FILED
Court of Appeals
Division II
State of Washington
11/16/2018 11:47 AM

No. 52183-1-II

No. 98201-5

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

JERRY L. PETERSON,

Respondent.

Appeal from the Superior Court of Washington for Lewis County
Case No. 17-1-00220-21

Appellant's Opening Brief

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it ruled the specific statute, RCW 69.50.410(3)(a), controlled.

2. The trial court erred when it determined Peterson's sentence was required to be two years.

3. The trial court erred when it ruled the Sentencing Reform Act did not control, and therefore, Peterson's standard range was not 68+ to 100 months in the Department of Corrections.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

A. Does the Sentencing Reform Act apply to RCW 69.50.410, and if so, is Peterson's standard range 68+ to 100 months in the Department of Corrections?

III. STATEMENT OF THE CASE

Jerry Peterson pleaded guilty to Count I: Sale of a Controlled Substance for Profit – Heroin, and Count II: Possession of a Controlled Substance – Heroin, as charged in the Second Amended Information. CP 11-23. Peterson had previously been convicted of a drug offense, therefore, the maximum term for Count I was doubled to 120 months. CP 14. The charges stem from Peterson selling heroin to a confidential informant. CP 4-5. Then, when Peterson was arrested police found a baggie of heroin in her purse. *Id.*

The State and Peterson's attorney disagreed on the proper sentence. CP 6-10, 26-49. Peterson's position was the maximum sentence was five years and the appropriate sentence was two years

pursuant to RCW 69.50.410, as the specific statute controlled. CP 6-10. The State's position was the Sentencing Reform Act controlled the standard range. CP 26-49. The trial court ruled in favor of Peterson and sentenced her to two years. RP 6/13/18 15; CP 50-59. The State timely appeals the trial court's rulings regarding Peterson's standard range and the Judgment and Sentence. CP 60-71.

The State will further supplement the facts in the argument section below.

IV. ARGUMENT

A. THE SENTENCING REFORM ACT APPLIES TO RCW 69.50.410, SALE OF CONTROLLED SUBSTANCE FOR PROFIT – HEROIN.

The Sentencing Reform Act (SRA) applies to all felonies, thereby felony convictions under the Uniform Controlled Substances Act, RCW 69.50, are controlled by the SRA. The trial court erred when it found the SRA did not apply, and instead the specific statute, RCW 69.50.410, controlled in Peterson's case. The trial court erroneously sentenced Peterson to a two year sentence. The SRA is applicable in Peterson's case, the standard range should have been 68+ months to 100 months, and this Court should reverse and remand for resentencing.

1. Standard Of Review.

Statutory interpretation is reviewed by this Court under a de novo standard. *In re Combs*, 176 Wn. App. 112, 116, 308 P.3d 763 (2013).

2. The Sentencing Reform Act Applies To Felony Convictions Of The Uniform Controlled Substances Act, RCW 69.50.

The Sentencing Reform Act prescribes the authority sentencing courts are awarded in Washington State when sentencing persons convicted of felony offenses. *In re Combs*, 176 Wn. App. at 117. "When a person is convicted of a felony, the court shall impose punishment as provided in this chapter." RCW 9.94A.505(1).

The SRA was enacted in 1981 by the legislature to create a sentencing structure with standard ranges for offenses, but still offer some discretion when it came to crafting and imposing sentences. RCW 9.94A.010; *State v. Clark*, 123 Wn. App. 515, 521-22, 94 P.3d 335 (2004). The Uniform Controlled Substances Act was enacted in 1971, predating the SRA and determinate sentencing ranges. Laws of 1971, Ex. Sess., ch. 308, § 69.50.101; *State v. Williams*, 70 Wn. App. 567, 570, 853 P.2d 1388 (1993).

In 2002 the Legislature made RCW 69.50.410, Selling a Controlled Substance for Profit a Level III Drug Offense under a new seriousness table in the SRA. Laws of 2002, ch. 290, § 9; RCW 9.94A.518. The Legislature also created a Drug Offense Sentencing Grid, which created standard sentencing ranges for different drug offense seriousness levels. Laws of 2002, ch. 290, § 8; RCW 9.94A.517. Under the Drug Offense Sentencing Grid, a Level III Offense has a standard range of 51 to 68 months for an offender score of zero to two, 68+ to 100 months for an offender score of three to five, and 100+ to 120 months for an offender score of six to nine or more. *Id.* Therefore, for someone like Peterson, with an offender score of four, the standard range for Sale of a Controlled Substance for Profit – Heroin, would be 68+ to 100 months. RCW 9.94A.505; RCW 9.94A.517; RCW 9.94A.525; RCW 69.50.410; CP 24-25.

