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STATE OF WASHINGTON
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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

(Court of Appeals No. 52183-1-II)

STATE OF WASHINGTON,

Petitioner,

vs.

JERRY L. PETERSON,

Respondent.

PETITION FOR REVIEW

On review from the Court of Appeals, Division Two,
And the Superior Court of Lewis County

JONATHAN MEYER
Lewis County Prosecuting Attorney



By:

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A. IDENTITY OF PETITIONER

Petitioner State of Washington was the Appellant in the Court of Appeals.

B. COURT OF APPEALS DECISION

The Petitioner seeks review of the published opinion in *State v. Jerry L. Peterson*, Court of Appeals, Division II, cause number 52183-I-II, filed February 5, 2020. A copy of the opinion is attached hereto as Appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals error when it determined the two year sentence mandated in RCW 69.50.410(3)(a) was a mandatory sentence and not a mandatory minimum sentence?

2. Did the Court of Appeals error when it applied RCW 9.94A.505(2)(a)(i) inconsistent with its own decision in *State v. Cyr*, 8 Wn. App. 2d 834, 441 P.3d 1238 (2019), and determined the provision required the Court to read the two-year mandatory minimum as “another term of confinement” rather than the 5 year maximum sentence allowed in RCW 69.50.410(1)?

D. STATEMENT OF THE CASE

Jerry Peterson sold heroin to a confidential informant. CP 4-5. Peterson ultimately pleaded guilty to Count I: Sale of a Controlled Substance for Profit – Heroin, and Count II: Possession of a Controlled Substance – Heroin. 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 State and Peterson were not in agreement regarding the proper sentence, in particular what statutes controlled and the sentencing range. CP 6-10, 26-49. Peterson's position was her sentence should be two years. CP 6-10. Peterson cited RCW 69.50.410(3)(a) as the specific statute controlling her sentence. *Id.* The State position was the Sentencing Reform Act (SRA), not RCW 69.50.410, controlled the standard range sentence. 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 appealed the trial court's rulings regarding Peterson's standard range and the Judgment and Sentence. CP 60-71; *State v. Peterson*, COA No. 52183-1-II (Appendix A). The Court of Appeals affirmed the trial court, finding the trial court properly sentenced Peterson to two years due to RCW 69.50.410(3)(a) requiring a mandatory two-year sentence for first offenses for Selling Heroin for Profit. *Peterson*, COA No. 52183-1-II, Slip. Op. at 4-5. The Court of Appeals also declined to address Peterson's standard range. *Id.* at 5.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The legislature carries out the will of the people by enacting laws to further public policy goals. The public has a substantial interest in having the criminal penalties enacted by the legislature interpreted uniformly by the courts. RAP 13.4(b)(4). The Court of Appeals failed to read the entirety of RCW 69.50.410. This failure led to an overemphasis of subsection (3)(a) instead of reading the section in context within the entire statute. RCW 69.50.410. If the Court of Appeals had read the entire statute it would have come to conclusion the legislature had intended, requiring the provision in (3)(a) to be a two-year mandatory minimum. *Id.*

The published Court of Appeals' decision in this case is in conflict with Division Two's own case, *State v. Cyr*, 8 Wn. App. 2d 834. *Cyr* was decided in May 2019. *Id.* The Court of Appeals determined offenders convicted of Selling Heroin for Profit were to be sentenced pursuant to the provisions of the SRA. *Id.* *Cyr* has been accepted for this Court for review.¹ *State v. Cyr*, 194 Wn.2d 1001 (2019). RAP 13.4(b)(2).

This Court should determine the mandatory two-year sentence required in RCW 69.50.410(3)(a) is a mandatory

¹ The oral argument for *State v. Cyr*, is February 25, 2020.

minimum sentence. This Court should also find, as Division Two did in *Cyr*, that the Sentencing Reform Act does apply to the Sale of Heroin for Profit and a person convicted should be sentenced pursuant to the standard range.

1. The Two Year Sentence Required For A Conviction For A First Offense Of Selling Heroin For Profit, RCW 69.50.410(3)(a), Is A Mandatory Minimum Sentence.

A person who is convicted of Selling a Controlled Substance for Profit, RCW 69.50.410 is convicted of a Class C felony offense. A first conviction of Selling a Controlled Substance for Profit, per subsection (1), shall be punished by a sentence of not more than five years. RCW 69.50.410(2)(a). A person who sells heroin for profit is subject to mandatory minimum sentences, two years for a first offense and 10 years for a second offense. RCW 69.50.410(3)(a)(b).

