

NO. 47376-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

DYLAN JOSEPH HECKL,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00170-1

BRIEF OF RESPONDENT

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SERVICE	John A. Hays 1402 Broadway, Suite 103 Longview, WA 98362 Email:	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. <i>or, if an email address appears to the left, electronically.</i> I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 4, 2015. Port Orchard, WA <i>Elizabeth Allen</i> Original e-filed at the Court of Appeals; Copy to counsel listed at left.
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether defendant’s claim that testimony was inadmissible under ER 404(b) was properly preserved at trial and, if so, whether the trial court abused its discretion by allowing the defendant’s admission that he was a heroin dealer into evidence and whether, even if it were considered an abuse of discretion, any such error was harmless given the overwhelming evidence against the defendant?

2. Whether defense counsel’s failure to bring a CrR 3.6 motion based on Officer Deatherage’s warrantless search of the defendant’s wallet to determine if he was truthful when he told her he had no money on his person was ineffective assistance of counsel that prejudiced him at trial? [STATE CONCEDES ERROR]

3. Whether the antiquated penalties set forth in RCW 69.50.410 take precedence over the Sentencing Reform Act’s RCW 9.94A.505(1), which states that courts “shall impose punishment as provided in this chapter”?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Dylan Joseph Heckl was charged by information filed in Kitsap County Superior Court with sale of heroin for profit, delivery of methamphetamine, possession of methamphetamine, possession of heroin,

and forgery. CP, 10-14. The first two counts were accompanied by a special allegation that they occurred in a protected school zone. CP 11, 12-13. Following a jury trial, Heckl was convicted of all charges. CP 124-25. By special verdict, the jury found that counts I and II were committed within a protected school zone. CP 126-27. Mr. Heckl was sentenced to 116 months in prison. CP 143. This appeal follows.

B. FACTS

On September 3, 2013, Detective Ejde organized a controlled buy between a confidential informant, Travis Gurno, and the defendant, Dylan Heckl. RP 71-72. Gurno had arranged the sale with Heckl by telephone. RP 171-72. Mr. Gurno met Detective Ejde and other detectives behind a Home Depot store. RP 72-73, 172. There both Gurno and his pick-up truck were searched. RP 73, 236, 247-49. \$140 in buy money was counted, logged, and photographed prior to being given to Mr. Gurno to make the purchase. RP 74-75. He was also given a key chain camera to take with him to the buy. RP 76-78, 173. Departing the secure area behind the Home Depot, Gurno drove to Heckl's home while being surveilled by the detectives. RP 239, 248, 250.

Travis Gurno arrived at Heckl's home and was invited up to Heckl's upstairs bedroom. RP 174. He gave Heckl the buy money and Heckl weighed the drugs out on the bed in the bedroom. RP 175. Heckl

gave Gurno the drugs after he weighed them. RP 175. Images of Dylan Heckl and his bedroom were caught on film by Gurno's key chain camera. RP 87, 89-93, 175-76. Following the purchase, Mr. Gurno returned to the secure area behind Home Depot and gave Detective Ejde the drugs he purchased. RP 80-81, 175. These drugs were later tested and found to contain heroin. RP 81, 226. Gurno was paid \$100 by Detective Ejde for his role in the controlled buy. RP 93. Both Gurno and his vehicle were searched following the controlled buy. RP 236-38. A previously unnoticed roll of quarters was found in the truck following the buy. RP 237, 242-43.

The next day, September 4th, a second buy between the Travis Gurno and Dylan Heckl was coordinated by Detective Ejde. RP 94, 176. Like the previous one, Gurno called Heckl in advance to arrange it. RP 176. Once again Gurno met the detectives behind the Home Depot. RP 94, 176-178. He was searched by detectives and given \$75 in buy money to make the purchase. RP 94, 239-41. This time, however, he was not given a key chain camera to use. RP 95. In addition, Gurno's truck had electrical problems and would not start. RP 240. Because of this, the detectives drove Gurno near to Heckl's home where they dropped him off to walk the remainder of the way while they surveilled him covertly. RP 96, 240-41, 251. They were able to watch Gurno walk up the driveway

towards Heckl's home. RP 96.

