

SUPREME COURT NO. 83654-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NIKEEMIA COUCIL,

Petitioner.

REC'D

MAR 11 2010

King County Prosecutor
Appellate Unit

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

The Honorable Catherine Shaffer, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE

When sentencing a defendant for bail jumping under RCW 9A.76.170(3), is the trial court to classify that offense based on the underlying offense as it was charged (i.e. a felony) or based on the underlying offense for which the defendant was convicted (i.e. a misdemeanor)?

B. STATEMENT OF THE CASE

On July 15, 2007, the King County prosecutor charged petitioner Nikeemia Coucil with one count of felony harassment. CP 1-5. After Coucil failed to appear at a hearing, the State amended the information and added one count of bail jumping. CP 8-10.

Prior to trial, the trial court granted Coucil's motion to sever the bail jumping charge from the underlying harassment charge. 2RP 6.¹ Coucil was first tried for harassment, with the jury finding him guilty only of the lesser-included offense of misdemeanor harassment.² CP 23-24.

¹ Transcripts are referred to as follows: 1RP (July 31, 2007); 2RP (March 26, 2008); 3RP (March 27, 2008); 4RP (March 31, 2008); 5RP (April 1, 2008); 6RP (April 21, 2008); 7RP (April 22, 2008); 8RP April 25, 2008).

² The Honorable Catherine Shaffer presided over this trial.

Before the bail jumping trial, defense counsel moved to have the bail jumping charge downgraded to a misdemeanor since Coucil had been convicted of misdemeanor harassment. 6RP 6-7. In response, the State argued it could proceed with a felony bail jumping charge since there was no misdemeanor conviction at the time Coucil was charged with that offense. 6RP 8.

The trial court³ ruled the State could proceed as charged with the to-convict instruction indicating only that there had been a felony charge. 6RP 13-14. The trial court also noted, however, that the real question was what penalty Coucil would face if the jury found him guilty, and whether the bail jumping offense would have to be downgraded to a misdemeanor at sentencing. 6RP 13, 18. The trial court declined to speculate as to the sentencing consequences. 6RP 18. Coucil was subsequently tried and found guilty of bail jumping. CP 96.

On April 25, 2008, the sentencing court entered the misdemeanor harassment judgment.⁴ CP 98-100. It also entered a felony bail jumping judgment without determining whether a

³ The Honorable Julie Spector presided over the bail jumping trial.

⁴ Prior to sentencing, the bail jumping case was transferred to Judge Shaffer for a consolidated sentencing hearing.

downgrading was appropriate. CP 101-08.

On appeal, Coucil argued RCW 9A.76.170(3) was ambiguous because it permitted Coucil's bail jumping classification to be based on the underlying offense either as charged or as convicted. Therefore, the rule of lenity required the bail jumping offense be classified as a gross misdemeanor. See, Brief of Appellant (BOA) at 6-9, Reply Brief of Appellant (RBOA) at 1-6, and Appellant's Motion for Reconsideration (MR) at 1-9.

The Court of Appeals disagreed, holding the statute was not ambiguous because the Legislature must have intended bail jumping classifications to be based on the underlying charge or conviction that was pending at the time the person was released or failed to appear. State v. Coucil, 151 Wn. App. 131, 132, 210 P.3d 1058 (2009). Appellant petitioned this Court and review was granted.

C. ARGUMENT

BECAUSE RCW 9A.76.170(3) IS AMBIGUOUS AS TO WHETHER PETITIONER'S BAIL-JUMPING CONVICTION SHOULD HAVE BEEN CLASSIFIED AS A FELONY OR A MISDEMEANOR, THE RULE OF LENITY APPLIES IN HIS FAVOR.

RCW 9A.76.170(3) directs a sentencing court to classify a bail jumping offense based on the underlying offense as charged,

as well as the underlying offense for which the defendant was convicted. Under the facts here, this meant Coucil's bail jumping offense could be classified as both a misdemeanor and a felony. Because the Legislature provides no guidance how to resolve this situation, the rule of lenity applies in Coucil's favor.

RCW 9A.76.170 provides:

(1) Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

....

(3) 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 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."

To be convicted of bail jumping under this statute, the defendant must be released by court order or admitted to bail with regard to “a particular [underlying] crime.” State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). However, the classification of the underlying offense is not an essential element of bail jumping. State v. Williams, 162 Wn.2d 177, 188, 170 P.3d 30 (2007). Instead, it is a question of law to be determined at sentencing. Id. at 191.

