

NO. 81348-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Petitioner

v.

THOMAS HARRY EATON, Respondent

CLARK COUNTY SUPERIOR COURT CAUSE NO. 05-1-02126-8

PETITIONER'S REPLY BRIEF *(Supplemental)*

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I. RESPONSE TO ARGUMENT

The defendant was charged with possession of methamphetamine. At the time of trial, after the jury found him guilty of that crime, they were then asked whether or not this crime was committed while he was in the county jail. This is consistent with the statutory penalty enhancement under RCW 9.94A.533(5).

The Court of Appeals, Division II, reversed this conviction indicating that the placement of the defendant in the county jail, where the drugs were found secreted on him, did not constitute a voluntary act on his part. The State appealed this matter to this court and review was accepted.

The defense spends a great deal of time talking about the “actus reus”, of the crime. However, as set forth in the State’s appellate briefs in the Court of Appeals and in this initial Petition, the actus reus involves the crime of possessing the controlled substance. The fact that the commission of that crime occurred in a jail setting leads to an enhancement, but does not lead to additional criminal elements which the legislature never contemplated.

As indicated in State v. Utter, 4 Wn. App. 137, 139-140, 479 P.2d

946 (1971):

There are 2 components of every crime. One is objective – the actus reus; the other subjective – the mens rea. The actus reus is the culpable act itself, the mens rea is the criminal intent with which one performs the criminal act. However, the mens rea does not encompass the entire mental process of one accused of a crime. There is a certain minimal mental element required in order to establish the actus reus itself. This is the element of volition (cite omitted).

In the present case, the appellant was charged with second degree murder and found guilty of manslaughter. The actus reus of both is the same – homicide. Thus, in order to establish either, the fact of homicide must first be established.

As the Utter court correctly noted, there are two components of every **crime**. As previously indicated, the crime is possessing a controlled substance. The actus reus is the actual possession of the drug itself. For the criminal act, it makes no difference whether it is being committed in a jail setting, at a school bus stop, or in someone's home. The criminal act remains the same.

The statute in question here is RCW 9.94A.533, which deals with adjustments to standard sentences. Specifically, the defendant was charged with the enhancement under sub (5). That particular provision reads as follows:

§ 9.94A.533. Adjustments to standard sentences

(5) The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection. If the offender or an accomplice committed one of the crimes listed in this subsection while in a county jail or state correctional facility, and the offender is being sentenced for an anticipatory offense under chapter 9A.28 RCW to commit one of the crimes listed in this subsection, the following additional times shall be added to the standard sentence range determined under subsection (2) of this section:

(a) Eighteen months for offenses committed under RCW 69.50.401(2)(a) or (b) or 69.50.410;

(b) Fifteen months for offenses committed under RCW 69.50.401(2)(c), (d), or (e);

(c) Twelve months for offenses committed under RCW 69.50.4013.

For the purposes of this subsection, all of the real property of a state correctional facility or county jail shall be deemed to be part of that facility or county jail.

This particular statute (RCW 9.94A. 533) has been interpreted by our state supreme court in State v. Jacobs, 154 Wn.2d 596, 115 P.3d 281 (2005). The court found an ambiguity dealing with whether or not the legislature intended multiple enhancements to be concurrent or consecutive. Other than that, the court did not find that the statute was ambiguous. The discussion in Jacobs was as follows:

We are asked to interpret RCW 9.94A.533. Statutory interpretation involves questions of law that we review de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In construing a statute, the court's objective is to determine the legislature's intent. *Id.* "[I]f the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent." *Id.* at 9-10. The "plain meaning" of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. Wash. Pub. Ports Ass'n v. Dep't of Revenue, 148 Wn.2d 637, 645, 62 P.3d 462 (2003); Campbell & Gwinn, 146 Wn.2d at 10-12. If after that examination the provision is still subject to more than one reasonable interpretation, it is ambiguous. *Id.* If a statute is ambiguous, the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); State v. Roberts, 117 Wn.2d 576, 585, 817 P.2d 855 (1991).

RCW 9.94A.533(6) states: "twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW [the Uniform Controlled Substances Act] if the offense was also a violation of RCW 69.50.435 or 9.94A.605. Here, there was a violation of RCW 69.50.435(1)(c) and RCW 9.94A.605. At least one 24-month enhancement, and possibly two, applies, to this fact situation. However, we need not decide whether two 24-month enhancements may be imposed where both RCW 69.50.435 and RCW 9.94A.605 are violated because according to the rule of lenity, even if both may be imposed, they must run concurrently. We hold that the sentencing court erred in applying them consecutively.

