

No. 81557-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT FAILEY,

Petitioner.

RECEIVED
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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Frank E. Cuthbertson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT/PETITIONER

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A. STATEMENT OF ISSUES

1. RCW 9.94A.030(29)(u) expressly makes a crime committed before December 2, 1993, a "most serious offense" if it is "comparable to a [current] most serious offense." RCW 9.94A.035 merely classifies felonies defined outside Title 9A RCW, the criminal code, as class A, B or C felonies depending on the maximum potential sentence. Does RCW 9.94A.030(29)(u), not RCW 9.94A.035, govern the determination of whether a 1974 pre-criminal code robbery conviction is a Class A or Class B felony?

2. Is RCW 9.94A.035 inapplicable to the pre-criminal code definition of robbery because robbery is a crime defined in Title 9A?

3. Is RCW 9.94A.035 at best an ambiguous statute which must be narrowly construed under the rule of lenity?

4. Is a narrow construction of RCW 9.94A.035, as inapplicable to former crimes currently codified in Title 9A, required to avoid the disproportional result of having a conviction for robbery which is most comparable to the current robbery in the second

degree, a class B felony, count as a class A felony?¹

5. Is a narrow construction of RCW 9.94A.035 required to avoid the disproportional result of having an out-of-state conviction with the same elements be deemed similar to robbery in the second degree, a class B felony, while a conviction under the former Washington pre-criminal code robbery statute is considered a class A felony?

6. Where a 1974 robbery conviction is for a general intent crime because it does not allege "intent to steal," is it not, in any event, insufficiently comparable even to second degree robbery to count as a strike offense?

B. STATEMENT OF THE CASE

On September 19, 1974, Robert Failey pled guilty to robbery and was sentenced to "a period of not more than 20 years." CP 59-143. He was released on parole three years later on November 18,

¹ Mr. Failey asserts that his prior 1974 robbery conviction is not a strike offense at all because it is not comparable to a current strike offense. But for purposes of his argument that it washed out in any event, he is assuming that it is comparable to a second degree robbery conviction, the only current crime to which it could be comparable.

1977. CP 59-143. The information to which he pled guilty alleged that he did

take personal property from the person or in the presence of Jack Dean Pruitt, against his will or by means of force or violence or fear of immediate injury to his person, the personal property so taken being in the possession of Jack Dean Pruitt, as agent, bailee or employee of the 7-11 Store, 6505 Steilacoom Blvd., the owner thereof.

CP 59-143. The information did not allege a specific intent to steal the property.

In 1974, robbery was not divided into first and second degree robbery, but was defined most comparably to what has since been codified in RCW Title 9A as second degree robbery, a class B felony. A person is guilty of second degree robbery, under RCW 9A.56.210, if he or she commits a robbery; the robbery is elevated to first degree robbery and a class A felony only where there is a deadly weapon involved, a display of what appears to be a deadly weapon or the infliction of bodily injury, or takes place within and against a

financial institution.² Former RCW 9.75.010, RCW 9A.56.190, RCW 9A.56.200, RCW 9A.56.210.

At Mr. Failey's sentencing for his current robbery conviction, the state argued that his 1974 robbery conviction should be classified as a class A felony even though it is comparable to second degree robbery conviction, a class B felony. The state argued that under RCW 9.94A.035, a statute which categorizes non-Title 9A offenses as class A, B or C felonies depending on the maximum sentence authorized, the 1974 conviction should be considered a class A which would not wash out and should subject him to a sentence of life without parole as a persistent offender. CP 5.

² Robbery under former RCW 9.75.010 was broader than robbery under the current definition in RCW 9A.56.190. Under the former statute robbery could be committed by fear of future violence or injury. Robbery under RCW 9A.56.190 requires that the taking be "by the use or threatened use of *immediate* force, violence, or fear of injury."

Thus, a person could have been found guilty of robbery under the former statute under circumstances which would not constitute robbery under the current statute. Further, as set out below, as Mr. Failey was charged in 1974, robbery under RCW 9.75.010 was a general intent crime and for this reason was not sufficiently comparable to second degree robbery to constitute a strike offense.

