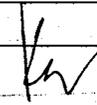


FILED  
COURT OF APPEALS

NO. 40174-6-II

JUL 25 PM 2:37

STATE OF WASHINGTON

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

CHARLES OSLAKOVIC, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Frederick W. Fleming, Judge

No. 09-1-00389-2

**Brief of Respondent**

MARK LINDQUIST  
Prosecuting Attorney

By  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the court appropriately sentence defendant to consecutive terms of imprisonment without violating statutory restrictions or the constitutional right to equal protection of the law?

B. STATEMENT OF THE CASE.

1. Procedure

On October 26, 2009, the State charged Charles Peter Oslakovic (defendant) with vehicular assault (count I) and failure to remain at injury accident (count II). CP 1-2. The charges were modified on November 5, 2009. CP 7-8. Count I was amended from the felony vehicular assault charge to the misdemeanor driving under the influence of intoxicants. RCW 46.61.506; RCW 46.61.502(1). Count II, failure to remain at injury accident, remained the same. RCW 46.52.020(1); RCW 46.52.020(4)(b).

On December 4, 2009, defendant entered an *Alford/Newton*<sup>1</sup> plea to both counts and was sentenced by the court to 365 days confinement, with 185 days suspended for count I, and 12 months for count II. CP 60-61, 48-59. At the sentencing hearing, the State recommended to the court

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<sup>1</sup> *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970); *State v. Newton*, 87 Wn.2d 363, 552 P.2d 682 (1976).

that the misdemeanor sentence be served consecutive to the felony sentence. RP 8. The court, following the State's recommendation, ordered the defendant to serve the sentences consecutively. RP 40-41. Defense counsel objected to the consecutive sentencing. RP 29-32.

Defendant filed a timely notice of appeal on December 31, 2009. CP 62-64.

## 2. Facts

On April 3, 2008, defendant picked up the victim, Amy Roznowski, at the airport and took her to dinner. CP 3. During the dinner, defendant consumed alcohol. *Id.* At the conclusion of dinner, he purchased a bottle of wine to-go from the restaurant. *Id.*

At approximately 10:30 pm, defendant proceeded southbound on I-5 with the victim in his car. RP 4. Defendant stated that the victim received a phone call and attempted to leave the vehicle, stepping out onto the running board. CP 4. Witnesses reported seeing defendant's car traveling 70 to 75 miles per hour with the victim standing on the running board of the vehicle for approximately one half to one quarter of a mile. CP 3-4. In the vicinity of the I-5/I-705 interchange, the victim fell from the car to the highway; defendant did not stop the car to render aid. *Id.*

Shortly thereafter, Trooper Ames stopped defendant on a northbound I-5 on-ramp south of the victim's location. CP 3. The trooper reported that defendant exhibited signs that he had been consuming

alcohol. RP 4. Defendant also admitted that he had been drinking. CP 4. Analysis of his blood returned a blood-alcohol level of .09 grams of alcohol per 100mL. *Id.*

C. ARGUMENT.

1. THE COURT APPROPRIATELY SENTENCED DEFENDANT TO CONSECUTIVE TERMS OF IMPRISONMENT PURSUANT TO STATUTE AND CASE LAW.

Criminal statutes provide the authority for courts to sentence offenders while also limiting their power. *State v. Phelps*, 113 Wn. App. 347, 354-55, 57 P.3d 624 (2002) (citing *State v. Theroff*, 33 Wn. App. 741, 657 P.2d 800 (1983)). Requirements for sentencing come from various sections of RCW Title 9 and 9A. The Sentencing Reform Act of 1981 (SRA) created substantive rules regarding felony sentencing, including limitations regarding consecutive sentencing. The issue of whether or not the court in this case had the statutory authority to impose the sentences consecutively is one of statutory interpretation and analysis, requiring review de novo. *State v. Armendariz*, 160 Wn.2d. 106, 110, 156 P.3d 201 (2007).