- State v Jacobs, 154 Wn.2d at 600-602

Questions of statutory interpretation are reviewed de novo. State v. Ammons, 136 Wn.2d 453, 456, 963 P.2d 812 (1998). Interpreting statutes, the appellate courts seek to give effect to the legislature's intent. If the statute's meaning is plain on its face, the appellate courts must follow that meaning without resorting to statutory construction. State v. Delgado, 148 W.2d 723, 727, 63 P.3d 792 (2003). The language of the statute is given its plain and ordinary meaning and efforts are taken to avoid interpretations that will lead to unlikely, absurd, or strained results. State v. Ammons, 136 Wn.2d at 457-458; State v. Hendrix, 109 Wn. App. 508, 512, 35 P.3d 1189 (2001). The touchstone in this discussion is that a court's objective is to construe a statute to determine the legislature's intent. Christensen v. Ellsworth, 162 Wn.2d 365, 173 P.3d 228 (2007).

The State submits that there is no ambiguity in this particular statutory scheme dealing with enhancements. The concept of the enhancement is not the crime itself, but an additional penalty that is tacked onto the criminal action itself. All the cases cited by the Respondent deal with crimes concerning contraband or bringing items into the jail. Clearly, in each instance, the criminal act is not merely the possession of the controlled substance, or contraband, but the transporting, secreting, or possessing the controlled substance in the jail facility. None of them deal with merely an enhancement to the criminal action itself.

A case from Missouri is illustrative of this particular discussion. In State of Missouri v. Windsor (Court of Appeals of Missouri, Western District), 110 S.W.3d 882 (2003). The discussion centered on actus reus and the possessing of controlled substance in or about the county jail. The defendant in that case claimed that this was not a willful act on his part.

The appellate court in Missouri responded as follows:

A paucity of applicable case law addressing the issue of a voluntary act exists in Missouri. Appellant cites Martin v. State, 31 Ala. App. 334, 17 So. 2d 427 (Ala. Ct. App. 1944), as support for his first ground, that the voluntary presence on the county jail premises of the person charged is a crucial element of the crime for which he stands convicted. In *Martin*, the defendant was drinking in his home when police officers seized him, transported him to a public highway and arrested him for public drunkenness. ***Id.* at 427.** He was later convicted for public drunkenness. ***Id.*** The statute defining public drunkenness punished "any person who intoxicated or drunk. . . appears in any public place. . . and manifests a drunken condition." ***Id.*** The Alabama Court of Appeals reversed the conviction because the defendant's presence on the public highway was involuntary. ***Id.*** Although reversal was appropriate in ***Martin***, it is not appropriate in this case because the voluntary presence of Appellant on county jail premises was not an element of the offense. ***Accord United States v. Cole*, 475 F. Supp. 422, 423-24 (E.D. Pa. 1979) (rejecting defendant's claim that his voluntary presence on federal property when he committed the offense of assault was a requisite element of the offense of assault).** Rather, Appellant was convicted for his voluntary conduct of possessing a controlled substance in or about the county jail. Appellant's willful possession of a controlled substance itself constitutes the requisite voluntary act. His secreting the substance in or about the county jail, regardless of

whether he was present voluntarily, satisfies evidentiary requirements to support the conviction.

- State of Missouri v Winsor, 110 S.W.3d at 886

The State submits that if this court were to adopt the rationale of the respondent and Division II of the Court of Appeals, then it would lead to a strained and unrealistic interpretive consequence of an unambiguous statute. State v. Fjermestad, 114 W.2d 828, 835, 791 P.2d 897 (1990). The legislature has made it clear that the enhancements are not the “crimes” but merely punishment factors to be considered by the court. There is no actus reus in the enhancement portion. It would be similar to an argument being raised by the defendant possessing the drugs in another prohibited area where he can claim that he was not intentionally doing so and it was not his volitional will that he possess the drugs for example in a schoolyard or at an ordinary school bus stop. This is adding elements to something that is not a crime.

II. CONCLUSION

The trial court should be affirmed and the striking of the enhancement by Division II should be overturned.

DATED this 25 day of Oct, 2008.

Respectfully submitted:

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