plain language of a statute, courts must consider “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.” *Evans*, 177 Wn.2d at 192.

RCW 69.41.095(5)(c) was added in 2015 in the same legislation that amended RCW 69.50.315. Laws of 2015, ch. 205, §§ 2, 4.⁵ RCW 69.41.095(5)(c) defines “Opioid-related overdose” as:

“Opioid-related overdose” means a condition including, but not limited to, extreme physical illness, *decreased level of consciousness*, respiratory depression, coma, or death that: (i) Results from the consumption or use of an opioid or another substance with which an opioid was combined; or (ii) a lay person would reasonably believe to be an opioid-related overdose requiring medical assistance.

(emphasis added).

In the case of multiple statutes or provisions governing the same subject matter, effect will be given to both to the extent possible. *In re Estate of Kerr*, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). Efforts will be made to harmonize statutes, particularly if the legislation itself recognizes that multiple statutes may govern. *State v. Conte*, 159 Wn.2d 797, 806-10, 154 P.3d 194, *cert. denied*, 552 U.S. 992 (2007).

In harmonizing RCW 69.41.095 with RCW 69.50.315, it demonstrates the Legislature intended for the definition in RCW 69.41.095 to apply to the term “drug-related overdose” in RCW 69.50.315(2). The two statutes were addressed by Legislature in the

⁵ RCW 69.50.315 was originally enacted in 2010. Laws of 2010, ch. 9, § 2.

same piece of legislation. Further, the intent of the Legislature in amending RCW 69.50.315 can found in the chapter text enacting RCW 69.41.095. Laws of 2015, ch. 205, § 1.

The language used in the two statutes is similar. *Compare* RCW 69.41.095(c) (“opioid-related overdose requiring medical assistance”) with RCW 69.50.315(2) (“overdose and the need for medical assistance”).

Under RCW 69.41.095(c), Mr. Osborn was plainly suffering an “opioid-related overdose.” Based on the testimony at the hearing, Mr. Osborn was suffering from at least a “decreased level of consciousness.” RCW 69.41.095(c). Further, based on the phone call from the citizen, the emergency responders believed Mr. Osborn was suffering from an overdose. *See* RCW 69.41.095(c) (condition that “a lay person would reasonably believe to be an opioid-related overdose requiring medical assistance”).

To construe the statutes as covering two different scenarios would render one or more of the terms of the statutes meaningless or superfluous. *See State v. Ervin*, 169 Wn.2d 815, 823, 239 P.3d 354 (2010) (“we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous.”). It also would lead to

the absurd result of having two definitions describing the same issue, which the Legislature could not have intended. *See Densley v. Dep't. of Retirement Sys.*, 162 Wn.2d 210, 221, 173 P.3d 885 (2007) (unlikely or absurd results should be avoided).

RCW 69.41.095(c) provides a definition for the term “drug-related overdose” as that term is used in RCW 69.50.315(2). The statutes applied to Mr. Osborn and he was immune from prosecution under RCW 69.50.315(2).

d. *The rule of lenity requires RCW 69.50.315 (2) be construed in Mr. Osborn’s favor requiring immunity from prosecution for possession of heroin.*

If after applying rules of statutory construction the statute remains ambiguous, “the rule of lenity requires [courts] to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *Winebrenner*, 167 Wn.2d at 462. *See also In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 250 n.4, 252-53, 955 P.2d 798 (1998) (“[I]f the indications of legislative intent are insufficient to clarify the ambiguity, we will then interpret the statute in favor of the defendant”).

As argued, *supra*, under the plain meaning of RCW 69.50.315, or after applying the canons of statutory construction, Mr. Osborn was

suffering a drug-related overdose and needed medical assistance; thus the trial court erred in finding he was not immune from prosecution. But, to the extent RCW 69.50.315 remains ambiguous, the statute must be construed in Mr. Osborn's favor. Thus, under RCW 69.50.315(2), Mr. Osborn needed aid for a drug-related overdose and, under the statute, he was immune from prosecution for possession of the heroin.

e. *This is an issue of substantial public interest that should be decided by this Court.*

This Court may grant review and consider a Court of Appeals opinion if it “involves an issue of substantial public interest that should be determined by the Supreme Court.” RAP 13.4(b)(4). A decision that has the potential to affect a number of proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *See State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005) (prosecutor's policy decision not to recommend DOSA in any case had the potential to affect every sentencing proceeding in Pierce County after November 26, 2001, where a DOSA sentence was or is at issue).

This decision by the Court of Appeals here presents an issue of substantial public interest as it has the potential to affect matters state-

wide regarding the quantum of proof necessary to establish immunity under RCW 69.50.315. This Court should grant review.

F. CONCLUSION

For the reasons stated, Mr. Osborn asks this Court to grant review and reverse his conviction.

DATED this 13th day of May 2019.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT GUY OSBORN,

Appellant.

