IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID ARLIN TAYES, Appellant.	No. 38662-3-II UNPUBLISHED OPINION

Worswick, J. — David Tayes appeals his sentence for first degree manslaughter, arguing that the trial court erred in sentencing him to life without the possibility of parole as a persistent offender and for entering findings of fact and conclusions of law, but no judgment and sentence, on his first degree assault conviction. We affirm.

FACTS

On January 26, 1979, Tayes pleaded guilty to third degree rape.[1] On October 18, 1982, he was released on parole, which the trial court revoked on June 6, 1984. He was again released on October 5, 1984. On June 24, 1986, he committed second degree assault and unlawful imprisonment and was subsequently charged and convicted of those crimes. He was released from incarceration in 1988. On May 31, 1996, the State charged him by information with second degree murder and second degree felony murder in the alternative, predicated on assault, relating

[1] Because the issues raised by Tayes in his appeal all relate to sentencing and other procedural matters, the underlying facts of his criminal conduct are omitted here.

to the death of his sister. The jury found him guilty of second degree murder. At sentencing on the murder conviction, the trial court found him to be a persistent offender and imposed a life without parole prison term under former RCW 9.94A.120(4) (1996).

In July 2007, the trial court vacated Tayes's murder conviction pursuant to our Supreme Court's decisions in *In re Personal Restraint of Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002) and *In re Personal Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004), which held felony murder convictions to be invalid when the underlying felony was an assault.

The State then charged Tayes by amended information on October 19, 2007, with second degree murder and first degree assault. The trial court held a bench trial and found him guilty of the lesser included offense of first degree manslaughter and first degree assault. The trial court sentenced him to life in prison as a persistent offender. As part of its judgment and sentence, the trial court included only the manslaughter conviction, not the assault, so as to not violate double jeopardy. But the trial court entered findings of fact and conclusions of law for both. Tayes appeals.

ANALYSIS

Sentencing

Tayes first contends that the trial court erred in counting his 1979 third degree rape conviction as a most serious offense because the conviction was not a sex offense as defined under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW, and because the conviction had washed out.

We review statutory construction questions de novo. *State v. Wentz*, 149 Wn.2d 342,

346, 68 P.3d 282 (2003). We look to the statute's plain language in order to give effect to legislative intent. *Wentz*, 149 Wn.2d at 346. We will not engage in judicial interpretation of an unambiguous statute. *State v. Thorne*, 129 Wn.2d 736, 762-63, 921 P.2d 514 (1996). A statute is ambiguous when the language is susceptible to more than one interpretation. *State v. Jacobs*, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005). In addition, the rule of lenity requires us to strictly construe an ambiguous criminal statute in favor of the accused. *State v. Lively*, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996).

Whenever possible, we must read statutes in harmony and must give each effect. *State v. Bays*, 90 Wn. App. 731, 735, 954 P.2d 301 (1998). We interpret statutes to give effect to all language in them and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We avoid a reading that produces absurd results because we do not presume that the legislature intended absurd results. *J.P.*, 149 Wn.2d at 450.

The SRA provides for life sentences for repeat or persistent offenders. Former RCW 9.94A.120(4). At the time of Tayes's criminal conduct in 1996, the SRA defined "persistent offender" as someone who

> (a)(i) Has been convicted in this state of any felony considered a most serious offense; and
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> (ii) Has, before the commission of the offense under (a) of this subsection, been convicted as an offender on at least two separate occasions, whether in this state or elsewhere, of felonies that under the laws of this state would be considered most serious offenses and would be included in the offender score under RCW 9.94A.360; provided that of the two or more previous convictions, at least one conviction must have occurred before the commission of any of the other most serious offenses for which the offender was previously convicted.

Former RCW 9.94A.030(27) (1996). The SRA's list of most serious offenses at the time also

included "[a]ssault in the second degree" and "[r]ape in the third degree." Former RCW 9.94A.030(23)(b), (n). And the SRA defined "sex offense" as

> (a) A felony that is a violation of: Chapter 9A.44 RCW or RCW 94.64.020 or RCW 9.68A.090 or a felony that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes;
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> (b) A felony with a finding of sexual motivation under RCW 9.94A.127 or 13.40.135; or
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> (c) Any federal or out-of-state conviction of an offense that under the laws of this state would be a felony classified as a sex offense under (a) of this subsection.

Former RCW 9.94A.030(33).

Tayes first argues that his 1979 conviction for third degree rape in violation of former RCW 9.79.190(1)(a) (1977) should not have counted toward the trial court's persistent offender determination because it was not a felony in violation of chapter 9A.44 RCW, sex offenses. This argument lacks merit, however, because former RCW 9.94A.030(23) specifically defined "most serious offense" to include third degree rape. And while the SRA does not reference RCW 9.79.190 directly, this is only because the legislature recodified the statutory language, making it a part of chapter 9A.44 RCW. Laws of 1979, 1st Ex. Sess., ch. 244, §§ 17-19. Interpreting the legislature's statute recodification to cause a prior rape conviction to be excluded from the persistent offender calculation would lead to an absurd result and is an argument that lacks sufficient authority.