Just as he did the previous day, Gurno went upstairs to Dylan Heckl's bedroom. RP 178. He gave the buy money to Heckl. RP 176, 178. Heckl measured the drugs on the bed. RP 178. Heckl gave the measured amount of drugs to Gurno. RP 178. Mr. Gurno then left Heckl's home and was picked up by Detective Ejde. RP 97. They returned to the secure area behind Home Depot and Gurno gave Ejde the drugs he had purchased from Heckl. RP 97-99. The drugs received from Heckl were later tested and confirmed to be methamphetamine. RP 226-27. Mr. Gurno was again paid \$100 for his participation in the drug buy. RP 102. When Gurno was searched following this second buy, a pocket knife that had gone previously undetected was found on his person. RP 240, 243.

Approximately seven weeks later, three detectives conducted an unrelated investigation into a forgery operation involving Dylan Heckl's roommate. RP 257-58. On October 25th, Heckl's roommate was arrested and questioned by the three detectives, Detectives Blankenship, Deatherage, and Nau. RP 258. Based on the information he provided, a search warrant was obtained for Dylan Heckl's home. RP 186-89, 258. Detective Ejde, being familiar with the Heckl residence, was dispatched to surveil the scene prior to service of the warrant by the other officers. RP

103, 190, 259. As the officers prepared to serve the search warrant, a vehicle drove up the driveway of the residence. RP 106, 260. Inside the vehicle were three people, including Dylan Heckl in the front passenger seat. RP 106, 260. Detective Deatherage of the Port Orchard Police Department detained Heckl as other detectives secured the other occupants of the vehicle. RP 142-143.

Detective Deatherage handcuffed Mr. Heckl and patted him down. RP 143. Heckl was not under arrest but detained only for officer safety purposes. RP 23-24. Officer Deatherage asked him, "Can I remove the contents of your pockets and set them up on the trunk?" RP 143. Heckl said that she could. RP 143. When she found Heckl's wallet, Detective Deatherage asked him if he had any money in it. RP 144. Heckl responded that he did not. RP 144. In order to make sure he was being truthful, Detective Deatherage opened up his wallet and saw there was a bill inside. RP 144. She confronted him with the bill, saying, "I thought you said there wasn't any money in here." RP 144. Heckl responded that the bill she was showing him was fake. RP 144. Detective Deatherage then read Heckl his *Miranda* warnings. RP 145. When asked where he obtained the fake bill, Heckl told her he received it from his roommate. RP 155.

After Detective Deatherage finished questioning Heckl about the

counterfeit bill in his wallet, he was led over toward Detective Blankenship's vehicle. RP 261. Detective Blankenship questioned Heckl further about his roommate's counterfeiting operation. RP 261-62. He told her that his roommate was using one of the upstairs bedrooms to make counterfeit money and there would be evidence of that up there. RP 262. Heckl also told Detective Blankenship that he had heroin and methamphetamine in the vehicle. RP 262. Detective Blankenship passed that information along to Detective Ejde who was conducting the drug investigation of Heckl. RP 262.

Detective Blankenship left Heckl with Detective Ejde when she went to go serve the search warrant. RP 263. Heckl confessed to Ejde that he sold drugs, specifically heroin. RP 109, 134. Heckl also talked to Detective Ejde about where he obtained the drugs that he sold. RP 109, 134. Heckl told Ejde that he received his drugs from somebody that lived nearby. RP 109. Detective Nau, who had obtained the telephonic search warrant for Heckl's residence, called the judge back to expand the warrant to include the vehicle that Heckl arrived in. RP 186-89, 192. Once the expanded search warrant was obtained, Detectives Ejde and Nau searched the vehicle. RP 109-10, 192.

Detective Ejde found a number of incriminating items in the front passenger seat area where Dylan Heckl had been sitting. RP 109-110. To

the right of the passenger seat, he discovered two glass pipes. RP 110, 113. He recognized these as methamphetamine pipes. RP 127-28. In front of the passenger seat on the floorboard he found a piece of plastic with a black tar residue on it. RP 110, 114-115. In the center console, he found a plastic straw along with some foil with burn marks on it. RP 110, 115-117. Ejde recognized the straw and foil as a method used by heroin users to ingest the drug. RP 115-16. The black tar substance on the piece of plastic was later identified as heroin. RP 125-26, 230.

Detective Nau assisted Detective Ejde in searching the vehicle that Heckl arrived in. RP 109-110, 192-93. Detective Nau located a scale with suspected heroin residue on it located in a zippered bag within a brown bag in the trunk of the vehicle. RP 192-193, 195-96. She also found the casing of a metal pen in the same bag which she recognized as a tool used to ingest heroin. RP 196-97. Underneath the front passenger seat where Heckl had been sitting, Detective Nau located a glasses case with a Seahawks logo on it. RP 142, 197. Inside the glasses case, Detective Nau found a piece of aluminum foil and a plastic baggie and a straw. RP 197-99. In the aluminum foil, Nau found a plastic bottle cap that was spilling over with a white crystal substance. RP 199. Nau suspected that this substance was methamphetamine. RP 201-02. This substance was later confirmed to be methamphetamine. RP 205, 231.

