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July 14, 2014
Court of Appeals
Division III
State of Washington

NO. 32170-3-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

CASTULO JOSE RIVAS,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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ASSIGNMENTS OF ERROR

1. Chapter 9A.36 RCW, which includes the assault statutes, and RCW 9.94.010 (prison riot) are concurrent statutes. The prosecuting attorney should have charged Castulo Jose Rivas under the more specific statute rather than the general statute.

2. The imposition of legal financial obligations (LFOs) on Mr. Rivas violates RCW 10.01.160(3).

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Are the assault statutes, contained in Chapter 9A.36 RCW, and RCW 9.94.010 concurrent statutes; and, if so, was the prosecuting attorney required to charge Mr. Rivas under the latter statute?

2. Did the imposition of LFOs violate RCW 10.01.160(3) when Mr. Rivas is already serving a life sentence without possibility of parole? *See: State v. Rivas*, 97 Wn. App. 349, 351, 984 P.2d 432 (1999).

STATEMENT OF CASE

A prison riot occurred on February 4, 2012. Inmates Valdez, Escamilla, Zepeda, Olney and Rivas were involved. Prison officials were alerted and approximately fifty (50) officers were required to control the riot. (Latham RP 81, l. 24 to RP 82, l. 7; RP 88, ll. 18-19; RP 93, ll. 1-2; ll. 8-11; RP 145, ll. 4-9; RP 335, l. 22 to RP 336, l. 12; RP 338, ll. 3-6)

The riot was captured on video. It started between Mr. Rivas and inmate Deleon. It then erupted into a series of assaults between other inmates and prison staff. (Latham RP 83, ll. 19-21; RP 83, l. 24 to RP 84, l. 4; RP 92, ll. 19-20; RP 115, ll. 7-23; RP 176, ll. 13-14; RP 257, ll. 9-11; RP 338, l. 20; Exhibit 1)

Sgt. Bailey was grabbed around his neck and pulled to the ground. Mr. Rivas then allegedly attacked him with a sharpened toothbrush. Sgt. Bailey received a small puncture wound on the head, a bump to the back of his head and bruised ribs. (Latham RP 106, ll. 23-25; RP 118, l. 22 to RP 119, l. 6; RP 151, ll. 1-3; RP 197, ll. 12-17; RP 263, ll. 14-18; RP 264, ll. 4-6; ll. 20-21; RP 265, ll. 16-19; RP 280, l. 24 to RP 281, l. 7)

Corrections officers recovered three (3) weapons during the course of the riot. There was a sharpened toothbrush and two (2) spring wires. The toothbrush is white. It was observed in Mr. Rivas's hand during the

riot. (Latham RP 106, ll. 8-12; RP 138, ll. 7-12; RP 139, ll. 7-8; RP 145, ll. 4-9; RP 162, ll. 1-13; RP 221, ll. 7-25; RP 262, ll. 4-15)

No medical testimony was presented. Corrections officers testified that in their experience similar weapons could have resulted in the puncture of a lung or other vital organs. Defense counsel's objection that the testimony was speculation and without foundation was overruled. (Latham RP 140, ll. 1-11; RP 152, ll. 3-7; RP 266, ll. 2-16)

Sgt. Bailey's shirt was ripped during the encounter. He had a notebook in one (1) of his shirt pockets. The notebook had four (4) indentations in it. Neither the sergeant's shirt nor the notebook were entered into evidence. (Latham RP 276, l. 15 to RP 277, l. 1; RP 279, ll. 6-12)

An Information was filed on January 22, 2013 charging Mr. Rivas with first degree assault under RCW 9A.36.011(c). (CP 4)

Mr. Rivas's court-appointed attorney filed motions for an investigator and an expert witness. Both motions were denied. (CP 10; CP 13)

Defense counsel filed several continuance motions. Mr. Rivas sent a letter to the Court complaining of ineffective assistance of counsel, asking for a change of venue, and advising the Court that he had not waived his presence at any of the continuances. He challenged time-for-trial in that letter. (CP 17; CP 28; CP 32; CP 39; CP 47; CP 52)

Mr. Rivas also sent a letter to the Court requesting a new attorney. On July 23, 2013 the Court granted Mr. Rivas's request and appointed new counsel to represent him. (CP 42; CP 58)

Defense counsel then filed a motion to dismiss for violation of the time-for-trial rules. The trial court held a hearing and entered an oral decision that Mr. Rivas had not been prejudiced by the delays and had not properly objected to the resetting of any of the trial dates. (CP 59; Latham RP 4, l. 4 to RP 6, l. 15; RP 10, ll. 20-23; RP 22, ll. 1-4; RP 42, l. 5 to RP 49, l. 8)

Mr. Rivas's motion for reconsideration was filed on September 13, 2013. This motion was also denied. (Latham RP 33, l. 21; RP 43, ll. 15-21; RP 44, ll. 3-4)

Mr. Rivas signed a time-for-trial waiver on October 29, 2013. His jury trial was set for December 16, 2013. (CP 163)

An Amended Information was filed on the first day of trial. It changed the subsection for first degree assault from subsection (c) to subsection (a). (CP 176)

A jury found Mr. Rivas guilty of first degree assault. Judgment and Sentence was entered on January 6, 2014. The trial court imposed a three hundred (300) month sentence consecutive to Skagit County Cause

Number 96 1 00519 2. LFOs were imposed in the amount of \$10,335.74.

