No. 52183-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

v.

JERRY L. PETERSON

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. Supplemental Issue Presented for Review

Whether, in light of the recently decided *State v. Cyr*, this Court should find that RCW 69.50.410(2) and (3) are not severable from the rest of the statute?

B. Supplemental Argument of the Respondent

Ms. Peterson's case comes before this Court in an unusual procedural posture. Ms. Peterson's position at both the trial level and the Court of Appeals was that the sentencing provisions of RCW 69.50.410 mean what they say and that a person convicted of the sale of a controlled substance for profit must be sentenced in accordance with the sentencing provisions of RCW 69.50.410(2) and (3). The trial court found subsection (3) of the statute applies and is mandatory and sentenced her to 24 months in prison. The State timely appealed.

While Ms. Peterson's case was pending in the Court of Appeals, one panel of Division II of the Court of Appeals found in another case that the sentencing provisions of RCW 69.50.410 do not apply and remanded Mr. Cyr's case for resentencing in accordance with the sentencing reform act (SRA). This Court granted review. *State v. Cyr*, 8 Wn.App.2d 834, 441 P.3d 1238, *review granted*, 194 1001 (2019). After review was granted in *Cyr*, a different panel of Division II agreed with Ms. Peterson's

interpretation of the statute. The State filed a timely petition for review and Ms. Peterson filed an answer on March 6, 2020.

Undersigned counsel, writing as *amicus* on behalf of the Washington Association of Criminal Defense Lawyers in the *Cyr* case, urged this Court to adopt Ms. Peterson's interpretation as well. On April 16, 2020, this Court rejected the position urged by Mr. Cyr and WACDL and held that RCW 69.50.410 "does not set forth an independent sentencing scheme." *State v. Cyr*, 195 Wn.2d 492, 507, 461 P.3d 360 (2020). This Court then granted the State's petition for review in Ms. Peterson's case.

One of the issues in *Cyr* was whether the doubling provision of RCW 69.50.408 applies to the defendant. If it did, then his standard range was 68+-100 months. If not, then his maximum sentence was 60 months and his 60 month sentence was lawful. Despite some contrary language in the record, Ms. Peterson's case does not involve the doubling provision of RCW 69.50.408. Although Ms. Peterson has some prior drug possession convictions on her record, drug possession is not a predicate offense under the doubling statute. CP, 24. See RCW 69.50.408(3) ("This section does not apply to offenses under RCW 69.50.4013.") Therefore, although Ms. Peterson has an offender score of 4, the maximum penalty for her offense

is 60 months and on remand her standard range under the SRA is 60 to 60 months, a very narrow range indeed.

RCW 69.50.410(3)(1) explicitly states anyone convicted of sale of heroin for profit "shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services." The trial court in this case followed the unambiguous language of the statute and imposed two years in a correctional facility of the department of corrections (DOC), there being no such correctional facility of the department of social and health services (DSHS). See *Bresolin v. Morris*, 86 Wn.2d 241, 543 P.2d 325 (1975) (*Bresolin I*) (holding DSHS in contempt for failure to provide the necessary services described in RCW 69.50.410 and required by former RCW 60.32.090); *Bresolin v. Morris*, 88 Wn.2d 167, 558 P.2d 1350 (1977) (*Bresolin II*) (noting the repeal of RCW 60.32.090). This Court concluded in *Cyr*, however, that the trial court's interpretation of the statute is not a reasonable interpretation and Ms. Peterson is required to be sentenced pursuant to the SRA and the Drug Offense Sentencing Grid. RCW 9.94A.517. Comparing RCW 69.50.410 to the SRA, this Court concluded, "Thus, the plain language of RCW 69.50.410, read in context, cannot *reasonably* be interpreted as creating an independent sentencing scheme that precludes the application of other sentencing provisions." *Cyr* at 368 (emphasis added). In essence, this

Court held that the sentencing provisions of RCW 69.50.410(2) and (3) have been replaced by the SRA and are a nullity.

