No. 34851-2

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION III

State of Washington, Respondent

vs.

Kasi L. Sleater, Appellant

Petition for Review to the Washington Supreme Court

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IDENTITY OF PETITIONER

Kasi L. Sleater, appellant, petitions the Washington Supreme Court for review.

COURT OF APPEALS DECISION

The Court of Appeals, Division III, affirmed the trial court's denial of Ms. Sleater's motion to vacate. This occurred via published opinion on September 28, 2017. Ms. Sleater did not seek reconsideration.

ISSUES PRESENTED FOR REVIEW

Does Ms. Sleater have a conviction for a "new crime" since the date of discharge for the purposes of vacating a felony conviction under RCW 9.94A.640 where the new crime occurred prior to the discharge date, but Ms. Sleater was convicted after the discharge date?

STATEMENT OF THE CASE

In 2006, the Benton County Superior Court convicted Kasi Sleater of a violation of the Uniform Controlled Substances Act for an offense committed on May 2, 2005. Agreed Report of Proceedings (ARP) at 1:2-3; Clerk's Papers (CP) at 1. The date of discharge for that offense is May 22, 2008. ARP at 1:3-5; CP at 66. On May 29, 2008, the same court convicted

Ms. Sleater of another violation of the Uniform Controlled Substances Act for an offense committed on May 15, 2008. ARP at 1:6-7; CP at 53. Thus, the date of Ms. Sleater's discharge for the 2005 offense (May 22, 2008) occurred between the dates she committed and was convicted of the 2008 offense (May 15, 2008 and May 29, 2008, respectively). ARP at 1:8-10.

In October 2016, Ms. Sleater filed a motion to vacate the 2005 case under RCW 9.94A.640, arguing that she had not been "convicted of a new crime . . . since the date of the offender's discharge" because her 2008 offense occurred prior to the discharge date for the 2005 offense. ARP at 1:11-12; CP at 15. The trial court denied the motion because the conviction for the 2008 offense occurred after the date of discharge for the 2005 offense. ARP at 2:22-23; CP at 63. The Court of Appeals affirmed the denial on the same basis. Appendix.

ARGUMENT

The Washington Supreme Court should grant review because the Court of Appeals is in conflict with well settled supreme court precedent and this case involves an issue of substantial public interest.

Two relevant considerations in granting review are whether the Court of Appeals decision is in conflict with a decision of the supreme court and whether the case presents an issue of substantial public interest. RAP 13.4(b). A decision that has the potential to affect a number of

proceedings in the lower courts may warrant review as an issue of substantial public interest if review will avoid unnecessary litigation and confusion on a common issue. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). Here, the Court of Appeals decision is in conflict with well settled supreme court precedent on the principles of statutory construction because it adopted an untenable interpretation of RCW 9.94A.640 that reads the word "new" completely out of the statute and renders it meaningless. Likewise, because the Court of Appeals issued a published opinion, this error is likely to permeate to the lower courts. Trial courts across the state hear thousands of motions to vacate both felony and misdemeanor convictions[1] every year. This is an issue of substantial public interest.

The Court of Appeals adopted an untenable interpretation of RCW 9.94A.640 by reading the word "new" out of the statute, violating principles of statutory construction.

The felony vacate statute provides that the record of conviction may not be cleared if "the offender has been convicted of a *new crime* . . . since the date of the offender's discharge under RCW 9.94A.637." RCW

[1] Both the felony vacate (RCW 9.94A.640) and the misdemeanor vacate (RCW 9.96.060) statutes use the same "new crime" language, but with different triggering dates. Thus, the Court of Appeals's decision indirectly affects misdemeanor vacates as well.

9.94A.640(2)(d) (emphasis added). The Court of Appeals ruled that the statute is not ambiguous, that the focus of the statute is the word "convicted," and that any conviction that occurs after the date of discharge invokes this clause. Without any citation to authority or logic, the Court of Appeals in a footnote also concluded that the word "new" doesn't really mean "new" – it must mean "different."

1. RCW 9.94A.640 is ambiguous.

A statute is ambiguous whenever it is amenable to more than one reasonable interpretation. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Ms. Sleater's interpretation of RCW 9.94A.640 is entirely reasonable. It is reasonable to interpret the word "new" to actually mean "new" – something that has "recently come into being." Black's Law Dictionary 1204 (10th ed. 2014).[2] Combining the word "new" with what follows, "crime . . . since the date of the offender's discharge," leads to a reasonable conclusion that the crime must be "new" – having recently come into being – since the date of discharge. "New" modifies the crime, not the conviction. Otherwise, there would be no need to use the word

[2] The full definition is: "**new**, *adj.* (bef. 12c) **1.** (Of a person, animal or thing) recently come into being . . . **2.** (Of any thing) recently discovered . . . **3.** (Of a person or condition) changed from the former state . . . **4.** Unfamiliar; unaccustomed . . . **5.** Beginning afresh . . . .

