IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 39752-1-III

On review from the Superior Court of Kittitas County, no. 22-1-00151-19

STATE OF WASHINGTON, Respondent,

v.

KARLI ANN HAAS, Appellant.

APPELLANT'S BRIEF (CORRECTED)

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TABLE OF CONTENTS

AUTHORITIES CITED

State Cases

Statutes

Session Laws

Other Materials

I. INTRODUCTION

The State charged Ms. Haas with eight drug offenses arising from three separate controlled buy transactions. It also alleged that each of the offenses was a major violation of the Uniform Controlled Substances Act under RCW 9.94A.535(e)(i), which applies when "[t]he current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." Because the plain language of the aggravating circumstance does not apply to Ms. Haas's convictions, which involve a single transaction each, and because the State presented no other evidence that the transactions were more onerous than ordinary drug deliveries, insufficient evidence supports the aggravating circumstance and the exceptional sentence predicated upon it.

Additionally, the trial court found Karli Haas indigent at the time of her sentencing and imposed a $500 crime victim penalty assessment under RCW 7.68.035 and a $100 DNA

collection fee under RCW 43.43.7541. Subsequently, the statutes authorizing those financial obligations were revised, prohibiting imposition of the crime victim penalty assessment on defendants who are indigent at the time of sentencing and eliminating the DNA collection fee. Because the legislative revisions apply to Ms. Haas's case while it is pending on appeal, both assessments should be stricken from the judgment and sentence.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Insufficient evidence supports the special verdicts finding that each of Ms. Haas's drug offenses constituted a major violation of the Uniform Controlled Substances Act.

ASSIGNMENT OF ERROR NO. 2: The $500 crime victim penalty assessment should be stricken from the judgment and sentence due to Ms. Haas's indigency.

ASSIGNMENT OF ERROR NO. 3: The $100 DNA collection fee should be stricken from the judgment and sentence because it has been eliminated.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether the plain language of RCW 9.94A.535(3)(e)(i) requires that the count charged consist of three or more separate transactions.

ISSUE NO. 2: Whether revisions to RCW 7.68.035 and 43.43.7541 made effective July 1, 2023 apply to Ms. Haas's case.

IV. STATEMENT OF THE CASE

A jury convicted Karli Haas of five counts of delivering a controlled substance and three counts of delivering a counterfeit substance arising from three undercover transactions. CP 98-113, 116, RP 403-04. A confidential informant for police testified that on three occasions, he purchased from Ms. Haas

methamphetamine and pills that were stamped to look like Oxycodone but actually contained fentanyl. RP 71, 75-76, 82, 85, 87, 89-90, 164-66, 69, 177, 178. In the first buy, he purchased an ounce and a half of methamphetamine and a couple of fentanyl pills for $400. RP 82, 127, 164, 169, 171-72. In the second buy, he purchased an ounce of methamphetamine and three fentanyl pills for $310. RP 87, 175-76, 177, 234-35. In the third buy, he purchased 50 fentanyl pills for $325. RP 89-90, 178, 296, 306. The State filed five separate charges for each substance purchased during each transaction and three separate charges for the delivery of the counterfeit Oxycodone pills. CP 7-10.

The State also charged a statutory sentence enhancement alleging that each of the offenses were major violations of the controlled substances act within the meaning of RCW 9.94A.535(3)(e)(i), which applies when "the current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do

so." CP 7-10. Police testified that the amounts involved were more than user amounts, comparing the ounce and a half of methamphetamine to a large bottle of Tylenol, but did not present any evidence that the transactions were unusually large or onerous buys; to the contrary, the informant decided how much to buy based on their own habits. RP 130-31, 134, 201.

In the instructions, the jury was directed to determine if each of the violations "were more onerous than the typical offense." CP 81. The instruction identified as a factor that permitted the major violation finding "Whether the offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so." CP 81. The jury returned special verdicts finding that all 8 counts were major violations. CP 99, 101, 103, 105, 107, 109, 111; RP 403-04.

At sentencing, the trial court *sua sponte* found that the delivery convictions that occurred on the same day but involved

different substances constituted the same criminal conduct, calculating Ms. Haas's offender score as a "2" with a standard range of 12+ to 20 months. RP 419, 425. Based on the aggravator for a major controlled substances crime, the trial court imposed an exceptional sentence of 40 months. CP 119, 121, RP 428.

At sentencing, the trial court found that Ms. Haas was indigent on the basis of her low income. CP 120. It imposed a $500 crime victim penalty assessment pursuant to RCW 7.68.035 and a $100 DNA collection fee pursuant to RCW 43.43.7541. CP 123-24. Ms. Haas timely appealed and was again found indigent for that purpose. CP 138, 140.