The trial court ruled that the 1974 conviction washed out because RCW 9.94A.035, is ambiguous because robbery *is* a Title 9A crime, and under the rule of lenity RCW 9.94A.035 could not be interpreted as converting the 1974 robbery to a class A felony. CP 44-56, 259-262; RP(12/1) 24.

The Court of Appeals held that RCW 9.94A.035 is unambiguous and applies to a pre-criminal code robbery conviction to make it a class A felony which would not wash out after ten crime-free years in the community.

D. ARGUMENT

1. **MR. FAILEY'S 1974 ROBBERY CONVICTION IS NOT A STRIKE OFFENSE BECAUSE IT IS MOST COMPARABLE TO A SECOND DEGREE ROBBERY, A CLASS B FELONY, AND WASHED OUT PRIOR TO HIS CURRENT CONVICTION.**

a. Under the plain terms of RCW 9A.30(29)(u), offenses such as Mr. Failey's 1974 conviction, which are in effect prior to December 2, 1993, are strike offenses only if comparable to a current crime which is a strike offense and which would be included as offender score.

The Persistent Offender Accountability Act (POAA), the three strikes law, authorizes a sentence of life without parole if an offender has a current conviction for a "most serious offense," and "has been convicted as an offender on at least two

separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.524." RCW 9.94A.030(37)(a)(i), (ii).

RCW 9.94A.030(29)(u) provides that "most serious offense" includes:

(u) Any felony offense in effect at any time prior to December 2, 1993, that *is comparable to a most serious offense* under this subsection, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony defined as a most serious offense under this subsection.

(emphasis added).

Under RCW 9.94A.030(29)(u), Mr. Failey's 1974 conviction is a felony offense in effect prior to December 2, 1993, to which a comparability analysis is applicable, in the same manner that a comparability analysis is applicable to a federal or out-of-state conviction. See State v. Thieffault, 160 Wn.2d 409, 158 P.3d 580 (2007) (to count as a most serious offense, courts must determine that foreign convictions are legally or factually comparable to a Washington most serious offense). To determine whether a foreign conviction is a most serious offense, the sentencing court converts the

out-of-state conviction to a Washington counterpart, then determines the consequences of the Washington counterpart and assigns the same consequences to the out-of-state conviction, treating the out-of-state conviction as if it occurred in Washington. State v. Berry, 141 Wn.2d 121, 131, 5 P.3d 658 (2000).

In either case, for a pre-1993 conviction or an out-of-state conviction, in enacting RCW 9.94A.030(29)(u), the legislature expressly provided that the determination of whether a conviction is for a most serious offense should be made by reference to a current most serious offense to which it is comparable.

Mr. Failey's 1974 robbery conviction does not qualify as a strike offense under the plain terms of the definition of a "most serious offense" because it is most comparable to a class B felony and washed out.

b. RCW 9.94A.035 classifies felonies defined outside the criminal code, Title 9A RCW, and does not apply to pre-code convictions.

In spite of the plain language of the RCW 9.94A.030(29)(u) that it governs pre-1993 convictions, the Court of Appeals agreed with the state that RCW 9.94A.035, not comparability analysis

under RCW 9.94A.030(29)(u), governs the determination of whether a 1974 conviction is a "most serious offense" for purposes of the Persistent Offender Accountability Act. Slip op. 11.

RCW 9.94A.035 classifies felonies, which are defined by statutes outside the criminal code:

For a felony defined by a statute of this state that is not in Title 9A RCW, unless otherwise provided:

(1) If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is twenty years or more, such felony shall be treated as a class A felony for purposes of this chapter;

(2) If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is eight years or more, but less than twenty years, such a felony shall be treated as a class B felony for purposes of this chapter;

(3) If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is less than eight years, such felony shall be treated as a class C felony for purposes of this chapter.

(emphasis added).

