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Supreme Court No. 90782-0

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY CONOVER,

Petitioner.

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SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. ISSUE FOR WHICH REVIEW WAS GRANTED

Whether the sentencing court erred in running the drug-zone enhancements for multiple convictions consecutively rather than concurrently, where the legislature did not amend the relevant statute the way it amended the weapons enhancement statute, which clearly mandates cross-count stacking of enhancements.

B. STATEMENT OF THE CASE

1. The three controlled buys

Police arrested Virgil Kell for delivering drugs. 1 RP 33.<sup>1</sup> He wanted to “work off” the charges, so he agreed to arrange drug transactions with other people, including Timothy Conover. 1 RP 33-34. Police used Mr. Kell for controlled buys with Mr. Conover on May 13, May 31, and July 7, 2011. 1 RP 35, 71, 79. Each time, Kell said he purchased heroin from Mr. Conover. 1 RP 35, 71, 79.

2. The trial and sentencing

The State charged Mr. Conover with three counts of delivering a controlled substance. The State alleged that a two-year zone

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<sup>1</sup> 1RP refers to the volume of proceedings from 10/11/12. 2 RP refers to the volume of proceedings from 10/12/12 and 10/15/12. 3 RP refers to the small volume consisting of short pretrial hearings on 12/14/11, 6/6/12, and 8/23, 12, as well as sentencing on 10/24/12.

enhancement applied to each count, because each occurred within 1,000 feet of a school bus stop. CP 12-13.

The jury convicted Mr. Conover as charged. CP 49-58. The sentencing court concluded Mr. Conover's offender score was five, and that the standard range was 20-60 months for each count. CP 61-62.

The court imposed an enhanced sentence because the jury found Mr. Conover committed each count within 1000 feet of a school bus zone. CP 60-65. However, the court did not simply add two years to the concurrent standard ranges for each count. Instead, the judge ordered that the three two-year enhancements be run consecutively to each other, and imposed a total of 10 years of confinement.<sup>2</sup> CP 65; 3 RP 18-19.<sup>3</sup>

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<sup>2</sup> Although the jury had found certain aggravating factors applied, the court did not increase the sentence based on these factors. There is no issue before this Court regarding the aggravators.

<sup>3</sup> Mr. Conover's attorney did not challenge the State's claim that the enhancements must be run consecutively across counts, but there is no question that this issue may be raised on appeal, and the State never argued otherwise. *See In re the Personal Restraint of Goodwin*, 146 Wn.2d 861, 870, 50 P.3d 618 (2002) (holding defendant could raise legal error in sentencing in a PRP even though he agreed to the sentence in the trial court, because "a defendant cannot empower a sentencing court to exceed its statutory authorization.")

### 3. The Court of Appeals' opinion

On appeal, Mr. Conover challenged his sentence on two grounds.<sup>4</sup> The State conceded error on one issue: that Mr. Conover's right to due process was violated when the trial court calculated his offender score based on the prosecutor's unsupported criminal history allegation. The Court of Appeals accepted the concession and remanded for resentencing. *State v. Conover*, 183 Wash. App. 1011 at \*5 (2014) (unpublished).

However, the Court of Appeals did not agree with Mr. Conover as to the issue now before this Court. Mr. Conover argued that the trial court misconstrued the drug zone enhancement section of the Sentencing Reform Act. Under the statute's plain language, the zone enhancement increases the standard range for each count, but the enhanced sentences for each count are then run concurrently. The trial court misapplied the statute when it ordered the zone enhancements for the three counts to run consecutively to each other.

In rejecting the argument, the Court of Appeals ruled that zone enhancements for multiple counts must be run consecutively to the base sentences *and* to each other. *Conover* at \*6. In so holding, the court

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<sup>4</sup> He also challenged his convictions, but those issues are not before this Court.

disagreed with a different panel of the same division of the Court of Appeals. There are now four unpublished Division Two opinions on this issue – two agreeing with Mr. Conover’s position and two agreeing with the State’s position.<sup>5</sup>

C. ARGUMENT

**Under the Sentencing Reform Act, drug-zone enhancements increase the standard range for each count to which they apply; they do not run consecutively to each other across counts.**