V. ARGUMENT

By its plain language, the aggravating circumstance established in RCW 9.94A.535(3)(e)(i) applies only when multiple transactions are charged in the aggregate in a single offense. In Ms. Haas's case, where the State charged only a single transaction in each count, the aggravator does not apply. Further, the State presented no other evidence that the deliveries for which Ms. Haas was convicted were different than any ordinary delivery. Accordingly, the special verdicts are not supported by sufficient evidence and Ms. Haas must be resentenced. In the alternative, the $500 crime victim penalty and the $100 DNA collection fee must be stricken from the judgment and sentence due to intervening changes in the law that apply to Ms. Haas's case on appeal.

A. Under the plain language of RCW 9.94A.535(3)(e)(i), the aggravator only applies when multiple transactions are charged in a single count.

The standard range for each of Ms. Haas's crimes was 12+ to 20 months, based on her offender score of "2." RP 419, 425. To impose a sentence above the standard range, a court must find substantial and compelling reasons justifying an exceptional sentence based on specifically enumerated aggravating circumstances that must be determined by a jury. RCW 9.94A.535(3); 9.94A.537(3).

The State must give pretrial notice of its intent to prove an aggravating circumstance listed in RCW 9.94A.535 to comport with minimum standards of due process. *State v. Siers*, 174 Wn.2d 269, 277, 274 P.3d 358 (2012). Here, the State gave notice of its intent to prove the aggravating circumstance set forth in RCW 9.94A.535(3)(e)(i), which reads, "The current offense involved at least three separate

transactions in which controlled substances were sold, transferred, or possessed with intent to do so." At issue here is the meaning of the term "the current offense," which is a matter of statutory interpretation subject to *de novo* review. *Siers*, 174 Wn.2d at 274.

The standards applicable to statutory interpretation are well-established and described as follows in *State v. Bigsby*, 189 Wn.2d 210, 216, 399 P.3d 540 (2017):

> Our fundamental purpose in construing statutes is to ascertain and carry out the legislature's intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of the legislature's intent. *Id.* The court ascertains a statute's plain meaning by construing that statute along with all related statutes as a unified whole and with an eye toward finding a harmonious statutory scheme. *See id*. Legislative history serves an important role in divining legislative intent. Where provisions of an act appear to conflict, we may discern legislative intent by examining the legislative history of the enactments. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 211, 118 P.3d 311 (2005) (*citing Timberline Air Serv., Inc. v. Bell*

Helicopter-Textron, Inc., 125 Wn.2d 305, 312, 884 P.2d 920 (1994)).

In discerning a provision's plain meaning, the court considers the entire statute in which it is found as well as related statutes and other provisions in the same act that disclose legislative intent. *State v. Alvarado*, 164 Wn.2d 556, 562, 192 P.3d 345 (2008). And in interpreting the statute, the Court seeks to avoid absurd results, applying its common sense to the analysis. *Id.*

RCW 9.94A.535 does not define "the current offense." However, throughout the Sentencing Reform Act, "the current offense" is used to describe the charged crime of conviction for which a sentence is being calculated. For example, RCW 9.94A.589(1)(a) details how to compute the standard range for each offense "whenever a person is to be sentenced for two or more current offenses" and provides that each current offense scores as if it were a prior conviction. *See also* Caseload Forecast Council, *Adult Sentencing Guidelines Manual*, 2023

ed., at 52, *available online at* https://cfc.wa.gov/sites/default/files/Publications/Adult_Sentencing_Manual_2023_0_3.pdf (last visited Dec. 27, 2023). Similarly, because the standard ranges do not increase beyond an offender score of 9, when multiple current offenses result in an offender score that exceeds 9, an exceptional sentence may be imposed to punish current offenses that would otherwise go unpunished. RCW 9.94A.535(2)(c); *see also Alvarado*, 164 Wn.2d at 563.

In other words, "the current offense" means each separate offense charged in an information that results in a conviction and for which a sentence must be imposed. This interpretation is consistent with the ordinary dictionary definition of "offense" as "a violation of the law; a crime, often a minor one." Black's Law Dictionary (11th ed. 2019). Applied to RCW 9.94A.535(3)(e)(i), this interpretation means that the aggravating circumstance only applies when multiple transactions are charged in a single count. Its use of the

singular "offense" rather than the plural "offenses" denotes that it is the individual charge, and not the criminal scheme as a whole, that must consist of three or more transactions.

