NO. 85893-4

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JENNIFER RICE, PETITIONER

Appeal from the Superior Court of Pierce County
The Honorable D. Gary Steiner

No. 07-1-04202-6
Court of Appeals #39600-9-II, 159 Wn. App. 545 (2011)

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED FOR REVIEW.

1. Does the petitioner demonstrate, beyond a reasonable doubt, that the provisions of RCW 9.94A.835-837 violate the Washington Constitution?

2. Does the exercise of legislative power in enacting provisions of RCW 9.94A.835-837 violate the separation of powers doctrine?

B. STATEMENT OF THE CASE.

1. Procedure

On August 13, 2007, the Pierce County Prosecuting Attorney (the State) charged Jennifer Rice, hereinafter referred to as the defendant, with one count of kidnapping in the first degree. CP 1. The Information also alleged that the crime was sexually motivated. *Id.* RCW 9.94A.030.

On September 12, 2007, the State filed an amended Information charging one count of kidnapping in the first degree with sexual motivation and alleging the aggravating factor of multiple offenses. CP 4. The State also charged the defendant with six counts of rape of a child in the first degree, adding the aggravating factor of multiple offenses, four counts of child molestation in the first degree, all alleging the aggravating factor of multiple offenses, and one alleging that the offense was

predatory. CP 4-8. The State also charged two counts of rape of a child in the third degree with the aggravating factor of multiple offenses. CP 8-9.

The defendant filed a motion to dismiss the allegations that the offenses were predatory and aggravated. CP 10-22. The trial court denied the motion, and entered findings of fact and conclusions of law. CP 44-50.

After negotiations (CP 58-59)[1], the State filed a Second Amended Information reducing the charges to one count of kidnapping in the first degree and one count of child molestation in the first degree regarding victim O.E.; and two counts of child rape in the third degree regarding victim R.E. CP 55-57. The kidnapping and child molestation counts included the allegations under RCW 9.94A.835-837. *Id.*

As agreed, the defendant waived her right to a jury trial (CP 67) and proceeded to trial on stipulated facts. CP 60-64. The court found her guilty of all the charges and also found the allegations that Count IV (child molestation in the first degree) was predatory, and the aggravating factor in the other counts. CP 53-54.

On July 24, 2009, the court sentenced the defendant. CP 68-83. The court sentenced her to 60 months in prison for rape of a child in the third degree (counts XII and XII), and 25 years to life, including the 25

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[1] As the Court of Appeals noted, the agreement permitted the defendant to preserve her challenge to the constitutionality of the statutes. Therefore, the State is not contesting her standing to do so. *See, **State v. Rice***, 159 Wn. App. 545, 560, n. 8, 246 P. 3d 234 (2011).

year mandatory minimum, for kidnapping in the first degree and child molestation in the first degree (counts I and IV). CP 74.

The Court of Appeals, Division II, affirmed the conviction and sentence. ***State v. Rice***, 159 Wn. App. 545, 246 P. 3d 234 (2011). The Court held that the defendant failed to meet her burden of proving that RCW 9.94A.835-837 were unconstitutional. *Id.*, at 560. The defendant timely petitioned for review.

2. Facts

The substantive facts underlying the charges were stipulated by the parties and set forth in detail in the Court of Appeals opinion below. *See*, ***Rice***, 159 Wn. App. at 554-555. In the interest of brevity and to avoid repetition, those facts will not be repeated at length here.

In brief summary, the defendant was a 4th grade teacher in an elementary school in Tacoma. One of the victims was a 10 year old 4th grade student at the defendant's school. The defendant initiated a sexual relationship with the boy. She later abducted the boy and drove him to Ellensburg, where she had sexual intercourse with him.

The defendant also initiated a sexual relationship with the 10 year old victim's 15 year old brother. The defendant had sexual intercourse with the 15 year old on two separate occasions.

C. ARGUMENT.

1. THE PROVISIONS OF RCW 9.94A.835, .836, AND .837 DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE.

a. The statutory provisions.

