

CROSS-APP. BURKE

THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

37944-9-II

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

STATE OF WASHINGTON  
RESPONDENT,

VS.

JOSHUA M. SHADDAY,  
APPELLANT.

BRIEF OF RESPONDENT

DAVID J. BURKE  
PROSECUTOR  
WSBA #16163

David J. Burke

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**A.**

**STATE'S RESPONSE TO APPELLANT'S  
ASSIGNMENTS OF ERROR**

1. The trial court did not violate Joshua Shadday's due process rights by sentencing him to 24 month enhancements on Counts 1, 2, 3.
2. No prosecutorial misconduct occurred; therefore, Joshua Shadday was not deprived of his due process right to a fair trial by an impartial jury.
3. Joshua Shadday did not receive ineffective assistance of counsel.

**B.**

**STATE'S RESPONSE TO ISSUES PERTAINING TO  
APPELLANT'S ASSIGNMENTS OF ERROR**

1. The prohibition of drug sales within 1,000 feet of a school bus stop does not violate the right to due process when the location of the school bus stop is readily ascertainable by the public. In this case, the bus stop, while unmarked, was readily ascertainable because the public

could request the location from the transportation supervisor for the Ocean Beach School District or through the Office of the Superintendent of Public Instruction. Additionally, school buses stopped at the location on school days. Assignment of Error 1.

2. The prosecutor did not improperly vouch for the confidential informant in closing argument by discussing the past interactions with the police. Assignment of Error 2.

3. Joshua Shadday did not receive ineffective assistance of counsel because the prosecutor's statements regarding the confidential informant were proper. Assignment of Error 3.

### C.

#### **STATE'S ASSIGNMENT OF ERROR**

1. The trial court erred by including the school bus stop enhancements in the standard range sentence rather than by treating sentencing enhancements as an add-on sentence as required by RCW 9.94A.533(6).

D.

**STATEMENT OF THE CASE**

The State accepts the Statement of the Case as delineated by Joshua Shadday.

E.

**ARGUMENT**

**1. THE SCHOOL BUS STOP SENTENCING ENHANCEMENT AS APPLIED TO MR. SHADDAY IS NOT UNCONSTITUTIONALLY VAGUE.**

- a. The statute increasing punishment for drug dealing within 1,000 feet of a school bus route stop is not unconstitutionally vague as applied to Mr. Shadday.**

Joshua Shadday's first contention is that RCW 69.50.435 is unconstitutionally vague as applied to school bus route stops. If a statute does not involve First Amendment rights, then any vagueness challenge is evaluated by examining the statute as applied under particular facts of the case. Spokane v. Douglass, 115 Wash. 2d 171, 182, 795 P.2d 693 (1990). RCW 69.50.435 does not implicate any First Amendment rights. Therefore, Mr. Shadday's vagueness challenge must be evaluated in light of how the statute has been applied to his case.

A statute is presumed to be constitutional, and the person challenging a statute on vagueness grounds has the heavy burden of proving vagueness beyond a reasonable doubt. Douglass, 115 Wash. 2d at 178. The challenger must show beyond a reasonable doubt that either (1) the statute “does not define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is proscribed,” or (2) the statute “does not provide ascertainable standards of guilt to protect against arbitrary enforcement.” Id.

The first requirement of sufficient definiteness “protects individuals from being held criminally accountable for conduct which a person of ordinary intelligence could not reasonably understand to be prohibited.” Id. This test permits some degree of imprecision in the language of a statute. Id. at 179.

The second requirement under the vagueness doctrine, the requirement of ascertainable standards, is intended to protect against “arbitrary, erratic, and discriminatory enforcement.” Id. at 181. A statute supplies adequate standards unless it “proscribes conduct by resort to ‘inherently subjective terms,’” or by inviting “an inordinate amount of police discretion.” Id.

Applying these principles to the current case, the Court should reject Mr. Shadday's argument that RCW 69.50.435 is unconstitutionally vague. The statute does not forbid conduct in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. Nor does it create a risk of arbitrary enforcement by the use of inherently subjective terms or by inviting an inordinate amount of police discretion. The statute in clear terms enhances the penalty for dealing drugs when the drug activity takes place within 1,000 feet of a school bus route stop. Additionally, the statute clearly defines such stops as those designated by a school district.

