

NO. 83654-0

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

NIKEEMIA COUCIL,

Appellant.

RECORDED
SUPERIOR COURT
STATE OF WASHINGTON
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SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUE PRESENTED.

Bail jumping is a class C felony if the defendant knowingly fails to appear at the time that he is charged with a class C felony. Any other interpretation of the bail jumping statute renders a significant portion of the statutory language meaningless and leads to absurd and inequitable results. Was the defendant's conviction for bail jumping a class C felony where he jumped bail while charged with a class C felony?

B. STATEMENT OF THE CASE.

The defendant, Nikeemia Coucil, was charged with one crime, felony harassment, on July 5, 2007. CP 1. The charges arose from an incident on a public bus in which Coucil threatened to kill a fellow passenger after the passenger asked him to turn down his music. CP 2-3. On August 14, 2007, Coucil failed to appear for a scheduled court hearing and the court issued a bench warrant. CP 8-10. Coucil was arrested on that warrant four months later on December 29, 2007. CP 10. On January 14, 2008, the State amended the information to add the charge of bail jumping. CP 19-20. The State amended the information a second time on March 26, 2008, charging three crimes: felony harassment of the

fellow bus passenger alleged to have occurred on June 29, 2007 (Count I); bail jumping that occurred on August 14, 2007 (Count II); and malicious harassment of the victim alleged to have occurred on June 29, 2007 (Count III). CP 4, 19-20.

The bail jumping count was charged as follows:

That the defendant NIKEEMIA COUCIL in King County, Washington, on or about August 14, 2007, *being charged with Felony Harassment, a Class C felony*, and having been released by court order and with knowledge of the requirement of a subsequent personal appearance before the court did fail to appear.

CP 9, 20 (emphasis added).

The harassment charges were severed from the bail jumping charge. 2RP 3-9. On April 1, 2008, a jury acquitted Coucil of felony harassment (Count I) and malicious harassment (Count III), and convicted him of the lesser included offense of misdemeanor harassment as to Count I.¹ CP 23-24. On April 22, 2008, a second jury convicted Coucil of bail jumping. CP 96. The court imposed a

¹As the jury was instructed, felony harassment requires the State to prove that the defendant made a threat to kill the victim and placed the victim in reasonable fear that the threat would be carried out. CP 38. Misdemeanor harassment requires the State to prove that the defendant made a threat to cause bodily injury to the victim and placed the victim in reasonable fear that the threat would be carried out. CP 45. Malicious harassment requires the State to prove that a person threatens to cause physical injury to the victim because of the victim's race, color, religion, ancestry or national origin. CP 47.

12-month suspended sentence as to Count I and a 17-month standard range sentence as to Count II. CP 101-08.

C. ARGUMENT.

WHEN A DEFENDANT JUMPS BAIL WHILE CHARGED WITH A CRIME, THE PUNISHMENT FOR BAIL JUMPING IS DETERMINED BY THE CRIME THAT WAS CHARGED.

Coucil was charged and convicted of having jumped bail while charged with a class C felony, based on the fact that Coucil knowingly failed to appear at pretrial hearing while charged with felony harassment, a class C felony. The court properly imposed a felony sentence for bail jumping. Coucil's argument that the court should have imposed a misdemeanor sentence is based on an interpretation of the bail jumping statute that is not reasonable and would lead to multiple absurd results. His claim that the rule of lenity requires this Court to adopt his interpretation of the statute must be rejected. The rule of lenity does not apply unless there are two equally reasonable interpretations of a statute, which is not the case here. Moreover, the interpretation that Coucil suggests would not be more lenient for all defendants.

The crime of bail jumping is defined in RCW 9A.76.170. The statute has three sections. The first section defines the crime as follows:

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.

RCW 9A.76.170(1). The second section provides an affirmative defense based on uncontrollable circumstances. RCW 9A.76.170(2). The third section divides the crime into different classes. It provides that:

(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.

RCW 9.94A.170(3). The classification controls the seriousness level that is assigned to bail jumping for purposes of calculating the

standard range. Bail jumping murder in the first degree has a seriousness level of VI; bail jumping a class A felony has a seriousness level of V; bail jumping a class B or C felony has a seriousness level of III. RCW 9.94A.515.

In the present case, Coucil was charged with felony harassment and knowingly failed to appear at a hearing on August 14, 2007. As a result, Coucil was charged with jumping bail while charged with felony harassment. CP 9, 20. The jury instructions asked the jury to determine beyond a reasonable doubt that Coucil had jumped bail while charged with a felony offense. CP 84. Coucil received a felony sentence for having jumped bail while charged with a class C felony. CP 114. Coucil argues that the sentence imposed was incorrect because eight months after he jumped bail he was convicted of a misdemeanor, rather than a felony. He argues that the rule of lenity requires this Court to construe the bail jumping statute so as to reach this result.