When a defendant is charged with rape of a child in the first or second degree, or child molestation in the first degree, and when sufficient evidence exists, the prosecuting attorney is required to allege that the offense is "predatory." Once the allegation is filed, it may not be withdrawn except in certain limited circumstances.

An offense is considered "predatory" if:

> (a) The perpetrator of the crime was a stranger to the victim, as defined in this section; (b) the perpetrator established or promoted a relationship with the victim prior to the offense and the victimization of the victim was a significant reason the perpetrator established or promoted the relationship; or (c) the perpetrator was: (i) A teacher, counselor, volunteer, or other person in authority in any public or private school and the victim was a student of the school under his or her authority or supervision. For purposes of this subsection, "school" does not include home-based instruction as defined in RCW 28A.225.010; (ii) a coach, trainer, volunteer, or other person in authority in any recreational activity and the victim was a participant in the activity under his or her authority or supervision; or (iii) a pastor, elder, volunteer, or other person in authority in any church or religious organization, and the victim was a member or participant of the organization under his or her authority.

RCW 9.94A.030(35).

The procedure for alleging that an offense is "predatory" is set forth in RCW 9.94A.836, which reads as follows:

(1) In a prosecution for rape of a child in the first degree, rape of a child in the second degree, or child molestation in the first degree, the prosecuting attorney shall file a special allegation that the offense was predatory whenever sufficient admissible evidence exists, which, when considered with the most plausible, reasonably foreseeable defense that could be raised under the evidence, would justify a finding by a reasonable and objective fact-finder that the offense was predatory, unless the prosecuting attorney determines, after consulting with a victim, that filing a special allegation under this section is likely to interfere with the ability to obtain a conviction.

(2) Once a special allegation has been made under this section, the state has the burden to prove beyond a reasonable doubt that the offense was predatory. If a jury is had, the jury shall, if it finds the defendant guilty, also find a special verdict as to whether the offense was predatory. If no jury is had, the court shall make a finding of fact as to whether the offense was predatory.

(3) The prosecuting attorney shall not withdraw a special allegation filed under this section without the approval of the court through an order of dismissal of the allegation. The court may not dismiss the special allegation unless it finds that the order is necessary to correct an error in the initial charging decision or that there are evidentiary problems that make proving the special allegation doubtful.

"A statute is presumed to be constitutional, and the party challenging its constitutionality bears the burden of proving its unconstitutionality beyond a reasonable doubt." ***State v. Abrams***, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008), quoting ***State v. Thorne***, 129 Wn.2d 736, 769-70, 921 P.2d 514 (1996).

b. Separation of powers in Washington.

The defendant's separation of powers argument must rest on the Washington State Constitution. When separation of powers arguments are raised, only the State Constitution is implicated. ***Carrick v. Locke***, 125 Wn.2d 129, 135, 882 P.2d 173 (1994); ***State v. Caton***, - Wn. App.-, - P.3d – (2011)(2011 WL 4036109). The federal separation of powers doctrine does not apply to state governments. *See* ***Sweezy v. State of New Hampshire***, 354 U.S. 234, 255, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957) ("the concept of separation of powers embodied in the United States Constitution is not mandatory in state governments"); ***Hughes v. Superior Court***, 339 U.S. 460, 467, 70 S. Ct. 718, 94 L. Ed. 985 (1950) ("the Fourteenth Amendment leaves the States free to distribute the powers of government as they will between their legislative and judicial branches"); ***Chromiak v. Field***, 406 F.2d 502, 505 (9th Cir. 1969) (federal constitutional doctrine of separation of judicial and executive powers applies only to operation of federal government and is not binding upon the states).

The State Constitution does not have a formal separation of powers clause. ***Brown v. Owen***, 165 Wn.2d 706, 718, 206 P.3d 310 (2009). However, the structure of the government into different branches results in the functional equivalent. *Id.*, citing ***Carrick v. Locke***, 125 Wn.2d 129, 882 P.2d 173 (1994).

