

NO. 68250-4-I

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

STATE OF WASHINGTON,

Respondent,

v.

JAMES A. BATTLE,

Appellant.

REC'D
JUN 20 2012
King County Prosecutor
Appellate Unit

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

The Honorable James D. Cayce, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court violated double jeopardy protections by amending James A. Battle's judgment and sentence.

2. The trial court violated the rule of lenity by amending Battle's judgment and sentence.

Issues Pertaining to Assignments of Error

1. Double jeopardy prohibits amendment of a correct sentence. Was the trial court's original sentence correct, even though it did not reflect a doubling of the statutory maximum despite (1) Battle's previous drug convictions and (2) his commission of a drug delivery within 1,000 feet of a school bus route stop?

2. Are the Uniform Controlled Substances Act doubling provisions found in RCW 69.50.408 and .435 ambiguous, thus mandating resort to the rule of lenity?

3. Even if Battle's original statutory maximum sentence was incorrect, did he have a legitimate expectation of finality in the sentence such that the trial court's amended judgment and sentence constituted double jeopardy?

B. STATEMENT OF THE CASE

1. Procedural Background

The King County prosecutor charged Battle delivery of cocaine, resisting arrest, and tampering with a witness. The State alleged the delivery occurred within 1,000 feet of a school bus stop. CP 13-15. The State did not allege that Battle had other convictions for violating the Uniform Controlled Substances Act, Chapter 69.50 RCW. The jury found Battle guilty of delivery, and returned a special verdict finding the delivery occurred within 1,000 feet of a school bus route stop. CP 9-17.

Battle's offender score of 9 yielded a standard range of 60 months to 120 months. RCW 9.94A.517. On December 17, 2007, the trial court imposed a standard range sentence of 90 months, then added 24 months for the school bus stop enhancement, for a total of 114 months. CP 12; RCW 9.94A.533(6) (mandating additional consecutive 24 months for violating RCW 69.50.435, which includes delivery of cocaine within 1,000 feet of school bus route stop). The judgment and sentence reflected the statutory maximum was 120 months incarceration and a \$20,000 fine. CP 10; RCW 69.50.401(2)(a). The prosecutor declared these to be the statutory maximum terms. RP 2.

Battle filed a timely notice of appeal. CP 18. During the course of the appeal, Battle filed a pro se Motion to Modify or Correct the Judgment and Sentence under CrR 7.8. Supp. CP __ (sub. no. 87, filed 2/7/2008). He maintained the trial court miscalculated his offender score. The trial court transferred the motion to this Court to be treated as a Personal Restraint Petition. Supp. CP __ (sub. no. 88, Order of Transfer, filed 2/7/2008). This Court dismissed the petition April 1, 2008, finding Battle failed to show the legal remedy available to him was inadequate. Supp. CP __ (sub. no. 106, Order of Dismissal, filed 4/1/2008).

In September 2008, Battle filed a pro se Motion for Release Pending Appeal. Supp. CP __ (sub. no. 109, filed 9/17/2008). The trial court denied the motion. CP 19; Supp. CP __ (sub. no. 112, Order Clarifying Court's Ruling, filed 10/7/2008). Battle challenged the trial court's orders in this Court. A Court Commissioner denied Battle's motion for release on November 18, 2008. Supp. CP __ (sub. no. 113, Mandate filed 6/30/2009, with Commissioner's Ruling attached).

Meanwhile, Battle's direct appeal progressed. In an unpublished opinion filed November 10, 2008, this Court rejected the arguments raised by counsel and Battle pro se and affirmed the conviction. State v. Battle,

147 Wn. App. 1021, 2008 WL 4838842 (2008), review denied, 166 Wn.2d 1003 (2009).

Battle filed a Personal Restraint Petition (PRP) challenging his conviction and sentence, which this Court dismissed in January 2010. Supp. CP __ (sub. no. 114, Certificate of Finality filed 9/13/2010, with Order Dismissing PRP attached). He filed another PRP, raising different arguments, which this Court dismissed in August 2010. Supp. CP __ (sub. no. 115, Certificate of Finality filed 9/27/2010, with Order Dismissing PRP attached). Finally, this Court dismissed another PRP, again alleging different errors, in November 2010. Supp. CP __ (sub. no. 117, Certificate of Finality filed 11/29/2010, with Order Dismissing PRP attached).

