No. 81348-5

FAIRHURST, J. (dissenting) — The issue in this case is whether the plain words of RCW 9.94A.533(5) mean what they say. RCW 9.94A.533(5) provides that a sentence enhancement must be added to the standard sentence range for certain drug crimes, including possession of a controlled substance, RCW 69.50.4013(1), if the defendant "committed the offense while in a county jail or state correctional facility." The majority holds that RCW 9.94A.533(5) applies only if the State proves, beyond a reasonable doubt, "that a defendant took some voluntary act to be placed within the enhanced zone." Majority at 11.

The majority is wrong for at least four reasons. First, the statute's plain meaning does not support the majority's interpretation of RCW 9.94A.533(5). Second, the majority undermines the statute's purpose of deterring drug crimes in county jails and state correctional facilities because RCW 9.94A.533(5) will no longer apply to prisoners--none of whom enter jail or prison voluntarily. Third, the majority ignores the difference between a person's conduct and the circumstances surrounding that conduct. Fourth, the majority's reasoning casts doubt on the

meaning of other statutes imposing sentence enhancements.

I respectfully dissent.

I. FACTS

Thomas Harry Eaton was arrested and taken to the Clark County Jail on suspicion of driving under the influence. Upon Eaton's arrival, the jail staff asked Eaton to remove his shoes and take his socks off. Eaton removed his shoes but hesitated to remove his socks. Staff asked him a second time to remove his socks. Eaton removed the sock from his left foot. Eaton then asked the jail staff if he could use the bathroom. After they said no and instructed him to remove the other sock, Eaton took off the sock on his right foot. The staff noticed a plastic bag taped to the top of the sock. When the staff moved forward to retrieve the bag, Eaton refused to relinquish the bag and had to be tackled. The bag fell to the floor, and an officer picked it up. The contents tested positive for methamphetamine. For possessing a controlled substance, Eaton was charged and convicted of violating RCW 69.50.4013(1). For being in a county jail at the time of the offense, Eaton received a 12-month sentence enhancement pursuant to RCW 9.94A.533(5).

II. ANALYSIS

Statutory interpretation begins and usually ends with the statute's plain

meaning. Because statutes are the creation of the people's elected representatives in the legislature, the "fundamental objective" of statutory interpretation "is to ascertain and carry out the Legislature's intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002) (citing *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001)). Under the plain meaning rule, "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." *Id.* at 9-10 (emphasis added) (citing *J.M.*, 144 Wn.2d at 480). When a statute does not define a word it uses, as here, the word's plain meaning includes its dictionary definition. *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001). "[T]he plain meaning rule requires courts to consider legislative purposes or policies appearing on the face of the statute as part of the statute's context." 2A Norman J. Singer & J.D. Shambie Singer, Statutes and Statutory Construction § 48A:16, at 918 (7th ed. 2007); *accord State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 500, 816 P.2d 725 (1991) (stating, "a statute is to be interpreted in a manner that is consistent with its underlying purpose" (citing *In re Det. of Cross*, 99 Wn.2d 373, 382, 662 P.2d 828 (1983))). Although a statute's plain meaning usually ends the debate, this court will look beyond the face of the statute if following the plain meaning would yield absurd results. *See State v. J.P.*,

149 Wn.2d 444, 450, 69 P.3d 318 (2003).

A. The words of RCW 9.94A.533(5)

RCW 9.94A.533(5) provides:

> The following additional times shall be added to the standard sentence range if the offender or an accomplice committed the offense while in a county jail or state correctional facility and the offender is being sentenced for one of the crimes listed in this subsection . . . .
>
> . . . .
>
> (c) Twelve months for offenses committed under RCW 69.50.4013.

The majority concludes that RCW 9.94A.533(5) "requires that a defendant took some *voluntary act to be placed* within the enhanced zone." Majority at 11 (emphasis added). But, as the majority acknowledges, "the language of RCW 9.94A.533(5) is silent on whether a volitional act is required before imposing an enhancement." Majority at 7. The words "voluntary," "volitional," "willful," and their kind do not appear in the statute. Words such as "entered" and "be placed" are conspicuously absent, showing that the legislature did not intend to include an actus reus. The majority adds words to the statute even though "[w]e cannot add words or clauses to an unambiguous statute when the legislature has chosen not to include that language." *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

The dictionary definitions of the words actually in RCW 9.94A.533(5) do not

support a requirement of a voluntary act. The dictionary defines "commit" as to "DO" or "PERFORM," with the usage example of "convicted of *committing* crimes against the state." Webster's Third New International Dictionary 457 (2002). A dictionary definition of "while" is "during the time that." *Id*. at 2604. With these definitions, RCW 9.94A.533(5) says that a sentence enhancement applies "if the offender or an accomplice [did] the offense [during the time that] [the offender was] in a county jail or state correctional facility." The plain language of RCW 9.94A.533(5) does not evidence legislative intent to include an element of a voluntary act.[1] The words relate only to the circumstances surrounding the criminal offense defined in other statutes.

