

Supreme Court No. 92771-5
Court of Appeals No. 71164-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

SHACON FONTANE BARBEE,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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 ORIGINAL

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A. SUMMARY OF APPEAL

Shacon Barbee profited from and advanced only a single continuous prostitution enterprise. His two convictions for second degree promoting prostitution violate the Double Jeopardy Clause.

The unit of prosecution for second degree promoting prostitution is the “enterprise” the defendant advances or profits from. The unit of prosecution does not turn on the number of prostitutes participating in the ongoing enterprise.

Barbee must also be resentenced because the trial court exceeded its statutory authority in imposing a sentence above the statutory maximum for one of the convictions of promoting the commercial sexual abuse of a minor.

B. ISSUES PRESENTED

1. A person commits the crime of second degree promoting prostitution statute if he operates or assists in the operation of “a prostitution enterprise,” or engages in any other conduct designed to institute, aid, or facilitate “an enterprise of prostitution.” The State’s evidence showed, and the deputy prosecutor argued, that Barbee operated a single continuous prostitution “enterprise” involving three young women working as prostitutes. Because Barbee engaged in only

a single continuous “enterprise” of prostitution, he committed only a single unit of the crime. Do his two convictions for second degree promoting prostitution violate the Double Jeopardy Clause?

2. A court may not impose a sentence that exceeds the statutory maximum for the crime. The trial court imposed a sentence that exceeded the statutory maximum for promoting the commercial sexual abuse of a minor. Must Barbee be resentenced?

C. STATEMENT OF THE CASE

Barbee befriended S.E. when she was thirteen years old and working as a prostitute. 8/27/13RP 9. In February 2010, after S.E. turned sixteen, she agreed to work as a prostitute for Barbee. 8/27/13RP 23. Barbee also asked S.E. to recruit girls or women to work as prostitutes for him. 8/29/13RP 29.

In early March 2010, S.E. recruited Brittany Klein. S.E. invited Klein to a motel room in SeaTac, explained how to work as a prostitute, and introduced her to Barbee. 8/22/13 RP 105, 107-08, 109-10, 111-12, 113. Barbee stated he would collect the money Klein earned and would take care of her. 8/22/13RP 114. Barbee gave her a pre-paid cellular telephone, chose an alias for her, chose photographs of her taken by S.E. to post at on-line advertising sites, especially

Backpage.com, and coached her on talking to potential customers. 8/22/13RP 114, 120, 122-23, 135. Together with S.E., Klein worked out of the motel room for several days and then she worked on “the track,” a term for a street where women working as prostitutes attempt to attract customers. 8/15/13RP 17; 8/22/13RP 118, 158, 160, 167.

In May 2010, S.E. recruited Cassandra Waller. 8/20/13RP 19. As with Klein, S.E. invited Waller to a motel room, explained how to work as a prostitute, and introduced her to Barbee. 8/20/13RP 27, 30. Barbee provided Waller with a cellular telephone. He brought lingerie to the motel room and took photographs of her wearing the lingerie to be posted on Backpage.com. 8/20/13RP 50-51, 55. The Backpage.com posts included a written description of her services that was composed by S.E. 8/20/13RP 65. Waller gave any money she earned to S.E. who, in turn, gave the money to Barbee. 8/20/13RP 36-37. After several weeks, Waller realized she would never be able to keep the money she earned so, in early June 2010, she left the motel and never again saw Barbee or S.E. 8/20/13RP 115; 8/21/13RP 30, 35.

In December 2010, the police organized an undercover “sting” operation at a motel in Kent, focused on prostitution. 8/29/13RP 113-14. An undercover detective responded to a Backpage.com

advertisement placed by S.E. and arranged for her to come to his room. 8/28/13RP 121, 122, 124; 8/29/13RP 119. When S.E. arrived and agreed to have sex with the detective, she was arrested. 8/28/13RP 42, 43, 52, 140-41. Barbee was arrested a short time later. 8/26/13RP 119-20, 122; 8/29/13RP 126, 128, 129.