Nothing in RCW 9.94A.035 indicates that it applies to pre-criminal code crimes generally or pre-criminal code crimes which are now codified in the criminal code, Title 9A RCW, as robbery is.

The legislative history of RCW 9.94A.035 shows that it was enacted specifically to provide for classification of crimes which are currently defined outside the criminal code. The Senate Bill Report for SB 6252, the companion bill to HB 2389 which became RCW 9.94A.035, stated that a 1995 decision of the Court of Appeals (State v. Kelley, 77 Wn. Ap. 66, 889 P.2d 940 (1995) required enactment of the statute to classify crimes outside the criminal code:

A 1995 decision of the Court of Appeals held that an existing criminal code statute, which had been used to classify felonies outside the code, applied only in narrowly defined circumstances. As a result, more than 80 felonies have been left without a classification, resulting in potential uncertainty and inconsistency for sentencing courts.

The Final Bill Report for HB 2389 similarly reflects that

[u]ntil last year, the unclassified offenses outside Title 9A generally were classified under a statute that assigned a classification according to the length of the maximum sentence. Last year, a case from the Washington Court of Appeals held that this statute applied only under narrow circumstances. Accordingly, the classification of felonies outside Title 9A is not clear.

Nothing in the legislative reports shows an intent to classify pre-criminal code convictions under RCW 9.94A.035. The legislative goal, reflected in the plain language of the statute, was to classify the more than 80 current crimes defined outside of the criminal code, Title 9A.

In State v. Kelley, 77 Wn. App. 66, 889 P.2d 940 (1995), the case which provided the impetus for RCW 9.94A.035, the court considered RCW 9A.20.040(1), a statute which classified crimes defined outside of Title 9A based on maximum sentence where the classification of the prior crime was necessary to determine the grade or degree of a current Title 9A offense. The Kelley court held that RCW 9A.20.040(1) did not apply the appellant's current drug offense which was not a Title 9A offense.

Since RCW 9A.20.040(1) had been used to classify non-Title 9A crimes before the decision in Kelley, as noted in the bill reports for RCW 9.94A.035, the legislature determined that a new statute was needed to assure that unclassified non-Title 9A crimes could continue to be classified.

RCW 9A.20.040(1), which had until the decision in Kelley been used to classify crimes defined outside the criminal code, had never applied to crimes defined by former criminal statutes which were codified in Title 9A RCW. The legislature declared, at the time of the passage of the Criminal Code, including RCW 9A.20.040(1), that the provisions of Title 9A in no way govern the construction of any crime or punishment which occurred before its effective date.

RCW 9A.04.010 provides:

(1) This title [9A] shall be known and may be cited as the Washington Criminal Code and shall become effective July 1, 1976.

(2) The provisions of this title shall apply to any offense committed on or after July 1, 1976, which is defined in this title or the general statutes. . . .

(3) The provisions of this title do not apply to govern the construction of and punishment for any offense committed prior to July 1, 1976, Such an offense must be construed and punished according to the provisions of law existing at the time of the commission thereof in the same manner as if this title had not been enacted.

(emphasis added).

Thus, both the plain language of RCW 9.94A.35 and the legislative history of RCW 9.94A.035 weigh against any interpretation which applies to pre-

criminal code convictions. The impetus for the enactment of RCW 9.94A.035 was the Kelley decision which narrowed the scope of RCW 9A.20.040(1), which had previously been the means of classifying crimes defined outside the criminal code. RCW 9.94A.035 was to replace this function of RCW 9A.20.040(1), and RCW 9A.20.040(1) expressly did not apply to pre-criminal code crimes.

d. RCW 9.94A.030(29)(u), a specific statute should apply over RCW 9.94A.035, a general statute.

And even if RCW 9.94A.035 were deemed to apply to pre-code convictions, a specific statute prevails over a general statute if both appear to pertain to the same subject and they cannot be harmonized. In re Estate of Kerr, 134 Wn.2d 328, 343, 949 P.2d 810 (1998). Where the legislature has expressly and specifically provided that convictions for offenses in effect prior to 1993 should be considered under a comparability test, the same as foreign or out-of-state convictions, this statute should be utilized.