Tayes also argues that his 1979 rape conviction "washed out" because he was not convicted of any felonies between his 1986 second degree assault conviction and his 1996 felony murder conviction. In 1990, the legislature amended the SRA to require sentencing courts to

include "washed out" sex convictions when calculating defendants' offender scores. Laws of 1990, ch. 3, § 706. Before 1990, class C felonies, including third degree rape, "washed out" after 5 years. Former RCW 9.94A.360(2) (1986).

This argument is also without merit. Sentencing courts look to the law in effect at the time the defendant committed the current offense. *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). The 1990 amendment was in effect when Tayes committed the present offense in 1996, and provides that his 1979 sex offense must be included in his offender score. Moreover, Tayes was not released from custody until 1988, two years prior to the 1990 amendment enactment. Because Tayes's 1979 offense did not wash out before the legislature enacted the 1990 amendment, his argument fails.

Double Jeopardy

Tayes, citing *State v. Womac*, 160 Wn.2d 643, 160 P.3d 40 (2007), contends that the trial court erred in entering findings of fact and conclusions of law for the first degree assault conviction rather than vacating the conviction, which violated his right against double jeopardy. The ultimate issue here is whether entering findings of fact and conclusions of law, but no judgment and sentence, in the event that the sentenced crime is vacated, violates double jeopardy.

Article I, section 9 of the Washington State Constitution provides the same protection against double jeopardy as the Fifth Amendment to the federal constitution. *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 815, 100 P.3d 291 (2004). Both the state and federal double jeopardy clauses protect against multiple punishments for the same offense, as well as against a subsequent prosecution for the same offense after acquittal or conviction. *Orange*, 152 Wn.2d at

815. Where a defendant's act supports charges under two criminal statutes, a court weighing a double jeopardy challenge must determine whether, in light of legislative intent, the charged crimes constitute the same offense. *Orange*, 152 Wn.2d at 815. We review questions of law de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

In *Womac*, the defendant was charged and convicted of homicide by abuse (count I), second degree felony murder (count II), and first degree assault for the death of his four-month-old son (count III). 160 Wn.2d at 647. The trial court entered judgment on all counts but imposed an exceptional sentence on count I only. *Womac*, 160 Wn.2d at 647. The trial court denied Womac's motion to dismiss counts II and III and left both on his record but, to avoid violating double jeopardy provisions, did not impose sentences on either count. *Womac*, 160 Wn.2d at 647. We affirmed the conviction on count I but remanded for resentencing within the standard range on that count. *Womac*, 130 Wn. App. 450, 452, 123 P.3d 528 (2005). Additionally, we directed the trial court to conditionally dismiss counts II and III, allowing for reinstatement should count I later be reversed, vacated, or set aside. *Womac*, 130 Wn. App. at 452.

Our Supreme Court ultimately affirmed our remand for resentencing on count I, but reversed the order conditionally dismissing counts II and III, noting that Womac remained exposed to danger as three separate convictions (arising from a single offense) remained on his record even after the trial court determined that sentencing on all three counts would violate double jeopardy. *Womac*, 160 Wn.2d at 650. The court specifically noted that Womac's convictions, for example, would count in his offender score should he be charged with another

crime in the future and that the presence of multiple convictions on one's record may impact parole eligibility, may be used to impeach the defendant's credibility, and carries the social stigma accompanying any criminal conviction. *Womac*, 160 Wn.2d at 656-57.

We recently considered similar sentencing issues post-*Womac* in *State v. Turner*, 144 Wn. App. 279, 182 P.3d 478, *review granted*, 165 Wn.2d 1002 (2008) and *State v. Faagata*, 147 Wn. App. 236, 193 P.3d 1132 (2008), *review granted*, 165 Wn.2d 1041 (2009).[2] In *Turner*, we held that a trial court must only vacate a charge on double jeopardy grounds that it has reduced to judgment. 144 Wn. App. at 281-82. And in *Faagata*, we also held that first degree murder and second degree felony murder convictions did not violate double jeopardy because the judgment and sentence was silent as to the second degree felony murder conviction. 147 Wn. App. at 250-51.

Tayes fails to demonstrate how entering findings of fact and conclusions of law, but no judgment and sentence, violates double jeopardy, particularly in light of *Womac*, *Turner*, and *Faagata*. Because the trial court did not reduce his first degree assault conviction to judgment, his argument fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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[2] Our Supreme Court accepted review of both *Turner* and *Faagata*. Oral argument was held on January 21, 2010, on the consolidated appeal and a decision was pending at the time of this opinion's filing.

Worswick, J.

We concur:

Penoyar, C.J.

Sweeney, J.