The SRA contemplates that the standard range for a sentence could be greater than the statutory maximum allowed for the charged crime. RCW 9.94A.599. "If the presumptive sentence duration given in the sentencing grid exceeds the statutory maximum sentence for the offense, the statutory maximum sentence shall be the presumptive sentence." RCW 9.94A.599. Therefore, in a Class C felony, such as RCW 69.50.410, with four points, the maximum

sentence will be five years, the statutory maximum, even though it is a Level III offense with a standard range of 68+ to 100 months.

The special provision in the Uniform Controlled Substance Act which allows for the statutory maximum to be doubled changes the maximum standard range. RCW 9.94A.599; RCW 69.50.408. While the doubling provision does not double the standard range of a sentence, it does allow for a standard range that would normally be outside the statutory maximum to now be the standard range due to the enlarged statutory maximum sentence. RCW 9.94A.599; RCW 69.50.408; *Clark*, 123 Wn. App. at 521-22.

The trial court in Peterson's matter declined to apply the SRA standard range for a Level III Drug Offense to Peterson. RP 38-39. Peterson's trial counsel submitted a sentencing memorandum calling for the trial court to apply the sentencing structure set forth in RCW 69.50.410. CP 6-10. The State responded to the memorandum, arguing the SRA was the proper sentencing scheme. CP 26-49. During the sentencing hearing the State advanced its position that Peterson should be sentenced pursuant to the SRA and not RCW 69.50.410. RP 6/13/18 12. The State argued Peterson's offense was a level three drug offense and her standard range is 68 to 100

months, and the State therefore requested 75 months in custody. *Id.* at 12.

The trial court found in favor of Peterson. RP 6/13/18 15; CP 50-53. The trial court ruled, “I think the specific statute controls this for selling of heroin, the specific charge here, that’s specifically listed in the statute under 69.50.410(3)(a). So that will be the sentence, two years, [twenty] four months on count I…” RP 6/13/18 15.

The trial court read RCW 69.50.410(2)(a) as requiring the trial court to not sentence Peterson to more than two years in custody upon a violation of RCW 69.50.410(3)(a). The trial court did not explain how the portions of the statute “in a correctional facility of the department of social and health services” was going to be enforced, as all felony sentences of over a year are subject to be served pursuant the SRA. RCW 9.94A.190; RCW 69.50.410(2)(a); CP 28; RP 6/13/18 15.

The SRA applies to all felonies and is controlling when it comes to the sentencing of felony convictions in Washington State regardless of which Title the felony may be codified in. RCW 9.94A.010; RCW 9.94A.505. Peterson was charged and pleaded guilty to a crime that was a Level III Drug Offense. RCW 9.94A.517; RCW 9.94A.518; RCW 69.50.410; CP 11-12, 13-23. Peterson had a

prior drug offense which elevated her new conviction to second or subsequent offenses. RCW 69.50.408; RCW 69.50.410; CP 24-25. Therefore, the statutory maximum for Peterson's Sale of a Controlled Substance for Profit – Heroin, was elevated from five years to ten years. RCW 69.50.408; RCW 69.50.410; *Clark*, 123 Wn. App. at 521-22; CP 11-12, 24-25.

While RCW 69.50.410(2)(a) states that any person should not have a sentence of more than five years for a first offense, the crime is normally a Class C felony, punishable by up to a statutory maximum of five years in prison. RCW 9A.20.010(1); RCW 69.50.410. Further, under the statutory scheme of RCW 69.50.410(3(a), it becomes a non-discretionary mandatory sentence of two years on a first offense. The SRA made RCW 69.50.410 a Level III Drug Offense, thereby enacting standard ranges that were far beyond the normal statutory maximum sentence. RCW 9.94A.517; 9.94A.518; RCW 69.50.410. In a case such as this, where the statutory maximum is ten years, the standard range should be 68+ to 100 months.

The trial court erred by finding the SRA did not apply in Peterson's case and the appropriate sentence was the mandatory two year sentence required under RCW 69.50.410(3)(a). The

statutory structure is in conflict with the principles of the SRA, gives no discretion to the trial court, and were improperly applied in this case. Peterson should have been sentenced pursuant to the SRA to a standard range sentence between 68+ to 100 months in the Department of Corrections. This Court should reverse the trial court, vacate Peterson's sentence, and remand for resentencing.

V. CONCLUSION

The trial court erred when it failed to apply the Sentencing Reform Act to Peterson's conviction for Sale of a Controlled Substance for Profit - Heroin charge and sentenced Peterson pursuant to RCW 69.50.410(3)(a). Therefore, this Court should reverse the trial court's ruling and vacate Peterson's sentence with instructions for the trial court to apply the Sentencing Reform Act and sentence Peterson within the standard range of 68+ to 100 months in prison.

RESPECTFULLY submitted this 16th day of November, 2018.

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November 16, 2018 - 11:47 AM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	52183-1
Appellate Court Case Title:	State of Washington, Appellant v. Jerry L. Peterson, Respondent
Superior Court Case Number:	17-1-00222-9

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