B. The purpose of RCW 9.94A.533(5)

Besides ignoring the words of RCW 9.94A.533(5), the majority's interpretation undermines the statute's purpose and leads to absurd results. On its face, the statute's purpose is to deter people from selling, buying, using, or possessing drugs in a jail or state correctional facility. But the majority's interpretation narrows the class of offenders subject to a sentence enhancement under the statute. Because voluntary entrance into the enhancement zone is an

[1]Further, the Court of Appeals, the parties, and the majority have not pointed to anything in the legislative history discussing whether the sentence enhancement requires a finding the offender was volitionally in the jail or prison.

element of RCW 9.94A.533(5), according to the majority, RCW 9.94A.533(5) will no longer apply to arrestees or prisoners--all of whom are forced into jail or prison against their will. Only employees and visitors enter a jail or prison voluntarily. In Eaton's case, even if Eaton's methamphetamine had not been discovered by jail staff until several days after he was booked, RCW 9.94A.533(5) would not apply because he did not enter the Clark County Jail on his own volition.[2] That result contradicts the statute's overall purpose of reducing the number of drug crimes in jails and prisons.

By contrast, the plain meaning of RCW 9.94A.533(5) advances the statute's purpose in at least three ways. First, a prisoner who is already in a jail or state correctional facility would think twice before having anything to do with illegal drugs. Second, before being taken to jail, an arrestee possessing drugs would have an incentive to either get rid of the drugs or admit possession to the arresting officer. A person so admitting would be subject to a possession charge but not the

[2]The majority dismisses this concern, claiming, "At some point, when the defendant retains possession despite the opportunity to do otherwise, possession within the zone becomes voluntary." Majority at 8 n.7. But the majority holds that the prosecution must prove beyond a reasonable doubt "that a defendant took some voluntary act to be placed within the enhanced zone." *Id.* at 11. The majority's interpretation conditions RCW 9.94A.533(5) on the defendant taking some affirmative, voluntary step to enter a county jail or state prison.

When these statements are taken together, the majority seems to say that by passing a few days in jail, an incarcerated person takes "some voluntary act to be placed within" the jail, in satisfaction of the majority's interpretation of RCW 9.94A.533(5). But how can an inmate's presence in jail suddenly become voluntary?

enhancement. Without the 12-month enhancement, however, the arrestee is better off keeping quiet or lying. There would be a chance that the drugs would not be detected by the booking officer, and even if the arrestee's drugs are noticed eventually by the jail staff, the maximum sentence would be the same as if the drugs had been discovered outside the jail. Because the penalty for possession inside the jail would be the same as for possession outside the jail, the arrestee, in the hope of avoiding being punished altogether, would be more likely to try to sneak the drugs past the jail staff unnoticed. But with the 12-month enhancement, trying to maintain possession unnoticed is a riskier proposition, and the arrestee is much more likely to try to get rid of the drugs or admit to their presence, making the presence of drugs in jail less likely. Third and finally, a nonincarcerated person who might otherwise consider possessing drugs would be less likely to commit possession in the first instance, because there is always the risk of being arrested and booked into jail.

C. The concept of attendant circumstances

The majority's fundamental error is to ignore the difference between a person's conduct and the circumstances surrounding that conduct. In criminal law, liability is often predicated on a combination of mental state, conduct, the conduct's results, *and* attendant circumstances--the facts surrounding the conduct. *See* 1

Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 1.2(c), at 12 (1986) ("The totality of these various items—conduct, mental fault, plus attendant circumstances and specified result when required by the definition of a crime—may be said to constitute the 'elements' of the crime."). The majority is right that criminal liability usually does not attach when the conduct is involuntary. But the same is not true for attendant circumstances.

This point is illustrated by a different statute. RCW 46.20.342(1) makes it a crime "for any person to drive a motor vehicle in this state while that person is in a suspended or revoked status." The conduct is the act of driving. An attendant circumstance is a suspended or revoked license. Rarely will a person voluntarily have his or her license suspended or revoked. The Department of Licensing usually does this *against* the licensee's will. But that does not matter. Criminal liability flows from the conduct of driving at the same time that the attendant circumstance--a suspended or revoked driver's license--is present, even though the attendant circumstance is usually involuntary.

