DATE FILED: January 27, 2016 12:23 PM
FILING ID: 5FDB7A48EBC7C
CASE NUMBER: 2014SC94

SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 10CA2454 Petitioner, THE PEOPLE OF THE STATE OF COLORADO, v. Respondent, CURTIS GORDON ADAMS.	▲ **COURT USE ONLY** ▲ Case No. 14SC94
CYNTHIA H. COFFMAN, Attorney General WILLIAM G. KOZELISKI, Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 9th Floor Denver, CO 80203 Telephone: 720-508-6455 E-Mail: william.kozeliski@coag.gov Registration Number: 37824 *Counsel of Record	

PEOPLE'S REPLY BRIEF

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the word limits set forth in C.A.R. 28(g) or C.A.R. 28.

It contains 2,650 words

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ William G. Kozeliski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

STATUTES

TABLE OF AUTHORITIES

OTHER AUTHORITIES

ARGUMENT

Defendant advances three primary contentions in support of his position that sentence enhancement provision in section 18-1.3-401(8)(a)(IV), C.R.S. (2015), does not apply to second degree assault as defined in section 18-3-203(1)(f), C.R.S. (2015). First, he asserts that this Court in *People v. Andrews*, 871 P.2d 1199 (Colo. 1994), did not focus on the fact that the enhancement provision would apply automatically to every individual convicted of escape. Second, he asserts that every conviction under section 18-3-203(1)(f) would be subject to sentence enhancement under section 18-1.3-401(8)(a)(IV). Third, he asserts that the General Assembly has approved of and effectively adopted the interpretation set forth in *People v. Willcoxon*, 80 P.3d 817 (Colo. App. 2002). The applicable statutory language and decisions of this Court do not support his assertions.

I. In *Andrews*, the threshold circumstance that drove any further analysis was that the enhancement provision would apply to every conviction for escape, effectively rendering part of the escape statute meaningless.

Defendant asserts that, under *Andrews*, the "principal reason…this Court held the legislature did not intend to punish escape and attempted escape through the application of the enhancement provision…was because" of the consecutive sentencing provision in the escape statute (AB, p.5). He claims that the People's "*focus* on [the] part of *Andrews*" dealing with this Court's observation that the application of the enhancement provision would apply in every case "is misplaced" because "this Court did not *focus* on this observation in support of its conclusion (AB, p.11) (emphasis added).

This Court need only look to *Andrews* to see what its focus was:

> We do not rely, however, on the "same element" rationale…in reaching our conclusion here. Instead, we *focus* on the overall statutory scheme and the implications of the two interpretations of the sentence enhancement provision which are now before this court. Under the construction advocated by the People, the enhancement provision…would apply automatically to every individual convicted of class 3 felony escape. This construction would effectively render meaningless the classification of the felony

> as class 3, since in each and every case an enhanced sentence would be imposed upon the defendant. Such a construction is contrary to the presumption that an entire statute, giving force and effect to all its parts, is intended to be effective.

Andrews, 871 P.2d at 1202 (emphasis added).

Andrews made clear that the consecutive sentencing provision was not the driving force behind its holding. Rather, this Court only looked to that provision because "the legislative intent [was] not so clear" and "[o]ne reason we question the legislative intent to apply the aggravator" was the consecutive sentencing provision. *Id.* at 1203. The provision was not determinative; rather, it only "cut[] against the likelihood that the legislature intended the additional punishment of the application of the sentence enhancement provision at issue in every instance." *Id.*

Thus, the threshold issue in *Andrews* was that applying the enhancement provision in every case would be contrary to the legislature's classification of escape as a class 3 felony. However, here, the enhancement provision would not apply in every case and would not render any part of section 18-3-203(1)(f) meaningless. Thus, the two

statutes can be read together and applied harmoniously. *See People v. Mojica-Simental*, 73 P.3d 15, 18 (Colo. 2003).

II. Every conviction under section 18-3-203(1)(f) will not be subject to sentence enhancement under section 18-1.3-401(8)(a)(IV).

