IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. VINH QUANG LAM, Appellant.	))))))))))	No. 64973-6-I DIVISION ONE UNPUBLISHED FILED: June 21, 2010

Cox, J. — Upon any resentencing following an appeal, prior convictions that were not included in the criminal history in a prior sentencing shall be included in the resentencing.[1] Here, Vinh Quang Lam argues that the judge who resentenced him following his first appeal improperly included two prior convictions in his criminal history. These convictions were not included at the time Lam was originally sentenced. Because RCW 9.94A.525(21) directs that prior convictions that were not included in the criminal history in a previous sentencing shall be included in any resentencing to ensure imposition of an accurate sentence, we disagree. We affirm.

In December 2006, the State charged Lam with crimes based on an incident that occurred that month. Count I was a possession of a stolen firearm

[1] RCW 9.94A.525(21).

charge. Count II was an unlawful possession of a firearm in the second degree charge. Count III was a charge for possessing stolen property in the first degree. Count IV was a charge for attempting to elude a pursuing police vehicle. Count V was for driving while in a suspended or revoked status in the second degree. Counts III and IV each included an allegation seeking a firearm sentence enhancement.

A jury found Lam not guilty on Count I, but guilty of all other counts, including the firearm allegations. The trial court sentenced Lam in July 2007. That judgment and sentence shows 10 prior convictions in Lam's criminal history, two of which the court did not include for sentencing purposes. It appears that the court did not include these two crimes because the documentation the State provided did not show that the crimes were for taking a motor vehicle without permission. Thus, that sentence was based on an offender score of eight, and the court sentenced Lam to a total of 111 months of total confinement.

Lam appealed. In an unpublished decision, the court vacated his conviction for second degree unlawful possession of a firearm for reasons not pertinent to this appeal. The opinion concluded by stating, "[W]e vacate [Lam's] conviction for second degree unlawful possession of a firearm and remand."[2]

On remand, the State elected to dismiss only the unlawful possession of a firearm count. At resentencing in March 2009, the parties disputed whether the State should be allowed to present additional evidence to prove the two prior

[2] Clerk's Papers at 172.

convictions for taking a motor vehicle without permission that were not included in the criminal history at the July 2007 sentencing. The trial court permitted the State to introduce evidence to prove these two convictions. Based on its finding that the State had proved these convictions by a preponderance of the evidence, the court included these two convictions in Lam's criminal history. This resulted in an offender score of eight. Based on that offender score, the court sentenced Lam to a total of 97 months of total confinement.

Lam appeals.

CRIMINAL HISTORY UPON RESENTENCING

Lam first argues that the sentencing statute that was in effect at the time of his resentencing, RCW 9.94A.525(21),[3] does not apply to this case. He bases this argument on the fact that his prior successful appeal required resentencing because one of his convictions was reversed. According to Lam, the 2008 amendments to this statute are limited to the circumstances of certain cases cited in the legislature's statement of intent that is included in the session law. We hold that the plain language of the statute controls disposition of this case.

"The court's fundamental objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent."[4] The meaning of a statute is a question of law reviewed de novo.[5]

---

[3] As amended by Laws of 2008, ch. 231, § 3, effective June 12, 2008.

[4] Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002).

RCW 9.94A.525(21), as amended in 2008, provides:

> The fact that a prior conviction was not included in an offender's offender score or criminal history at a previous sentencing shall have no bearing on whether it is included in the criminal history or offender score for the current offense. Prior convictions that were not counted in the offender score or included in criminal history under repealed or previous versions of the sentencing reform act shall be included in criminal history and shall count in the offender score if the current version of the sentencing reform act requires including or counting those convictions. *Prior convictions that were not included in criminal history or in the offender score* ***shall*** *be included upon* ***any*** *resentencing to ensure imposition of an accurate sentence*.[6]

The legislature added the last sentence to this statute in 2008.[7] The legislature also expressly stated that the amended statute applies "to ***all*** sentencings and ***resentencings*** commenced before, on, or ***after***" June 12, 2008.[8]

The language of the statute and the statement of its effective date support the conclusion that the trial court properly permitted the State to present evidence at Lam's March 2009 resentencing of the two prior convictions that were not included in his criminal history at the July 2007 sentencing. Lam does not argue that the language of the statute is ambiguous. Moreover, he does not dispute that he was convicted of the two crimes the court included in his March 2009 offender score. Rather, he claims that because his resentencing was due to reversal of a conviction, the statute does not apply to him.