This interpretation also comports with the purposes of the Sentencing Reform Act to provide for punishment that is proportionate to the seriousness of the offense and commensurate with other similar offenses. RCW 9.94A.010(1), (3). Prosecutors have broad charging discretion. *State v. Rice*, 174 Wn.2d 884, 898-99, 279 P.3d 849 (2012). In exercising that discretion in a case involving multiple controlled buys, prosecutors can choose whether to file a single count based on multiple alleged criminal acts, or separate counts for each alleged criminal act. *See, e.g., State v. Petrich*, 101 Wn.2d 566, 573, 683 P.2d 173 (1984) (describing unanimity requirements in cases where multiple acts could support a single charged crime). Filing separate counts potentially allows the State to obtain a higher offender score and standard range based on multiple current offenses than an offender charged with a single

count based on multiple acts, despite committing the same conduct. RCW 9.94A.535(3)(e)(i) equalizes this disparity by permitting an exceptional sentence when "the current offense" is proved by three or more transactions to offset the lower resulting offender score and standard range.

Under this interpretation, the aggravator is unsupported by substantial evidence in this case, where each "current offense" charged a single transaction for a single substance. The evidence supporting a statutory aggravating circumstance is reviewed the same as the sufficiency of the evidence supporting the elements of a crime, viewing the evidence in the light most favorable to the State and inquiring whether any rational trier of fact could have found the aggravating circumstances to exist beyond a reasonable doubt. *State v. Burrus*, 17 Wn. App. 2d 162, 171, 484 P.3d 521, *review denied*, 198 Wn.2d 1006 (2021). Here, the evidence established only one transaction for one substance for each "current offense," so the aggravator is inapplicable on its face.

The State may contend that the aggravator requires only that it prove that each offense was "more onerous than the typical offense of its statutory definition," with proof that the offense involved at least three separate transactions being merely one way to establish its atypicality. RCW 9.94A.535(3)(e); CP 81; *see also State v. Hrycenko*, 85 Wn. App. 543, 547-48, 933 P.2d 435 (1997) (the "more onerous than typical" sets the standard, which can be established by the non-exhaustive factors). But here again, the State did not present any evidence of what a typical drug delivery is or why a few drug buys for a few hundred dollars each is worse than a typical drug delivery. Although the State presented some evidence that the amounts exceeded user amounts, it neither gave notice of its intention to seek nor submitted to the jury the factor established in RCW 9.94A.535(3)(e)(ii), "The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use." Consequently, the record is devoid of evidence

supporting a finding that Ms. Haas's deliveries were more onerous than typical deliveries.

Here, the jury's special verdicts on the aggravating factors provided the sole basis for the exceptional sentence imposed. CP 119. Absent the aggravator, there is no legal basis in the record for an exceptional sentence to be imposed. Consequently, remand for resentencing within the standard range is required.

B. Intervening legislative changes that prohibit the imposition of certain legal financial obligations apply to Ms. Haas's case on appeal.

In the spring of 2023, the legislature passed a bill amending several statutes governing criminal legal financial obligations and made it effective July 1, 2023. Laws of Wash. c. 449 (68th Leg. 2023). The amendments applicable in this case are:

- A new subdivision was added to RCW 7.68.035, the crime victim penalty assessment statute, prohibiting the court from imposing the penalty if it finds the defendant indigent at sentencing. Laws of Wash. c. 449 § 1; RCW 7.68.035(4).
- The $100 DNA collection fee established by RCW 43.43.7541 was eliminated. Laws of Wash. c. 449 § 4; RCW 43.43.7541.

Ms. Haas was found to be indigent at the time of sentencing. CP 120. Consequently, if the statutory amendments apply to her case, then both assessments are unauthorized and should be stricken.

The Supreme Court has held that the precipitating event for application of a prospective statute concerning attorney fees and costs is the termination of the case. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714 (2018). Because a case is not terminated until it is final on appeal, the statute applies

prospectively to cases that are pending on appeal at the time the statute was enacted. *Id.* The Court of Appeals has specifically concluded that the amendments at issue in this case apply to cases pending on appeal following the reasoning of *Ramirez*. *State v. Ellis,* 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023).

Thus, under *Ramirez* and *Ellis*, the revisions to the crime victim penalty and DNA collection statutes apply to Ms. Haas's case on appeal. Under the revisions, the crime victim penalty may not be imposed due to Ms. Haas's indigency, and the DNA collection fee is no longer authorized. Accordingly, both obligations should be stricken from the judgment and sentence.

VI. CONCLUSION

For the foregoing reasons, Ms. Haas respectfully requests that the court STRIKE the $500 crime victim penalty assessment and the $100 DNA collection fee from her judgment and sentence.

RESPECTFULLY SUBMITTED this 25 day of January, 2024.

This document contains 2,533 words, excluding the parts of the document exempted from the word count by RAP 18.17.

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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief (Corrected) upon the following parties in interest by U.S. mail, first-class postage prepaid thereon, addressed to the following:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 25 day of January, 2024 in Kennewick, Washington.

Andrea Burkhart