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AUG 07 2014

King County Prosecutor
Appellate Unit

NO. 70951-8-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JAMES TUCKER,

Appellant.

FILED
COURT OF APPEALS OF THE
STATE OF WASHINGTON
2014 AUG -7 PM 4:17

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

The Honorable Gregory Canova, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING SENTENCE ON THE ATTEMPTED DELIVERY OF COCAINE CONVICTIONS.	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>In re Pers. Restraint of Hopkins,</u> 137 Wn.2d 897, 976 P.2d 616 (1999).....	1, 2
<u>State v. Cameron,</u> 80 Wn. App. 374, 909 P.2d 309 (1996).....	2
<u>State v. Mendoza,</u> 63 Wn. App. 373, 819 P.2d 387 (1991), <u>review denied,</u> 841 P.2d 1232 (1992).....	1-3
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
Chapter 69.50 RCW.....	2, 3
Former RCW 9.94A.410.....	2
Former RCW 9.94A.120(7).....	3
RCW Title 9A.....	1
RCW Title 69.....	1
RCW 9A.28.020.....	1-3
RCW 9A.28.020(3)(c).....	3
RCW 9A.28.030.....	2
RCW 9A.28.040.....	2
RCW 9.94A.505(2)(b).....	3
RCW 9.94A.517.....	1
RCW 9.94A.595.....	2
RCW 69.50.401.....	1

TABLE OF AUTHORITIES

Page

RULES, STATUTES AND OTHER AUTHORITIES

RCW 69.50.407	1
Seth A. Fine & Douglas J. Ende, 13B Wash. Prac., Criminal Law § 3512 (2012-2013 ed.).....	3
Uniform Controlled Substances Act	2, 3
2013 Washington State Adult Sentencing Guidelines Manual.....	3

A. ARGUMENT IN REPLY

THE COURT EXCEEDED ITS STATUTORY AUTHORITY IN IMPOSING SENTENCE ON THE ATTEMPTED DELIVERY OF COCAINE CONVICTIONS.

The State agrees a conviction for an attempted drug offense under RCW 69.50.407 is an unranked felony carrying a standard range of 0-12 months. Brief of Respondent (BOR) at 5 (citing State v. Mendoza, 63 Wn. App. 373, 378, 819 P.2d 387 (1991), review denied, 841 P.2d 1232 (1992)). But it contends Tucker was convicted of attempted delivery of cocaine under the criminal attempt provision of RCW 9A.28.020 and is therefore subject to the standard range set forth in RCW 9.94A.517 minus 25 percent rather than the standard range for an unranked felony. BOR at 3.

Established law destroys the State's argument. Case law makes clear that the anticipatory drug offenses of attempt and conspiracy are not subject to the general attempt provision of RCW 9A.28.020. As a matter of law, Tucker could not be convicted and sentenced under that provision.

Drug offenses are not defined in the criminal code, RCW Title 9A. Rather, RCW Title 69 defines offenses involving various kinds of controlled substances. "Delivery of cocaine is prohibited under the Uniform Controlled Substances Act, RCW 69.50.401." In re Pers. Restraint of Hopkins, 137 Wn.2d 897, 899, 976 P.2d 616 (1999). "In

general, Washington law criminalizes three inchoate or 'anticipatory' offenses: attempt; solicitation; and conspiracy. RCW 9A.28.020, .030, .040." Hopkins, 137 Wn.2d at 900. The Uniform Controlled Substances Act, RCW 69.50, expressly includes attempt and conspiracy as specific offenses under chapter 69.50 RCW. Id. at 900-01 (holding solicitation to deliver cocaine, unlike attempt and conspiracy, is not an offense under RCW 69.50 because not specifically included therein).

Appellate courts have therefore "consistently and specifically distinguished between anticipatory offenses expressly included within RCW 69.50 as opposed to those generally falling within RCW 9A.28." Id. at 902 (citing cases) see also State v. Cameron, 80 Wn. App. 374, 379, 909 P.2d 309 (1996) ("Conspiracy to possess marijuana with intent to deliver is governed by RCW 69.50.407, and not by the general conspiracy statute, RCW 9A.28.040."). Because chapter 69.50 RCW includes no sentencing directions such as those contained in RCW 9.94A.595¹ (former RCW 9.94A.410) it is impossible to determine the seriousness level of inchoate

¹ RCW 9.94A.595 provides "For persons convicted of the anticipatory offenses of criminal attempt, solicitation, or conspiracy *under chapter 9A.28 RCW*, the presumptive sentence is determined by locating the sentencing grid sentence range defined by the appropriate offender score and the seriousness level of the crime, and multiplying the range by 75 percent." (emphasis added).

crimes under chapter 69.50 RCW. Id. at 902 n.3. Therefore, RCW 9.94A.505(2)(b) (former RCW 9.94A.120(7)) must apply. Id. (citing Mendoza, 63 Wn. App. at 376-78). Under that statute, sentences for "unranked" offenses cannot exceed 12 months. RCW 9.94A.505(2)(b).

Settled law thus supports Tucker's position. See also 2013 Washington State Adult Sentencing Guidelines Manual at 64-65 (recognizing anticipatory VUCSA offenses under chapter 69.50 RCW (attempt or conspiracy) are sentenced as unranked felonies); Seth A. Fine & Douglas J. Ende, 13B Wash. Prac., Criminal Law § 3512 (2012-2013 ed.) ("if the current offense is an anticipatory offense, the sentencing range is 75% of the range for the completed offense. This rule does not apply to an attempt or conspiracy to violate the Uniform Controlled Substances Act, rather, those crimes are unranked offenses.") (footnote citations omitted).

The trial court imposed 60 month terms of confinement on each count of Attempted Delivery of Cocaine, a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW. 2CP 78. The court exceeded its statutory authority in so doing. The standard range sentence for Tucker's attempted delivery of cocaine convictions cannot exceed 12 months confinement.

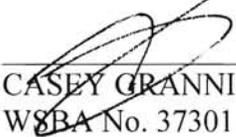
B. CONCLUSION

Tucker requests that this Court remand for resentencing.

DATED this 7th day of August 2014

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



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DIVISION ONE

STATE OF WASHINGTON,)	
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Respondent,)	
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v.)	COA NO. 70951-8-1
)	
JAMES TUCKER,)	
)	
Appellant.)	

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 7TH DAY OF AUGUST, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY EMAIL AND/OR DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] AMES TUCKER
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WASHINGTON STATE PENITENTIARY
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WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF AUGUST, 2014.

x Patrick Mayovsky