

No. 39837-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

MAYSO PICKINS,
Appellant.

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DIVISION II
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STATE OF WASHINGTON
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APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

I. INTRODUCTION 1

II. ASSIGNMENTS OF ERROR 2

 A. Assignment of Error 2

 The superior court erred in determining Mr. Pickins ineligible for the first time offender waiver provision of RCW § 9.94A.650 2

 B. Issue Pertaining to Assignment of Error . . . 2

 Did the trial court err in holding Mr. Pickins ineligible for a first-time offender waiver of his standard sentence range because his standard sentence range was increased under RCW § 9.94A.533(11) for endangering one or more persons while attempting to elude a pursuing police vehicle? 2

III. STATEMENT OF THE CASE 3

 A. Procedural History 3

 B. Facts Underlying the Convictions 4

 C. Sentencing 6

IV. ARGUMENT 8

 When the Plain Language of RCW 9.94A.533(11) Increases a Defendant's Standard Sentence Range and the Plain Language of RCW 9.94A.650 Allows Waiver of the Standard Sentence Range, the Two Statutes Allowed Mr. Pickins to Benefit from the First Time Offender Waiver Provision 8

V. CONCLUSION 14
CERTIFICATE OF SERVICE 15

TABLE OF AUTHORITIES

Table of Cases

State v. Archambault, 86 Wn. App. 711, 937 P.2d 1323
(1997) 4, 10-11

State v. Mandanas, ___ Wn.2d ___, 2010 Wash. LEXIS 67
(2010) 8-9, 13

Statutes

RCW 9.94A.533 passim

RCW 9.94A.650 passim

RCW 46.20.342(1)(b) 3

RCW 46.61.024(1) 3

RCW 46.61.502(1)(b)(c) 3

I. INTRODUCTION

The defendant-appellant in this case, Mayso Pickins, was convicted, *inter alia*, of attempting to elude a police vehicle with a special jury finding of endangering one or more persons during such attempt. The special finding required Mr. Pickins's standard sentence range to be adjusted upward 12 months and a day under RCW 9.94A.533(11).

Mr. Pickins asked for waiver of his standard sentence range under the first time offender statute, RCW 9.94A.650. The trial court found Mr. Pickins ineligible for the first time offender waiver due to the jury's special verdict of endangerment. This decision misinterpreted the plain language of the relevant statutes.

In sentencing first time offenders, RCW 9.94A.650 allows the court to "waive the imposition of a sentence *within the standard sentence range.*" RCW 9.94A.650(2) (emphasis added). The special jury finding required an increase to Mr. Pickins's "standard sentence range." RCW 9.94A.533(11). Because the effect of RCW

9.94A.533(11) is simply to increase the standard sentence range, there is no conflict with the first time offender provision. That provision allows waiver of the standard sentence range, whatever that range is. Accordingly, the trial court erred in finding Mr. Pickins ineligible under the two statutes. Moreover, to the extent the two provisions conflict, the rule of lenity requires a decision in Mr. Pickins's favor.

II. ASSIGNMENTS OF ERROR

A. Assignment of Error

The superior court erred in determining Mr. Pickins ineligible for the first time offender waiver provision of RCW 9.94A.650. Verbatim Report of Proceedings (RP) 227-28.

B. Issue Pertaining to Assignment of Error

Did the trial court err in holding Mr. Pickins ineligible for a first-time offender waiver of his standard sentence range because his standard sentence range was increased under RCW 9.94A.533(11) for endangering one or more persons while attempting to elude a pursuing police vehicle?

III. STATEMENT OF THE CASE

A. Procedural History

By amended information filed December 30, 2008, Mr. Pickins was charged with the following crimes: 1) Attempting to Elude Police Vehicle in violation of RCW 46.61.024(1), and during the commission of which endangering more than one other person adding to his presumptive sentence under RCW 9.94A.533(11); Driving Under the Influence (DUI) and refusing a breath or blood test in violation of RCW 46.61.502(1)(b)(c); and Driving While License Invalidated in violation of RCW 46.20.342(1)(b); all occurring on July 25, 2008. Clerk's Papers (CP) 1-3.

After a jury trial held in June 2009, Mr. Pickins was convicted of all charges, including the special finding of endangering one or more persons while attempting to elude. RP 216-218; CP 32-36. The jury's special finding resulted in an increase to the standard sentence range of 12 months and one day.

Mr. Pickins asked for waiver of his standard sentence range under RCW § 9.94A.650. CP 37-44. The

trial court, the Honorable James R. Orlando presiding, e-mailed the parties with copies of *State v. Archambault*, 86 Wn. App. 711, 937 P.2d 1323 (1997), which held that application of the firearm penalty provision disallowed application of the first time offender waiver. RP 224.