(CP 197; CP 199)

Mr. Rivas filed his Notice of Appeal on January 7, 2014. (CP 208)

SUMMARY OF ARGUMENT

Prison riot, as defined in RCW 9.94.010(1), is a specific statute pertaining to assaultive behavior within a correctional institution. It is concurrent to the assault statutes set forth in Chapter 9A.36 RCW.

The prosecuting attorney abused his discretion in filing an Information charging Mr. Rivas with first degree assault as opposed to prison riot. Mr. Rivas's conviction should be reversed.

Additionally, the LFOs imposed by the trial court violate RCW 10.01.160(3). Mr. Rivas is serving a life sentence without possibility of parole. There is no basis to require him to make payment of LFOs.

ARGUMENT

I. PROSECUTORIAL DISCRETION TO CHARGE

... (A) prosecuting attorney's exercise of charging discretion is not entirely unfettered. For example, a prosecutor must actually ex-

ercise individualized discretion in each case [citation omitted], and each exercise of discretion must comport with constitutional requirements such as equal protection [citation omitted.] Further, each charge filed must be authorized by the legislature. *See: State v. Lee*, 87 Wn.2d 932, 934, 558 P.2d 236 (1976). ... [Citation omitted.] The underlying discretion to select from available charges in each individual case remains with the prosecutor, however, and not with the legislature. ...

State v. Rice, 174 Wn.2d 884, 903, 279 P.3d 849 (2012).

Mr. Rivas contends that one (1) area where the prosecuting attorney's discretion is limited is when there are concurrent statutes.

Mr. Rivas was convicted under RCW 9A.36.011(1) which provides, in part:

A person is guilty of assault in the first degree if he or she with intent to inflict great bodily harm:

- (a) Assaults another with a ... deadly weapon or by any force or means likely to produce great bodily harm or death

The Legislature has not defined the word "assault." However, case law has been specific with regard to the meaning of that particular word.

... "Assault" is not statutorily defined, resort must be ... made to the common law. [Citations omitted.] Our courts typically have defined "assault" in general terms to be "an attempt, with unlawful force, to inflict bodily injury upon another, accompanied with the

apparent present ability to give effect to the attempt if not prevented.” [Citations omitted.]

State v. Krup, 36 Wn. App. 454, 457, 676 P.2d 507 (1984).

RCW 9A.36.011(1)(a) includes the phrase “deadly weapon.” The definition of “deadly weapon” is contained in RCW 9A.04.110(6) and includes, in part:

... Any other weapon, device, instrument, article, or substance ... which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm

The assault statutes are general criminal statutes. They define a particular type of offense.

On the other hand, RCW 9.94A.010 defines a specific offense - prison riot. The statute states, in part:

(1) Whenever two or more inmates of a correctional institution assemble for any purpose, and act in such a manner as to disturb the good order of the institution and contrary to the commands of the officers of the institution, **by the use of force or violence ... and whether acting in concert or not, they shall be guilty of prison riot.**

(Emphasis supplied.)

The “use of force or violence” constitutes assault. In *Pasco v. Ross*, 39 Wn. App. 480, 483, 694 P.2d 37 (1985) the Court adopted the rule that:

The terms “violence” and “force” are synonymous when used in relation to assault, and include any application of force, even though it entails no pain, bodily harm, or serious injury
....

(Footnote omitted.) 6A C.J.S. *Assault and Battery*, § 66, at 434 (1975); *see also: People v. Flummerfelt*, 153 Cal. App. 2d 104, 313 P.2d 912, 913 (1957); *Falconiero v. Maryland Cas. Co.*, 59 N.J. Super. 105, 157 A.2d 160 (1960); *State v. Smith*, 306 A.2d 5 (Me. 1973).

Mr. Rivas asserts that since the terms “violence” and “force” are synonymous then any assault which occurs in a prison comes within the parameters of prison riot as defined in RCW 9.94.010(1).