In State v. Coria, 120 Wash. 2d 156, 839 P.2d 890 (1992), the Court found that the school bus route stops, like most others, were not marked. Nevertheless, information regarding the locations of the stops was available through such means as observing the gathering of school children waiting for school buses or contacting local schools or the director of transportation for the school district. Id. at 167. In Coria, the court ruled that the statute proscribing additional punishment for certain actions in proximity to

a school bus route stop does not violate due process. Id. at 164-68.

In State v. Becker, 132 Wash. 2d 54, 935 P.2d 1321 (1997), the Supreme Court reversed the school zone enhancements because of the trial court's error in using a special verdict form that commented on the evidence. Also, the location of the school grounds could not be ascertained by any readily accessible means. In Becker, the school grounds were located in a commercial office building in downtown Seattle. Id. at 58. The facility was located on the third floor and offered a general equivalency degree, six classrooms, five certified teachers, and two or three classified staff. Id. Considerable evidence at trial indicated that the school grounds in question did not have many of the attributes of a traditional school otherwise required by law. Id. The Office of the Superintendent of Public Instruction did not have the building in question listed as a school. Id. at 59. Therefore, a person contacting the agency in charge of all public schools in the State would not have been told that a school existed at the location in question. Id. at 63. Moreover, no evidence was presented that a

person calling the Seattle School District would have been informed that a school was located in the building. Id.

**b. In the present case, any member of the public could readily ascertain the location of the school bus route stops for the Ocean Beach School District.**

Deputy Bergstrom observed a school bus and children during the second controlled buy. 1RP at 47. Additionally, Deputy Bergstrom obtained a list of locations of school bus route stops from Ben Mount, the transportation supervisor of the Ocean Beach School District. Deputy Bergstrom determined that a school bus stop was directly across the street from the location where the controlled buys occurred. Deputy Bergstrom observed a school bus drop off children across the street from the controlled buys and measured the distance from the controlled buys to the bus stop. That distance was a mere 53 feet. 1RP at 59-60.

Ben Mount testified that a school bus stop was located at 126 East Spruce Street. 2RP at 36. Furthermore, he testified that anyone who wanted a record of this information could obtain this material from himself or the Office of the Superintendent of Public Instruction. 2RP at 36-37. He did not testify that the only form that this information could be obtained was in longitude and latitude.

Thus, the location of school bus stops was not opaque and hidden from the public.

**c. Reversal of the school bus stop enhancements is not required.**

Mr. Shadday's reliance on Becker is misplaced. Global Positioning System (GPS) coordinates delineate with specificity the exact location of any school bus stop. The GPS coordinates of the school bus stops of the Ocean Beach School District were on file with the school district and with the Office of the Superintendent of Public Instruction. The Appellant's contention that the GPS coordinates do not provide a readily accessible means of determining the locations of school bus stops is without merit. The era of "the horse and buggy" has been replaced with a techno-savvy culture that relies on electronic communication. If one is armed with GPS coordinates, it is a trivial exercise to determine the physical space which corresponds to specific GPS coordinates. To be sure, one likely would need access to the internet to complete this task, but internet access is readily available at any library. Moreover, Mr. Shadday could have obtained this information by contacting the School District.

Consequently, this case is completely dissimilar from the facts in Becker where a reasonable person would not have known that a school existed at the site in question, because the school was inside a building that was used for other purposes. In the present case, any casual observer of the operation of school buses could determine where school buses stop and therefore would roughly know the locations of school bus stops. But more importantly, the precise location of the bus stops was available from the School District and the Office of the Superintendent of Public Instruction via GPS coordinates. If Mr. Shadday had contacted the School District regarding the location of school bus stops, he would have been able to determine the various locations of the school bus stops with ease.

GPS coordinates are a part of the modern world. The notion that a defendant should escape justice because he cannot communicate in “the language of the day” is nothing less than fatuous. If nothing else, the delineation of school bus stops via GPS coordinates puts every member of the public on notice of where the school bus stops are located.

In short, the Appellant's facile argument is no different than a person who asserts that because he only speaks German, he should not be subject to any rules that are written in English. Because any such contention is ludicrous, the analysis in Coria controls the disposition of this case. Mr. Shadday's argument should be rejected.