He is mistaken for at least three reasons. First, the word "shall" in the last

---

[5] Id. at 9.
[6] (Emphasis added.)
[7] Laws of 2008, ch. 231, § 3.
[8] Laws of 2008, ch. 231, § 5 (emphasis added).

sentence of the statute indicates a legislative command, not a discretionary determination to be made by the courts.[9] Second, the word "any," which appears in the last sentence of the statute, has, as this court has noted, "multiple, conflicting definitions, including (1) one; (2) one, some, or all regardless of quantity; (3) great, unmeasured, or unlimited in amount; (4) one or more; and (5) all."[1] Nevertheless, as our supreme court recently stated when considering the meaning of "any" in the context of another statute, the most expansive definition of the word is most consistent with that court's construction of the word in a variety of contexts.[11] Washington courts have repeatedly construed "any" as including "every" and all."[12]

Third, the session laws for the 2008 amendments to the statute make clear by the use of the words "all" and "resentencings" in the statement of the effective date of the amendments that the statute was intended to apply to

---

[9] Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993) ("The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent.").

[1] State v. Sutherby, 165 Wn.2d 870, 880, 204 P.3d 916 (2009) (citing State v. Sutherby, 138 Wn. App. 609, 614, 158 P.3d 91 (2007) (citing Webster's Third New International Dictionary 97 (1976))).

[11] Id. at 880-83 (In determining unit of prosecution for possession of child pornography, the court noted its repeated construction of "any" as including "every" and "all." The court held that the proper unit of prosecution under statutory scheme prohibiting possession of "any photograph or other material" was one count per possession, without regard to the number of images comprising such possession or the number of minors depicted in the images possessed.) (citing Rosenoff v. Cross, 95 Wash. 525, 164 P. 236 (1917) ("any" had broad and inclusive connotation in statutory requirements for applications for shipments by druggists) and State v. Smith, 117 Wn.2d 263, 814 P.2d 652 (1991) (where statutory provision allowed "[a]ny party in interest" to move for revision of juvenile court commissioner's ruling, every party entitled to so move)) (other citations omitted).

[12] Id. at 882.

resentencings "commenced before, on, or after" June 12, 2008.[13] This March 2009 resentencing was commenced after that date. There simply is no question that this statement of legislative intent requires this statute to be applied to Lam's resentencing. In sum, there is nothing in the words of the statute to indicate a legislative intent to bar applying it to Lam.

Lam argues that a statement of legislative intent that accompanies the 2008 amendment mentions certain supreme court cases, and that the statute should only apply to the circumstances of those cases. Specifically, he argues "the 2008 amendment to the SRA was meant to address a particular situation: one where the defendant appeals his sentence or offender score and the appellate court remands for resentencing."[14] Because "the need to resentence Lam does not arise from a defect in his offender score, but instead because one of his convictions was reversed," he argues that the amendment to the statute should not apply to him.[15] This argument is not persuasive.

The provision on which Lam relies states in relevant part:

> It is the legislature's intent to ensure that offenders receive accurate sentences that are based on their actual, complete criminal history. Accurate sentences further the sentencing reform act's goals of:
>
> (1) Ensuring that the punishment for a criminal offense is proportionate to the seriousness of the offense and the offender's criminal history;
>
> (2) Ensuring punishment that is just; and
>
> (3) Ensuring that sentences are commensurate with the

[13] Laws of 2008, ch. 231, § 5.
[14] Opening Brief of Appellant at 7.
[15] Id.