"new." It is also reasonable to reject the Court of Appeals's proposed definition of "new" as simply "different" since there is no authority, legal or etymological, that supports such contortion of the English language. Ms. Sleater's 2008 offense did not result in a conviction for a new crime because the crime already existed prior to the date of discharge on the 2005 offense. It had not recently come into being since the date of discharge.

2. The Court of Appeals ruling violates principles of statutory construction.

"Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute." *Roggenkamp*, 152 Wn.2d at 621, 106 P.3d 196. A settled principle of statutory construction is that each word is to be accorded meaning and legislators are presumed to have used no superfluous words. *Id.* at 624. Courts must accord meaning, if possible, to every word in a statute. *Id.* "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Id.*

The Court of Appeals's ruling violates these settled principles by nullifying the word "new." A version of the statute that reads "the

offender has been convicted of a [] crime . . . since the date of the offender's discharge under RCW 9.94A.637" creates the exact same result as the Court of Appeals's interpretation of the actual language of RCW 9.94A.640. The word "new" is rendered meaningless and superfluous.

Clearly, the legislature could not have meant "new" as "different," otherwise it could have kept the word "new" out completely, used the word "different" or a synonym, or worded the statute as "the offender has a *new conviction* . . . since the date of the offender's discharge." But the legislature did not do any of those, it chose to use the words "new crime . . . since the date of the offender's discharge" in tandem for a reason. The only way to square this language with principles of statutory construction is to interpret it in Ms. Sleater's favor.

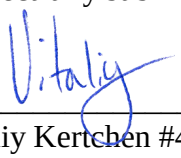
3. The rule of lenity applies.

If principles of statutory construction are insufficient to resolve the ambiguity, courts must apply the rule of lenity to interpret the statute in favor of the defendant. *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013). The Court of Appeals declined to apply the rule of lenity because it incorrectly found the statute unambiguous, but the statute is ambiguous and the rule of lenity should apply to resolve the ambiguity in Ms. Sleater's favor.

CONCLUSION

Based on the foregoing, the Washington Supreme Court should accept review because the Court of Appeals decision conflicts with supreme court precedent and this case presents an issue of substantial public interest.

Respectfully submitted,



Vitaliy Kertchen #45183
Date: 10/5/17

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 10/5/17, I served this document on the Benton County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to prosecuting@co.benton.wa.us. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,

Vitaliy Kertchen #45183
Date: 10/5/17
Place: Tacoma, WA

APPENDIX

FILED
SEPTEMBER 28, 2017
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. KASI LYNN SLEATER, Appellant.	)	No. 34851-2-III PUBLISHED OPINION

KORSMO, J. — Kasi Sleater appeals from an order denying her motion to vacate her 2006 conviction for possession of methamphetamine, arguing that a subsequent conviction occurring after the certificate of discharge issued for an offense committed prior to that date was not a "new crime" preventing vacation of the offense. We disagree with the focus of her argument and affirm the trial court.

FACTS

Ms. Sleater pleaded guilty on February 8, 2006, to possession of methamphetamine and complied with all the terms of the judgment and sentence. A certificate of discharge issued on May 22, 2008. However, one week before the certificate issued, she had been arrested for possessing methamphetamine with the intent to deliver.

She promptly pleaded guilty on May 29, 2008, to one count of unlawful possession of methamphetamine with the intent to manufacture or deliver and was sentenced to 22

months in prison. On October 3, 2016, Ms. Sleater moved to vacate the 2006 conviction, declaring that she did "not have a conviction for any new crime in any jurisdiction since discharge." Clerk's Papers at 16. The State responded that the 2008 conviction prevented vacation of the 2006 conviction.

The trial court heard argument on the motion and agreed with the State's interpretation of the statute. Ms. Sleater timely appealed to this court. A panel considered the matter without argument.

ANALYSIS

The sole issue presented is whether the 2008 offense prevented the vacation of the 2006 conviction. Ms. Sleater wrongly focuses on the timing of her 2008 arrest rather than the date of conviction for that offense.