The detectives focused their search of Heckl's residence to the two upstairs bedrooms on opposite sides of a landing or hallway between them. RP 158-59, 161, 263-64. In the hallway area, Blankenship located a printer box with scraps of counterfeit-making materials within it. RP 162-63, 210, 266. Additional evidence of counterfeiting was found in Heckl's roommate's room. RP 163-65. No evidence of counterfeiting was found in Heckl's bedroom. RP 167.

In Dylan Heckl's room, Detective Blankenship found foil, a Q-tip, and a scale on the bed. RP 268. The foil had black lining and appeared to have been used to consume drugs. RP 268. Detective Blankenship considered the Q-tip to be an item that could be used to clean out drug pipes while the scale was one that could be used to weigh drugs. RP 268. She also found a number of baggies on a table in Heckl's bedroom. RP 269. Detective Ejde, with the assistance of another detective, took measurements between Dylan Heckl's home and the nearest school bus stop. RP 101-02, 252-53. They measured the distance at 209 feet. RP 102, 253.

Prior to trial a CrR 3.5 hearing was held. RP 19-44. During the hearing, Detective Deatherage testified that after she detained Mr. Heckl, she patted him down for officer safety reasons and then asked him if she "could remove the contents out of his pockets." RP 24. Detective

Deatherage testified that Heckl responded by telling her, yes, she could. RP 25. One of the items she removed from his pockets was Mr. Heckl's wallet. RP 25. Officer Deatherage testified that she looked inside it and removed an apparently fake \$20 bill after Heckl told her he did not have any money. RP 25-26. Neither Mr. Heckl nor his counsel objected to this search during the CrR 3.5 hearing or later upon Detective Deatherage's testimony on this point at trial. RP 19-44, 143-145. At the conclusion of the CrR 3.5 hearing, the court ruled Heckl's statements to Detective Deatherage were admissible. RP 43-44, CP 136-138.

Following the CrR 3.5 hearing, the trial court next addressed Mr. Heckl's admissions to Detective Ejde that he was a heroin dealer who obtained his heroin from a local supplier. RP 44. The issue had been previously reserved by the trial court following the 3.5 hearing. RP 7-8. The prosecutor at that time had expressed uncertainty as to whether the defendant was even challenging the proffered evidence. RP 8. The prosecutor, following the 3.5 hearing, indicated that she offered the statements as an admission by the defendant but wanted the court to also conduct a precautionary 404(b) analysis if the court felt one was necessary. RP 45. The State's offer of proof was as follows:

Your Honor, the statements the State is referring to are actually the ones that Detective Ejde reported in his police report; the statements that the State sees anyway that could potentially implicate 404(b). And those statements

are that the defendant admitted to dealing heroin, that he had a supplier who would give him heroin, and then he would deal that to other people.

It's kind of – it is a borderline statement as to whether it even requires a 404(b) analysis because it's the State's position that it is basically an admission to the crime charged.

However, as a cautionary measure, because it doesn't – he isn't directly asked whether he delivered to a specific CI, the State is asking the Court to do a 404(b) analysis in that regard if the Court feels it's necessary.

This statement – when defendants are contacted for these types of offenses by detectives, it's routine for the officers to ask generic questions of whether they deal drugs, rather than specific questions that would reveal who the confidential informant was that was sent in to purchase drugs, and that that is to protect the confidential informant but still to gain information about the defendant's drug dealing operation.

The fact that the defendant was an admitted drug dealer is circumstantial evidence of the crime charged, which is one way in which 404(b) evidence is admissible. It also so connected in time and place that it is essentially a part of the case.

Even though it might implicate him in dealing to other individuals, it was never specifically said in the police reports whether he indicated how many individuals he was selling to. I expect it to be pretty generic testimony that he admitted to dealing heroin. I don't expect go into specific details about who he was dealing to, or anything like that, except to the confidential informant.

In addition, the fact that the defendant is an admitted drug dealer certainly goes to many other elements of the crime that the State has to prove. The State has to prove that the defendant knew what he was delivering was heroin on one occasion and meth on another occasion.