In an attempt to shoehorn section 18-3-203(1)(f) to fit the actual reasoning of *Andrews*, defendant asserts that section 18-1.3-401(8)(a)(IV) "will apply to every defendant convicted under" section 18-3-203(1)(f) (AB, p.12). Specifically, he asserts that the "modifier 'as a convicted felon' only modifies 'correctional institution'," and, thus, the enhancement provision will always apply because every person who violates section 18-3-203(1)(f) will be "under confinement."[1] This interpretation is contrary to this Court's precedent interpreting the plain language of section 18-1.3-401(8)(a)(IV). Moreover, even if correct,

[1] Defendant relies in part on the last antecedent rule to support his interpretation (AB, p.13). Because the current version of section 18-1.3-401(8)(a)(IV) was enacted after 1981, the last antecedent rule has no applicability. *See* § 2-4-214, C.R.S. (2015); *People v. O'Neal*, 228 P.2d 211, 214 (Colo. App. 2009).

the enhancement provision would still not always apply to convictions under section 18-3-203(1)(f).[2]

The General Assembly and this Court have made clear that the enhancement provision only applies to crimes committed by convicted felons. In *People v. Chavez*, 764 P.2d 356, 359 (Colo. 1988), this Court held that the "language of [section 18-1.3-401(8)(a)(IV)] clearly reflects a legislative intent to punish felony offenses committed by *convicted felons confined in detention facilities* more severely than felonies *committed by non-felons in detention facilities*." (Emphasis added). In that case, the defendant's sentence was properly enhanced because he "committed a felony offense while *under confinement as a 'convicted' felon*." *Id.* (emphasis added). *Andrews* subscribed to that same interpretation. In citing the statute, this Court stated that "as a convicted felon" applied to all of the listed circumstances, including

[2] Defendant's interpretation takes an extremely broad view of the enhancement provision that the People have never advanced. Under his interpretation, any crime committed under confinement is subject to enhancement. While this interpretation potentially helps defendant in this case, it would appear to subject many additional defendants to sentence enhancement who have never been subject to the provision in the past.

"under confinement." *Andrews*, 871 P.2d 1199 (enhancement statute applied when there was a "commission of a felony while 'under confinement…as a convicted felon'" (ellipsis in original)); *accord People v. Nitz*, 104 P.3d 240, 242 (Colo. App. 2004) (enhancer applies "if the defendant was under confinement as a convicted felon"). Thus, this Court has already rejected defendant's interpretation.

Moreover, even under defendant's interpretation, the aggravator will not always apply because the first clause of section 18-3-203(1)(f) provides that a person can violate the statute when he or she is "lawfully confined *or in custody*." § 18-3-203(1)(f) (emphasis added). As this Court has recognized, the statute extends to "field arrest situations." *People v. Armstrong*, 720 P.2d 165, 168 (Colo. 1986). Thus, defendant's assertion that "§ 18-1.3-401(8)(a)(IV) will apply to every defendant convicted under § 18-3-203(1)(f)" is belied by its plain language because not every defendant who violates section 18-3-

203(1)(f) will be "under confinement." Rather, he or she could only be "in custody."[3]

III. The General Assembly has not approved of the decision in *Willcoxon*. Rather, it has superseded *Andrews*.

Finally, defendant asserts that the General Assembly has approved of the decision in *Willcoxon*. Specifically, he asserts that the General Assembly has not amended the enhancement provision to apply to section 18-3-203(1)(f) since that case was decided.

Defendant's assertion fails because legislative inaction as an interpretative tool cannot prevail over the primacy of a statute's plain language. As a division of the court of appeals has observed, a court's main task in interpreting a statute "is to determine and give effect to the intent of the General Assembly that enacted it." *Francen v. Colo.*

---

[3] Defendant's argument that every person in prison is a convicted felon is likewise unavailing. An individual could commit a crime while in prison and not be a convicted felon. For example, despite the fact that a person was housed in a prison, the crime could occur after a mandate from an appellate court reversing his conviction was entered or after a trial court's order vacating a conviction was entered.

Dep't of Revenue, 2012 COA 110, ¶32, *aff'd* 2014 CO 54.[4] "[W]hat a later General Assembly thinks a statute does or should mean says little, if anything, about what the General Assembly that enacted it intended it to mean." *Id.* "[L]egislative inaction cannot legitimize a flawed analysis nor does it alter [a court's] obligation to rely on the plain language of a statute." *State v. Ramsey*, 762 S.E.2d 15, 18 (S.C. 2014).