No. 77783-1-I

DIVISION ONE

UNPUBLISHED OPINION

FILED: April 15, 2019

APPELWICK, C.J. — A jury found Osborn guilty of possession of a controlled substance—heroin. He argues that the trial court erred in finding that he did not have immunity from prosecution under RCW 69.50.315. He also argues that the trial court erred by including an out-of-state prior conviction in his offender score, without conducting a comparability analysis. We affirm the conviction, but remand for resentencing.

FACTS

On September 29, 2015, Police Officer Geoffrey Albright responded to a request from the fire department to assist at the scene near Virginia Avenue. When Albright arrived, he was told that there had been a report of someone passed out behind the wheel of a car parked in an alley. The firefighters woke up the person in the car, and that man, Robert Osborn, gave a firefighter a plastic bag that contained a needle, pieces of dirty cotton, and a brown substance that was later tested and determined to be heroin. Osborn told Officer Albright that he did not

know where the bag came from and that it was not his. Osborn told the officer that it was his car, and that he was currently living in it. Albright arrested Osborn and read him his Miranda¹ rights.

The State charged Osborn with possession of heroin. Pursuant to RCW 69.50.315, Osborn moved to suppress the evidence. He argued that police discovered the heroin as a result of someone reporting what he or she believed was an overdose, and that this incident fell within the protection of the statute.

The trial court found that the statute “provides protection to two classes: (1) a person who calls for medical help to report someone having an overdose; and (2) a person who experiences an overdose calling for help.” It concluded that Osborn did not fit either of those categories, and denied his motion to suppress.

After the first trial, the jury was deadlocked and the court declared a mistrial. The second jury found Osborn guilty of possession of a controlled substance. At sentencing, the State calculated Osborn’s offender score, and included an Idaho burglary conviction. It stated, “The defendant’s criminal history includes nine adult felonies. Two of those effectively wash, though. There were three felonies stemming from one case in Idaho.” The State calculated Osborne’s offender score as a six. The court imposed a sentence based on the State’s calculation of the offender score, which included one Idaho felony conviction. Osborn appeals.

¹ Miranda v. Arizona, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

DISCUSSION

Osborn makes two arguments. First, he argues that the trial court erred in concluding that he was not immune from prosecution under RCW 69.50.315. Second, he argues that the trial court erred in including the Idaho prior conviction in his offender score, because it failed to conduct the required comparability analysis.

I. Immunity from Prosecution

Osborn argues first that the trial court erred in concluding that he was not protected from prosecution by RCW 69.50.315. He asserts that, under the plain language of the statute, he was immune from prosecution for possession. Alternatively, he argues that, if this court finds the statute ambiguous, it must be construed in his favor.

A. Statutory Interpretation

We review a question of statutory construction de novo. State v. Roggenkamp, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). The purpose of statutory interpretation is to determine and give effect to the intent of the legislature. State v. Evans, 177 Wn.2d 186, 192, 298 P.3d 724 (2013). When interpreting a statute, the court first looks to the “plain language 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.” Id. Plain language that is not ambiguous does not require construction. Id. Courts neither add language to nor delete language from an unambiguous statute; instead, all language must be given effect, without rendering any part of the statute

meaningless or superfluous. State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be ambiguous. Roggenkamp, 153 Wn.2d at 621. Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute. Id.

B. RCW 69.50.315

Osborn asserts that he was immune from prosecution pursuant to RCW 69.50.315(2). The statute provides,

A person who experiences a drug-related overdose and is in need of medical assistance shall not be charged or prosecuted for possession of a controlled substance pursuant to RCW 69.50.4013, or penalized under RCW 69.50.4014, if the evidence for the charge of possession of a controlled substance was obtained as a result of the overdose and the need for medical assistance.

RCW 69.50.315(2).

The State charged Osborn under RCW 69.50.4013 for possession of heroin. He argues that, because firefighters found him unconscious when they arrived at the scene, a reasonable inference was that he was experiencing a “drug-related overdose” as the term is used in the statute. He points to Officer Albright’s testimony, in which he stated that the fire department was called to the scene to respond to a report of a “slumper,” a term that is commonly associated with heroin use or an overdose. Albright also testified that the initial call was to respond to someone “passed out behind the wheel of a vehicle in the alleyway.” Albright stated that the first responder, firefighter Timothy Mann, had arrived at the scene

before him and “somehow roused” Osborn. Osborn asserts that, under these facts, he was immune from prosecution under the plain language of the statute.

Osborn challenges the trial court’s conclusion that “[m]edical personnel delivered no aid. No facts suggest that Osborn was using drugs, or needed aid.”

Albright testified that the firefighters who arrived before him “were able to awake[n] the person in the vehicle.” Albright did not administer medical treatment to Osborn, nor did he see anyone administer medical treatment. When asked if there was anything in his report indicating that the fire department administered any medical treatment such as Naloxone² or Narcan, Albright responded,

Not directly. In a way -- if the fire department administers Naloxone, they transport to the hospital 100 percent of the time. So the fact that they did not transport him, I know that they did not give him Naloxone.