Sentence enhancements typically relate to attendant circumstances. As the majority observes correctly, "The purpose of sentencing enhancements is to provide legislative guidance to courts in calibrating the appropriate punishment for crimes

based on *relevant circumstances surrounding the underlying conduct*." Majority at 6 (emphasis added). And as the Court of Appeals noted in its opinion, a "sentence enhancement is not a separate sentence of a separate substantive crime." *State v. Eaton*, 143 Wn. App. 155, 160, 177 P.3d 157 (2008). Instead, an enhancement statute presupposes the defendant committed a crime involving conduct--in this case, possession of methamphetamine--and increases the sentencing range when an attendant circumstance is present. *See State v. Barnes*, 153 Wn.2d 378, 385, 103 P.3d 1219 (2005).

RCW 9.94A.533(5) follows this pattern. To the contrary of what the majority suggests, RCW 9.94A.533(5) does not deal with conduct, namely the act of entering a particular area. Rather, RCW 9.94A.533(5) describes a circumstance--the offender's location--attending the conduct prohibited by another statute. When a person violates RCW 69.50.4013(1) by possessing a controlled substance "while in a county jail or state correctional facility," the legislature requires the sentencing court to impose a sentence enhancement of 12 months to the standard sentence range. RCW 9.94A.533(5). In this way, RCW 9.94A.533(5) "provide[s] legislative guidance to courts in calibrating the appropriate punishment for crimes based on relevant circumstances surrounding the underlying conduct." Majority at 6. The

statute indicates that possession of illegal drugs is already culpable, but it becomes even more culpable when done at a given location. RCW 9.94A.533(5) is unconcerned with how a person got to jail. Rather, RCW 9.94A.533(5) provides additional punishment for a person's voluntary misconduct once there.

In this case, although Eaton did not bring about the attendant circumstance defined in RCW 9.94A.533(5), the underlying criminal conduct of possessing drugs is a justifiable basis for criminal liability. Possession is a continuing offense "lasting as long as the act of possession does," 1 Wayne R. LaFave, *Substantive Criminal Law* § 6.1(d), at 430 n.46 (2d ed. 2003), and Eaton voluntarily continued his possession. This case would be very different if Eaton were arguing that his possession became involuntary due to the arrest or transport of him to jail. But he does not make that argument, and Eaton does not contest his conviction under RCW 69.50.4013(1). So the majority is wrong to suggest that Eaton was punished for involuntary conduct.

The majority claims that Eaton "did not have the requisite ability to choose." Majority at 9. But criminal liability was still within Eaton's control; he could have simply ceased possessing drugs. Eaton did not choose to enter the Clark County Jail, but he had a choice about his course of conduct upon his arrival. By continuing

his possession while he was in jail, rather than relinquishing the methamphetamine beforehand, Eaton subjected himself to the 12-month enhancement provided in RCW 9.94A.533(5). The location of the offense was an attendant circumstance triggering additional punishment for the predicate crime.

D. Effect on other sentence enhancements

The majority's logic and sweeping language also raises doubts about how other sentence enhancements should be read. For instance, several subsections in RCW 69.50.435(1) subject an offender to a sentence enhancement for selling drugs "to a person" who is "[i]n a school," "[w]ithin one thousand feet of the perimeter of the school grounds," "[i]n a public park," "[i]n a public transit stop shelter," or located in another such place. As in RCW 9.94A.533(5), the statute levies an additional punishment for a person who commits a drug offense while in a specific location. As in RCW 9.94A.533(5), the statute merely describes an attendant circumstance accompanying a substantive crime defined in another statute. Under the logic of the majority, however, RCW 69.50.435 presumably would not apply unless the prosecution affirmatively proves beyond a reasonable doubt that the defendant voluntarily entered the enhancement zone.

III. CONCLUSION

I would hold that the plain meaning of RCW 9.94A.533(5) does not include a requirement that the offender was voluntarily in a jail or prison. Because the Court of Appeals reversed Eaton's sentence based on this argument, the court did not address Eaton's other arguments on appeal. I would reverse and remand to the Court of Appeals to address Eaton's other claims.

AUTHOR:
Justice Mary E. Fairhurst

WE CONCUR:
Chief Justice Barbara A. Madsen
Justice Susan Owens

Justice James M. Johnson