**2. THE PROSECUTION DID NOT DENY MR. SHADDAY A FAIR TRIAL BY VOUCHING FOR THE CONFIDENTIAL INFORMANT'S CREDIBILITY.**

Where prosecutorial misconduct is claimed, the defense bears the burden of demonstrating the impropriety of the comments made by the State's attorney, as well as the prejudicial effect. State v. Brown, 132 Wash. 2d 529, 561, 940 P.2d 546 (1997). Any alleged improper statement must be viewed in the context of the State's entire argument, the issues of the case, the evidence discussed in the argument, and the jury instructions. State v. Russell, 125 Wash. 2d 24, 85-86 882 P.2d 747 (1994). Where trial counsel does not object, the claim of error is waived unless the misconduct was "so flagrant and ill-intentioned that the prejudice could not have been obviated by a curative instruction." State v. Echevarria, 71

Wash. App. 596, 597, 860 P.2d 420 (1993). Prejudice on the part of the State's attorney is established only when "there is a substantial likelihood the instance of misconduct affected the jury's verdict." State v. Pirtle, 127 Wash. 2d 628, 672, 904 P.2d 245 (1995). If the prejudice could have been cured by a jury instruction but the defense did not request one, reversal is not required. Russell, 125 Wash. 2d at 85. The absence of a contemporaneous objection strongly suggests that the argument did not appear critically prejudicial to the defendant in the context of the trial. State v. Swan, 114 Wash. 2d 613, 661, 790 P.2d 610 (1990).

A review of the record in this case indicates that the prosecutor did not vouch for the credibility of the confidential informant. Initially, defense counsel repeatedly asked questions about the confidential informant's prior work with law enforcement. 1RP 91, 106, 110-111, 2RP 12, 22-23. In response, the prosecutor, on re-direct, clarified the extent of the confidential informant's work with law enforcement. 2RP 25-28. In closing argument, Mr. Shadday's counsel argued that the confidential informant was not credible. 2RP 158-159. The prosecutor in rebuttal clearly and unmistakably discussed matters that had been

admitted into evidence. The record does not indicate that the prosecutor ever stated that he believed the confidential informant.

The Appellant refers to a number of cases, e.g. State v. Sargent, 40 Wash. App. 340, 698 P.2d 598 (1985), to advance the proposition that the prosecutor improperly injected his personal opinion into the trial. Appellant's Brief at 14-17. But the facts in Sargent are qualitatively different from the present case. In Sargent, the prosecutor explicitly stated in his closing argument that he believed a State's witness. 40 Wash. App. at 343. In the present case, the prosecutor rebutted the inference drawn by Mr. Shadday's counsel that the confidential informant was not credible. The prosecutor made an argument based on the facts adduced during the course of trial as to why the testimony of the confidential informant was believable. The prosecutor asked the jury to analyze the credibility of the confidential informant by considering his history with the police. The prosecutor did not personally vouch for the credibility of the confidential informant as alleged by the Appellant.

Moreover, because Mr. Shadday's trial counsel did not make a timely objection on this point during the State's closing argument, the Appellant's assignment of error cannot be sustained unless the

prosecutor's statements were so flagrant and ill-intentioned that a curative instruction could not have neutralized the prejudice. Assuming arguendo that a timely objection would have been sustained, there is no reason to doubt the efficacy of a relevant curative instruction. Consequently, even if the prosecutor "crossed the line" in his closing argument (a contention which the State rejects), the applicable standard of review does not afford the Appellant relief. In essence, because the prosecutor's comments did not improperly taint the jury's verdict, the Appellant's argument does not pass muster.

**3. MR. SHADDAY WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS DEFENSE COUNSEL FAILED TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT.**

Ineffective assistance of counsel is analyzed using a two prong test: (1) was counsel's performance deficient; and (2) did the deficient performance prejudice the defense? Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L.Ed 2d 674 (1984). If the defendant fails to establish either prong of the test, the claim must be rejected. State v. Lord, 117 Wash. 2d 829, 894, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856 (1992).

Counsel's performance is deficient if it falls below an objective standard of reasonableness based on the totality of the circumstances. State v. Stough, 96 Wash. App. 480, 485, 980 P.2d 298 (1999). There is a strong presumption that counsel's representation was effective. State v. Townsend, 142 Wash. 2d 838, 843, 15 P.3d 145 (2001). The defendant bears the burden to show from the record a sufficient basis to rebut the "strong presumption" that counsel's representation was effective. State v. McFarland, 127 Wash. 2d 322, 336, 899 P.2d 1251 (1995).