To determine whether a particular action violates separation of powers, the Appellate Court looks to whether the activity of one branch threatens the independence or integrity or invades the prerogatives of another. ***Carrick***, 125 Wn.2d at135, citing ***Zylstra v. Piva***, 85 Wn.2d 743, 750, 539 P.2d 823 (1975).

In ***Brown v. Owen***, Lt. Governor Owen, the president of the Senate, refused to forward a bill passed by a majority vote of the Senate to the House of Representatives. Senator Brown sought a writ of mandamus from the Supreme Court to require him to do so. The Supreme Court refused to interfere in the internal proceedings of the legislature. 165 Wn.2d at 720.

In ***Carrick v. Locke***, a shoplifter died while being detained by Carrick and others. Then-King County executive Gary Locke requested that the District Court conduct a coroner's inquiry, as authorized under RCW 36.24. Carrick opposed a court inquest, asserting that determination of the cause of death was a function of the executive branch. The Supreme Court held that the County Executive and the District Court acted within the authority granted by statute and the county charter. 125 Wn.2d at 145.

c. <u>The office of prosecuting attorney</u>.

In the Washington Constitution, Article 2, § 1 vests the legislative authority in the legislature. It also grants the people the right to propose laws through initiative or referendum. *Id.* Article 4, § 5 creates the

superior courts. Prosecuting attorneys are created or acknowledged under Art. 11, § 5, "County Government", which reads:

> The *legislature*, by general and uniform laws, shall provide for the election in the several counties of boards of county commissioners, sheriffs, county clerks, treasurers, *prosecuting attorneys* and other county, township or precinct and district officers, as public convenience may require, and *shall prescribe their duties*, and fix their terms of office" ... (emphasis added)

In RCW 36.27.020, the Legislature grants prosecuting attorneys their authority. Although the statute grants the prosecuting attorney many duties and authority, they are limited to those granted by the Legislature. *See* ***In re Detention of Martin***, 163 Wn.2d 501, 509, 182 P.3d 951 (2008), citing ***Bates v. School District #10 of Pierce County***, 45 Wash. 498, 501, 88 P. 944 (1907).

Many statutes promulgated by the legislature mandate specific action by prosecuting attorneys. *See* RCW 7.56.110 (requiring the prosecuting attorney to institute proceedings to enforce judgment against a corporation), RCW 9.94A.411 (requiring the prosecuting attorney to file charges in cases involving crimes against persons where sufficient evidence exists), RCW 13.40.077 (requiring the prosecuting attorney to file charges in juvenile cases involving crimes against persons if sufficient evidence exists), RCW 18.04.370 (requiring the prosecuting attorney to bring proceedings against those who commit violations of chapter 18 RCW), RCW 36.77.070 (requiring the prosecuting attorney to prosecute

the failure to publicize construction projects), RCW 38.44.060 (requiring the prosecuting attorney to proceed to enforce penalty for failure to allow persons to examine certain records), RCW 58.17.200 (requiring the prosecuting attorney to commence action to restrain illegal subdivisions), RCW 76.04.750 (requiring the prosecuting attorney to bring action to recover costs from uncontrolled fires), RCW 84.09.040 (requiring the prosecuting attorney to prosecute suits for non performance of duty by county officers).

In ***State v. Mannussier***, 129 Wn.2d 652, 921 P.2d 473 (1996), the defendant challenged Initiative 593, the Persistent Offender Accountability Act (POAA), in part as a violation of the separation of powers doctrine. The defendant argued that the POAA gave the prosecuting attorney *too much* power, through its charging decision, to determine which defendants would be sentenced under the strict provisions of the POAA. The Supreme Court rejected this argument. *Id.*, at 667-668. The Court found the statute constitutional.

By comparison, the superior courts have clearer constitutional authority than prosecuting attorneys. But the legislature has power to limit the discretion of the trial courts, as well.