The police searched storage units rented to Barbee and found a large quantity of women's clothing and lingerie, books and DVD's pertaining to "pimping," and a safe containing a large amount of cash. 9/3/13RP 15, 63, 67, 118, 120, 121-22, 127, 128; 9/9/13RP 99-100. The police obtained Backpage.com records that showed Barbee paid for numerous advertisements for escort services. 8/29/13RP 20; Ex. 13, 14, 15, 24, 35, 44-A, 50, 51, 52, 53, 74, 75, 76. Forensic examinations of Barbee's and S.E.'s cellular telephones revealed contact information for and numerous photographs of S.E., Klein, and Waller, and a large number of communications between Barbee, S.E., Klein, and Waller. 8/28/13RP 77, 91, 95-98, 99-114; Ex. 57, 58, 59, 87-94.

Barbee was charged with two counts of promoting the commercial sexual abuse of a minor, S.E. CP 244-48. The first count covered January 1, 2010, through August 31, 2010. The second count covered September 1, 2010, through December 31, 2010. CP 244-48.

Barbee was also charged with one count of first degree promoting prostitution of Klein, and one count of second degree promoting prostitution of Waller. CP 244-48. Finally, Barbee was charged with one count of leading organized crime, alleging he intentionally organized, managed, directed, supervised and financed S.E., Klein and Waller, with the intent to engage in a pattern of criminal profiteering activity, to-wit: promoting prostitution.¹ CP 244-48.

For the first count of promoting the sexual abuse of a minor, the State alleged the aggravating factor that the offense involved an ongoing pattern of sexual abuse of the same minor victim manifesting multiple incidents over a prolonged period of time. CP 244. On all of the counts, the State alleged the aggravating factor that Barbee committed multiple current offenses and his high offender score resulted in some of the current offenses going unpunished. CP 244-48.

In closing argument, the deputy prosecutor argued the charges of promoting the commercial sexual abuse of a minor, promoting

¹ Barbee was also charged and convicted of two counts of first degree theft, one count of second degree theft, and one count of tampering with a witness. CP 244-48, 323-38. Although Barbee challenged some of those convictions in his petition for review, they are not currently at issue in this Court.

prostitution, and leading organized crime were all interconnected and part of “the entire enterprise of prostituting out these three girls.” 9/17/13RP 163. Barbee’s actions were “designed to institute, aid, or facilitate an act or enterprise of prostitution.” 9/17/13RP 169. There was a “pattern,” and a “commonality or nexus between the prostitution of these three girls.” 9/17/13RP 188. According to the prosecutor, Barbee “managed his enterprise like a business,” and he “organized, managed, directed, [and] supervised these girls . . . like an employer would” as part of that business. 9/17/13RP 185-86.

The jury found Barbee guilty as charged of two counts of promoting the commercial sexual abuse of a minor, guilty of the lesser charge of second degree promoting prostitution of Klein, guilty as charged of second degree promoting prostitution of Waller, and guilty of leading organized crime. CP 307-16. The jury also found Count I was part of an ongoing pattern of sexual abuse of the same minor involving multiple incidents over a prolonged period of time. CP 308.

At sentencing, on Counts I and II, the court calculated Barbee’s standard range as 240 to 318 months, based on its understanding that promoting the commercial sexual abuse of a minor was a Class A felony with a seriousness level XII. CP 325. The court imposed an

exceptional sentence of 420 months for both counts. CP 323-38. The court also imposed an exceptional sentence of 300 months for the leading organized crime count, and a standard range sentence on the remaining counts. CP 323-38.

Barbee appealed, arguing among other things, that his two convictions for second degree promoting prostitution violate the Double Jeopardy Clause because he committed only a single, continuous offense. He also challenged his exceptional sentence on count I, arguing he must be resentenced because the trial court miscalculated the standard range and because one of the aggravators—the “pattern of abuse” aggravator—was invalid. The Court of Appeals rejected the double jeopardy argument. As for the exceptional sentence for count I, the court agreed the trial court had miscalculated the standard range and that the “pattern of abuse” aggravator was invalid. But the court held Barbee was not entitled to be resentenced because the trial court would have imposed the same sentence anyway.

Barbee petitioned for review. The Court accepted review of two issues: (1) whether the two convictions for second degree promoting prostitution violate the Double Jeopardy Clause; and (2) whether Barbee is entitled to be resentenced based on the trial court’s errors.

D. ARGUMENT

1. The unit of prosecution for second degree promoting prostitution is a single continuous enterprise involving one or more prostitutes.