The meaning of a statute is a question of law and is reviewed de novo. State v. Riofta, 166 Wn.2d 358, 365, 209 P.3d 467 (2009). The fundamental objective of this Court is to carry out the legislature's intent. Id. To that end, this Court should give effect to the plain meaning of a statute, which is presumed to reflect

the legislative purpose. Id. However, if the plain meaning is not apparent on the face of the statute, this Court may derive the intended meaning from related statutes and the statutory scheme as a whole. State v. Winebrenner, 167 Wn.2d 451, 456, 219 P.3d 686 (2009); Born v. Thompson, 154 Wn.2d 749, 776, 117 P.3d 1098 (2005).

If this Court concludes that the statute is subject to more than one reasonable interpretation, then the statute is ambiguous. Winebrenner, 167 Wn.2d at 456. However, a statute is not ambiguous simply because more than one interpretation is conceivable. Id. To be ambiguous, two interpretations must be equally reasonable and legislative intent must be insufficient to clarify the ambiguity. Winebrenner, 167 Wn.2d at 468 (Madsen, J., concurring). A statute can only be determined ambiguous after the court makes a "'serious investigation' of the language of the statute and its purpose, its context, related statutes, the statutory scheme, and legislative history." Id. at 469. If after such investigation, the statute is subject to two equally reasonable interpretations, both of which are consistent with the legislature's intent, then the rule of lenity requires this Court to adopt the interpretation that decreases

the penalty imposed. Id. at 462, 469. The rule of lenity is the last resort when construing a criminal statute. Id. at 469.

1. The Bail Jumping Statute Is Subject To Only One Reasonable Interpretation And Is Not Ambiguous.

In determining the plain language of a statute the court must give effect to all the words of the statute, and not render a portion of the statute “meaningless or superfluous.” State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030 (2001). As previously noted, RCW 9A.76.170(3) provides that the classification of a bail jumping conviction is based on the classification of the underlying crime the defendant was “held for, charged with, or convicted of.” In this context, each phrase describes a different situation. “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.² The fact that

² In State v. Pope, 100 Wn. App. 624, 628, 999 P.2d 51, review denied, 141 Wn.2d 1018 (2000), the Court of Appeals held that the plain language of the statute allows a defendant to be convicted of bail jumping after sentencing for the failure to appear at probation violation hearings.

these phrases are listed in the disjunctive demonstrates that they are intended to have independent meaning, with the punishment based on the situation as it existed when the defendant jumped bail.

The only reasonable interpretation of the statute is that the classification of a bail jumping conviction is based on the classification of the underlying crime at the time the defendant jumps bail. Thus, when a defendant jumps bail while charged with a class C felony, the bail jumping conviction is a class C felony. If a defendant jumps bail while charged with a misdemeanor, the bail jumping conviction is a misdemeanor. Likewise, if a defendant jumps bail after being convicted of a class C felony, the bail jumping conviction is a class C felony. If a defendant jumps bail after being convicted of a misdemeanor, the bail jumping conviction is a misdemeanor. Coucil did not jump bail after being convicted of a misdemeanor. He jumped bail while charged with a class C felony. Thus, his bail jumping was a felony offense.

Under Coucil's interpretation, the only relevant inquiry would be what crime the defendant was "convicted of" in the underlying case. Coucil's interpretation would have the effect of reading out of the statute the phrases relating to a defendant who had been "held

for” or “charged with” a crime, because those provisions would no longer have any meaning. Coucil’s interpretation would allow the one phrase to effectively “trump” the other two, and would render them meaningless or superfluous.

Second, Coucil’s interpretation of the statute would lead to multiple absurd results. The court must avoid interpretations that lead to absurd results. State v. Fjermestad, 114 Wn.2d 828, 835, 791 P.2d 897 (1990). First, Coucil’s interpretation would make it impossible to give the defendant notice of whether he is charged with a felony or a misdemeanor. In State v. Williams, 162 Wn.2d 177, 185, 170 P.3d 30 (2007), this Court found that the information charging bail jumping was sufficient where it identified the underlying crime. Under Coucil’s interpretation of the statute--that the relevant crime is the crime of which the defendant is later convicted--it would be impossible to identify the particular crime that Coucil was “convicted of” in the charging document because he had not yet been convicted.