2. Current Appeal

On December 23, 2011, the trial court – apparently at the behest of the prosecutor – entered an order amending Battle's judgment and sentence to correct the statutory maximum to 20 years incarceration and/or a fine of \$40,000. CP 25.¹ Battle filed a timely notice of appeal. CP 26- 27.

¹ Neither the record on appeal nor the trial court docket includes a prosecutor's motion to amend.

C. ARGUMENT

1. THE TRIAL COURT VIOLATED BATTLE'S CONSTITUTIONAL DOUBLE JEOPARDY PROTECTIONS BY AMENDING THE JUDGMENT AND SENTENCE AND DOUBLING THE STATUTORY MAXIMUM PENALTIES.

The double jeopardy clause prohibits resentencing to increase a correct sentence. State v. Hardesty, 129 Wn.2d 303, 310, 915 P.2d 1080 (1996). Because the trial court had the discretion not to double the statutory maximum penalty for Battle's violation of the Uniform Controlled Substances Act, the court's original sentence was correct. By later amending and increasing this correct sentence, the court violated Battle's constitutional protection against double jeopardy. This Court should order the amended judgment and sentence vacated.

"The double jeopardy clauses of the Fifth Amendment and article 1, section 9 of the state Constitution forbid multiple punishments for the same offense." State v. Lynch, 93 Wn. App. 716, 723, 970 P.2d 769 (1999) (citing State v. Hull, 83 Wn. App. 786, 792, 924 P.2d 375 (1996), review denied, 131 Wn.2d 1016 (1997)); see State v. Toney, 149 Wn. App. 787, 797, 205 P.3d 944 (2009) ("The Washington State Constitution prohibits the State from punishing a defendant twice for the same crime."), review denied, 168 Wn.2d 1027 (2010).

A double jeopardy claim may be made for the first time on appeal. State v. Jackman, 156 Wn.2d 736, 746, 132 P.3d 136 (2006). Although the double jeopardy clause constitutes a constitutional protection, "the analytical framework centers around a question of statutory interpretation and legislative intent." State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007). Double jeopardy questions are thus reviewed de novo. State v. Freeman, 153 Wn.2d 765, 770, 108 P.3d 753 (2005).

a. Battle's original sentence was correct.

To determine whether Battle's original sentence correctly reflected the statutory maximum penalties, this Court must determine whether doubling is mandatory or discretionary. If the trial court had discretion not to double the maximum, the original sentence was correct.

Battle's original statutory maximum punishment -- 120 months and a fine of not more than \$20,000 -- was consistent with RCW 69.50.401(2)(a). A sentencing court "may" double this maximum for second or subsequent violations of delivery of a controlled substance, RCW 69.50.408(1), or if the delivery occurs within 1,000 feet of a school bus stop. RCW 69.50.435(1)(c).

"'May' is a discretionary term in contrast to the mandatory 'shall'" Amren v. City of Kalama, 131 Wn.2d 25, 35 n.8, 929 P.2d 389 (1997); see

State ex rel. Beck v. Carter, 2 Wn. App. 974, 977-78, 471 P.2d 127 (1970) ("The general rule of statutory construction has long been that the word 'may' when used in a statute or ordinance is permissive and operates to confer discretion."). "Shall" will be interpreted as being permissive only where a contrary legislative intent is shown. State v. Bartholomew, 104 Wn.2d 844, 848, 710 P.2d 196 (1985)

While acknowledging this general rule, this Court held RCW 69.50.408 is mandatory. In re Personal Restraint of Hopkins, 89 Wn. App. 198, 201, 948 P.2d 394 (1997), reversed on other grounds, 137 Wn.2d 897 (1999). This Court reached this conclusion after observing that every other provision of the Uniform Controlled Substances Act that sets a maximum term, such as RCW 69.50.401(2)(a)² and RCW 69.50.4011(2)(a),³ also uses the term "may." Therefore, "when a defendant is convicted under RCW 69.50 and has a prior conviction under that chapter, his statutory maximum term automatically becomes twice as long as would otherwise be authorized for his crime." Id. But see State v. Williams, 70 Wn. App. 567, 571, 853 P.2d 1388 (1993) ("RCW 69.50.435

² "Any person who violates this section . . . is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years[.]"