Barbee was convicted of two counts of second degree promoting prostitution, one involving Klein and one involving Waller. CP 246, 310, 311. The prosecutor argued Barbee's actions were interconnected and all part of a single continuous "enterprise of prostituting out these three girls." 9/17/13RP 163, 169, 185-86, 188. The artificial division of a single, continuous enterprise of advancing and profiting from prostitution violated the prohibition against double jeopardy.

The Double Jeopardy Clause precludes the State from punishing a person twice for the same offense. State v. Adel, 136 Wn.2d 629, 632, 965 P.2d 1072 (1998); U.S. Const. amend. V. When a person is convicted twice for violating a single statute, the question is "what act or course of conduct has the Legislature defined as the punishable act?" Id. at 634. The Legislature's determination of the scope of the crime is the "unit of prosecution." Id. The Double Jeopardy Clause protects a person from being convicted twice under the same statute for committing only one unit of the crime. Id.

Determining the unit of prosecution is a question of statutory interpretation and legislative intent. Adel, 136 Wn.2d at 634-35. The Court looks to the statute's plain meaning to determine legislative intent. State v. Ose, 156 Wn.2d 140, 144, 124 P.3d 635 (2005). If the statute is susceptible to more than one reasonable interpretation, it is ambiguous. Id. Under the rule of lenity, the Court must give effect to the meaning favoring the defendant. Adel, 136 Wn.2d at 634-35. All doubt must be resolved against turning a single transaction into multiple offenses. Id.

The second degree promoting prostitution statute provides a person is guilty if he or she knowingly "advances prostitution" or "profits from prostitution." RCW 9A.88.080; CP 280-81. These terms are defined:

(1) "Advances prostitution." A person "advances prostitution" if, acting other than as a prostitute or as a customer thereof, he or she causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

(2) "Profits from prostitution." A person "profits from prostitution" if, acting other than as a prostitute receiving compensation for personally rendered prostitution services, he or she accepts or receives money

or other property pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of prostitution activity.

RCW 9A.88.060; CP 273.

The plain meaning of the statute indicates the Legislature intended to punish as a single unit all of a defendant's conduct that advances "a prostitution enterprise." The Court has consistently interpreted the Legislature's use of the word "a" (or "an") in criminal statutes as authorizing punishment for each individual instance of criminal conduct. Ose, 156 Wn.2d at 147. In Ose, for example, the second degree possession of stolen property statute provided a person was guilty if "[h]e or she possesse[d] a stolen access device." Id. at 145. The Court concluded the Legislature's use of the word "a" before "stolen access device" plainly indicated an intent to authorize punishment for each access device possessed. Id. at 147.

Numerous other cases of this Court have reached similar results, holding the Legislature's use of the word "a" in a criminal statute indicates the Legislature's intent that each instance of criminal conduct be the unit of prosecution. See State v. Graham, 153 Wn.2d 400, 407-08, 103 P.3d 1238 (2005) (reckless endangerment statute providing person is guilty if he or she recklessly engages in conduct that creates a

substantial risk of death or serious physical injury to “another person” authorizes separate punishment for each person endangered); State v. DeSantiago, 149 Wn.2d 402, 418, 68 P.3d 1065 (2003) (sentencing enhancement statute that applies when defendant or accomplice is armed with “a firearm” or “a deadly weapon” authorizes additional punishment for each weapon involved); State v. Westling, 145 Wn.2d 607, 611-12, 40 P.3d 669 (2002) (second degree arson statute providing person is guilty if he or she knowingly and maliciously caused “a fire or explosion” that damaged a building or any automobile demonstrates Legislature’s intent that punishment be based on each fire caused by defendant); State v. Root, 141 Wn.2d 701, 710-11, 9 P.3d 214 (2000) (Legislature’s use of words “a minor” in sexual exploitation of a minor statute authorized separate charge for each minor involved).

The promoting prostitution statute criminalizes operating or assisting in the operation of “a prostitution enterprise,” and any other conduct designed to institute, aid, or facilitate “an . . . enterprise of prostitution.” RCW 9A.88.060(1). Thus, each prostitution “enterprise” is a separate unit of prosecution.