The Appellant asserts that ineffective assistance of counsel occurred because his trial counsel failed to object to alleged improper comments that were made by the prosecutor during closing argument. This argument does not account for the fact that defense counsel's strategy throughout the trial was to attack/undermine the credibility of the confidential informant. Having fired the first salvo against the confidential informant, a competent attorney might not want to object to the comments of the prosecutor, especially when it is not clear that an objection would be sustained. Further, the process of objecting could cause the jury to focus more attention on the prosecutor's observations.

Hence, it was not unreasonable for trial counsel to choose not to lodge an objection. Since strategic or tactical reasons for adopting a certain course of action do not support an ineffective assistance of counsel claim, McFarland, 127 Wash. 2d at 336, the Appellant's argument fails to pass the first prong of the Strickland test.

In addition, the alleged deficiency did not prejudice Mr. Shadday under the second prong of the Strickland test. Mr. Shadday's trial counsel had a full opportunity to argue his theory of the case, and the verdict of the jury was not improperly influenced by the prosecutor's rebuttal comments concerning the "track record" of the confidential informant. Finally, given the strong presumption that Mr. Shadday's trial counsel's representation was effective, the Appellant's contention regarding ineffective assistance of counsel should be rejected.

**4.THE TRIAL COURT ERRED BY INCLUDING THE SCHOOL BUS STOP ENHANCEMENTS IN THE STANDARD RANGE SENTENCE RATHER THAN BY TREATING SENTENCING ENHANCEMENTS AS AN ADD-ON SENTENCE AS REQUIRED BY RCW 9.9A.533(6).**

Under RCW 9.94A.660, the drug offender sentencing

alternative (DOSAs), a prison term consists of “one-half the midpoint of the standard range.” It does not consist of one-half of the midpoint of the standard range as increased by any enhancements. Likewise, the community custody term does not consist of the remainder of the midpoint of the standard range as increased by any enhancements. The statute states in part:

- (a) A period of total confinement in a state facility for one-half of the midpoint of the standard sentence range or twelve months, whichever is greater. . . .
- (b) The remainder of the midpoint of the standard range as a term of community custody . . . .

RCW 9.94A.660(5). The standard ranges are listed under RCW 9.94A.510 and RCW 9.94A.517. They do not include enhancements. DOSAs are a sentencing provision of Chapter 9.94A RCW. Community custody also is a sentencing provision of Chapter 9.94A RCW.

The statute that requires the enhancements in this case provides:

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other

sentencing provisions for all offenses sentenced under this chapter.

RCW 9.94A.533(6) [emphasis added]. Enhancements must run consecutively to “all other sentencing provisions.” Thus, under a prison-based DOSA, enhancements must be added after the sentencing court has followed the requirements of RCW 9.94A.660. Failure to run the school zone enhancements consecutively to a DOSA sentence violates the clear and unambiguous language of RCW 9.94A.533(6).

It does so for two reasons. First, under a prison-based DOSA, enhancements would be imposed concurrently with the DOSA prison term, rather than consecutively to the DOSA prison term. Second, the enhancements would run concurrently with the community custody term. In both instances, RCW 9.94A.533(6) mandates that enhancements cannot run concurrently with these (or any other) sentencing provisions.

The primary duty in interpreting statutes is to determine and implement the legislature’s intent. State v. J.P., 149 Wash. 2d 444, 450, 69 P.3d 318 (2003). Legislative intent is primarily revealed by the statutory language. State v. Moses, 145 Wash. 2d 370, 374, 37

P.3d 1216 (2002). Courts should avoid reading a statute in a way that leads to absurd results since the legislature presumably did not intend such results. J.P., 149 Wash. 2d at 450. “When statutory language is unambiguous, a court looks only to that language to determine the legislative intent, without considering outside sources.” State v. Delgado, 148 Wash. 2d 723, 727, 63 P.2d 792 (2003). “Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” State v. Elmore, 143 Wash. App. 185, 188, 177 P.3d 172, 173 (2008). Statutes are construed as a whole to harmonize and give effect to all provisions when possible. State v. Young, 125 Wash. 2d 688, 696, 888 P.2d 142 (1995). “A statute is ambiguous if it can be reasonably interpreted in more than one way.” State v. Mullins, 128 Wash. App. 633, 642, 116 P.3d 441 (2005). “If the language of a penal statute is ambiguous, the courts apply the rule of lenity and resolve the issue in a defendant’s favor.” State v. Knutson, 64 Wash. App. 76, 80, 823 P.2d 513 (1991).