The SRA limits the discretion of judges with respect to consecutive sentencing, restricting it to situations “under the exceptional sentence provisions of RCW 9.94A.535.” RCW 9.94A.589(1). The purpose of the

SRA “is to make the criminal justice system accountable to the public by developing a system for *the sentencing of felony offenders* which structures, but does not eliminate, discretionary decision affecting sentences.” RCW 9.94A.010 (emphasis added). Interpreting this portion of the statute, the Court of Appeals has clarified the scope of the SRA, holding that “the Sentencing Reform Act of 1981 (SRA) *applies only to felony sentences* and does not limit the judge's discretion in imposing a sentence for a misdemeanor conviction.” *State v. Whitney*, 78 Wn. App. 506, 517, 897 P.2d 374 (1995) (citing *State v. Langford*, 67 Wn. App. 572, 837 P.2d 1037 (1992)) (emphasis added).

Following *Langford*, the *Whitney* court affirmed the sentence of a defendant convicted of one felony charge and one misdemeanor charge where the sentences were ordered consecutive. *Id.* The Washington Supreme Court has affirmed the conclusion that the SRA applies only to felonies.<sup>2</sup> *State v. Snedden*, 149 Wn.2d 914, 73 P.3d 995 (2003). The limitations of RCW 9.94A.589(1) associated with sentencing do not limit the court when sentencing misdemeanor crimes.

RCW 9.92.080 contains guidelines for non-felony consecutive sentencing. Per the statute, the court shall issue consecutive sentences by

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<sup>2</sup> The Washington Supreme Court held that a misdemeanor offense can be considered “a crime against a person,” even though it does not appear in the SRA’s list of crimes against persons. The Court clarifies that the “the SRA list only applies to felonies” and thus “one would not expect to find [a misdemeanor] among the SRA list of felonies.” *Snedden*, 149 Wn.2d at 922.

default for multiple offenses arising from separate and distinct acts. RCW 9.92.080(3). The court retains the option to make sentences consecutive for multiple offenses arising from a single act or omission. RCW 9.92.080(2). Since the restrictions regarding consecutive sentencing provided in RCW 9.94A.589(1) do not apply to the misdemeanor offense, the court had discretion in imposing a consecutive misdemeanor sentence upon the defendant.

The court has statutory authority to sentence misdemeanor convictions consecutively with felony convictions. This shifts the standard of review to whether or not the court abused its discretion in sentencing defendant. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 482 P.2d 775 (1971). “Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Id.* at 26. Here, the State highlighted the terrible circumstances under which the victim fell from the vehicle and how the defendant left her in the middle of the freeway at night. RP 4-6. “Leaving a person in the middle of I-5, at 70 to 75 miles an hour, is such irresponsible and reprehensible conduct” that the State recommended a standard range sentence with the misdemeanor sentence to run consecutive. RP 9. The sentencing court, following the recommendation of the State, directed that the misdemeanor sentence would be consecutive to the felony sentence. RP 41-43. The

Court of Appeals has held that the decision to apply misdemeanor sentences consecutive to felony sentences “is within [the court’s] discretion.” *State v. Harstad*, 153 Wn. App. 10, 27, 218 P.3d 624 (2009). Following established precedent regarding sentencing, the court did not abuse its discretion in rendering the decision.

While felony sentences must abide by the restrictions of RCW 9.94A.589(1) regarding consecutive versus concurrent sentences, misdemeanor sentencing, bound by RCW 9.92.080, has fewer limiting restrictions. As the Court of Appeals held in *Whitney*, a sentencing court can impose a felony sentence upon a defendant along with a consecutive misdemeanor sentence. *Whitney*, 78 Wn. App. at 517. Given the precedent and statutory authority present, the court may sentence accordingly as long as it does not abuse its discretion. Here, the sentencing court appropriately sentenced defendant to consecutive terms. There is no abuse of discretion.

2. THE IMPOSITION OF CONSECUTIVE SENTENCES ON THE DEFENDANT DID NOT VIOLATE HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT OF EQUAL PROTECTION.

Defendant argues that the court violated his constitutional right to equal protection under the law. App. Br. at 5. The federal constitution states that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any

State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, §1. The comparable section of the Washington state constitution provides that “[n]o law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.” Const. art. I, §12. The Supreme Court has found that these clauses “are substantially identical and considered by this court as one issue.” *State v. Smith*, 117 Wn.2d 263, 281, 814 P.2d 652 (1991). The alleged equal protection violation can be analyzed on the federal and state level together.