Any person convicted of a violation of subsection (1) of this section by selling heroin shall receive a mandatory sentence of two years in a correctional facility...and no judge or of any court shall suspend or defer the sentence imposed for such a violation.

RCW 69.50.410(3)(a).

Selling a Controlled Substance for Profit was enacted in 1973, prior to Sentencing Reform Act and when the courts still employed indeterminate sentencing. Laws of 1973, 2nd Ex. Sess.,

ch. 2, § 2;² Laws of 1981, ch. 137.³ Most, if not all, of the statutes originally enacted in the Uniformed Controlled Substances Act contain some sort of sentencing structure. See, Laws of 1971, ch. 308, §§ 69.50.401, 69.50.402, 69.50.403.⁴ Therefore, in order to effectuate the desire to have a mandatory sentence that could not be reduced for selling heroin for profit, the legislature passed RCW 69.50.410.

Since 1973, the legislature had made it clear that the two-year sentence is a mandatory minimum with the amendment in 1999, adding subsection (4): “[w]hether or not a mandatory minimum term has expired, an offender serving a sentence under this section may be granted an extraordinary medical placement when authorized under *RCW 9.94A.728(4).” RCW 69.50.410; Laws of 1999, ch. 324, § 6.⁵ The legislature would not have added a specific provision allowing for the release of an offender who has

² Laws of 1973, 2nd Ex. Sess., ch. 2, is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1973ex2c2.pdf> (last visited 2/23/20).

³ Laws of 1981, ch. 137 is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1981c137.pdf> (last visited 2/23/20).

⁴ Laws of 1971, Ex. Sess., ch. 308, is available on the Code Reviser’s website at <http://leg.wa.gov/CodeReviser/documents/sessionlaw/1971ex1c308.pdf> (last visited 2/23/20).

⁵ Laws of 1999, ch. 324, is available on the Code Reviser’s website at <http://lawfilesexst.leg.wa.gov/biennium/1999-00/Pdf/Bills/Session%20Laws/House/1299.sl.pdf> (last visited 2/23/20).

been sentenced to a mandatory minimum sentence under this section, if such a sentence did not exist.

The Court of Appeals ignored the plain language of RCW 69.50.410 when it determined subsection (3)(a) was a mandatory sentence of two years, rather than a mandatory minimum sentence of two years. *Peterson*, COA Slip Op. at 3-5. The Court of Appeals also incorrectly applied the rule of lenity when the statute was not ambiguous. *Id.* at 4-5.

The Court of Appeals failed to read and give meaning to RCW 69.50.410 in its entirety. It ignored subsection (4), as stated above, and it failed to address the five year maximum stated in subsection (2)(a). This failure led the Court of Appeals to incorrectly conclude the two-year mandatory sentence was not a mandatory minimum sentence, but rather the only sentence the trial court could impose. *Peterson*, COA Slip Op. at 4-5. The Court of Appeals failure to correctly interpret the criminal penalties in a statute, in particular that a statute has a mandatory-minimum penalty rather than simply a mandatory penalty, is of substantial public interest and should be reviewed by this Court. RAP 13.4(b)(4).

2. The Court Of Appeals Opinion In This Case Conflicts With Its Own Recent Opinion Interpreting The Same Statute, RCW 69.50.410.

The Court of Appeals found the two-year mandatory minimum was a mandatory sentence, not a minimum sentence, and refused to determine what Peterson's standard range would be in regards to the Sentencing Reform Act. *Peterson*, COA Slip Op. at 4-5. The Court of Appeals cited to *Cyr* for the historical background regarding the enactment of the SRA and the calculation of sentencing ranges from the sentencing grid. *Peterson*, COA Slip Op. at 3, *citing Cyr*, 8 Wn. App. 2d at 837. Yet, the Court of Appeals failed to follow its opinion in *Cyr*, as the facts were analogous to Peterson's case. *Cyr* was convicted of Selling Heroin for Profit, had a prior conviction under Chapter 69.50, and therefore his maximum authorized sentence was doubled. *Cyr*, 8 Wn. App. 2d at 836-41. Division Two found once *Cyr*'s maximum sentence was doubled, his standard range, 68+ to 100 months was the standard range sentence the trial court had the discretion to sentence *Cyr* within, not the five years found in RCW 69.50.410(2)(a). *Cyr*, 8 Wn. App. 2d at 842-43.