A plain reading of RCW 9A.76.170(3) reveals the Legislature directed the sentencing court to classify Coucil’s bail-jumping offense as a felony if he was “charged with” a felony; however, it also directed the sentencing court to classify Coucil’s bail jumping offense as a misdemeanor if he was “convicted of” a gross misdemeanor. Thus, both classifications were applicable at the time of sentencing. The statute is silent as to how to resolve this conflict. As such, the rule of lenity requires the sentencing court to impose the lesser of two penalties – the misdemeanor. See, United States v. Hardy, 289 F.3d 608, 614 (9th Cir.2002); State v. Leyda, 157 Wn.2d 335, 345, n.8, 138 P.3d 610 (2006); State v. Roberts, 117 Wn.2d 576, 586, 817 P.2d 855 (1991).

The State asserts RCW 9A.76.170 is not ambiguous because the only reasonable reading of the statute is that the bail jumping classification is predicated on the status of the underlying offense at the time a defendant was released. Specifically, the State suggests:

“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.

To accept the State’s reading of the statute as the only reasonable one, this Court must conclude the Legislature clearly intended the bail jumping classification be based on the status of the underlying offense at the time of the defendant was released, not at the time of sentencing. The plain language of the statute does not support such a conclusion.

An equally plausible, if not probable, reading of the penalty provisions is: if, at the time of sentencing, the defendant has been convicted of the underlying offense -- the “convicted of” language applies; if the defendant had only been charged with, but not

convicted of the underlying offense (i.e. the charges dropped) -- the "charged with" language applies; but if the defendant was being held for an offense but never charged -- the "held for" language applies. The validity of this reading is underscored by recent court decisions interpreting RCW 9A.76.170.

This Court recently reviewed the bail jumping statute and determined the classification of the bail jumping offense is a question of law that pertains to sentencing, explaining:

"[W]hile the penalties for bail jumping are divided into classes, the crime itself is not." Therefore, the classification for sentencing purposes of both the underlying offense and the bail jumping charge is a question of law for the judge.

Williams, 162 Wn.2d at 191 (citing State v. Gonzalez-Lopez, 132 Wn. App. 622, 635, 132 P.3d 1128 (2006)); see also, State v. Williams, 133 Wn. App. 714, 716, 136 P.3d 792 (2006) (holding the penalty classification is "relevant only to the sentence to be imposed on conviction"). Under Williams, RCW 9A.76.170(3)'s classification provisions only come into operation at the time of sentencing. Thus, it is reasonable to infer that the penalty section, which serves solely to determine a sentence, requires bail jumping classifications to be based on the procedural posture of the underlying offense as it stands at the time of sentencing.

Had the Legislature intended to connect the penalty classification for bail jumping with the status of the underlying offense at some point prior to sentencing, it would have expressly done so. Noticeably absent from RCW 9A.76.170 is any language expressly connecting the penalty classification with the status of the underlying offense at the time the defendant was released.

Like Washington, other states have structured the crime of bail jumping as a single offense with varying sentencing classifications. However, other state statutes expressly connect the penalty classifications to the status of the underlying offense at the time the person was released, making bail jumping a felony if the defendant was "released in connection with" a felony charge, or a misdemeanor if the defendant was "released in connection with" a misdemeanor.⁵ Under these statutes, a defendant cannot fall into two penalty classifications, as is the case here, because the statutes expressly connect the penalty classification to the status of the underlying offense at the time the defendant was released.

⁵ See e.g., SDCL § 23A-43-31; DC ST § 23-1327; F.S.A. § 843.15; I.C.A. § 811.2; MCA 45-7-308; NDCC, 12.1-08-05; N.H. Rev. Stat. § 642:8.

No such connecting language exists here. Moreover, there is no other statutory language or prevailing rule of construction that permits a reviewing court to read the extra language into the statute to resolve the ambiguity that exists here. See, State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (explaining a reviewing court may not add language to a statute where the Legislature inadequately expressed the intent to do so); see also, State v. Tvedt, 153 Wn.2d 705, 710, 107 P.3d 728 (2005) (citations omitted). Without the judicial insertion of additional language, two reasonable readings of the statute remain. Thus, the statute is ambiguous.