The superior court is established in Article 4, § 5 of the State Constitution. Its jurisdiction and basic authority is established in Article 4, § 6. Even though the State Constitution establishes the superior courts with certain powers, their authority is not unlimited. The courts have the

authority to try cases, but the legislature has near plenary authority to establish what crimes are tried through the criminal code and determine what punishment shall be. *See* ***State v. Varga***, 151 Wn.2d 179, 193, 86 P.3d 139 (2004).

The legislature has the power to completely change the sentencing code, as it did in RCW 9.94A, the Sentencing Reform Act. The SRA abolished the wide sentencing discretion the superior courts had for many years preceding. Even so, this was not a violation of the separation of powers. *See* ***State v. Ammons***, 105 Wn.2d 175, 180-181, 713 P.2d 719 (1986).

While the principle of separation of powers prevents the judiciary from interfering in the legislative process, as in ***Brown v. Owen***, it does not prevent the legislature from limiting the authority or actions of prosecuting attorneys. All of the authority of a prosecuting attorney, unlike that of the superior courts, is determined by the legislature. RCW 36.27.020. As pointed out above, Article 11, § 5 of the State Constitution provides that the legislature shall prescribe the duties of the prosecuting attorneys.

The legislature has not "invaded the prerogatives" of the prosecuting attorney in the enactment of RCW 9.94A.835-837. The legislature controls what the prosecuting attorney is authorized to do. In prescribing the duties of the prosecuting attorney, the legislature has the power to create or remove a prosecuting attorney's "prerogatives." Laws

enacted by the legislature may be perceived to, or have the effect of, expanding the discretion of the prosecutor, as in the POAA, or contracting it, as in RCW 9.94A.835-837. The legislature in this case has done exactly what the Washington Constitution permits. These statutes do not violate the separation of powers doctrine.

d. The prosecuting attorney's discretion under RCW 9.94A.835-837.

In the present case, the Court of Appeals correctly pointed out that the statutory language of RCW 9.94A.835-837 permits the exercise of prosecutorial discretion.

The Court noted that the "when sufficient admissible evidence exists" language in RCW 9.94A.835(1) demonstrates that the prosecutor retains discretion to evaluate the evidence and decide whether the provision should be alleged. 159 Wn. App. 562. Additional language that the prosecutor "*consider*[] with the most plausible, reasonably foreseeable defense that could be raised under the evidence" and "would *justify* a finding" (emphasis added) certainly contemplates that the prosecuting attorney will make a decision after evaluating the evidence; i.e, exercise discretion.

The Court of Appeals properly observed:

> Under the statutes, a prosecutor must evaluate the admissibility of evidence and determine the strength of that evidence for obtaining a finding on the special allegation. Accordingly, a prosecutor takes the same actions when

> deciding whether to file a special allegation as he/she does when determining and deciding what crimes to charge. In both instances, a prosecutor evaluates whether the evidence supports various outcomes and then, based on that evaluation, files or does not file charges and/or special allegations believed appropriate.

Rice, 159 Wn. App. at 562.

The Court went on to note that the language of .836 and .837 similarly permitted the prosecuting attorney to exercise discretion. The Court found that the "unless" language of the statute gave the prosecuting attorney discretion to decide whether or not to file the allegations. The Court gave a very common example of how and why the prosecuting attorney could still exercise discretion, even under the "shall" language of these statutes:

> Accordingly, even if a prosecutor believes the evidence is strong enough for a reasonable fact finder to enter a finding on either of these two special allegations, he or she can choose (i.e., exercise discretion) not to file the special allegations under certain circumstances. For example, a child victim might refuse to testify at a trial involving a predatory special allegation for fear of consequences to a close family friend being denominated as a "predator." In such an instance, the statute affords a prosecutor the discretion not to file the predatory special allegation.

Rice, 159 Wn.App. at 563.

Under RCW 9.94A.835-837, the prosecuting attorney retains the discretion to charge the underlying crime. The prosecutor retains the ability to consider the circumstances of each case and to negotiate an

agreed resolution. It is common for prosecutors and defense counsel to structure a resolution where a defendant enters a plea to several counts, even as a legal fiction[2], resulting in a specific lengthy sentence, in order to avoid an even longer sentence, the such as a life sentence under the POAA. Here, the parties could have discussed the defendant's individual circumstances, and possible alternative resolutions of the case.