Peterson, similar to *Cyr*, was convicted of Selling Heroin for Profit, had a prior conviction under Chapter 69.50, and therefore

her standard range should have been 68+ to 100 months. CP 6, 14, 25, 52.⁶ Yet, the Court of Appeals ignored its decision in *Cyr* and determined the two-year mandatory minimum argued in Peterson's case required a different result. This inconsistency requires this Court to review Peterson's case. RAP 13.4(b)(2).⁷

F. CONCLUSION

This Court should accept review and hold the two-year mandatory provision in RCW 69.50.410(3)(a) is a mandatory minimum sentence. This Court should also determine the standard range from the SRA is the applicable sentencing range Peterson should be sentenced within. Therefore, Peterson's matter must be remanded back to the sentencing court for resentencing within the standard range.

RESPECTFULLY submitted this 24th day of February, 2020.

JONATHAN MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

⁶ Peterson never contested her maximum sentence was 10 years due to the doubling provision, RCW 69.50.408.

⁷ The State will be filing a separate motion to stay this petition until this Court has issued an opinion on *State v. Cyr*, Supreme Court No. 97323-7, as the decision could be dispositive to this petition.

Appendix A

State v. Peterson, COA No. 52183-1-II

Published Decision (February 5, 2020)

February 5, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Appellant,

v.

JERRY L. PETERSON,

Respondent.

No. 52183-1-II

PUBLISHED OPINION

MELNICK, J. — Jerry Lynn Peterson pled guilty to selling heroin for profit.¹ RCW 69.50.410(3)(a), part of the Uniform Controlled Substances Act (UCSA), states that people convicted of selling heroin for profit “shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services and no judge of any court shall suspend or defer the sentence imposed for such violation.” Accordingly, the trial court sentenced Peterson to 24 months under this statute and not pursuant to the standard range directed by the Sentencing Reform Act of 1981, chapter 9.94A RCW, (SRA). The State appeals, arguing that the court should have sentenced Peterson pursuant to the SRA. We affirm Peterson’s sentence.

FACTS

After law enforcement conducted several controlled buys from Peterson, she pled guilty to selling heroin for profit in violation of RCW 69.50.410(1).

¹ Peterson also pled guilty to possession of heroin but no appeal issues relate to that conviction or its sentence.

Peterson stipulated to an offender score of four and a criminal history that included two prior possession of a controlled substance convictions. She agreed that her standard range sentence for the selling for profit conviction would be argued at sentencing and that it was either “68+ to 100 months” or “2 years exactly.” Clerk’s Papers (CP) at 14. She also agreed that the selling for profit conviction had a maximum sentence of “10 years/\$20,000 (Doubled from Class C Felony).” CP at 14.

At sentencing, the State argued that the SRA controlled and Peterson had a standard sentencing range of 68+ to 100 months. The State recommended a 75-month term of confinement on the selling for profit conviction. Peterson argued that under RCW 69.50.401(3)(a), she had to be sentenced to two years.

The sentencing court agreed with Peterson and sentenced her to 24 months on the selling for profit conviction. The court stated, “I think the specific statute controls on this for selling of heroin, the specific charge here, that’s specifically listed in the statute under [RCW] 69.50.410(3)(a).” Report of Proceedings (June 13, 2018) at 15. The State appeals.

ANALYSIS

The State contends that the sentencing court erred in sentencing Peterson to only 24 months for the selling for profit conviction because Peterson’s standard range sentence under the SRA was 68+ to 100 months. We conclude that the court properly sentenced Peterson.

I. STANDARD OF REVIEW AND LEGAL PRINCIPLES

Deciding the application of the SRA and the UCSA on Peterson’s sentence is a matter of statutory interpretation, which we review de novo. *State v. Evans*, 177 Wn.2d 186, 191, 298 P.3d 724 (2013). When possible, we find the legislature’s intent “solely from the plain language” of the statute, “considering the text of the provision . . . , the context of the statute in which the

provision is found, related provisions, and the statutory scheme as a whole.” *Evans*, 177 Wn.2d at 192.

In 1971, the legislature enacted the UCSA which made it a crime to manufacture, deliver, or possess controlled substances. *State v. Christman*, 160 Wn. App. 741, 750, 249 P.3d 680 (2011); RCW 69.50.401-.412. In 1981, the legislature enacted the SRA, which “contains sentencing grids that calculate a sentence range for offenders according to their offender score and the ‘seriousness level’ of their offense.” *State v. Cyr*, 8 Wn. App. 2d 834, 837, 441 P.3d 1238 (quoting RCW 9.94A.510, .517), *review granted*, 194 Wn.2d 1001 (2019). “The UCSA delineates offenses and establishes maximum penalties, but does not set out determinate sentence ranges, which are provided for in the Sentencing Reform Act of 1981 (SRA).” *State v. Silva-Baltazar*, 125 Wn.2d 472, 476, 886 P.2d 138 (1994).