> punishment imposed on others for committing similar offenses.
>
> Given the decisions in In re Cadwallader, 155 Wn.2d 867 (2005); State v. Lopez, 147 Wn.2d 515 (2002); State v. Ford, 137 Wn.2d 472 (1999); and State v. McCorkle, 137 Wn.2d 490 (1999), the legislature finds it is necessary to amend the provisions in RCW 9.94A.500, 9.94A.525, and 9.94A.530 in order to ensure that sentences imposed accurately reflect the offender's actual, complete criminal history, whether imposed at sentencing or upon resentencing.[16]

The cases cited by the legislature generally held that, in certain circumstances, the State could not present new evidence to prove additional convictions after remand to correct sentencing errors.[17] Nothing in the above text expressly states that the statute is limited to the circumstances of the cited cases.

More importantly, reliance on this statement by the legislature to modify the plain words of the statute before us conflicts with established rules of statutory construction that the supreme court has long followed.[18] Here, the

---

[16] Laws of 2008, ch. 231, § 1.

[17] See In re Pers. Restraint of Cadwallader, 155 Wn.2d 867, 878, 123 P.3d 456 (2005) (defendant had no obligation to object and State was not allowed the remedy of an evidentiary hearing where State failed to allege a prior out-of-state conviction); State v. Lopez, 147 Wn.2d 515, 520-21, 55 P.3d 609 (2002) (where defendant raises a specific objection and the disputed issues have been fully argued to the sentencing court, reviewing court holds the State to the existing record on remand for resentencing); State v. Ford, 137 Wn.2d 472, 485-86, 973 P.2d 452 (1999) (where defendant did not put the court on notice as to apparent defects in State's classification of prior out-of-state convictions, remand for an evidentiary hearing to allow the State to prove the classification of disputed convictions was appropriate).

[18] See State v. Alvarez, 74 Wn. App. 250, 258, 872 P.2d 1123 (1994), aff'd, 128 Wn.2d 1, 904 P.2d 754 (1995) (While Washington courts have, at times, relied on a legislative intent statement for help in interpreting an otherwise ambiguous or vague statute, the cases cited by the appellant did "not permit reliance on a statement of legislative intent to override the unambiguous elements section of a penal statute or to add an element not found there."); see

language of the statute is unambiguous. The statement of legislative intent on which Lam relies can neither add to nor subtract from the legislative intent expressed by the plain words of this statute.

Lam next argues that the State waived its right to challenge Lam's offender score because it failed to challenge on cross-appeal the trial court's July 2007 ruling excluding the two prior convictions on the basis the State failed to prove them. But he cites no legal authority for this contention and we do not consider on appeal arguments that are not supported by citation to authority.[19] Moreover, this court will not review issues for which inadequate argument has been presented or only passing treatment has been made.[2] For these reasons, we decline to address this argument.

Lam also argues that the State was time-barred by CrR 7.8 and RCW 10.73.090 from challenging the trial court's July 2007 exclusion of his two prior convictions from his criminal history. The court rule and statute limit the time for seeking relief from a judgment to one year. This argument is not persuasive.

Under RCW 10.73.090(1), a collateral attack on a judgment in a criminal case is barred if filed more than one year after a final judgment, unless the judgment is invalid on its face or the court lacked jurisdiction. A CrR 7.8 motion

---

also Kilian v. Atkinson, 147 Wn.2d 16, 23-24, 50 P.3d 638 (2002) (The statement that discriminatory practices because of age were "a matter of state concern" in a policy statement within Washington's law against discrimination did not outweigh the fact that the legislature did not include "age" in the list of protected classes specified within that chapter. "A declaration of policy in a legislative act . . . serves only as an important guide in determining the intended effect of the operative sections.").

[19] RAP 10.3(a)(6).

[2] State v. Thomas, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004).

to vacate judgment is a collateral attack.[21] RCW 10.73.090(3) states:

> For the purposes of this section, a judgment becomes final on the ***last*** of the following dates:
>
> (a) The date it is filed with the clerk of the trial court;
>
> ***(b) The date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction;*** or
>
> (c) The date that the United States Supreme Court denies a timely petition for certiorari to review a decision affirming the conviction on direct appeal. . . .[22]

Assuming without deciding that CrR 7.8 and RCW 10.73.090 apply here, there is nothing in this record to show that the appellate court issued its mandate for the original appeal more than one year before the State's request at the March 2009 resentencing to prove the two prior convictions. Subsection (b) of the above statute would have started the running of the one year period under the facts of this case. Thus, RCW 10.73.090(3), if it applied, did not bar the State's arguments on resentencing.

