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MAR 27 2009

King County Prosecutor  
Appellate Unit

83654-0

NO. 61731-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

NIKEEMIA COUCIL,

Appellant.

COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2009 MAR 27 PM 03:22

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

REPLY BRIEF OF APPELLANT

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**RULES, STATUTES AND OTHERS**

RCW 9A.76.170(3) . . . . . 2-5

A. ARGUMENT IN REPLY

THE TRIAL COURT ERRED WHEN IT SENTENCED APPELLANT FOR FELONY BAIL JUMPING.

Appellant Nikeemia Coucil argues he should have been sentenced only for misdemeanor bail jumping because at the time of sentencing he had been convicted only of a misdemeanor underlying offense. Brief of Appellant (BOA) at 6-9. In response, the State argues the bail jumping statute unambiguously permits the trial court to sentence someone based on the charged underlying offense even if the defendant is convicted of a lesser offense. Brief of Respondent (BOR) at 18-24. The State's arguments should be rejected for the following reasons.

First, the State argues the bail jumping statute is unambiguous because the Court of Appeals concluded so in State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). BOR at 21. However, Pope involved a different issue. There, the defendant argued the statute was ambiguous because it permitted one to be sentenced for bail jumping if convicted of the underlying offense but not if convicted and already *sentenced* for the underlying offense. Id. at 628. Essentially, Pope asked the Court of Appeals to read the statutory phrase "convicted of" to mean "only convicted of, and not yet sentenced." Id. The Court held the statute was not

ambiguous because the fact of a conviction remains whether a defendant has been convicted and not sentenced or convicted and sentenced. Id.

Here, unlike in Pope, appellant is not asking this Court to redefine the terms of the statute in order to create an ambiguity. Instead, appellant asserts -- given the Washington Supreme Court's more recent interpretation of RCW 9A.76.170(3) in State v. Williams, 162 Wn.2d 177, 191, 170 P.3d 30 (2007) -- the existing language of RCW 9A.76.170(3) is ambiguous. BOA at 7-9.

The State also suggests RCW 9A.76.170(3) is not ambiguous because it plainly states "the punishment class of a bail jumping conviction is based on the punishment class of the underlying offense **at the time the defendant actually jumped bail.**" BOR at 21 (emphasis added). However, the statute does not include any language suggesting the penalty level is to be determined by the underlying offense as it was classified at the time the defendant jumped bail.<sup>1</sup> Thus, the State is asking this Court

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<sup>1</sup> RCW 9A.76.170(3) provides:

Bail jumping is:

(a) A class A felony if the person was held for, charged with, or convicted of murder in the first degree;

(b) A class B felony if the person was held for, charged with, or convicted of a class A felony other than murder in

(continued...)

to read language into the statute that is simply not there. However, this is not something the courts may do. See, Pope, 100 Wn. App. at 627 (citing State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997)) (explaining a reviewing court may not add language to a clear statute even if the court believes the Legislature intended something else but failed to adequately express it).

The State also imports this non-existent language into its characterization of appellant's reading of the statute, claiming the appellant has argued "the statute also makes bail jumping a misdemeanor if the defendant **committed the crime** while 'held for, charged with, or convicted of' a gross misdemeanor." BOR at 20 (emphasis added). However, the State fundamentally misreads appellant's argument. Appellant's position has been, and remains to be, RCW 9A.76.170(3) is ambiguous precisely because it does not contain plain language directing the sentencing court to look at underlying pending charge at the time the person jumped bail

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<sup>1</sup>(...continued)  
the first degree;

(c) A class C felony if the person was held for, charged with, or convicted of a class B or class C felony;

(d) A misdemeanor if the person was held for, charged with, or convicted of a gross misdemeanor or misdemeanor."

or at the ultimate conviction at the time the court is imposing sentence.

BOR at 7-8.

The problem is RCW 9A.76.170(3) sets forth different triggering events to determine the applicable bail jumping penalty, but the Legislature provides no basis for determining when one particular trigger is to be applied over another, thus, leaving the statute open to more than one reasonable interpretation. See, State v. Leyda, 157 Wn.2d 335, 345, n.8, 138 P.3d 610 (2006). On the one hand, the State suggests one way of reading the statute:

"Held for" refers to the defendant who has been taken into custody, but is released before charges have been filed. "Charged with" refers to the defendant who has been charged with a crime, but is released while the case is still pending. "Convicted of" refers to the defendant who has been released after conviction, but with some further hearing that must take place.

BOR at 23.

On the other hand, an equally plausible, if not probable, reading is: if the defendant has been convicted of the underlying offense the "convicted of" language controls; if the defendant had only been charged with, but not convicted of the underlying offense (i.e. the charges dropped), then the "charged with" language applies; and if the defendant was being

held for an offense but never charged, then the "held for" language applies.<sup>2</sup>

Given these two logical interpretations, the statute is ambiguous and the rule of lenity applies in Coucil's favor. State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

Finally, the State suggests appellant's reading of the statute would lead to absurd results because someone convicted of a lesser included crime might be treated more leniently than someone who was charged with the same underlying crime but never convicted. However, it is equally absurd that the Legislature would permit the State to benefit from overcharging the underlying crime beyond what the facts were found to support and then using this to bump up the penalty for bail jumping. Hence, there is a certain amount of absurdity that results from either reading of the statute, further underscoring the ambiguous nature of this statute.

For the reasons stated above and in appellant's opening brief, this Court should find RCW 9A.76.170(3) is ambiguous, apply the rule of lenity, and remand for resentencing.

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<sup>2</sup> Contrary to the State's assertion (BOR at 23), none of the statutory language is rendered superfluous under appellant's reading of the statute.

B. CONCLUSION

For the reasons stated herein and those stated in appellant's opening brief, this Court should reverse appellant's convictions or remand for resentencing on the bail jumping conviction.

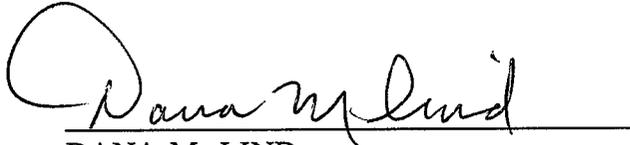
DATED this 27 day of March, 2009.

Respectfully submitted,

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