Because the jury found one enhancement for each count, the standard range for each count should have been increased by two years. Then, the enhanced sentences for each count should have been run concurrently. In arguing otherwise, the State ignores the differences in language and history among the subsections of the enhancements statute. The legislature clearly mandated that firearm, deadly-weapon, and sexual-motivation enhancements be run consecutively to each other across multiple counts. But the drug zone enhancements section does not contain this language requiring cross-count stacking of enhancements. This is so even though the legislature had the

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<sup>5</sup> Compare *State v. Conover*, 183 Wash.App. 1011 (2014) and *State v. White*, 170 Wash.App. 1026, 2012 WL 5343231 (2012) with *State v. Ross*, 157 Wash.App. 1054, 2010 WL 3489931 (2010) and *State v. Lawson*, 145 Wash.App. 1031, 2008 WL 2601424 (2008).

opportunity to use similar language when it amended the relevant statutes in 1998 and again in 2006. The difference in language demonstrates a difference in intent. To the extent the statute could possibly be deemed ambiguous, the rule of lenity requires an interpretation in favor of Mr. Conover. This Court should reverse and hold that drug-zone enhancements increase the standard range for each count, but do not run consecutively to each other across counts.

1. Legislative intent is determined by the text, and there is a difference in intent where the legislature uses different language in different sections of a statute.

The issue before the Court is one of statutory construction, a question of law this Court reviews de novo. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). It is for the legislature to establish the appropriate punishments for criminal activity. *State v. Benn*, 120 Wn. 2d 631, 670, 845 P.2d 289 (1993). In determining the legislature's intent, courts look first to the statutory text; if the statute is clear on its face, its meaning is to be derived from the language alone. *State v. Moeurn*, 170 Wn.2d 169, 174, 240 P.3d 1158 (2010). If the statute is susceptible to more than one reasonable interpretation, "we may resort to statutory construction, legislative history, and relevant case law for

assistance in discerning legislative intent.” *State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010) (internal citation omitted).

“When construing a statute, we read it in its entirety and interpret the various provisions in light of one another.” *In re the Postsentence Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998). Where the legislature uses certain statutory language in one provision, and different language in another, there is a difference in legislative intent. *State v. Roberts*, 117 Wn. 2d 576, 586, 817 P.2d 855 (1991). Finally, if a statute is ambiguous, the rule of lenity requires it be interpreted strictly against the State and in favor of the accused. *State v. Jacobs*, 154 Wn.2d 596, 603, 115 P.3d 281 (2005).

2. Because the drug-zone enhancement section has different language from the weapons enhancement section, zone enhancements for multiple counts do not run consecutively to each other the way weapons enhancements do.

The Sentencing Reform Act (“SRA”) dictates that a judge has limited discretion to choose a criminal sentence within a designated range. RCW 9.94A.505. The “standard range” is calculated by assigning points for prior convictions and other current convictions, then referencing the seriousness level of the offense. RCW 9.94A.510; RCW 9.94A.517. For most cases in which a person is convicted of

multiple counts in a single proceeding, the SRA mandates that the sentences run concurrently rather than consecutively. RCW 9.94A.589.

After a standard range is calculated based on criminal history, it may be further increased by certain offense-specific conduct. The statute governing these enhancements is RCW 9.94A.533.<sup>6</sup> Subsection (3) imposes additional time for crimes committed with a firearm; subsection (4) does the same for other deadly weapons; and subsection (5) deals with crimes committed in jail or prison. Other sections address enhancements for prior DUIs, for crimes committed with sexual motivation, for offenders who involved minors in gang crimes, and for other conduct. *See id.*

The drug-zone enhancement at issue here is listed in subsection (6):

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435<sup>[7]</sup> or 9.94A.827. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

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<sup>6</sup> The statute in effect at the time of the crimes would apply, but the pertinent provisions have not changed since 2011, so Mr. Conover cites the current statute.

<sup>7</sup> RCW 69.50.435 includes the enhancement applicable here, for delivering drugs “within one thousand feet of a school bus route stop designated by the school district.” RCW 69.50.435(1)(c).

RCW 9.94A.533 (6).