Under RCW 9.94A.030(29)(u), Mr. Failey's 1974 robbery conviction is best comparable to what is currently defined as a second degree robbery, a class B felony strike offense. As comparable to a

class B felony, as the trial court found, this conviction washed out.

e. RCW 9.94A.035 is, at best, ambiguous and the rule of lenity applies to prevent it from being applied to Mr. Failey's 1974 conviction.

At best, RCW 9.94A.035 is, as the trial court ruled, ambiguous: "RCW 9.94A.035 is not applicable to the instant case because it is ambiguous, susceptible to more than one interpretation" and therefore governed by the rule of lenity. CP 259-262; RP (12/1) 25. The trial court noted that RCW 9.94A.035, reads, in relevant part, that it is applicable to "a felony defined by a statute of the State that is not in Title 9A RCW," and that the felony of robbery "is codified at 9A.56.190 through .210." RP(12/1) 4 (emphasis added).

Accordingly, the trial court properly found that robbery is a felony defined under Title 9A RCW rather than a felony defined by a statute that is not in Title 9A RCW.

As noted by the Supreme Court in State v. Tvedt, 153 Wn.2d 705, 712 n. 2, 107 P.3d 728 (2005), new property crimes have been added to Title 9A RCW since the recodification of crimes in that title,

but "the legislature, not the code reviser placed robbery in chapter 9A.56 RCW. See LAWS of 1975, 1st Ex. Sess., ch. 260, at 841, 846. The legislature's placement of an offense within the criminal code is evidence of legislative intent." The Tvedt court also cited a 100-year-old case, State v. Hall, 54 Wash. 142, 102 P. 888 (1909), and noted that the "robbery statute then in effect was in relevant part essentially the same as the present statute." Tvedt, 153 Wn.2d at 714.

Crimes such as vehicular homicide, RCW 46.61.520, formerly 46.56.040, or violations of the Uniform Controlled Substance Act, RCW 69.50, are not within Title 9A RCW. Robbery, however, has been a crime in Washington for 100 years; it is not a crime defined in some statute other than Title 9A. It is a crime within the criminal code and now set out in RCW 9A.56.210. RCW 9.94A.035 is inapplicable to the crime of robbery.

At the least it is ambiguous whether RCW 9.94A.035 applies to Mr. Failey's robbery conviction. Given that ambiguity, the statute must be narrowly construed to be inapplicable to the felony of robbery, which is defined in Title 9A.

State v. Hachenev, 160 Wn.2d 503, 518-519, 158 P.3d 1152 (2007) (the rule of lenity requires a narrow construction of ambiguous statutes, especially statutes which determine whether to impose the most severe penalties of death and life without parole); (citing In re Personal Restraint of Cruz, 157 Wn.2d 83, 88, 134 P.3d 1166 (2006)).

f. The Court of Appeal's reliance on State v. Ball was misplaced.

Although the Court of Appeals cited State v. Ball, 127 Wn. App. 956, 956 n.1, 113 P.2d 520, review denied, 156 Wn.2d 1018 (2006), for the proposition that comparability analysis is inapplicable to Mr. Failey's 1974 robbery conviction, the Ball court performed just such a comparability analysis. The court in Ball looked at Ball's two earlier statutory rape convictions and determined that although statutory rape was no longer a crime, in Ball's case, his statutory rape convictions were comparable to the current crime of rape of a child, a class A felony, and therefore strike offenses. Ball, 127 Wn. App. at 959.

Consistently with Ball, Mr. Failey's 1974 conviction for robbery as it was then defined is no longer a crime in Washington, qneshould be

considered comparable to robbery in the second degree, a class B crime.

- g. It would be inequitable to count Mr. Failey's 1974 offense as a most serious offense and inconsistent with the proportionality goals of the Sentencing Reform Act.**

Counting Mr. Failey's 1974 conviction as a class A felony, even though it is comparable to second degree robbery, a class B felony, is inequitable and inconsistent with the proportionality goals of the Sentencing Reform Act (SRA).