This Court's conclusion that RCW 69.50.410(2) and (3) do not create an independent sentencing scheme and are invalid raises grave issues about the validity of the statute as a whole. It is, therefore, incumbent on this Court to review the entirety of the statute to determine whether the remainder of the statute can continue to operate with full force and effect in the absence of its narrowly tailored sentencing provisions. Although review by this Court is generally limited to issues raised in the Petition for Review or the Answer (RAP 13.7), the rules of appellate procedure are to be liberally interpreted to promote justice and facilitate the decisions of cases on the merits. RAP 1.2(a); *In re Fero*, 190 Wn.2d 1, 13, 409 P.3d 214 (2018). In light of this Court's conclusions in *Cyr*, Ms. Peterson's case cannot be fairly decided without regard to the proper application of the statute as a whole.

Ordinarily, when one part of a statute is invalidated, the remainder of the statute will remain intact. *In re Parentage of C.A.M.A.*, 154 Wn.2d 52, 67, 109 P.3d 405 (2005), quoting *Guard v. Jackson*, 83 Wn.App. 325, 333, 921 P.2d 544 (1996). An invalidated provision may not be severed, however, if its connection to the remaining, constitutionally sound provision is so strong that it could not be believed that the legislature

would have passed one without the other; or where the part eliminated is so intimately connected with the balance of the act as to make it useless to accomplish the purposes of the legislature. Also, the court is obliged to strike down the entire act if the result of striking only the proviso is to give the remainder of the statute a much broader scope. *Id.* If saving the non-offending portion of the statute requires rewriting the legislation, the remedy is to strike down the entirety of the statute. *See C.A.M.A.* at 69 ("Courts do not amend statutes by judicial construction, nor rewrite statutes to avoid difficulties in construing and applying them.")

The existence of a severability clause is strong evidence of the legislature's intent that the provisions be severable, but not dispositive. *C.A.M.A.* at 68. Chapter 69.50 RCW used to have a severability statute. See former RCW 69.50.605. The severability statute was decodified in 2016, however, indicating a legislative intent that the provisions not be severable.

RCW 69.50.410 has seven subsections. Subsection (1) sets out the elements of the offense and defines the relevant terms. Subsections (2) and (3) contain the sentencing provisions invalidated by this Court in *Cyr*. Subsections (4) and (5) contain additional sentencing provisions. Subsection (6) is an unusual provision that allows a drug addict to voluntarily participate in the non-existent DSHS treatment program in

exchange for immunity from prosecution. Subsection (7) reads, "This section shall not apply to offenses defined and punishable under the provisions of RCW 69.50.401 through 69.50.4015." Read as a whole, this statute was intended to be a comprehensive approach to solving the state's problem of drug addicts selling controlled substances for profit and the provisions are not severable.

To be severable, the invalid provision must be grammatically, functionally, and volitionally severable. *State v. Abrams*, 163 Wn.2d 277, 178 P.3d 1021 (2008); *McGowan v. State,* 148 Wn.2d 278, 295, 60 P.3d 67 (2002). Grammatically, the seven subsections of RCW 69.50.410 are not severable. Subsections (2) through (7) reference subsection (1) seven separate times. The phrase "any person convicted of a violation of subsection (1) of this section" explicitly appears three times in subsections (2)(a), (2)(b), (3)(a) and implicitly in (3)(b). Gramatically, the sentencing provisions of subsections (2) and (3) are intertwined with the elements and definition provisions of subsection (1).

Further, the legislature explicitly stated RCW 69.50.410 is to be treated uniquely from the rest of the uniform controlled substances act. As set out in subsection (7), RCW 69.50.410 does not apply to the provisions of RCW 69.50.401 through 69.50.4015. People convicted of sale for profit are all to be treated differently than other people who violate the

uniform controlled substances act, including delivery of a controlled substance, possession with intent to deliver, possession of controlled substance, and delivery of a substance in lieu of a controlled substance.