In holding that the drug-zone enhancements for separate counts run consecutively to one another, the Court of Appeals relied on the portion of the statute stating that the enhancements “shall run consecutively to all other sentencing provisions.” *Conover*, 183 Wash.App. 1011 at \*6 (quoting RCW 9.94A.533(6)). But the Court of Appeals ignored the important differences among the sections of RCW 9.94A.533. The firearm enhancement section, unlike the drug-zone enhancement section, explicitly mandates that multiple weapons enhancements are to run consecutively to each other, not just to the base sentence and other enhancements:

Notwithstanding any other provision of law, all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon enhancements*, for all offenses sentenced under this chapter.

RCW 9.94A.533(3)(e) (emphasis added). The same is true for other deadly weapons enhancements. RCW 9.94A.533(4)(e).

Subsections 3(e) and 4(e) thus have the language the Court of Appeals here referenced, *plus* a clause mandating that the enhancements must run consecutively to each other. Under the Court of Appeals’ reasoning in this case, the two clauses are redundant. But

“a court must not interpret a statute in a way that renders any portion meaningless or superfluous.” *State v. K.L.B.*, 180 Wn.2d 735, 742, 328 P.3d 886 (2014).

A prior version of the firearm-enhancement section looked more like the current drug-zone enhancement section:

Notwithstanding any other provision of law, any and all firearm enhancements under this section are mandatory, shall be served in total confinement, and shall not run concurrently with any other sentencing provisions.

*Charles*, 135 Wn.2d at 247 (quoting former RCW 9.94A.310(3)(e)).

The Court held that under this prior version of the statute, firearm enhancements on multiple counts did *not* run consecutively to each other, but only to the base sentence. *Charles*, 135 Wn.2d at 253-54. Enhancements were only to be run consecutively to each other if the underlying sentences themselves were consecutive. *Id.* at 254. This makes sense, because “[a]n enhancement is not a separate sentence; rather, it is a statutorily mandated increase to an offender’s sentence range because of a specified factor in the commission of the offense.” *Id.* at 253.

In response to *Charles*, the legislature amended the statute to add the language emphasized above: “...shall run consecutively to all other sentencing provisions, *including other firearm or deadly weapon*

*enhancements.” State v. DeSantiago*, 149 Wn.2d 402, 415-16, 68 P.3d 1065 (2003) (citing RCW 9.94A.510(3)(e); RCW 9.94A.510(4)(e); Laws of 1998, ch. 235 § 1)). Additionally, the legislature added language to the introductory sections of the weapons enhancement statutes stating, “If the offender is being sentenced for more than one offense, the firearm enhancement or enhancements must be added to the total period of confinement for all offenses, regardless of which underlying offense is subject to a firearm enhancement.” Laws of 1998, ch. 235 § 1 at 978; *id.* at 979 (same language for deadly weapons). Following the amendments, “all firearm and deadly weapon enhancements are mandatory and, where multiple enhancements are imposed, they must be served consecutively to base sentences and to any other enhancements.” *DeSantiago*, 149 Wn.2d at 416. Furthermore, the amendment “seems to clearly anticipate the possibility of multiple enhancements in the case of multiple offenses.” *State v. Mandanas*, 168 Wn.2d 84, 88, 228 P.3d 13 (2010) (Holding that firearm enhancements on two different counts ran consecutively to each other).

Critically, the legislature did *not* add this language to the section at issue here. Laws of 1998, ch. 235 § 1 at 981. The drug-zone section

read simply, “(6) An additional twenty-four months shall be added to the presumptive sentence for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435.” *Id.* It is clear that the legislature knew how to state that enhancements must run consecutively to each other across counts, because it said so in the firearm and deadly weapon enhancement sections. RCW 9.94A.533(3); RCW 9.94A.533(4). The fact that the legislature explicitly provided for consecutive enhancements in one section of the statute shows it did not intend for courts to impose consecutive enhancements in the sections in which it omitted such language. *See State v. Delgado*, 148 Wn.2d 723, 728, 63 P.3d 792 (2003) (giving effect to differences in language between two-strike statute and three-strike statute); *Charles*, 135 Wn.2d at 249 (provisions must be interpreted in light of one another); *Roberts*, 117 Wn. 2d at 586 (“Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent”).

3. The State's argument is flawed and fails to account for the differences in language and history among the subsections of RCW 9.94A.533.