³ "Any person who violates this section . . . is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years[.]"

gives a trial court discretion to sentence 'up to' double the imprisonment otherwise authorized."), review denied, 123 Wash.2d 1011 (1994).

Divisions Two and Three disagree with Hopkins. In State v. Mayer,⁴ Division Three relied on the distinction between the terms "may" and "shall" to hold the doubling provision set forth in RCW 69.50.408 was discretionary. See also State v. Roy, 147 Wn. App. 309, 315, 195 P.3d 967 (2008) ("A judge is not required to impose a double sentence, but the option is available to him or her under RCW 69.50.408(1)."), review denied, 165 Wn.2d 1051 (2009). Division Two is in accord. State v. O'Neal, 126 Wn. App. 395, 429, 109 P.3d 429 (2005) affd. on other grounds, 159 Wn.2d 500 (2007); see also State v. Cameron, 80 Wn. App. 374, 380, 909 P.2d 309 (1996) (RCW 69.50.408 "embodied a measure of prosecutorial discretion, if not also a measure of judicial discretion.").⁵

Questions of statutory interpretation are reviewed de novo. State v. Bunker, 169 Wn.2d 571, 577-78, 238 P.3d 487 (2010). A court's goal when construing a statute is to carry out the legislature's intent. State v. Wofford, 148 Wn. App. 870, 877, 201 P.3d 389 (2009), review denied,

⁴ 120 Wn. App. 720, 727, 86 P.3d 217 (2004).

⁵ The Hopkins Court declined to follow Cameron because the State did not argue RCW 69.50.408 must be construed consistently with other statutes using the same language to set maximum terms for other felonies.

170 Wn.2d 1010 (2010). Unambiguous statutes are read according to their plain language. In re Personal Restraint of Skylstad, 160 Wn.2d 944, 948, 162 P.3d 413 (2007).

If the statute can be reasonably interpreted in two or more ways, it is ambiguous and a court must use additional tools of statutory construction to determine its meaning. In re Detention of Hawkins, 169 Wn.2d 796, 801, 238 P.3d 1175 (2010). Courts must construe an act as a whole, considering all provisions in relation to each other and harmonizing them rather than rendering any superfluous. State v. George, 160 Wn.2d 727, 738, 158 P.3d 1169 (2007). "Every word, clause, and sentence of a statute should be given effect, if possible." State v. Kelley, 77 Wn. App. 66, 72, 889 P.2d 940 (1995). Courts also presume the legislature did not intend absurd results. State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010). Absent legislative intent to the contrary, the rule of lenity requires a court to interpret an ambiguous statute in favor of the defendant. State v. Coucil, 170 Wn.2d 704, 706-07, 245 P.3d 222 (2010).

As applied to Battle's case, the split of authority regarding RCW 69.50.408 is supported by reasonable interpretations on both sides. In other words, the statute is ambiguous. Consideration of other sentencing provisions of the Uniform Controlled Substances Act, however, supports

the view that a trial court has discretion whether to double the statutory maximum under the statute. As Hopkins noted, RCW 69.50.401(2)(a) and (b) state the eligible offender "may be imprisoned for not more than ten years[.]" And the same language is used in RCW 69.50.4011, which sets the sentencing maximums for offenses involving counterfeit controlled substances.