Likewise, the plain language of the statute indicates the Legislature intended to punish as a single unit all of a person’s

activities in profiting from prostitution pursuant to a single agreement or understanding, regardless of the number of individuals involved. A person is guilty if “he or she accepts or receives money or other property pursuant to *an* agreement or understanding with *any* person.” RCW 9A.88.060(2) (emphases added). Use of the word “a” means “each,” while “any” means “every” and “all.” Westling, 145 Wn.2d at 611. In Westling, the second degree arson statute provided a person was guilty if he or she “knowingly and maliciously cause[d] *a fire* or explosion which damage[d] . . . *any* . . . *automobile*.” Id. (quoting RCW 9A.48.030(1)) (emphases added). The Court concluded, “under the plain language of the statute, one conviction is appropriate where one fire damages multiple automobiles, i.e., by use of the word ‘any’ the statute speaks in terms of ‘every’ and ‘all’ automobiles damaged by one fire.” Id. at 611-12.

Similarly, the use of the words “a” and “any” in the promoting prostitution statute indicates one conviction is appropriate where a person profits from prostitution pursuant to a single agreement or understanding involving multiple prostitutes.

A statute may criminalize both identifiable discrete acts and other acts that identify a course of conduct. State v. McReynolds, 117

Wn. App. 309, 338-39, 71 P.3d 663 (2003) (discussing possession of stolen property statute).

Promoting prostitution is such a crime, as it can involve either a continuing offense or separate specific acts. State v. Elliott, 114 Wn.2d 6, 12, 785 P.2d 440 (1990); see also State v. Gooden, 51 Wn. App. 615, 618, 754 P.2d 1000 (1988) (“Although the statute regarding promoting prostitution in the first degree permits conviction for each distinct act, it also contemplates a continuing course of conduct: instituting, aiding, or facilitating a prostitution enterprise.”).

If a statute defines a crime as a course of conduct, “then it is a continuous offense and any conviction or acquittal based on a portion of that course of action will bar prosecution on the remainder.” McReynolds, 117 Wn. App. at 338-39 (internal quotation marks and citation omitted). The State may not “divide a continuous course of conduct into separate, discrete units of prosecution.” Id.

Promoting prostitution is a continuous offense involving a single business enterprise and one or more prostitutes. State v. Doogan, 82 Wn. App. 185, 191, 917 P.2d 155 (1996) (“profiting from prostitution tends to be the result of an ongoing businesslike enterprise rather than a discrete event”); State v. Barrington, 52 Wn. App. 478,

482, 761 P.2d 632 (1988) (evidence showed “promotion of a prostitution enterprise conducted over a period of about three months in which Barrington received the profits from Lott’s prostitution, not separate distinct acts occurring in a separate time frame and identifying place”); Gooden, 51 Wn. App. at 620 (evidence showed single course of promoting prostitution where Gooden used two women to promote an enterprise with a single objective to make money).

As discussed, where the evidence shows a single prostitution “enterprise,” the plain language of the statute indicates the Legislature intended to create only a single unit of prosecution. Separate convictions may stand only if the evidence shows separate, discrete enterprises, such as where the defendant promotes the prostitution of different individuals over different time-frames from different locations. Elliott, 114 Wn.2d at 13-14.

In State v. Mason, 31 Wn. App. 680, 644 P.2d 710 (1982), the proprietor of a steam bath and massage parlor was convicted of three counts of promoting prostitution for her employment of three different women who committed acts of prostitution at the business. The Court of Appeals held the multiple convictions violated the Double Jeopardy Clause. Id. at 687. The court explained, “We do not find in RCW

9A.88.080 a clear legislative intent to impose multiple punishment upon one person's promotion of prostitution by employing two or more persons simultaneously over a period of weeks in the same location." Id. The court reasoned: "The apparent evils the legislature sought to attack were 'advancing prostitution' and 'profiting from prostitution.' A person is equally guilty of either of those evils whether he has only one prostitute working for him or several." Id.

This Court approved of the Mason court's reasoning in State v. Adel, and applied it to the crime of possession of marijuana. See Adel, 136 Wn.2d at 636-37 (citing Mason and concluding that although Adel hid stashes of marijuana in separate locations, he committed only a single unit of prosecution because "[a] person is *equally guilty* of possession whether that person has the drug stashed in one place, or hidden in several places under the person's dominion and control").²

² In State v. Song, 50 Wn. App. 325, 326-28, 748 P.2d 273 (1988), the Court of Appeals upheld separate convictions for promoting prostitution where the defendant accepted money and entered agreements on three separate occasions with different women, with the knowledge the women would engage in prostitution at her massage parlor. To the extent the evidence showed three separate discrete prostitution "enterprises," the Court of Appeals' holding in Song is consistent with the analysis presented here. To the extent the evidence showed a single continuous

Under these authorities, the unit of prosecution for promoting prostitution is each continuous prostitution “enterprise,” regardless of the number of prostitutes employed.