The State acknowledges the rule that the meaning of a statute is determined not by looking at a provision in isolation but by considering “the context of the statute, related provisions, and the statutory scheme as a whole.” Answer at 5. Yet it fails to apply that rule to this case. It argues that the legislature’s 2006 amendments to the drug-zone enhancement statute demonstrate its intent that such enhancements be run consecutively across counts. Answer at 7-8. The State is wrong.

Mr. Conover agrees that the legislature amended the drug-zone enhancement statute in response to *Jacobs, supra*. See Laws of 2006, ch. 339 § 301; Answer at 7-8 (citing bill reports). What the State fails to recognize is that *Jacobs* did not involve stacking enhancements across counts. The question in that case was whether two different drug-crime enhancements applied to a single count should be run consecutively or concurrently. *Jacobs*, 154 Wn.2d at 602. This Court held that the enhancements should be run concurrently, such that only 24 months was added to the standard range even though the jury had found two different enhancements. *Id.* The next year, the legislature clarified that if more than one enhancement applies to a given count,

each enhancement should increase the standard range by another 24 months. Laws of 2006, ch. 339 § 301 at 1634. The legislature did so by adding a sentence to subsection (6):

An additional twenty-four months shall be added to the standard sentence range for any ranked offense involving a violation of chapter 69.50 RCW if the offense was also a violation of RCW 69.50.435 or 9.94A.605. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

*Id.*

Notably, the legislature did not amend the statute in the same way it amended the weapons enhancement statutes in response to *Charles*. The natural inference of the post-*Jacobs* amendment is that multiple enhancements attached to *a given count* run consecutively to each other. The amendment does *not* mandate that where the same enhancement is applied to multiple counts those enhancements run consecutively to each other. *See Jacobs*, 154 Wn.2d at 602 (holding that two different enhancements on the same count run concurrently); *Gutierrez v. Department of Corrections*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008) (legislature amended RCW 9.94A.533(6) in response to *Jacobs*).

This intent is further demonstrated by the fact that in the same session, the legislature included language in its new sexual-motivation enhancement statute that tracks the language of the weapons enhancement statutes. *See* Laws of 2006, ch. 123 § 1. Like the weapons enhancement statute, the sexual motivation enhancement statute requires not only that different enhancements attached to the same count be stacked, but also that sexual motivation enhancements run consecutively to each other across multiple counts:

(8)(a) The following additional times shall be added to the standard sentence range for felony crimes committed on or after July 1, 2006, if the offense was committed with sexual motivation, as that term is defined in RCW 9.94A.030. *If the offender is being sentenced for more than one offense, the sexual motivation enhancement must be added to the total period of total confinement for all offenses, regardless of which underlying offense is subject to a sexual motivation enhancement. ...*

(b) Notwithstanding any other provision of law, all sexual motivation enhancements under this subsection are mandatory, shall be served in total confinement, and shall run consecutively to all other sentencing provisions, *including other sexual motivation enhancements*, for all offenses sentenced under this chapter.

RCW 9.94A.533(8)(emphases added).

If the legislature wanted to use the same language in the drug-zone enhancement statute, it could have done so. *See Jacobs*, 154 Wn.2d at 603. It did not. Presumably the legislature was being careful

about adding this language only where it deemed it essential, because ordering that enhancements for multiple convictions be served consecutively “runs counter to the normal structure of the SRA.” *Charles*, 135 Wn.2d at 254.

In sum, as to the drug-zone enhancements, the reasoning of *Charles* controls, and the enhancements do not run consecutively to each other. Rather, for each count, each enhancement increases the standard range by two years. The court then sentences the defendant within the enhanced range for each count. The question of whether the sentences for each count run concurrently or consecutively is determined by reference to RCW 9.94A.589. *See Charles*, 135 Wn.2d at 254 (citing former RCW 9.94A.400, since recodified at 9.94A.589). The crimes at issue here are not serious violent offenses; therefore, the sentences are concurrent, not consecutive. RCW 9.94A.589.

D. CONCLUSION

It is for the legislature to establish sentencing law. The legislature has explicitly treated different types of enhancements differently. Although the Sentencing Reform Act dictates that weapons enhancements for multiple counts run consecutively to each other, it does not set forth the same rule for drug-zone enhancements. This Court should accordingly hold that drug-zone enhancements increase the standard range for each count, but do not run consecutively to each other across counts.

Respectfully submitted this 6th day of March, 2015.

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Date: March 6, 2015

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