A careful reading of RCW 9.94A.533(6) shows that this statute is not ambiguous. According to RCW 9.94A.533(6), “[a]ll

enhancements under this subsection shall run consecutively to all other sentencing provisions, . . . “ [emphasis added]. The word “enhancements” in the above sentence indicates that the statute contemplates more than one enhancement. Hence, when there are multiple enhancements under RCW 9.94A.533(6), the enhancements must be stacked on top of one another. Furthermore, the enhancements “run consecutively to all other sentencing provisions.” [emphasis added]. Since the drug offender sentencing alternative (DOSA) in RCW 9.94A.660 is a sentencing provision, multiple enhancements under RCW 9.94A.660(6) must run consecutively to a DOSA sentence. Because the language of RCW 9.94A.660(6) is unambiguous on its face, the canons of statutory construction prevent a court from looking at legislative history or other factors to determine legislative intent. Therefore, the court need not apply the rule of lenity nor look outside the statute’s plain meaning for interpretive guidance.

The State is aware that Division Three of the Court of Appeals has reached a different answer to this question in Gutierrez v. Department of Corrections, 146 Wash. App. 151, 188 P.3d 546 (2008). While this opinion is persuasive, it is not

controlling. As mentioned previously, if the plain meaning of a statute is clear, the statute is to be enforced in accordance with its plain meaning and no further inquiry is necessary.

From the State's perspective, the opinion in Gutierrez, goes off on several tangents without addressing the fundamental issue. RCW 9.94A.533(6) was rewritten in 2006 to explicitly say that drug zone enhancements must be served consecutively "to all other sentencing provisions." Gutierrez' sidesteps the salient issue by not acknowledging that DOSA is another sentencing provision. Therefore, since RCW 9.94A.533(6) is crystal clear, a court does not need to analyze anything beyond the plain meaning of the statute.

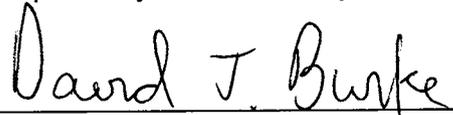
Thus, Gutierrez' analysis of legislative history, exceptional sentences, and routine interpretation/longstanding practice is inapposite. Because the holding of Gutierrez flies in the face of the plain meaning of RCW 9.94A.533(6), the State urges Division II of the Court of Appeals to re-examine the holding of Division III. The State asserts that the logic of Gutierrez is flawed and that this decision should be rejected by Division II.

F.

**CONCLUSION**

For the reasons stated above, the Appellant's assignments of errors should be rejected and relief sought by the Appellant should be denied. The Appellant's convictions should be upheld. This case should be remanded to the Pacific County Superior Court so that the Appellant is resentenced with the school bus stop enhancements running consecutively to the sentence imposed under DOSA.

Respectfully Submitted By:

A handwritten signature in cursive script that reads "David J. Burke".

DAVID J. BURKE WSBA #16163  
Pacific County Prosecutor

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

STATE OF WASHINGTON, )  
 )  
 Respondent. )  
 )  
 vs. )  
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 JOSHUA M. SHADDAY, )  
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NO 37944-9-II

AFFIDAVIT OF MAILING

09 JAN 27 AM 11:24  
STATE OF WASHINGTON  
BY DEPUTY

FILED  
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STATE OF WASHINGTON )  
 ) ss.  
COUNTY OF PACIFIC )

DAVID J. BURKE, being first duly sworn on oath, deposes and says:

I am the Prosecuting Attorney for Pacific County, Washington.

That on 1/24, 2009, I mailed two copies of the State's Brief of Respondent to PETER TILLER, Attorney for Appellant at the following address:

Peter Tiller  
Attorney at Law  
P.O. Box 58  
Castle Rock, WA 98531

*David J Burke*

\_\_\_\_\_  
DAVID J. BURKE

SUBSCRIBED & SWORN to before me this 26<sup>th</sup> day of  
January, 2009.

*Dick Fendley*

\_\_\_\_\_  
NOTARY PUBLIC in and for the State  
of Washington, residing at:

*Raymond*