And certainly the fact that he admitted to being a heroin dealer or dealing heroin goes to that knowledge, and it also goes to the intent of intending to deliver that

controlled substance to another individual. It's certainly relevant and highly probative of this particular case, and the State would ask the Court to admit that evidence.

RP 44-46. The court then asked for a response from defense counsel. RP 46. Counsel stated, "Your Honor, I will defer to the Court on this issue." RP 46. The court then admitted the statements as circumstantial evidence of the crime charged and res gestae evidence. RP 46-47, CP 134-135.

At his trial, Heckl testified that he never made a drug transaction with the informant. RP 291. He denied assisting his roommate with counterfeiting nor of knowing about it prior to his roommate's arrest. RP 293-94. Heckl denied making the statements related to knowledge of drugs being in the vehicle that Detective Blankenship had attributed to him. RP 299. Heckl testified that he did not know there were any drugs in the car he had been traveling in. RP 297.

III. ARGUMENT

- A. **HECKL'S COUNSEL DID NOT OBJECT TO STATE'S OFFER OF PROOF UNDER ER 404(B) SO THIS COURT SHOULD NOT REACH THE ASSERTED ERROR; IN THE ALTERNATIVE IT SHOULD FIND NO ERROR BECAUSE THE EVIDENCE WAS PROPERLY ADMITTED UNDER ER 404(B) OR, FAILING THAT, IT WAS NOT LIKELY TO AFFECT THE OUTCOME GIVEN THE OVERALL QUANTUM OF EVIDENCE AGAINST THE DEFENDANT.**

Heckl argues that the trial court abused its discretion in admitting Heckl's statements that he was a heroin dealer under ER 404(b). App.'s Brief at 13. This claim is without merit because defendant failed to offer any argument against this evidence at trial, it was properly admitted under ER 404(b) by the trial court and, even if it were held inadmissible under ER 404(b) it cannot be said that there is a reasonable probability that the result of the trial would have been different.

An appellate court will not reverse a trial court's ruling under ER 404(b) absent a manifest abuse of discretion such that *no reasonable judge* would have ruled as the trial court did. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007)(emphasis added). To preserve an issue for appeal, a party must bring an objection at trial unless it is a "manifest error affecting a constitutional right." RAP 2.5(a); *State v. MacFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Failure to object to ER 404(b)

evidence does not rise to the level of a constitutional error. *State v. White*, 43 Wn. App. 580, 587, 718 P.2d 841 (1986). Erroneous admission of ER 404(b) evidence is not of a constitutional magnitude. *State v. Everybodytalksabout*, 145 Wn.2d 456, 468-69, 39 P.3d 294 (2002).

The only response by the defendant to the State's lengthy offer of proof regarding Mr. Heckl's admission that he was a heroin dealer was to state he would defer to the trial court on this issue. RP 46. Heckl made no argument as to why it was inadmissible under ER 404(b) nor did he state an objection in any respect at all to its admission. RP 7-8, 46. Given the failure of the defendant to articulate an objection below, this court should find that his claim of error is unpreserved and decline to reach it. RAP 2.5(a); *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007); *State v. MacFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

In its written findings the court stated:

That the Court finds that the ER 404(b) evidence is admissible. (1) this Court makes a finding by a preponderance of evidence that the misconduct occurred. (2) this Court finds that the evidence is admissible as circumstantial evidence of the crime charged. The defendant admitted to having a drug dealing business during the time period that the controlled buys occurred; thus, the statements are a partial confessions to the controlled buys. In addition, the evidence is admissible as common scheme or plan. The defendant is in the business of selling drugs. These two controlled buys are evidence of this plan to deal heroin. (3) This Court finds the evidence is relevant for the purposes listed above; (4) This Court

finds that the probative value outweighs any prejudice. In this case there is likely to be little emotional impact from the defendant's statements. Further, the defendant is entitled to a jury limiting instruction if the defendant proposes such instruction which would limit any risk of unfair prejudice.

CP 135. It cannot be said that no reasonable judge would not have ruled as the court did. *State v. Mason*, 160 Wn.2d 910, 933-34, 162 P.3d 396 (2007). The courts admission of this evidence under ER 404(b) should be affirmed should this court decide to reach the issue.