On September 25, 2009, the trial court, the Honorable James R. Orlando presiding, sentenced Mr. Pickins to 12 months and a day on the attempting to elude, 365 days, 363 days suspended for five years on the DUI, 365 days suspended two years on the driving while license suspended, \$2381 in total fines and fees, a \$1,200 DAC recoupment fee, and specific driving- and alcohol-related conditions. RP 228-229; CP 54-74. It thus denied recourse to the first time offender provision. RP 227-28.

This appeal followed. CP 53-74.

B. Facts Underlying the Convictions

A police officer trained to recognize the signs of intoxication and driving under the influence, noticed Mr. Pickins riding a motorcycle and approaching from

behind his patrol car on I-5 northbound on the evening of July 25, 2008. RP 61-67. Mr. Pickins, speeding, passed the patrol car. His motorcycle was weaving within its lane, although not actually crossing any lane lines. It was also changing lanes to get around slower vehicles. The officer ran the license plate to find that the vehicle was registered to Mr. Pickins, whose license was suspended. RP 67-71; 108.

The officer activated the patrol car's lights and sirens to stop the motorcycle. Mr. Pickins looked back, accelerated, and continued passing vehicles at a rapid rate. He cut off numerous cars as he made rapid lane changes, traveling from 80 to 85 miles per hour in a 60-mile-per-hour zone. At one point, the motorcycle drove between two vehicles traveling in adjacent lanes. The pursuit lasted three or four minutes. RP 71-76; 139-41.

Mr. Pickins drove onto the shoulder of I-5 and exited the highway. Unable to make the turn on the exit ramp, he drove through the grass median, across a street and onto a grassy area where the motorcycle

apparently stalled. Mr. Pickins began running, then walking, toward the patrol car. The officer ordered him to get on the ground, but he ignored the order. The officer then Tasered Mr. Pickins, to no apparent effect, another officer from a back-up patrol car Tasered him as well, and he fell to the ground on his back. The officers cuffed him and noticed the smell of alcohol coming off his person. In a very slurred speech, Mr. Pickins admitted to drinking two beers. He showed signs of a high level of intoxication. RP 76-94; 105-08; 142-48.

C. Sentencing

At sentencing, Mr. Pickins expressed his remorse about all that had happened, stating that none of these events were part of his character. RP 226-27. He asked for waiver of the standard sentence range under the first time offender provision, RCW 9.94A.650. RP 224-25. In addition, Mr. Pickins asked for the court's leniency for two reasons, because of his wife's ill health and because of their joint business, domestic violence counseling. His wife of thirty years is

diabetic, was having seizures, and suffered from serious medical issues. Their business faced closure without Mr. Pickins's skills and input. RP 225-26.

The State argued for the full standard range sentences, with no recourse to the first time offender waiver. RP 222-23; CP 45-52.

Noting that Mr. Pickins was the one most endangered by his actions in this case, since he was on a motorcycle, the trial court nevertheless found that Pickins put others at risk and thus must serve the sentence penalty without recourse to the first time offender waiver. RP 227-28. It held that since the Legislature enacted an enhanced penalty provision applicable where people's lives were endangered, it intended that the penalty should be served. "I don't think their intent was to simply have that finding made, go through the extra work of submitting that question to the jury, and then ignoring it, basically." RP 227.

Finding that "the statutory scheme" required Mr. Pickins to serve the full enhancement and not get the

benefit of the first time offender statute, the court noted that "I don't think I would do that under these circumstances in any event." RP 228. The court imposed the low end of the sentence range, plus fines, fees, costs, and conditions. RP 228-29; CP 54-74.

IV. ARGUMENT

When the Plain Language of RCW 9.94A.533(11) Increases a Defendant's Standard Sentence Range and the Plain Language of RCW 9.94A.650 Allows Waiver of the Standard Sentence Range, the Two Statutes Allowed Mr. Pickins to Benefit from the First Time Offender Waiver Provision

The plain language of RCW 9.94A.533(11) and RCW 9.94A.650, read together, allowed Mr. Pickins to benefit from the first time offender waiver provision. Questions of statutory interpretation are reviewed *de novo*. *State v. Mandanas*, ___ Wn.2d ___, 2010 Wash. LEXIS 67, *3 (2010) (citations omitted) (holding firearm enhancement provision unambiguous). Courts strive to give effect to the intent of the Legislature, beginning with the plain language of the statute. *Id.* If the plain language supports only one interpretation, then that interpretation resolves the question. *Id.* On the other hand, if a statute is subject to more than

one reasonable interpretation, it is ambiguous and the rule of lenity requires a court to interpret it in favor of a criminal defendant absent legislative intent to the contrary. *Id.*

In this case, the plain language of the two applicable statutes is subject to only one interpretation: that Mr. Pickins was eligible for the first time offender waiver. By the terms of RCW 9.94A.650, the first time offender waiver provision "applies to offenders who have never been previously convicted of a felony in this state, federal court, or another state, and who have never participated in a program of deferred prosecution for a felony, and who are convicted of a felony" that is not one of several enumerated felonies. RCW 9.94A.650(1). There is no dispute that Mr. Pickins satisfies these requirements. In sentencing such offenders, the court "may waive the imposition of a sentence *within the standard sentence range.*" RCW 9.94A.650(2) (emphasis added).