When considering equal protection claims, the court must first determine the appropriate standard of review. Here, defendant questions the procedural differences of felony and misdemeanor sentencing and its disparate effect on defendants. The classification scheme in question presents no suspect or semi-suspect class such as national origin or gender. Thus, the court should adopt rational basis review for determining the viability of the equal protection question. *State v. Manussier*, 129 Wn.2d 652, 672, 921 P.2d 473 (1996); *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S. Ct. 3249 (1985).

Under rational basis review, “a law will be upheld if it rests upon a legitimate state objective and is not wholly irrelevant to achieving that objective.” *Harris v. Charles*, 151 Wn. App. 929, 937, 214 P.3d 962

(2009). Furthermore, “[t]he burden is on the party challenging the classification to show that it is ‘purely arbitrary.’” *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992) (citing *Omega Nat’l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)). It rests on defendant to show that the statutes in question create a capricious or arbitrary classification scheme for offenders.

Defendant argues that “[t]here is no legitimate governmental interest which can be served by treating people in *exactly the same situation* – being before a court for sentencing for multiple offenses – so differently.” App. Br. at 8 (emphasis added). By the nature of the charges brought, a defendant sentenced for felony charges differs substantially from a defendant sentenced for misdemeanor charges. The Court of Appeals has already stated that “[t]he sentencing systems for felonies and misdemeanors are significantly different.” *Harris*, 151 Wn. App. at 937. A brief review of criminal statute demonstrates that the legislature also sees misdemeanors and felonies as different classes of criminal behavior warranting disparate treatment. A person convicted of a gross misdemeanor faces a maximum penalty of one year in jail and a fine of \$5,000. RCW 9A.20.020; RCW 9A.20.021(2). A conviction for a class A felony carries a maximum possible penalty of life in prison and a fine of \$50,000, while a class C felony carries a maximum possible penalty of five years in custody and a fine of \$10,000. RCW 9A.20.021(1). The possible penalty for misdemeanors and felonies differ by an order of

magnitude, demonstrating a substantial difference in their importance as seen by the legislature.

The gross difference in length of sentence provides rational justification for the different standards concerning consecutive sentencing. The notion that the legislature would require a judge to have extenuating circumstances prior to rendering consecutive felony sentences, but not require it for misdemeanor sentences is rational; two misdemeanors sentenced consecutively would not exceed two years of incarceration, while two class A felonies sentenced consecutively could be as great as two lifetimes of imprisonment. With no demonstration of invidious purpose by defendant, it is sufficient that the legislature could have had a legitimate, rational purpose for the disparate treatment of law, meeting the requirements of rational basis review. *Railway Exp. Agency v. People of State of N. Y.*, 336 U.S. 106, 110, 69 S. Ct. 463, 93 L. Ed. 533 (1949).<sup>3</sup> The sentencing schemes enacted by the legislature, as evaluated under rational basis review, do not violate defendant's right to equal protection of the laws.

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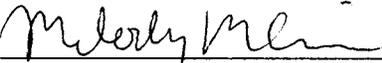
<sup>3</sup> In *Railway Exp. Agency*, New York City passed a regulation prohibiting the placement of advertisements on vehicles. However, a business could place their own advertisements on their vehicles used for usual business purposes. In considering the possible justifications, the Supreme Court suggested its own possible rational reasons for the regulation. Since the Court could conceive of such a justification, it held that the regulation did not violate equal protection under rational basis review.

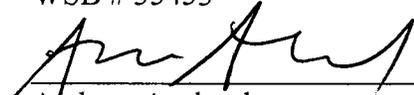
D. CONCLUSION.

A sentencing court has the discretion, as authorized by statute, to order misdemeanor sentences consecutively with felony sentences. The court did not abuse its authority in imposing the sentence on defendant based on case law. The fact that the criminal statutes differentiate misdemeanor and felony sentencing does not, under rational basis review, constitute a violation of defendant's right to equal protection of the laws. For the reasons argued, the State respectfully requests that defendant's sentence be affirmed.

DATED: July 14, 2010.

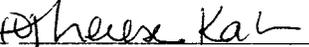
MARK LINDQUIST  
Pierce County  
Prosecuting Attorney

  
MELODY CRICK  
Deputy Prosecuting Attorney  
WSB # 35453

  
Andrew Asplund  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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