But when read in context, the "may" in those provisions relied on by the Hopkins Court is plainly mandatory. The full phrase makes that clear. It reads in pertinent part: "is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years[.]" RCW 69.50.401(2)(a), (b). The term "class B felony," derives from RCW 9A.20.021(b), which provides for a statutory maximum term of 10 years for conviction of a class B felony. Indeed, the operative language in RCW 69.50.401(2)(c), (d), and (e), relating to class C violations, is "is guilty of a class C felony *punishable according to chapter 9A.20 RCW[.]*"⁶ (Emphasis added).

The only reason subsections (a) and (b) are worded differently is the legislature chose to impose different fines for offenses involving two

⁶ Most other penalty provisions also refer to punishment "according to chapter 9A.20 RCW." See RCW 69.50.4012, .4013, .4015, .415, and .440.

or more kilograms of the controlled substance at issue. RCW 69.50.401(2)(a)(i)(ii), (b)(i)(ii).⁷

When examined this way, it is clear the "class B" or class C" maximum sentences set forth in RCW 9A.20.021 apply. To read the word "may" as meaning a trial court can choose a different statutory maximum sentence under these provisions would render the legislature's reference to "class B" or "class C" superfluous. Such a reading would also lead to absurd results, because although clearly designated a class B felony, violation of RCW 69.50.401(2)(a), for example, could carry whatever maximum sentence the judge saw fit. This is improper; "[t]he legislature,

⁷ RCW 9.94A.4011, the corresponding statute for counterfeit controlled substances, also refers to "class B" and "class C" felonies. Subsection (2)(a) provides:

Any person who violates this section with respect to: (a) A counterfeit substance classified in Schedule I or II which is a narcotic drug, or flunitrazepam classified in Schedule IV, is guilty of a class B felony and upon conviction may be imprisoned for not more than ten years, fined not more than twenty-five thousand dollars, or both[.]

Subsection (2)(c) provides: "Any other counterfeit substance classified in Schedule I, II, or III, is guilty of a class C felony punishable according to chapter 9A.20 RCW[.]"

not the court, determines crimes and punishments." In re Personal Restraint of Carrier, 173 Wn.2d 791, 822, 272 P.3d 224 (2012).

Furthermore, where the legislature chooses to punish a classified felony differently than in RCW 9A.20.021, it so specifies. See RCW 69.50.416(3) ("A person who violates this section is guilty of a class C felony and upon conviction may be imprisoned for not more than two years, fined not more than two thousand dollars, or both.").

In contrast to the other drug offense sentence-setting provisions of chapter 69.50 RCW, neither RCW 69.50.408 nor .435 refers to the felony classifications of RCW 9A.20.021. Instead, the term "may" is untethered from any other statutory sentencing provision that would change or narrow its customary permissive meaning. This suggests a sentencing court may, but not must, apply the doubling statutes.

Furthermore, the legislature has made clear when enhanced punishment for second or subsequent violations of the Uniform Controlled Substances Act is mandatory. RCW 69.50.430 provides:

(1) Every person convicted of a felony violation of RCW 69.50.401 through 69.50.4013, 69.50.4015, 69.50.402, 69.50.403, 69.50.406, 69.50.407, 69.50.410, or 69.50.415 *shall be fined one thousand dollars* in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court.

(2) On a second or subsequent conviction for violation of any of the laws listed in subsection (1) of this section, the person *shall be fined two thousand dollars* in addition to any other fine or penalty imposed. Unless the court finds the person to be indigent, this additional fine shall not be suspended or deferred by the court.

(Emphasis added). RCW 69.50.430's use of "shall" renders the fine mandatory. State v. Cowin, 116 Wn. App. 752, 760, 67 P.3d 1108, review denied, 150 Wn.2d 1019 (2003).

Yet under RCW 69.50.408 and .435, the legislature chose to use "may" instead of "shall." "Where a provision contains both the words 'shall' and 'may,' it is presumed that the lawmaker intended to distinguish between them, 'shall' being construed as mandatory and 'may' as permissive." Scannell v. City of Seattle, 97 Wn.2d 701, 704-05, 648 P.2d 435 (1982).