In addition to being a partial admission, the statements were circumstantial evidence that the Heckl knew the drugs he was dealing were controlled substances. As Washington courts have consistently held, the elements of the crime of unlawful delivery of a controlled substance are simply: (1) delivery; and (2) "guilty knowledge." *State v. Evans*, 80 Wn. App. 806, 814, 911 P.2d 1344 (1996); *State v. Nunez-Martinez*, 90 Wn. App. 250, 253, 951 P.2d 823 (1998) (citing former RCW 69.50.401(a); *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979)); RCW 69.50.401. In addition, the courts have stated that the "guilty knowledge" that the State is required to prove "is knowledge that the substance being delivered is a controlled substance. It is not knowledge of the substance's exact chemical or street name." *Nunez-Martinez*, 90

Wn. App. at 254. Heckl's admission that he was a heroin dealer with a local supplier was probative of this guilty knowledge.

Even were the court to find the statements here inadmissible under ER 404(b), the overall amount of remaining evidence against the defendant should lead the court to affirm the convictions. The erroneous admission of prior drug convictions under ER 404(b) in a trial for delivery of a controlled substance does not result in reversal where the other evidence in the record powerfully supports the defendant's guilt. *State v. Hendrickson*, 129 Wn.2d 61, 80, 917 P.2d 563 (1996). The standard of review is whether it is reasonably probable that the outcome of the trial was materially affected by the improper admission. *State v. White*, 43 Wn. App. 580, 587, 718 P.2d 841 (1986) citing *State v. Robtoy*, 98 Wn.2d 30, 653 P.2d 284 (1982).

In Heckl's case, the evidence against him was substantial even when one excludes his admissions to drug dealing. Two controlled buys on two consecutive days were conducted on Mr. Heckl. RP 72-75, 175-76, 178, RP 239-241, RP 248-253. The confidential informant left with money, traveled to Heckl's residence, and returned shortly after with drugs and without the money. *Id.* During the first controlled buy, Heckl's face was caught on the key chain camera Gurno carried and another image captured Heckl's bedroom. RP 87, 89-93, 175-76. Drug evidence was

found in Heckl's home and the car he was riding in. RP 110, 113-117, 127-28, 142, 192-99, 201-02, 205, 231, 268-69. Even if the admission of Heckl's statements concerning his drug dealing activities was erroneous, it cannot be said that there is a reasonable probability that the result of his trial would have been any different.

B. HECKL'S TRIAL COUNSEL WAS INEFFECTIVE IN NOT CHALLENGING THE WARRANTLESS SEARCH OF HIS WALLET AND IT PREJUDICED HIM ON THE FORGERY CHARGE.

Heckl next claims that his counsel was ineffective for failing to bring a CrR 3.6 motion to suppress evidence. App.'s Brief at 22. The State agrees.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965

P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, review denied, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

It is well settled under Washington law that when a trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it does not support a claim of ineffective assistance. See, *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance based on the failure of trial counsel to object to the admission of evidence, a defendant must

establish: (1) that the failure to object fell below prevailing professional norms; (2) that the proposed objection likely would have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

Defendant correctly argues that Detective Deatherage's search of Heckl's wallet was not a valid inventory search given her testimony that he was not under arrest. App.'s Brief, 22-31, RP 23-26, CP 137 ["At this point, she did not put the defendant under arrest but he was detained for safety reasons"]. While Heckl consented to the detective's removal of his wallet from his pocket, the detective exceeded the scope of his consent when she opened up the wallet and removed the contents. RP 143 [consent given only to remove the contents of his pockets and set them up on the trunk]. Her offered rationale, to make sure he was being truthful with her regarding the amount of money in his wallet, is not an exception to the warrant requirement. RP 144. Given that he was clearly not under arrest and no other exception to the warrant requirement exists for this search, it is clear that had counsel objected to it, the objection to the introduction of this evidence pursuant to CrR 3.6 would have been sustained.

Because the counterfeit \$20 bill was the central piece of evidence

against Heckl on the count of forgery, the result of the trial as to the forgery charge would have been different if it would not have been admitted. Finally, given that an objection to the search of the wallet and against the admissibility of the fruits of that search would have been sustained, there is no legitimate strategic reason for trial counsel not to have moved to suppress the counterfeit bill. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). The State agrees with Heckl that this court should reverse his forgery conviction.

C. HECKL WAS PROPERLY SENTENCED UNDER RCW 9.94A.517 AND 9.94A.518.

Heckl next claims the trial court violated RCW 69.50.410(3)(a) when it sentenced him based on the standard range specified in RCW 9.94A.517 and the seriousness level specified for violations of RCW 69.50.410 found in RCW 9.94A.518. App.'s Brief, 31-37. This claim is without merit because sentencing for all felonies committed after June 30, 1984 is governed by the Sentencing Reform Act of 1981. RCW 9.94A.905 and 9.94A.505 (formerly RCW 9.94A.120).