When a specific statute and a general statute punish the same conduct, the statutes are concurrent and the State can charge a defendant only under the specific statute. *State v. Shriner*, 101 Wn.2d 576, 580, 681 P.2d 237 (1984); *State v. Presba*, 131 Wn. App. 47, 52, 126 P.3d 1280 (2005). This rule gives effect to legislative intent and ensures charging decisions comport with that intent. [Citations omitted.] We review the question of whether two statutes are concurrent *de novo*. *State v. Chase*, 134 Wn. App. 792, 800, 142 P.3d 630 (2006).

State v. Wilson, 158 Wn. App. 305, 313-14, 242 P.3d 19 (2010).

Multiple inmates were involved in the riot that occurred on February 2, 2012. Mr. Rivas and Mr. Valdez were two (2) of those inmates. They were the two (2) inmates who used “force” or “violence” against Sgt. Bailey.

RCW 9.94.010(1) does not differentiate degrees of force or violence. It therefore encompasses all degrees of assault, along with reckless endangerment, as set forth in Chapter 9A.36 RCW.

Statutes are concurrent only when every violation of the specific statute would result in a violation of the general statute. [Citation omitted.]

In determining whether two statutes are concurrent, we examine the elements of each of the statutes to ascertain whether a person can violate the specific statute without necessarily violating the general statute. [Citations omitted.] Statutes are concurrent if all of the elements to convict under the general statute are also elements that must be proved for conviction under the specific statute.

State v. Wilson, supra, 314.

It is Mr. Rivas’s position that a violation of RCW 9.94.010(1), requiring the “use of force or violence” will necessarily violate the assault statutes. This specific statute is aimed at assaults occurring within the correctional institutions of the State of Washington.

Mr. Rivas contends that further support is given to his analysis based upon RCW 9A.36.100(1) which states, in part: “A person is guilty of custodial assault if that person is not guilty of an assault in the first or second degree”

The Legislature is presumed to know what it is doing, including the statutes it enacts. *See: State v. Slattum*, 173 Wn. App. 640, 655, 173 P.3d 318 (2007).

Thus, if RCW 9.94.010(1) was intended not to apply if an assault is a first or second degree assault, then the Legislature would have included the same language that it did in RCW 9A.36.100(1) concerning custodial assault.

If Mr. Rivas’s analysis is correct, then his conviction for first degree assault must be reversed.

II. LFOs

RCW 10.01.160(3) states:

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of the costs will impose.

The trial court conducted a colloquy with Mr. Rivas at the sentencing hearing. The colloquy involved his ability to pay LFOs. Mr. Rivas is

currently serving a life sentence without possibility of parole under Skagit County Cause Number 96 1 00519 2. Even under those circumstances the trial court imposed LFOs. (Latham RP 429, l. 23 to RP 430, l. 25)

As clearly set forth in *Utter v. DSHS*, 140 Wn. App. 293, 303-04, 165 P.3d 399 (2007), the requirements for a recoupment statute are:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears that there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portions;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Eisenman, 62 Wn. App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (1991) (citing *Barklind*, 87 Wn.2d [State v. *Barklind*, 87 Wn.2d 814, 557 P.2d 314 (1976)] at 817-18).

Mr. Rivas will never be released from prison. He is serving a life sentence without possibility of parole. The current trial court imposed an additional three hundred (300) months to run consecutive to that life sentence. (Latham RP 431, ll. 6-10)

It is ludicrous to believe that Mr. Rivas will ever have any funds with which to pay any LFOs. The trial court's imposition of LFOs violates factors (3), (4) and (5) as applied to RCW 10.01.160 (3).

CONCLUSION

RCW 9.94.010(1) is a specific statute relating to assaults committed within a correctional institution. The Legislature has not limited the statute in any way or manner to preclude using a specific degree of assault as an element.

Since RCW 9.94.010 (1) is specific to correctional institutions, the general assault statutes are inapplicable to assaults occurring within such an institution.

Mr. Rivas respectfully requests that his conviction for first degree assault be reversed.

Additionally, the imposition of LFOs violates RCW 10.01.160(3).
If the conviction is not reversed, then Mr. Rivas respectfully requests that
the Judgment and Sentence be amended to remove the LFOs.

DATED this 12th day of July, 2014.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

nodblspk@rcabletv.com

NO. 32170-3-III
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	WALLA WALLA COUNTY
Plaintiff,)	NO. 13 1 00020 0
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
CASTULO JOSE RIVAS,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 12th day of July, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

CERTIFICATE OF SERVICE

TERESA CHEN
Attorney at Law
PO Box 5889
Pasco, WA 99302-5801
tchen@wapa-sep.wa.gov

E-FILE
(per agreement)

CASTULO JOSE RIVAS #907450
Washington State Penitentiary
1313 N 13th Ave, IMU South F-05
Walla Walla, WA 99362

U.S. MAIL

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE

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