Finally, Lam argues that the 2008 amendments to RCW 9.94A.525(21) violate the separation of powers doctrine. We hold that the provisions of the statute that are at issue here do not violate that doctrine.

"The doctrine of separation of powers, implicit in our state constitution, divides the political power of the people into three co-equal branches of government."[23] The three branches "are not hermetically sealed," however, and some overlap must exist.[24] In the context of statutory amendments, "[s]eparation

---

[21] RCW 10.73.090(2).
[22] (Emphasis added.)
[23] City of Fircrest v. Jensen, 158 Wn.2d 384, 393, 143 P.3d 776 (2006).

of powers issues arise when the legislature attempts to perform judicial functions."[25] But the legislature is not prohibited from passing a law that directly impacts a case pending in Washington courts.[26] A statutory amendment that is a facially neutral law for the court to apply to the facts before it does not violate the separation of powers doctrine.[27]

Lam appears to argue that this statute violates the separation of powers doctrine because the July 2007 judgment and sentence was a final judgment that the 2008 amendments could not affect. He cites Haberman v. Washington Public Power Supply System[28] to support this argument.

There, the supreme court found no separation of powers violation where a retroactive amendment did "not impede upon the court's right and duty to apply new law to the facts of the case," did "not dictate how the court should decide a factual issue," and did not "affect a final judgment."[29] As we have already explained in this opinion, the July 2007 judgment and sentence was not a final judgment for these purposes. Thus, the underlying premise of Lam's argument is incorrect.

---

[24] Id. at 393-94.

[25] State v. Mann, 146 Wn. App. 349, 358, 189 P.3d 843 (2008) (citing Haberman v. Wash. Pub. Power Supply Sys., 109 Wn.2d 107, 143, 744 P.2d 1032, 750 P.2d 254 (1987)).

[26] Wash. State Farm Bureau Fed'n v. Gregoire, 162 Wn.2d 284, 304, 174 P.3d 1142 (2007); see also Haberman, 109 Wn.2d at 143 ("A statute prescribing new rules to pending litigation is generally constitutional.").

[27] Wash. State Farm Bureau Fed'n, 162 Wn.2d at 304 (quoting Port of Seattle v. Pollution Control Hearings Bd., 151 Wn.2d 568, 626, 90 P.3d 659 (2004)).

[28] 109 Wn.2d 107, 744 P.2d 1032, 750 P.2d 254 (1987).

[29] Id. at 144.

The legislature is not prohibited from passing a law that directly impacts a case pending in Washington courts.[3] The 2008 amendments went into effect on June 12, 2008,[31] more than six weeks before the appellate court filed its first opinion in Lam's case.[32] Thus, Lam's case was not "final" for purposes of a separation of powers analysis.

Moreover, the amendment did not impede the court's duty to apply new law to the facts of this case. Likewise, it did not dictate how the court should decide a factual issue.

For all these reasons, the statute does not violate the separation of powers doctrine.

We affirm the judgment and sentence.

Cox, J.

WE CONCUR:

[3] Wash. State Farm Bureau Fed'n, 162 Wn.2d at 304; see also Haberman, 109 Wn.2d at 143 ("A statute prescribing new rules to pending litigation is generally constitutional.").

[31] Laws of 2008, ch. 231, § 5 ("Sections 2 and 3 of this act apply to all sentencings and resentencings commenced before, on, or after" June 12, 2008.). RCW 9.94A.525(21) was amended by Laws of 2008, ch. 23, § 3.

[32] State v. Lam, noted at 146 Wn. App. 1016, 2008 WL 2898584 (July 28, 2008).

Spearman, J.

Grosse, J.