In addition, this secondary rule of "statutory interpretation assumes a great deal." *Francen*, 2012 COA 110, ¶33. As this Court has observed, "of the many sources [courts] consult to discern legislative intent, reliance on legislative inaction is particularly risky. The reasons for enacting, or not enacting, legislation are too numerous to tally." *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 998 n.8 (Colo. 2003).

---

[4] In affirming the court of appeals in that case, this Court relied on the plain language of the statute rather than giving any weight to the General Assembly's later amendments. *Francen v. Colo. Dep't of Revenue*, 2014 CO 54, ¶10 n.4 ("[T]he amendments were unrelated and immaterial to the language at issue here."); *see id.* at ¶40 (Hood. J., dissenting) (dissenting justice reasoned that majority gave insufficient weight to legislative inaction).

Further, an intermediate appellate court's erroneous interpretation of the plain language of a statute is not determinative when the legislature fails to act in the subsequent years.[5] *See Rodriguez v. Compass Shipping Co.*, 451 U.S. 596, 615-16 (1981) ("[W]e are satisfied that [the court of appeals] did not correctly construe the 1959 amendments. It is true that Congress did not expressly disclaim that case in 1972, but that legislative inaction does not modify the plain terms of the 1959 amendments."). This Court has never opined on the certiorari question in this case. Thus, the General Assembly's silence following *Willcoxon* provides little weight. *See Welby Gardens*, 71 P.3d at 998 n.8 ("Where *this court* has provided an interpretation of a statute and the General Assembly subsequently amends the statute without changing the previously construed portion, we presume that the legislature agrees with the interpretation provided by *this court*."). Indeed, when construing a statutory provision for the first time in a particular context, it would be an anomalous, if not absurd, result for

[5] This principle holds even more weight in this case because *Willcoxon's* holding is based on an erroneous application and interpretation of a decision of this Court, rather than the statute's language.

this Court to conclude that the plain language of a statute evinced a clear intent but that intent did not control because the court of appeals had come to a contrary conclusion in the preceding years based on an erroneous interpretation of one of this Court's precedents.

This is particularly true given this Court's recent statement in *People v. Diaz*, 347 P.2d 621 (Colo. 2015), concerning the enhancement provision. In *Diaz*, this Court addressed what sentences would run consecutively to a sentence imposed for a conviction under section 18-3-203(1)(f). *Id.* at 623. However, in a footnote, without reference to *Andrews* or *Willcoxon*, this Court stated that the defendant's sentence was aggravated under section 18-1.3-401(8)(a)(IV), the provision at issue in this case, because the defendant committed the offense while under confinement as a convicted felon. *Id.* at 623 n.2. This statement conflicts with *Willcoxon*. In light of this Court's statement, any legislative inaction should be given little weight.

Finally, not only has the General Assembly not implicitly approved of *Willcoxon* but it has superseded *Andrews* with new

legislation. Thus, the Court's interpretation in *Andrews* carries no weight under the current statutory scheme.

As stated above, this Court's holding in *Andrews* hinged on the fact that the enhancement provision would apply in every case, which would "effectively render meaningless the [General Assembly's] classification of the felony as class 3." 871 P.2d at 1202. Under the statutory scheme relevant to *Andrews*, it appears a felony's classification was only pertinent to the presumptive sentence for that crime and nothing else. *See id.* However, the General Assembly eliminated that circumstance when it amended the habitual criminal statute in 1993.

The defendant in *Andrews* committed his crimes in 1990. *Id.* at 1200. Under the habitual criminal statute in effect at that time, a defendant "convicted…of any felony for which the maximum penalty prescribed by law exceed[ed] five years" and who was twice previously convicted of a felony would receive a sentence of 25 to 50 years. § 16-13-101(1), C.R.S. (1992). A person convicted of "any felony" who had three prior felonies received a life sentence. § 16-13-101(2), C.R.S. (1992).