The adjustment to Mr. Pickins's sentence required by the special jury finding increased his standard

sentence range: "An additional twelve months and one day shall be added to the standard sentence range for a conviction of attempting to elude a police vehicle as defined by RCW 46.61.024, if the conviction included a finding by special allegation of endangering one or more persons under RCW 9.94A.834." RCW 9.94A.533(11).

Because the effect of RCW 9.94A.533(11) is simply to increase the standard sentence range, there is no conflict with the first time offender provision. That provision allows waiver of the standard sentence range, whatever that range is. RCW 9.94A.650(2) (for qualifying offenders, the court "may waive the imposition of a sentence within the standard sentence range"). Accordingly, the trial court erred in finding Mr. Pickins ineligible for relief under RCW 9.94A.650 and this Court should remand for resentencing.

The trial court's erroneous decision was likely based on the decision it e-mailed to the parties, *State v. Archambault*, 86 Wn. App. 711, 937 P.2d 1323 (1997). That case is inapposite, however, because it is concerned solely with a provision of the firearm

penalty. That provision is unique to the firearm and deadly weapon penalty provisions of RCW 9.94A.533. It contains language specifically overriding the effect of any other statute: "Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions." RCW 9.94A.533(3)(e).

It was this specific language from a former but substantively identical provision of the firearm enhancement law that controlled the outcome in

Archambault:

RCW 9.94A.310(3) expressly resolves this conflict by stating that "notwithstanding any other provision of law," including the first offender option in RCW 9.94A.120(5), the firearm enhancement portion of a presumptive sentence is no longer presumptive; rather, it is "mandatory" and "shall be served in total confinement."

86 Wn. App. 711, 715. When no similar language pertains to the enhancement applicable to Mr. Pickins, *Archambault* does not control this case. Instead, the plain language of the statute resolves this question to

allow Mr. Pickins the benefit of the first time offender waiver.

In the trial court, the State argued that the two statutes conflict because of the mandatory word "shall" in the enhancement provision, "An additional twelve months and one day *shall* be added to the standard sentence range." RCW 9.94A.533(11); CP 46-47. Mr. Pickins does not dispute the mandatory nature of this provision. The standard sentence range must be increased. However, no conflict exists because the first time offender provision allows a court to waive the standard sentence range, whatever that range is, with no exclusion for ranges increased by an enhancement. RCW 9.94A.650(2) (for qualifying offenders, the court "may waive the imposition of a sentence *within the standard sentence range*"). The plain language of the statute supports no other conclusion.

Moreover, to the extent there is a conflict between the two statutes which creates an ambiguity, the ambiguity must be resolved in Mr. Pickins's favor.

As the Supreme Court recently averred, restating a long-standing legal tenet, "The rule of lenity requires us to interpret an ambiguous criminal statute in favor of the defendant absent legislative intent to the contrary." *Mandanas*, 2010 Wash. LEXIS 67, *3.

Accordingly, if the State is correct and a conflict exists, the rule of lenity compels the conclusion that Mr. Pickins was eligible for the first time offender waiver.

Finally, the State also argued that because the Legislature enacted the enhancement, it intended to add an additional penalty and its intention would be thwarted if the penalty could be waived. CP 47. But it was also the Legislature that enacted RCW 9.94A.650, the first time offender provision. Under that provision, the Legislature clearly intended that most mandatory statutory criminal penalties could be waived in the appropriate circumstances. On the other hand, when the Legislature intended to make a penalty provision impervious to waiver, it has done so clearly and specifically, as, for example, with the firearm and deadly weapon penalties. RCW 9.94A.533(3)(e) & (4)(e).

When no similar language pertains to the penalty applicable to Mr. Pickins, this Court must assume the Legislature intended this penalty to be just as open to waiver as any other standard sentence range is under RCW 9.94A.650.

V. CONCLUSION

For all of these reasons, Mayso Pickins respectfully requests this Court to remand his case for resentencing.

Dated this 18th day of February, 2010.

Respectfully submitted,


Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 18th day of February, I caused the original and a true and correct copy of Appellant's Brief to be served by U.S. mail on:

The Court of Appeals
Of the State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Ms. Kathleen Proctor
Pierce County Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402-2102
Respondent's Attorney; and

Mr. Mayso Pickins
DOC No. 334609
Progress House Work Release
5601 6th Avenue
Tacoma, Washington 98406.

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Carol Elewski