All these features of chapter 69.50 RCW, considered as a whole and in relation to each other, show it was the legislature's intent to allow trial judges to determine whether or not to double the statutory maximum penalty for VUCSA recidivists. And because RCW 69.50.435, which permits doubling where the second or subsequent offense occurs within 1,000 feet of a school bus stop, uses language similar to RCW 69.50.408, the same result obtains. Because the doubling option is discretionary, the

trial court's original sentence was correct. Amending a correct sentence violates double jeopardy, a result that should obtain here.

Alternatively, RCW 69.50.408 and the corresponding doubling provision in .435 are ambiguous and the rule of lenity should apply in Battle's favor. In either event, this Court should vacate the trial court's amended judgment and sentence.

- b. Even if the original sentence was incorrect, Battle had a legitimate expectation of finality in its terms.

Even correction of an erroneous sentence can constitute double jeopardy. The "analytical touchstone" in such circumstances "is the defendant's legitimate expectation of finality in the sentence." State v. Hardesty, 129 Wn.2d at 311. This expectation is affected by factors such as sentence completion, passage of time, existence of a pending challenge to the sentence, or a defendant's misconduct in obtaining the sentence. Harris v. Charles, 171 Wn.2d 455, 461, 256 P.3d 328 (2011).

For example, the Hardesty Court permitted amendment of a sentence nearly two years later because the defendant failed to disclose two additional felonies when he certified his criminal history and pleaded guilty. 129 Wn.2d at 306-08. The Court held that even though Hardesty completed his sentence, he had no expectation of finality in the fraudulently obtained sentence. State v. Hardesty, 129 Wn.2d at 316.

In State v. Gonzalez,⁸ the defendant was ordered to pay \$20,886 restitution to cover the victim's substantial medical bills. The victim continued to accrue bills post-sentencing, which eventually totaled \$46,447.90. 168 Wn.2d at 260. More than 900 days after sentencing, the State moved for an amended restitution order to reflect the increased expenses. The trial court granted the motion and Gonzalez appealed. 168 Wn.2d 260.

The Supreme Court affirmed, pointing out the restitution statute expressly permitted amendment to reflect changing costs.⁹ Holding all citizens are presumed to know the laws, the Court found no legitimate expectation of finality because Gonzalez was on notice his restitution order could be modified. 168 Wn.2d at 269.

In contrast to Hardesty and Gonzalez, application of the factors here show Battle had a reasonable expectation in the finality of his original sentence. Battle played no role in the setting of the maximum sentence,

⁸ 168 Wn.2d 256, 226 P.3d 131, cert. denied, 131 S. Ct. 318 (2010).

⁹ RCW 9.94A.753(4), in pertinent part, provides:

The portion of the sentence concerning restitution may be modified as to amount, terms, and conditions during any period of time the offender remains under the court's jurisdiction, regardless of the expiration of the offender's term of community supervision and regardless of the statutory maximum sentence for the crime.

which was consistent with RCW 69.50.401. Nor did the State argue for doubling of the maximum at sentencing. Further, the trial court did not enter the amended judgment and sentence for more than four years after entry of the original sentence. CP 25. By then Battle's direct appeal had long since been mandated, all his PRPs had been dismissed, and the one-year deadline for correcting "mistakes" under CrR 7.8(b)(1) had expired.

Because Battle's expectation of finality was legitimate, the trial court's entry of the amended judgment and sentence violated the constitutional right against double jeopardy. For this reason as well, this Court should vacate the amended sentence.

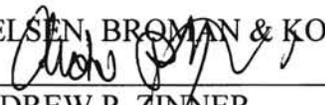
D. CONCLUSION

For the above reasons, the trial court violated Battle's double jeopardy protections. This Court should vacate the amended judgment and sentence.

DATED this 20 day of June, 2012.

Respectfully submitted,

NIELSEN, BROMAN & KOCH



ANDREW P. ZINNER

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Attorneys for Appellant

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
v.)	COA NO. 68250-4-1
)	
JAMES BATTLE,)	
)	
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 20TH DAY OF JUNE 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JAMES BATTLE
DOC NO. 749272
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF JUNE 2012.

x Patrick Mayovsky

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STATE OF WASHINGTON
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