“The sentences required under this chapter shall be prescribed in each sentence which occurs for a felony committed after June 30, 1984.” RCW 9.94A.905. “When a person is convicted of a felony, the court shall impose punishment as provided in this chapter.” RCW 9.94A.505(1).

The court shall impose a sentence as provided in the following sections and as applicable in the case:

Unless another term of confinement applies, a sentence within the standard range established in RCW 9.94A.510 or 9.94A.517;

RCW 9.94A.505(2)(a)(i). RCW 9.94A.517 provides a sentencing grid table for the three seriousness levels of drug felonies. RCW 9.94A.518 specifies the seriousness levels of a variety of drug offenses. "Selling for profit (controlled or counterfeit) any controlled substance (RCW 69.50.410)" is listed as a seriousness level III drug offense in Table 4. RCW 9.94A.518. Table 3, the drug offense sentencing grid, indicates that a seriousness level III offense for someone with an offender score between three and five carries a standard range sentence of 68 - 100 months. RCW 9.94A.517.

At his sentencing, the trial court applied the above statutes to his case. RP 8/8/14 1-25, CP 141-151. The court found that count I, the sale of a controlled substance for profit carried with it a seriousness level of III and consequent sentencing range of 68-100 months based on Mr. Heckl's calculated offender score of 5. CP 141-42. The trial court sentenced Mr. Heckl to a total of 116 months. RP 8/8/14 23, CP 143. This was the low end of his sentencing range plus the two school zone enhancements which ran consecutive to each other. RP 8/8/14 23, CP 143.

The defendant now argues that the Sentencing Reform Act did not

apply to Heckl's case and the court should have sentenced him under RCW 69.50.410(3).

Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such a violation.

RCW 69.50.410(3)(a). This provision has been part of RCW 69.50.410 since it was created in 1973. See Laws of Washington, 1973 2nd Ex.Sess., Chapter 2, Section 2. Discussion of these antiquated sentencing provisions embedded within RCW 69.50.410 is difficult to find in case law. One case stated the following:

RCW 69.50.410 establishes mandatory prison sentences for persons convicted of selling certain drugs. The sole purpose of the above-quoted language is to except the sale of marijuana from these harsh mandatory sentencing provisions. See House Journal 1st and 2nd Ex.Sess. 1742, 1743 (1973).

State v. McGinley, 18 Wn. App. 862, 868, 573 P.2d 30 (1977). This alludes to the largely discretionary sentencing regime that prevailed at that time and how the RCW 69.50.410 provision contrasted with it. Of course, with the advent of mandatory sentencing laws in 1984 for all felonies, the "harsh mandatory sentencing provisions" in RCW 69.50.410 as described in *McGuinley* now appears quite lenient.

Statutes that governed felony sentencing prior to 1984 were superseded by the Sentencing Reform Act of 1981 and do not control felonies occurring after 30 June 1984. RCW 9.94A.905, *See e.g. In re Chapman*, 105 Wn.2d 211, 213, 713 P.2d 106 (1986) (noting that RCW 9.92.080 was superseded by the SRA as of 30 June 1984). The fact that RCW 69.50.410 is specifically listed in the seriousness level table found in RCW 9.94A.517 and consequently has a standard range pursuant to 9.94A.518 is evidence of legislative intent to punish violaters under the Sentencing Reform Act. This superseding intent should prevail over an antiquated statute referring to mandatory stays in corrections facilities operated by the department of social and health services. RCW 69.50.410(3). The court should find that the sentencing provision found in RCW 60.50.410(3) was superseded by the Sentencing Reform Act of 1981 and Mr. Heckl was sentenced appropriately pursuant to RCW 9.94A.505, 9.94A.517, and 9.94A.518.

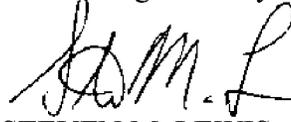
IV. CONCLUSION

For the foregoing reasons, Heckl's convictions should be affirmed with the exception of Count V, which should be reversed and remanded for a new trial.

DATED May 4, 2015.

Respectfully submitted,

TINA R. ROBINSON
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "S.M. Lewis". The signature is written in a cursive, somewhat stylized font.

STEVEN M. LEWIS
WSBA No. 35496
Deputy Prosecuting Attorney

KITSAP DISTRICT COURT

May 04, 2015 - 4:24 PM

Transmittal Letter

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Case Name: Heckl, Dylan

Court of Appeals Case Number: 47376-3

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