This case presents an issue of statutory interpretation, so the basic rules of statutory construction govern this claim. Questions of statutory interpretation are reviewed de novo. *State v. Bradshaw*, 152 Wn.2d 528, 531, 98 P.3d 1190 (2004). A court begins by looking at the plain meaning of the rule as expressed through the words themselves. *Tesoro Ref. & Mktg. Co. v. Dep't of Revenue*, 164 Wn.2d 310, 317, 190 P.3d 28 (2008). If the meaning is plain on its face, the court applies the plain meaning. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Only if the language is ambiguous does the court look to aids of construction. *Id.* at 110-11. A provision is ambiguous if it is reasonably subject to multiple interpretations. *State v. Engel*, 166

Wn.2d 572, 579, 210 P.3d 1007 (2009); *State v. McGee*, 122 Wn.2d 783, 787, 864 P.2d 912 (1993).

The rule of lenity can be applied to ambiguous criminal statutes. If a statute is truly ambiguous, the rule of lenity requires that "the court must adopt the interpretation most favorable to the criminal defendant." *McGee*, 122 Wn.2d at 787.

Vacation of a felony conviction in Washington is a two-step process under the Sentencing Reform Act of 1981, chapter 9.94A RCW. When a convicted offender completes the requirements of his judgment and sentence, a certificate of discharge will enter and restore many civil rights. RCW 9.94A.637. After the receipt of the certificate of discharge and the passage of the requisite amount of time,[1] the offender can seek vacation of the conviction pursuant to RCW 9.94A.640.

At issue here is the meaning of one of the vacation policy's exceptions found in RCW 9.94A.640(2). The relevant provision states:

> (2) An offender may not have the record of conviction cleared if: . . . (d) the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender's discharge under RCW 9.94A.637.

RCW 9.94A.640 (emphasis added).

[1] A five year period for most class C felony offenses and ten years for most class B felony crimes. RCW 9.94A.640(2).

Focusing on the phrase, "new crime," Ms. Sleater argues that there was nothing "new" about the 2008 offense since it occurred and was known to law enforcement prior to the certificate of discharge. She contends that the 2008 conviction could not therefore prevent vacation of the 2006 conviction since it did not involve a new offense occurring after the certificate of discharge. She also contends that her reading of the statute shows that, at a minimum, the statute is ambiguous and the rule of lenity should apply.

Although Ms. Sleater has a clever argument, we do not agree with her reading of the statute. The plain reading makes inescapable the conclusion that since Ms. Sleater's 2008 *conviction* was entered after the certificate of discharge for the 2006 conviction, she is ineligible to vacate the earlier offense. The statute does not mention, let alone focus on, the date of the "new crime." Instead, the statute clearly states the trigger mechanism is whether the offender has been "*convicted* of a new crime" after the date of discharge and is, therefore, ineligible for vacation. RCW 9.94A.640(2)(d) (emphasis added). The words "new crime" modify the verb "convicted." That verb is the focus of the sentence.[2] It is the fact of conviction of a new crime, not the date that the new crime was committed, that has significance for the vacation rules. This statute is not ambiguous and there is no

[2] Ms. Sleater places emphasis on the word "new" in the phrase "new crime" to contend that the crime had not occurred prior to the date of discharge. That interpretation does not flow from a plain reading of the sentence. The natural reading, based on the total construction of the sentence, is that "new" means "different." This clarifies that the second crime for which an offender was convicted must be different from the crime that had been discharged.

need to resort to the rule of lenity. The trial court correctly concluded that the 2006 conviction could not be vacated due to the subsequent 2008 conviction.

Nonetheless, Ms. Sleater is not without remedy. Once she has received her certificate of discharge for the 2008 offense and is eligible to vacate it, she can first vacate that conviction and then seek vacation of the 2006 offense. *See State v. Smith*, 158 Wn. App. 501, 246 P.3d 812 (2010).[3] There is little utility to vacating the 2006 possession conviction while the more serious 2008 possession with intent conviction remains on her record.

The judgment of the trial court is affirmed.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J.

[3] Our decision is consistent with *Smith*. There, Division One of this court affirmed the vacation of an offender's 1989 felony conviction following the vacation of his 1995 misdemeanor conviction. 158 Wn. App. at 503. That court's analysis also focused on whether the vacated 1995 offense constituted a subsequent *conviction* rather than whether it was merely a post-discharge "new crime."

KERTCHEN LAW, PLLC

October 05, 2017 - 10:53 AM

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