Because RCW 9.94A.835-837 restricts the prosecutor's authority to dismiss the allegation, once charged, negotiation may need to take place before the charging decision. While the statute restricts the prosecutor's discretion, it does not eliminate it.

In the present case, the prosecuting attorney exercised discretion several times. In the amended Information, the prosecuting attorney decided what to charge the defendant with and how many counts; 13 counts, including rape of a child in the first degree and child molestation in the first degree, in 11 of which RCW 9.94A.835-837 should have applied, given the alleged facts. However, the special allegations were only applied to count I, kidnapping in the first degree. For some reason, the prosecuting attorney decided not to file the special allegations in the rape and molestation counts.

Then, after negotiations, the prosecuting attorney dismissed 6 counts of rape of a child in the first degree and 3 counts of child

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[2] *See* ***In re Barr***, 102 Wn.2d 265, 684 P. 2d 712 (1984).

molestation in the first degree. The record does not reflect that, when dismissing these charges, the court found that it was "necessary to correct an error in the initial charging decision" or that evidentiary problems made "proving the special allegation doubtful". *See* RCW 9.94A.835-837(3). Nor does the record reflect that the court found that it had been error to omit the special allegations in the first place.

The Constitutional arguments must return to the same basic principle: that the prosecuting attorney only has such power and authority as the legislature grants or removes. In RCW 9.94A.835-837, the legislature has made policy decisions directing or narrowing the decisions of the prosecuting attorney. Although these statutes do direct and limit the prosecuting attorney's decisions, the statutory language also permits the exercise of discretion in making these special allegations. The statutes do not interfere with the prosecuting attorney's basic decision of what crime to charge. The defendant has failed to prove beyond a reasonable doubt that RCW 9.94A.835-837 are unconstitutional

e. ***State v. Pettitt*** and the exercise of discretion.

In ***State v. Pettitt***, 93 Wn.2d 288, 609 P.2d 1364 (1980), the defendant argued that the Lewis County Prosecuting Attorney's mandatory policy to file habitual criminal allegations under former RCW 9.92.090 arbitrary and a violation of due process. *Id.*, at 294. The Supreme

Court struck down the Lewis County Prosecuting Attorney's mandatory policy. The Court held that "this fixed formula which requires a particular action in every case upon the happening of a specific series of events constitutes an abuse of the discretionary power lodged in the prosecuting attorney." *Id*, at 296.

However, the right to be free from an abuse of legislatively granted discretion is not the same as the right to have discretion vested in the prosecutor in the first place. The defendant does not have a right to prosecutorial discretion. Also, a defendant has no constitutional right to plea-bargain. ***State v. Yates***, 161 Wn.2d 714, 741, 168 P.3d 359 (2007).

The Pierce County Prosecuting Attorney did not abuse his discretion in the charging decision, as occurred in ***Pettitt***. There is no showing, here, that efforts to resolve the case were made which were arbitrarily rejected by the prosecuting attorney. For example, there is no allegation that the prosecuting attorney failed to consider whether "sufficient admissible evidence" existed. *See* RCW 9.94A.835. If the defendant could make such a showing, ***Pettitt*** would apply. Instead, as pointed out above, the record shows that efforts to resolve the case resulted in the State dropping 6 counts of rape of a child in the first degree and 3 counts of child molestation in the first degree from the amended Information. Therefore, ***Pettitt*** does not conflict with the current case.

D. CONCLUSION.

The mandatory sentencing provisions of RCW 9.94A.835, .836, and .837 do not violate the Washington or United States Constitutions. The trial court applied the law as required and authorized by statute. There was no error. The State respectfully requests that the judgment and sentence be affirmed.

DATED: October 10, 2011

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Certificate of Service: e-mail
The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/10/11 Johnson
Date Signature