

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

TEMPLE OF JUSTICE.

41783-9-II

NO: ~~84248-5~~

STATE OF WASHINGTON

Respondent,

v.

JD. KIENITZ,

Appellant.

by h E

APPEAL FROM SUPERIOR COURT
IN AND FOR CLARK COUNTY
09-1-00136-5/10-9-01021-1

APPELLANT'S PRO SE SUPPLEMENTAL BRIEF.

Statement of Additional Grounds

Presented by;
Appellant JD. Kienitz
Larch Correction Center
15314 NE. Doyle Valley Rd.
Yacolt, WA 98675

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STATEMENT OF CASE.

Appellant was charged with Three (3) counts of delivery of a controlled substance. To wit Marijuana, in violation of RCW 69.50.401(1),(2),(c). Schedule I, Class C Felonies. (punishable up to 5 yrs) Each was charged with a Delivery within 1000 feet of a School Bus Zone. That was alleged to have been within 1000 feet of Appellant's Private Residence.

The Charges stemmed from undercover C.I. agents buying small quantities of marijuana from Appellant inside his Residence.

Several Months after being charged with the aforementioned crimes, Appellant was charged with an additional count of Tampering with a Witness.

During trial it was brought out that all the transactions for the "delivery" were in Appellants Private Residence, (RP. 173-175) and that they were not for Profit. They were for Paying Rent, buying Food. RP. 209.

Appellant was found guilty after a Trial by Jury of all counts, and was Sentenced to a "Middle Range" Standard Sentence of 12 Months for the Crimes. And then Sentenced to 3, 24 month school bus enhancement.

The Judgment and Sentence listed the Crimes as Class B. Felonies. And punishable up to 10 years. When the Jury only returned a verdict on the Class C Felonies,

and the Court, nor Prosecution moved to have the Crime Doubled to a Class B Felony.

The Trial Court imposed a Sentence totaling 84 Months. 24 Months past the Statutory maximum sentence allowed by law.

At Sentencing there was No Mentioning of "Doubling Provision". Nor was there ever a Request for an "Exceptional Sentence" to be imposed. On the contrary the State deliberately stated in the record it was not seeking an extended sentence, but a Standard Range Sentence. RP. 490. Which was imposed.

Appellant timely Appealed, and this action is now before the Court.

ARGUMENTS IN SUPPORT.

A. DID THE TRIAL COURT EXCEED ITS AUTHORITY WHEN IT IMPOSED A SENTENCE BEYOND THE STATUTORY MAXIMUM ALLOWED BY LAW.? IN VIOLATION OF LAWS OF THE STATE OF WASHINGTON AND KNOWN CASE LAW.?

Appellant claims and states that the Sentence Imposed of 84 Months, which violates RCW 9A.20.020. RCW 9.94A.535, RCW 9.94A.537, and Blakely v. Washington, 542 U.S. 296, 302, 124 S.Ct. 2531 (2004).

Appellant was found guilty of Four (4) Class C Felonies, run concurrent. Class C felonies are punishable up to a Statutory Maximum of 5 Years or 60 months Maximum Incarceration. See RCW 9A.20.020.

Appellant was found guilty by Jury of the Crime Delivery of a class I controlled substance. See RCW 69.50.401(1),(2)(c). Which states;

"(c) Any other controlled substance classified in schedule I, II, or III, is guilty of a class C felony punishable in accordance to chapter 9A.20."

The Sentence imposed was 84 Months, 12 months for the crimes, and 72 months for enhancements. That is a full 24 Months over the Statutory Maximum Sentence, and there are Only Two (2) Ways that the Trial Court could have imposed a Sentence that exceeded the Statutory Maximum. One (1) Is that the Trial Court used the Doubling Provision found in RCW 69.50.408 (1). Which clearly states; "Under this Chapter MAY be imprisoned for a term

up to twice"... The statute makes it voluntary not mandatory, or Automatic. It states may, and then only after a Second or subsequent offense. And here this was Appellants First Offense and Only Offense.

Further, the State specifically Declined this at. RP. 490 line 10, of the Sentencing hearing the Standard Range was calculated at 6-18 Months by the Prosecution.

At RP. 488, lines 9-14 of sentencing. The Prosecution deliberately states;

THE STATE DIDN'T, HASN'T, IS NOT SEEKING AN AGGRAVATOR, OR AN EXCEPTION UP, BUT IT DOES SET FORTH IS POSITION THAT -UM--UM-- THIS IS WITHIN THE CONTEXT, NOT ONLY SHOULD THE MITIGATOR NOT APPLY BUT ARGUABLY AN AGGRAVATOR SHOULD OR COULD. AGAIN THOUGH, THE STATE ISN'T SEEKING THAT."

When the Judge Imposed the Sentence it was stated "I am going to impose midpoint of the standard range" RP. 501. Line 22. Sentencing hearing. February 18.. Under both instances the Trial Court Declined to Impose a Sentence of Twice the Standard Range. Or Double. It was Never Asked for and never given.