Likewise they would transported [sic] him if they gave him [cardiopulmonary resuscitation] and any other kind of things commonly associated with a heroin overdose. In this case it was simply waking him up.

There was no evidence that established that medical aid was given to Osborn. Nor was there evidence that Osborn used drugs prior to his interaction with the fire department and law enforcement, or that he needed aid when they arrived. Under the plain language of the statute, a person who experiences a drug-related overdose and is in need of medical assistance will not be charged or prosecuted for possession of a controlled substance, if the evidence was obtained as a result of the overdose and need for medical assistance. RCW 69.50.315(2).

² Naloxone is used to counteract the effects of heroin, and is administered to a person experiencing an overdose.

We must give effect to all the language of the statute, without rendering any part of the statute meaningless or superfluous. Here, there is no evidence that Osborn experienced an overdose and needed medical assistance. The evidence supports the trial court's conclusion.

Therefore, the trial court did not err in concluding that Osborn was not immune from prosecution under RCW 69.50.315(2).

C. Ambiguity in Statute

Osborn also asserts that the language used in RCW 69.50.315(2) is similar to that in RCW 69.41.095, and that the definition of "opioid-related overdose" of RCW 69.41.095(5)(c) should apply to the term "drug-related overdose" in RCW 69.50.312(2). He argues that he was experiencing an "opioid-related overdose" as defined in RCW 69.41.095(5)(c). Osborn stresses that he was suffering from "at least a 'decreased level of consciousness.'" Moreover, Osborn argues that if the statute "remains ambiguous," the rule of lenity requires courts to interpret the statute in his favor.

RCW 69.41.095(5) provides,

For purposes of this section, the following terms have the following meanings unless the context clearly requires otherwise:

....

(c) "Opioid-related overdose" means a condition including, but not limited to, extreme physical illness, decreased level of consciousness, respiratory depression, coma, or death that: (i) Results from the consumption or use of an opioid or another substance with which an opioid was combined; or (ii) a lay person would reasonably believe to be an opioid-related overdose requiring medical assistance.

This definition is in the context of a statute which authorizes a practitioner to prescribe or administer opioid overdose medication. See RCW 69.41.095. That definition has no application here. RCW 69.50.315(2) applies when a person is actually experiencing a drug-related overdose and needs medical assistance. The existence of the definition in RCW 69.41.095 does not render RCW 69.50.315(2) ambiguous. The rule of lenity does not apply.

II. Offender Score

Osborn argues second that the trial court erred in including the Idaho prior conviction in his offender score. The State concedes that it was error for the court to include the conviction without conducting the comparability analysis. It agrees with Osborn that this court should remand for resentencing for the trial court to conduct a legal and factual comparability analysis.

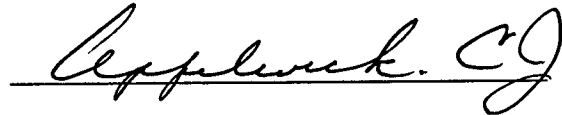
To properly calculate a defendant's offender score, the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, requires that sentencing courts determine a defendant's criminal history based on his prior convictions and the level of seriousness of the current offense. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The SRA also requires that prior out-of-state convictions be classified according to the comparable offense definitions and sentences provided by Washington law. Id.; RCW 9.94A.525(3).

A challenge to the offender score calculation may be raised for the first time on appeal. State v. Ford, 137 Wn.2d 472, 477-78, 973 P.2d 542 (1999). Where evidence is insufficient to support the conclusion that the disputed convictions would be classified as felonies under Washington law, resentencing is required.

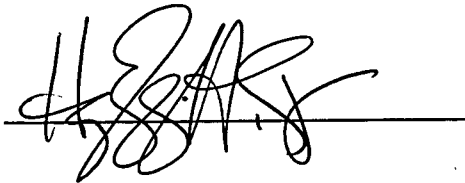
Id. at 485. On remand, both parties may present and the court may consider all relevant evidence regarding criminal history, including history and information not previously presented. State v. Cobos, 182 Wn.2d 12, 15-16, 338 P.3d 283 (2014).

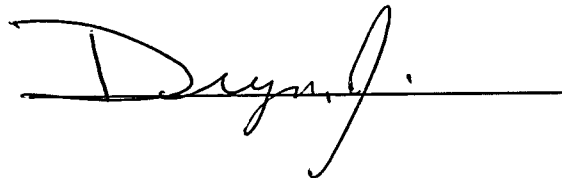
There is no evidence that the court below conducted a comparability analysis. Osborn did not object to the court including his Idaho burglary conviction in his offender score. But, Osborn did not affirmatively accept the inclusion. The evidence is insufficient to support the conclusion that the Idaho prior conviction is legally or factually comparable to a felony under Washington law.

We affirm the conviction but remand for the court to conduct a legal and factual comparability analysis on resentencing.



WE CONCUR:





DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 77783-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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