Similarly, Coucil’s interpretation would make it impossible to properly instruct the jury, unless the underlying crime is litigated first. Pursuant to WPIC 120.41, the second element which the jury must find beyond a reasonable doubt is that “the defendant [was

being held for] [or] [was charged with] [or] [had been convicted of] fill in crime." In Williams, this Court stated that the underlying crime should be identified in the jury instructions. 162 Wn.2d at 188. Pursuant to the pattern jury instruction, the jury in Coucil's case was instructed to find that he was charged with a felony offense. CP 84. Again, under Coucil's interpretation--that the only relevant crime is the crime of which the defendant is later convicted--it would be impossible to properly instruct the jury until after the defendant is convicted of the underlying crime.

Moreover, under Coucil's interpretation, a defendant whose underlying charge is eventually dismissed is punished more severely than a defendant, like Coucil, who is found guilty of a lesser charge. In Williams, the defendant was charged with possession of cocaine and failed to appear at the omnibus hearing. 162 Wn.2d at 181. He was then charged with bail jumping. One month later, the possession charge was dismissed. Id. A jury convicted Williams of bail jumping even though the underlying charge had been dismissed, and Williams was sentenced to 43 months in prison. Id. at 182. This Court affirmed his conviction and sentence. Id. at 191. Williams establishes that a defendant is guilty of felony bail jumping if he was charged with a felony at the

time that he jumps bail even if the charge is later dismissed. Similarly, in State v. Downing, 122 Wn. App. 185, 904, 93 P.3d 900 (2004), and State v. Gonzalez-Lopez, 132 Wn. App. 622, 625, 132 P.3d 1128 (2006), Divisions I and II of the Court of Appeals affirmed convictions for bail jumping where the defendant was not found guilty of the underlying offense. Under Coucil's interpretation, the defendants in Williams, Downing and Gonzalez-Lopez, who were acquitted of the underlying crime or whose underlying crime was dismissed, are punished more severely than a defendant who is convicted, but of a lesser offense. That would be an absurd result.

The bail jumping statute is not ambiguous. It is subject to only one reasonable construction that does not lead to absurd results: that the relevant crime for purposes of punishment is the crime the defendant was held for, charged with, or convicted of *at the time that he jumped bail*.³

³ Other jurisdictions have held that under their versions of bail jumping statutes, bail jumping is a separate and distinct offense that is not dependent upon the outcome of the underlying charge. State v. DeAtley, 11 Kan.App.2d 605, 731 P.2d 318, 323 (1987); State v. Small, 692 S.W.2d 536, 540 (Tex.App. 1985); People v. Holcombe, 89 A.D.2d 644, 453 N.Y.S.2d 126, 127 (1982); State v. Aranda, 94 N.M. 784, 617 P.2d 173, 176 (1980); Williams v. United States, 331 A.2d 341, 342 (D.C.App 1975); People v. Minefee, 14 Ill.App.3d 796, 303 N.E.2d 591, 594 (1973).

2. The Interpretation Requested By Coucil Would Not Be More Lenient For All Defendants.

Even if the statute could be construed as ambiguous, Coucil's reliance on the rule of lenity is misplaced. The rule of lenity has no application in this case because the interpretation that Coucil urges would not be more lenient for all defendants. It is only more lenient under the particular facts of this case. The interpretation could lead to a harsher penalty under different facts. Suppose a defendant had initially been charged with a misdemeanor, jumped bail, and was convicted of a felony upon amended charges. Under the State and the Court of Appeals' interpretation of the statute, that defendant would be guilty only of a misdemeanor because he was only charged with a misdemeanor when he committed bail jumping. Under Coucil's interpretation of the statute, the defendant would be guilty of a felony because that was the crime of which he was ultimately convicted, even though at the time he jumped bail he was only charged with a misdemeanor. Thus, while Coucil's interpretation would decrease the punishment in his case, it would increase the punishment in other cases. Coucil's interpretation of the statute cannot be justified by the rule of lenity.

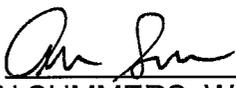
D. CONCLUSION.

Council properly received a felony sentence for jumping bail while charged with a class C felony. The Court of Appeals decision and sentence should be affirmed.

DATED this 9th day of March, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Dobson, the attorney for the appellant, at P.O. Box 15980, Seattle, WA 98115-0980, containing a copy of the Supplemental Brief of Respondent, in STATE V. COUCIL, Cause No. 83654-0, in the Supreme Court, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame

Name

Done in Seattle, Washington

3/10/10

Date

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Dana Lind, the attorney for the appellant, at Nielsen, Broman & Koch, 1908 East Madison St., Seattle, WA 98122-2842, containing a copy of the Supplemental Brief of Respondent, in STATE V. COUCIL, Cause No. 83654-0, in the Supreme Court, for the State of Washington.

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