The Second way that the trial Court could have exceeded the Statutory Maximum Sentence was to impose an Exceptional Sentence under RCW 9.94A.535, RCW 9.94A.537, and Blakely v. Washington, 542 U.S. 296, 302, 124 S.Ct. 2531 (2004). But one look to the Jury Instructions, and to the Charging Information there was no Request for an Exceptional Sentence, No Stipulations to an Exceptional Sentence or Jury Verdict. therefore, the Trial Court Abused its

Authority when it imposed a sentence that Exceeded the Statutory Maximum. And any sentence entered erroneously must be thrown out. State v. Sloan, 121 Wn.App. 220, 221, 87 P.3d 1241 (2004); Apprendi v. new Jersey, 530 U.S. 466, 494, 120 S.Ct. 2348 (2000); Blakely v. Washington, supra.

B. WAS APPELLANT DENIED HIS SIXTH AMENDMENT RIGHTS TO WHEN HE WAS DENIED A STATUTORY DEFENSE TO THE SCHOOL BUS ENHANCEMENTS.?

Appellant claims, and is supported by law, that he was denied his rights under the Sixth Amendment to a fair, impartial trial when the Trial Court did not use Washington State Statutory built-in defense against School Bus Enhancements.

Under RCW 69.50.435(4) it states;

"it is an affirmative defense to the prosecution for violation of this section that the prohibited conduct, too place entirely within a private residence. That no such person under the eighteen years of age or younger was present in such private residence during the commission of the offense and the prohibited conduct did not involve delivering, manufacturing, selling, or processing with intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit."

Appellant can find no case law on this Point, due to the simple fact that most defendants do not commit their crimes in their own home, and it is done for profit.

Here it was established by fact, in the Trial Court that (a) The crime was Inside Appellants Private Residence, and that it was Only him and the C.I. present. And (b) that the crime was not for Profit. RP. 173-75, 491-92.

Appellant meet each of these stringent standards and was denied this defense, he was not even informed that he had such a defense. And being denied his a right that is by Statute is a complete denial of Appellant's Constitutional Right to Due Process of the Fourteenth Amendment, and the Sixth Amendment to a Fair Trial, and Protection of the Law as written by the Legislation of the State of Washington.

As stated by Appellant there is no Case Law on the point for this Denial. And Appellant asks this Court to make a Ruling as to the Legislative Intent of the "Statutory Defense", and create a standard that can be carried forward to future cases.

C. IS THE STATUTES RCW 69.50.410(1) RCW 69.50.435(1) AND RCW 9.94A.650(d) UN-AMBIGUOUS WHEN LEGISLATURES PLACED "EXCEPT MARIJUANA LEAVES AND FLOWERING TOPS.?"

Appellant was convicted of selling small amounts of Marijuana. (less than 10 grams or less than a $\frac{1}{4}$ ounce) To the C.I.

Under the Laws of the State of Washington, the Leaves and Flowering Tops of Marijuana, was and is exempt from the Doubling Statute, and from the Enhancement Statute.

Under Washington State Laws RCW 69.50.410, RCW 69.50.435, and RCW 9.94A.650(d) it reads;

(1) Any person who violates RCW 69.50.401 by manufacturing, selling, delivering, or possessing with intent to manufacture, sell or deliver a controlled substance listed in RCW 69.50.501 or who violates RCW 69.50.410 by selling for profit any controlled substance or counterfeit substance

classified in schedule I. RCW 69.50.204. Except leaves and flowering tops of marijuana."

69.50.410 (1)

(1) Except as authorized by this chapter it is a class C felony for any person to sell for profit any controlled substance or counterfeit substance classified as schedule I. RCW 69.50.204. Except leaves and flowering tops of marijuana."

9.94A.650(d)

The selling for profit of any controlled substance or counterfeit substance classified schedule I. RCW 69.50.204. Except leaves and flowering tops of marijuana."

The Court of Appeals addressed the issue of Except in the case of State v. Pierce, 78 Wn.App. 1, 895 P.2d 25 (1995). Where the court contemplated whether the Except portion of the statute's meant that the Legislation wanted to punish, or to not punish a defendant for his actions when marijuana was the drug.

The Court held that under RCW 69.50.425, the Overcrowding Statute, that if jails could not shorten a misdemeanor sentence in order to ease overcrowding, then the legislation meant that the word Except meant nothing. And it did not actually address the Meaning of the word Except. Which as held by common plain language means;

"Except means" "Not Included" "To Leave Out" "To Exclude." Webster Dictionary. Revised New Edition."

The word Except is clear, concise, and easy to understand, but the Pierce decision renders three (3) Statues un-clear, and ambiguous in its reading if the words mean nothing. And Appellant ask this Court to look at the

Words, Legislative Intent, and how they Apply as a Whole, for Three (3) Statutes contain the same language, and yet all three statutes mean nothing if read only in part.

Since the decision of Pierce decision the Legislation has many chances to change the Language of "Except leaves and flowering tops. And Legislation has not changed the Wording. They have repeatedly left the wording in place. And the meaning is clear. Therefore, Appellant asks this Court to Overrule/Modify the Pierce Decision to reflect the Laws that where passed by Legislative Intent.

CONCLUSION

Appellant respectfully request that this Court Reverse his Sentence, and impose one that is within the Guidelines of the State of Washington. And that this Court finds that the Sentencing Enhancements where imposed in excess of the statutory Laws of the State of Washington and Remand this case to the trial court for correction.

Respectfully Submitted

Dated this 26th day of September, 2010



JD. Kienitz #337750
Larch correction center
15314 NE. Doyle Valley RD.
Yacolt, WA 98675-9531