Once the “unit of prosecution” is determined, the next question is whether the defendant committed more than one unit of the crime. State v. Varnell, 162 Wn.2d 165, 168, 170 P.3d 24 (2007).

The State presented evidence that during 2010, Barbee coerced S.E. to recruit Klein and Waller for his enterprise, confined them in motel rooms or his apartment, and took all of the money they received from customers.

The prosecutor argued these actions were interconnected and part of a single continuous “enterprise of prostituting out these three girls.” 9/17/13RP 163, 169, 185-86, 188. All of Barbee’s actions were designed to institute, aid, or facilitate a single prostitution enterprise. 9/17/13RP 169. They were part of a single “pattern” of conduct with a “commonality or nexus between the prostitution of these three girls.” 9/17/13RP 188. Barbee was guilty of the “evils” of advancing and

prostitution “enterprise” involving three different women, the court’s conclusion in Song is incorrect and should not be followed.

profiting from prostitution, regardless of the number of people working for him.

Barbee's two convictions for promoting prostitution of different women as part of the same enterprise over the same period of time encompassed a single unit of prosecution in violation of the Double Jeopardy Clause. One of the convictions must be vacated and Barbee must be resentenced. Adel, 136 Wn.2d at 636-37.

2. Barbee must be resentenced because the trial court imposed a sentence for count I that exceeded the statutory maximum.

The trial court imposed an exceptional sentence of 420 months for count I, promoting the commercial sexual abuse of a minor. CP 323-38. This exceeded the statutory maximum.

Prior to June 10, 2010, promoting the commercial sexual abuse of a minor was a class B felony with a seriousness level of VIII. Former RCW 9.68A.101; former RCW 9.94A.515. Effective June 10, 2010, the crime was elevated to a class A felony with a seriousness level of XII. Laws of 2010, ch. 289, § 14. Nonetheless, on count I, Barbee was sentenced based on the classification of the offense as an A felony with a seriousness level of XII.

A court's sentencing authority is derived solely from statute. State v. Pillatos, 159 Wn.2d 459, 469, 150 P.3d 1130 (2007). RCW 9.94A.345 provides, "Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed." A defendant's constitutional right to due process is violated when he is sentenced pursuant to a statute that was not in effect at the time of the offense. State v. Aho, 137 Wn.2d 736, 744, 975 P.2d 512 (1999); U.S. Const. amend. XIV. Similarly,

[w]hen the sentence for a crime is increased during the period within which the crime was allegedly committed, and the evidence presented at trial indicates the crime was committed before the increase went into effect, the lesser sentence must be imposed.

In re Pers. Restraint of Hartzell, 108 Wn. App. 934, 944-45, 33 P.3d 1096 (2001).

Promoting the commercial sexual abuse of a minor was changed from a class B to a class A felony during the charging period for count I. The charging period for that count was January 1, 2010, through August 31, 2010. CP 244. Because the sentence for the crime increased during the charging period, Barbee was entitled to receive the lesser sentence. Hartzell, 108 Wn. App. at 944-45.

The statutory maximum for a class B felony is 120 months. RCW 9A.20.021. The court imposed a sentence for count I of 420 months, well above the statutory maximum. CP 323-38.

A defendant is entitled to be resentenced when a court imposes a sentence in excess of statutory authority. In re Pers. Restraint of Goodwin, 146 Wn.2d 861, 869, 50 P.3d 618 (2002). Because the sentence of 420 months for count I exceeded the court's statutory authority, Barbee must be resentenced.

E. CONCLUSION

Barbee committed only a single unit of prosecution for second degree promoting prostitution. One of his two convictions must be vacated and he must be resentenced. The trial court exceeded its authority in imposing a sentence beyond the statutory maximum for count I. This is an additional reason why Barbee must be resentenced.

Respectfully submitted this 2nd day of August, 2016.

/s/ Maureen M. Cyr

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
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)
 Petitioner.)

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