In 1993, the General Assembly altered habitual criminal eligibility and sentencing so that both were controlled by the particular class of felony for which a defendant was convicted. Ch. 322, sec. 1, § 16-13-101, 1993 Colo. Sess. Laws 1975-76. Specifically, under section 16-13-101(1), C.R.S. (1993), a defendant was eligible for habitual criminal sentencing if he or she was convicted of "any class 1, 2, 3, 4, or 5 felony" and had two previous felonies. In that event, the defendant would receive a sentence of "three times the maximum of the presumptive range" set forth for that class of felony. *Id.* Under section 16-13-101(2), C.R.S. (1993), a defendant who committed "any felony" and had three previous felonies would receive a sentence of "four times the maximum of the presumptive range" set forth for that class of felony. *Id.*[6]

Thus, subsequent to *Andrews* and under the current statutory scheme, it remains true that the enhancement provision will apply in every case to the crimes of escape and attempted escape from a felony.

[6] The current version of the habitual criminal statute, which retains determining eligibility and sentencing by the class of felony is located in section 18-1.3-801, C.R.S. (2015).

See § 18-8-208(1)-(2), C.R.S. (2015); § 18-8-208.1(1), C.R.S. (2015). However, the crime of escape's classification as a class 3 or 4 felony is not rendered meaningless by the application of the enhancement provision. To be sure, defendants convicted of class 3 or 4 felony escape will be effectively sentenced for a class 2 and 3 felony by operation of the enhancement provision. *See* § 18-1.3-401(1)(a)(V)(A), C.R.S. (2015). However, if a defendant is subject to habitual criminal sentencing, *the classification of that offense as a class 3 or 4 felony will control the sentence.* Thus, in contrast to the law in effect under *Andrews*, the General Assembly's classification continues to have meaning under the current statutory scheme.

The General Assembly further superseded *Andrews* when it altered the consecutive sentencing provisions applicable to escape and attempted escape. In 2010, the legislature added section 18-8-208.1(1.5) and amended section 18-8-209. Ch.260, sec. 1, §§ 18-8-208.1 & 18-8-209, 2010 Colo. Sess. Laws 1178-79. In those provisions, the mandatory nature of a consecutive sentence was removed. Specifically, if a defendant commits attempted escape or escape while serving a

direct sentence to a community corrections program or while in an intensive supervision parole program, then the trial court retains discretion to impose a concurrent sentence. *See* § 18-8-208.1(1.5), C.R.S. (2015); § 18-8-209(1)-(2), C.R.S. (2015).

Therefore, under current law, neither circumstance that arguably drove this Court's analysis in *Andrews* is present. Accordingly, *Andrews* should not guide this Court's determination of the issue here.

Notably, this Court has never extended the reasoning of *Andrews* to apply to any other sentencing provision. *See e.g., People v. Leske*, 957 P.2d 1030, 1045 n.20 (Colo. 1998) ("[O]ur decision in *Andrews* is limited to its facts" and "to the crime of escape…."). Further, the only case to cite *Andrews* for the proposition that a consecutive sentencing provision controls to the exclusion of another general sentencing provision is *Willcoxon*. As set forth in the Opening Brief, that conclusion is inconsistent with this Court's precedent that where two statutory provisions do not conflict, or where an apparent conflict can be reconciled, the statutory provisions are read together to give both effect. *Mojica-Simental*, 73 P.3d at 18. Only when a specific statute

irreconcilably conflicts with a statute of general application does the specific statute prevail to the exclusion of the general. *See* § 2-4-205, C.R.S. (2015).

Under *Willcoxon* and defendant's assertions, even when two provisions do not conflict, the General Assembly has to explicitly provide that the general statute operates in tandem with the specific statute. Such a conclusion is contrary to Colorado law.[7]

CONCLUSION

For the foregoing reasons and those stated in the Opening Brief, the judgment of the court of appeals should be reversed.

CYNTHIA H. COFFMAN
Attorney General

/s/ William G. Kozeliski
WILLIAM G. KOZELISKI, 37824*
Assistant Attorney General
Criminal Appeals Section
Attorneys for Petitioner
*Counsel of Record

[7] To the extent *Andrews* is inconsistent with *Mojica-Simental* and *Martinez v. People*, 69 P.3d 1029 (Colo. 2003), this Court has effectively overruled it.

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within **PEOPLE'S REPLY BRIEF** upon **CORY D. RIDDLE**, via Integrated Colorado Courts E-filing System (ICCES) on January 27, 2016.

/s/ Tiffiny Kallina