The Court of Appeals' interpretation of RCW 9.94A.035 as converting Mr. Failey's 1974 conviction to a class A felony would result in an anomalous and disproportionate situation in which essentially the same crime would be a class A rather than a class B felony depending on the date it was committed. It would also be contrary to the legislature's intent that robbery be punished as a class B felony, absent additional factors which elevate it to a class A felony.

Further, the legislature's designation of most of the same elements as a class B felony demonstrates the legislature's intent that robbery

under RCW 9.75.010 be considered a class B felony.

As the court held in State v. Johnson, 51 Wn. App. 836, 759 P.2d 459 (1988), a 1964 conviction for taking a motor vehicle should be classified as a class C felony even though it carried a 10-year maximum sentence in 1964. Because taking a motor vehicle was a class C felony under the then-current classification, the court held that any other interpretation would be inconsistent with the purpose of the SRA to avoid diverse treatment:

We hold that to be consistent with the purpose of the SRA to avoid diverse treatment, the present classification of crimes should be used to determine the pre-SRA classification of the crime for offender score and sentencing purposes. Were we to uphold the State's position (classification should be according to the punishment as it was at the time the crime was committed), a person who had committed the crime of taking a motor vehicle in 1974 would be subject to a 10-year wash-out provision, while an individual who committed the same crime the following year would only be subject to a 4-year wash-out provision. Such a result would denigrate the uniform treatment of defendants which is at the very heart of the SRA.

Johnson, 51 Wn. App. at 839-840. Although the Court of Appeals held that Johnson was pre-RCW 9.94A.035, and therefore inapplicable, the reasoning in Johnson still applies, and nothing in RCW 9.94A.035

indicates an intent to overrule it. RCW 9.94A.035 makes no reference to pre-code convictions for crimes which are now a part of the criminal code.

Counting the 1974 robbery conviction as a class A felony would punish convictions for similar crimes differently depending on the date of conviction. It would also punish some Washington robberies more severely than a similar out-of-state conviction. Absent some indication of legislative intent to punish pre-criminal code Washington convictions more severely, this result is inconsistent with the proportionality goals of the SRA.

The holding of the Court of Appeals should be reversed and the trial court's ruling should be affirmed. The trial court properly ruled that the statute was ambiguous and subject to a narrow construction. Any other interpretation would violate the proportionality goals of the SRA.

2. MR. FAILEY'S 1974 CONVICTION IS NOT A STRIKE OFFENSE BECAUSE IT IS NOT COMPARABLE TO A CURRENT STRIKE OFFENSE.

Under In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), Mr. Failey's 1974 robbery conviction is not sufficiently comparable to second degree robbery to be a strike offense. As in

Lavery, the information charging him did not allege a specific "intent to steal." Absent this allegation, the robbery charge was only a general intent crime and not comparable to the current robbery in the second degree, a specific intent crime. State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991) ("intent to steal" is an essential element of second degree robbery).

Further, "a 1975 amendment to the robbery statute deleted language that said force or fear used 'merely as a means of escape . . . does not constitute robbery.'" See State v. Manchester, 57 Wn. App. 765, 770, 790 P.3d 417 (1990) (holding that robbery, as currently defined, includes force used to retain property after the robbery was otherwise complete). This change indicates the legislature's intent in 1975 to broaden the scope of the taking, by including violence during the flight immediately following the taking. Under Lavery, Mr. Failey's robbery was not comparable to second degree robbery and should not be counted as a strike offense at all.

Comparability analysis, by statute, is the means by which offenses committed prior to 1993

should be considered in determining whether they are most serious offenses. Under a comparability analysis, Mr. Failey's prior conviction was not a strike offense.

D. CONCLUSION

Respondent Robert Failey respectfully submits that the decision of the Court of Appeals should be reversed and the trial court affirmed.

DATED this 1st day of December 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on the 15th day of December 2008, I caused a true and correct copy of the Supplemental Brief of Appellant/
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