Although the Court of Appeals found the State's reading of RCW 9A.76.170(3) to be the only reasonable one, it predicated its conclusion on the insertion of new language into the statute for which there is no textual support. The Court of Appeals concluded:

Thus, a person who, while released on bail, knowingly "fails to appear" for a court hearing "is" guilty of bail jumping, which "is" **(at that time)** either a class A, B, or C felony, or a gross misdemeanor or misdemeanor, depending on the underlying offense's classification.

Coucil, 151 Wn. App. at 135 (emphasis added).

The Court of Appeals attempted to ground its insertion of this new language in a grammatical analysis of the statute.

However, its analysis was incomplete. The Court of Appeals wrote:

Inasmuch as the penalty classifications in RCW 9A.76.170 use the present tense, [applying the classification at the time one fails to appear] is the sole reasonable reading of the statute. Thus, a person who, while released on bail, knowingly "fails to appear" for a court hearing "is" guilty of bail jumping, which "is" (at that time) either a class A, B, or C felony, or a gross misdemeanor or misdemeanor, depending on the underlying offense's classification....Here, Council's interpretation is contrary to the verb tense used in the plain text of the statute itself and, thus, is not reasonable. The statute is not ambiguous.

151 Wn. App. at 135.

However, the Court of Appeals overlooks one critical verb that negates its emphasis on the present tense. Again, RCW 9A.76.170

(3) provides:

(3) Bail jumping is:

...

(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.

Emphasis added. The past tense verb might refer to the status of the underlying offense at the time the defendant was released;

however, it might also refer to the status at the time of sentencing.

Hence, a grammatical analysis does not resolve the definitive question here.

The Court of Appeals also suggests Coucil's interpretation of the statute is not well-taken because it "would allow defendants acquitted of the underlying charges to suffer no penalty at all for jumping bail, because they would not be 'held for, charged with, or convicted of' the underlying offenses at the time of sentencing." Coucil 151 Wn. App. at 136. This is not so.

In State v. Downing, 122 Wn. App. 185, 192, 93 P.3d 900 (2004), the Court of Appeals determined a defendant is subject to conviction for bail jumping, even when all underlying charges are dismissed. Assuming this is a correct interpretation of the statute, if a defendant was acquitted of the underlying charge but convicted of bail jumping, the only facts before the sentencing court would be that the defendant was charged with an underlying offense. Under those circumstances, there is no ambiguity because there is only one way to classify the bail jumping offense. The penalty must be based on the charge because there was no conviction.

A more troubling consequence of this poorly worded statute was raised by the State when it suggested that someone charged

with an underlying felony, but convicted of a lesser-included misdemeanor, might be treated more leniently than a defendant who was actually acquitted of the underlying felony. BOR at 24. Such potential inequities are disturbing, pointing to yet another unfortunate consequence of the Legislature's failure to provide a clear statute. While this is something that should perhaps be taken up with the Legislature, the potential systemic inequities that may result under a different set of facts are not the subject of this case. This record does not support a review of the systemic inequities that might potentially be out there as a consequence of this poorly worded statute; instead it raises the narrow question of whether additional language may be read into the bail jumping statute to justify Coucil's harsher sentencing classification. As explained above, they cannot.

In conclusion, Coucil's bail jumping offense falls squarely within two sentencing classification provisions. There is no guidance from the Legislature which applies. Hence, the statute is ambiguous and the rule of lenity applies in Coucil's favor, resulting in a gross misdemeanor classification.

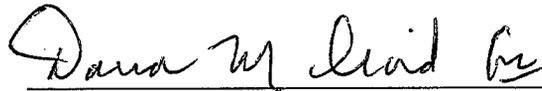
D. CONCLUSION

This Court should reverse the Court of Appeals and remand for resentencing.

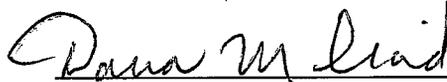
Dated this 10th day of March, 2010.

Respectfully submitted

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 83654-0
)	
NIKEEMIA COUCIL,)	
)	
Petitioner.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 11TH DAY OF MARCH, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] NIKEEMIA COUCIL
C/O LARRY SMITH
2307 NE 4TH STREET
RENTON, WA 98056

SIGNED IN SEATTLE WASHINGTON, THIS 11TH DAY OF MARCH, 2010.

x Patrick Mayovsky