Functionally, the legislature intended sale for profit to address different concerns than other offenses in the uniform controlled substances act. The clear intent of the sentencing provisions of RCW 69.50.410 was not to be punitive in a penal setting but to provide drug treatment for addicts in a therapeutic setting. The statute goes so far as to provide a safe haven from prosecution for people who voluntarily enter the DSHS treatment facility. See subsection (6). Four of the seven subsections address the treatment needs of people who sell controlled substances for profit. When the legislature refused to fund DSHS with a treatment facility and then created the SRA, it rendered the entire treatment function of the statute null and void.

The statute is also not volitionally severable. A clause is volitionally severable if the balance of the legislation would have likely been adopted had the legislature foreseen the invalidity of the clause at issue. *Abrams* at 288, citing *Calfarm Ins. Co. v. Deukmejian,* 48 Cal.3d 805, 258 Cal.Rptr. 161, 771 P.2d 1247 (1989). The evidence shows if the legislature had known that the sentencing provisions of subsections (2) and (3) were going to be ignored by this Court, if would have not passed

the statute. The same conduct criminalized in RCW 69.50.410 is also criminalized in RCW 69.50.401 and there is no practical distinction between drug sellers and drug dealers. WPIC 50.17, mirroring the language of RCW 69.50.410(1), defines selling for profit as follows: "To sell means to pass title and possession for a price whether or not the price is paid immediately or at a future date. Price means anything of value. For profit means the obtaining of anything of value in exchange for the controlled substance." It is not necessary that the seller actually make a profit; even a sell at a loss violates the statute. *State v. Leek*, 26 Wn.App. 651, 614 P.2d 209 (1980). Almost all deliveries involve the exchange of drugs for something of value, including but not limited to, money, goods, stolen property, house cleaning or landscaping services, or even sex. Therefore, the State has almost unfettered discretion to charge drug dealers either with delivery or sale for profit.

When the legislature passed the uniform controlled substances act in 1971, there were good reasons to charge defendants differently for the same conduct, one with sale for profit and the other with delivery. The prosecutor may have deemed the former defendant as more appropriate to a DSHS treatment facility and the latter defendant more appropriate to a DOC correction center. But subsequent developments have made that decision meaningless: the DSHS treatment facility was never funded and

in *Cyr* this Court held sentencing for both offenses must be pursuant to the SRA. As a result, the principled discretion contemplated in 1971 has been replaced by arbitrary and capricious prosecutors.

It is worth noting that the choice between rehabilitative treatment and punitive sanctions, as it existed in 1971, has been replaced within the framework of the SRA. Currently, the SRA has two versions of the Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660-.664. DOSA is designed to identity and treat offenders who have a drug addiction. RCW 9.94A.660(5). Those with longer sentences are sentenced to a prison-based DOSA in a "state facility." RCW 9,94A.662(1)(a). Those with shorter sentences receive treatment in a "residential chemical dependency treatment facility certified under chapter 70.96A RCW for a period set by the court between three and six months." RCW 9.94A.664(1). Currently, American Behavior Health Systems (ABHS) has the residential DOSA contract and runs full time treatment facilities in Chehalis and Spokane. ABHS also provides treatment for other individuals, including federal offenders.

The arbitrary and capricious application of the statute is amply demonstrated by Ms. Peterson's case. As noted in Ms. Peterson's Response to Petition for Review, although a total of 1162 people were convicted of drug dealing in the State of Washington in 2018, all but three

of them were convicted of delivery of a controlled substance in violation of RCW 69.50.401. The three exceptions were Ms. Peterson, Mr. Cyr, and one other unidentified person. Therefore, 99.74% of all drug dealers in 2018 were sentenced as Level II drug offenders. RCW 9.94A.517. The year 2018 is not unique. Out of the 48,892 people who received prison sentences for drug convictions between 1999 and 2019, only 17 convictions[1] were for selling for profit.[2] In eleven of those years of (1999, 2001, 2002, 2003, 2005, 2012-2016, and 2019), there were no convictions for selling for profit. Therefore, 99.965% of all drug offenders sentenced to prison for a drug offense are convicted of an offense other than selling for profit. For defendants like Mr. Cyr and Ms. Peterson with an offender score of between 3 and 5, instead of being sentenced to between 20+ and 60 months for delivery, they were sentenced with a standard range of 68+ to 100 months. It is possible this disparately punitive charging choice influenced the trial court's decision to sentence her to 24 months rather than the requested 68 to 100 months.