Under the SRA, drug offenders are sentenced according to the “seriousness level” attributable to their crime and their offender score. RCW 9.94A.517. Selling heroin for profit has a seriousness level of three. RCW 9.94A.518. For Peterson, who had an offender score of four, the standard range would be 68+ to 100 months. RCW 9.94A.517.

Under the USCA, RCW 69.50.410(3)(a) states that “[a]ny person convicted of . . . selling heroin shall receive a mandatory sentence of two years in a correctional facility of the department of social and health services^[2] and no judge of any court shall suspend or defer the sentence imposed for such violation.”

² We note that the portion of the statute relating to the Department of Social and Health Services is no longer relevant as correctional facilities are operated by the Department of Corrections. RCW 72.09.050.

II. PETERSON’S SENTENCE

The State argues that the sentencing court should have sentenced Peterson using the sentencing grid in the SRA, RCW 9.94A.517, instead of the penalties section under the UCSA, RCW 69.50.410(3)(a), which mandated a two-year sentence.

The issue here is gleaning the legislature’s intent. The penalty language that the court relied on predates the SRA; however, the statute has been amended several times, the latest time being 2003.³

On the other hand, the SRA governs sentencing for all felonies committed after June 30, 1984. RCW 9.94A.905. “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 specifically refers to selling heroin for profit in the table of seriousness levels and assigns it a seriousness level of three. RCW 9.94A.518.

However, RCW 9.94A.505 contains an exception to the general rule that the SRA applies to all felonies committed after June 30, 1984. RCW 9.94A.505(2)(a)(i) states that the trial court must apply the sentencing grids “[u]nless another term of confinement applies.” We reconcile RCW 9.94A.505(1) and RCW 69.50.410(3)(a) by concluding that the provision of RCW 69.50.410(3)(a) that directs offenders to receive a mandatory sentence of two years for selling heroin for profit constitutes “another term of confinement” under RCW 9.94A.505(2)(a)(i). Accordingly, RCW 69.50.410(3)(a), which calls for a mandatory two-year sentence, controls.

Additionally, the rule of lenity weighs in favor of a 24-month sentence. In general, the rule of lenity applies when a sentencing statute is ambiguous. *State v. Barbee*, 187 Wn.2d 375, 383, 386 P.3d 729 (2017). The court will then construe any ambiguity in favor of the defendant.

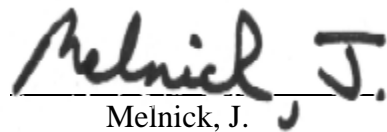
³ LAWS OF 2003, ch. 53, § 342.

Barbee, 187 Wn.2d at 383. While the relevant statutes here are unambiguous, they do create a sentencing ambiguity. In such case, we rule in favor of Peterson.

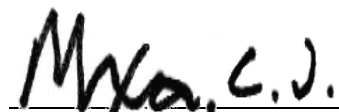
Lastly, we recognize there are other tangential issues regarding the dichotomy between the SRA and the UCSA that arose in the briefing and at oral argument. We want to make it clear that we are solely deciding Peterson's sentence. We are not addressing the other issues including what is Peterson's standard range; whether the sentencing court has discretion to impose an exceptional sentence; and whether Peterson would receive a mandatory ten-year sentence if she committed a second offense of selling heroin for profit under RCW 69.50.410(3)(b).⁴ These issues are reserved for cases involving specific facts that squarely present them.⁵

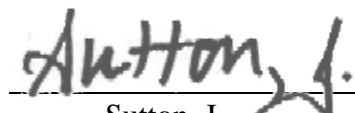
III. CONCLUSION

Under RCW 69.50.410(3)(a), the court properly sentenced Peterson to two years in a correctional facility. We affirm.


Melnick, J.

We concur:


Maxa, C.J.


Sutton, J.

⁴ While Peterson argues in her response brief that her maximum sentence did not double to ten years, she failed to file a notice of cross review to preserve this issue for appeal. *See* RAP 5.1(d).

⁵ We note that some of these issues may be addressed by the Supreme Court in *Cyr*.

LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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