



State v. McKiernan

1997 | Cited 0 times | Court of Appeals of Washington | August 28, 1997

HUNT, J. -- Michael Wayne McKiernan appeals his sentence under the Persistent Offender Accountability Act, RCW 9.94A.120, ¹ following his conviction in Pierce County Superior Court. McKiernan was convicted of assault in the second degree, RCW 9A.36.021(1), unlawful imprisonment, RCW 9A.40.040, theft in the third degree, RCW 9A.56.050, and attempted escape in the second degree, RCW 9A.76.120. McKiernan challenges the Persistent Offender Accountability Act (POA) as unconstitutional as enacted and applied. We affirm. .

McKiernan makes the following challenges to the POA: (1) It violates Article II, section 37 of the Washington State Constitution because the amended act is not set forth in the amending provision; (2) it violates the separation of powers by transferring sentencing discretion from Judges to prosecutors without providing standards for the exercise of that discretion; (3) it is an unlawful bill of attainder; (4) it violates substantive and procedural due process rights under the federal and state constitutions; (5) it allows the imposition of cruel and unusual punishment; (6) it violates the equal protection clause of the federal and state constitutions; and (7) it violates the constitutional guarantee of a republican form of government because it was adopted by the initiative process.

After McKiernan filed his appeal with this court, the Washington State Supreme Court addressed and resolved the above issues in *State v. Manussier*, 129 Wash. 2d 652, 921 P.2d 473 (1996), cert. denied, 137 L. Ed. 2d 709, 117 S. Ct. 1563 (1997); *State v. Rivers*, 129 Wash. 2d 697, 921 P.2d 495 (1996); and *State v. Thorne*, 129 Wash. 2d 736, 921 P.2d 514 (1996). The court determined the POA was constitutional, as enacted and applied. The issues raised by McKiernan are accordingly settled law and will be addressed only briefly here.

First, the POA does not violate Article II, section 37 because it is a complete act and not revisory. *Manussier*, 129 Wash. 2d at 663-65. Thus, the POA need not set out the provisions of the Sentencing Reform Act (SRA), RCW 9.94A, in its text. *Manussier*, 129 Wash. 2d at 663-65.

The POA does not violate the doctrine of separation of powers because fixing penalties has always been a legislative, not a judicial, function. *Manussier*, 129 Wash. 2d at 667-68; *Thorne*, 129 Wash. 2d at 767. Although the POA gives prosecutors discretion over what charges to file, it does not give prosecutors "a veto over persistent offender sentencing." *Thorne*, 129 Wash. 2d at 762. Further, the procedural provisions of the POA are the same as those in the SRA. *Manussier*, 129 Wash. 2d at 684. The procedural provisions in the SRA have also been held constitutional. *State v. Ammons*, 105 Wash. 2d 175, 713 P.2d 719, 718 P.2d 796 (1986).



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The POA is not an unconstitutional bill of attainder because punishment is imposed only upon a judicial determination that certain criminal offenses were committed. *Manussier*, 129 Wash. 2d at 666.

The POA provides sufficient procedural and substantive due process protections. *Manussier*, 129 Wash. 2d at 684. Further, the POA does not chill the exercise of the right to trial by giving prosecutors undue leverage in the plea bargaining process; *Manussier*, 129 Wash. 2d at 680-81, accordingly, it does not violate substantive due process rights on those grounds.

McKiearnan next argues the POA allows the imposition of cruel and unusual punishment because the punishment is disproportionate and is based on propensity or future danger. But in *Manussier* the court found that the POA punishes upon the commission of a third "most serious offense," not on likelihood of future criminal conduct. *Manussier*, 129 Wash. 2d at 679, n. 111.

In determining whether a sentence is disproportionate, a court must consider (1) the nature of the offense, (2) the punishment the offense would receive in other jurisdictions for the same offense, and (3) the punishment imposed for other offenses in the same jurisdiction. *State v. Fain*, 94 Wash. 2d 387, 397-402, 617 P.2d 720 (1980). McKiearnan's life sentence is not disproportionate to sentences imposed on others convicted of second degree robbery.

Manussier was convicted of robbery. His underlying convictions contributing to his persistent offender status were also robberies. The court determined that the nature of these offenses were "serious crimes." *Manussier*, 129 Wash. 2d at 677. Similarly, the nature of McKiearnan's current conviction of assault in the second degree, and his underlying offenses of robbery in the first degree and robbery in the second degree, are all "most serious offenses." RCW 9.94A.030(23); *Manussier*, 129 Wash. 2d at 667.

The two remaining factors support the Conclusion that McKiearnan's sentence is not disproportionate. The trend in other jurisdictions has been increased penalties for repeat offenders. *Manussier*, 129 Wash. 2d at 678. Additionally, prior to enactment of the POA, McKiearnan could have received up to a life sentence upon conviction for any of his three most serious offenses. *Manussier*, 129 Wash. 2d at 678; RCW 9A.20.021(a). Accordingly, McKiearnan's life sentence is not a disproportionate penalty for a third conviction of a serious offense. *Manussier*, 129 Wash. 2d at 678-79.

Applying the rational basis test, the POA does not violate equal protection rights. *Manussier*, 129 Wash. 2d at 673. A persistent offender is not a suspect class, and the POA's goal of improved public safety is a legitimate state objective. *Manussier*, 129 Wash. 2d at 673-74, 921 P.2d 473; *Thorne*, 129 Wash. 2d at 772.

Finally, the court declined to rule on whether the POA violated the guarantee of a republican form of



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government. Because the issue involves the constitutionality of the initiative process itself, it is a political and governmental issue for the Legislature, and therefore, not within the power of the court to decide. *Manussier*, 129 Wash. 2d at 670-71.

McKiernan does not raise any issues not already addressed and dismissed by the Washington State Supreme Court.

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.

Hunt, J.

We concur:

Morgan, J.

Bridgewater, A.C.J.

1. The Persistent Offender Accountability Act was enacted by the Legislature in 1994, after approval of Initiative 593 by the voters of the State of Washington in 1993. The act amended the Sentencing Reform Act, RCW 9.94A.120.