There is no basis in this record to explain the decision of the Lewis County Prosecutor's Office to single out Ms. Peterson. Instead of treating

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[1] This number includes the one conviction in 2004 where the defendant received a mitigated exceptional of less than one month in jail.

[2] http://www.cfc.wa.gov/Publications.htm

her like almost every other drug dealer in the state, the State chose to charge her with a Level III drug offense, believing she would receive a much more draconian sentence. The probable cause statement in this case reflects that this was a run-o-the-mill drug delivery. Ms. Peterson was the subject of a routine controlled buy with a confidential informant. CP, 4-5. In fact, the original information charged her with drug delivery. CP, 1. Neither the quantity nor price of the drugs appear in the record.

One of the purposes of the SRA is to impose sentences "commensurate with the punishment imposed on others committing similar offenses." RCW 9.94A.010(3). There is nothing about the facts of Ms. Peterson's case that justifies sentencing her for a Level III drug offense over a Level II drug offense. Her criminal history is unremarkable except insofar as it demonstrates she has a problem staying away from drugs.[3] Allowing RCW 69.50.410 to stand absent the sentencing provisions that imbue it with a just purpose in fact violates the spirit of the SRA.

The rarely use common law doctrine of desuetude recognizes a statute should not be enforced when it has fallen into disuse. *State v. Johnstone*, 96 Wn.App. 839, 982 P.2d 119 (1999). The rationale of the

[3] Ms. Peterson was convicted in 2012 of two counts of drug possession and one count of residential burglary stemming from two arrests. CP, 51-52.

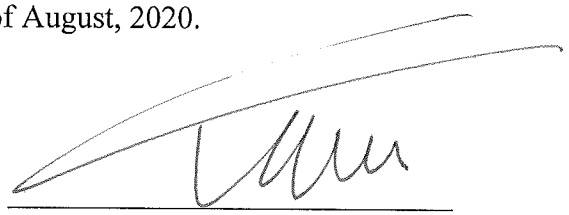
doctrine is that a law prohibiting some act that has not given rise to real prosecution for a substantial number of years is unfair to one person selectively prosecuted under it. *Committee on Legal Ethics v. Printz*, 187 W.Va. 182, 416 S.E.2d 720 (1992). While selling for profit has not fallen into complete disuse, the fact that prosecutors choose instead to prosecute delivery of a controlled substance over 99.96% of the time is indicative that the statute is disfavored.

The provisions of RCW 60.50.410 that this Court rendered null in *Cyr* are not grammatically, functionally, and volitionally severable from the rest of the statute. In 2016, the legislature decodified the severability statute of the uniform controlled substances act. Given this Court's interpretation of the statute, this Court should find that the sentencing provisions of the statute are not severable from the rest of the statute.

C. Conclusion

This Court should find that RCW 69.50.410 is not severable, vacate Ms. Peterson's judgment and sentence, and remand to the trial court for further proceedings.

DATED this 4th day of August, 2020.



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

STATE OF WASHINGTON, Respondent, vs. JERRY L. PETERSON, Defendant.	Court of Appeals No.: 52183-1-II DECLARATION OF SERVICE OF SUPPLEMENTAL BRIEF OF RESPONDENT

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On August 4, 2020, I e-filed the Supplemental Brief of Respondent in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent to the Lewis County Deputy Prosecuting Attorney Sara I Beigh via email to: sara.beigh@lewiscountywa.gov through the Court of Appeals transmittal system.

On August 4, 2020, I deposited into the U.S. Mail, first class, postage prepaid, a true and correct copy of the Supplemental Brief of Respondent to the defendant/respondent:

Jerry L. Peterson
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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.

DATED: August 4, 2020, at Bremerton, Washington.

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