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SUPREME COURT NO. 99547-8

NO. 80723-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DEMARCUS RASHAHID

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Catherine Shaffer, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/COURT OF APPEALS DECISION

Petitioner Demarcus Rashahid, the appellant below, seeks review of the court of appeals decision, State v. Rashahid, noted at __ Wn. App. 2d __, 2021 WL 321505, No. 80723-4-I (Feb. 1, 2021).

B. ISSUE PRESENTED FOR REVIEW

Is the felony firearm registration statute, RCW 9.41.330, subject to an attack on Fourteenth Amendment due process vagueness grounds when its requirements are imposed as part of a criminal sentence?

C. STATEMENT OF THE CASE

The state charged Demarcus Rashahid with first degree unlawful possession of a firearm under RCW 9.41.040(1), and following a jury trial, Mr. Rashahid was convicted as charged. CP 15, 34; RP 484.

The trial court imposed a standard range sentence at the low end of 41 months. CP 50, 52.

The trial court also imposed the requirement that Mr. Rashahid register as a felony firearm offender. CP 57; RP 484. The court stated, “I am ordering firearm registration in this case. I wouldn’t normally, but I really don’t like this history of guns, and I want to make sure it stops.” RP 484. The court later stated, “I guess what I’m telling you, Mr. Rashahid, with this is, I trust you, but I want to verify this time. Okay? And I wouldn’t

do this if you didn't have at least three prior criminal offenses I can see that link to firearms.” RP 490.

Mr. Rashahid appealed. CP 58-68. He challenged the felony firearm registration statute, RCW 9.41.330, as void for vagueness. In an unpublished per curiam decision, the Court of Appeals rejected his challenge by analogizing the firearm registration statute to a mere “sentencing guideline” as in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), to which the void for vagueness doctrine does not apply. Slip op., 1-2. The decision does not address his discussion of federal law at all.

D. ARGUMENT IN SUPPORT OF REVIEW

The felony firearm registration statute is subject to a vagueness challenge because it lengthens a criminal sentence and requires affirmative conduct on the part of the registrant

Mr. Rashahid agrees that “sentencing guidelines”—guidelines pertaining to the length of the trial court’s permissible sentencing discretion within an advisory or standardized sentence range—are not subject to a vagueness attack. This was the holding of Beckles v. United States, ___ U.S. ___, 137 S. Ct. 886, 197 L. Ed. 2d 145 (2017), involving a vagueness challenge to advisory federal sentencing guidelines. The Washington Supreme Court recently held the same with respect to the juvenile disposition statutes. State v. T.J.S.-M., 193 Wn.2d 450, 461-62, 441 P.3d 1181 (2019). Less recently, the Washington Supreme Court held the same

with respect to adult standard range sentencing. State v. Baldwin, 150 Wn.2d 448, 459, 8 P.3d 1005 (2003).

However, the felony firearm registration requirement is not a “sentencing guideline” about the permissible term of incarceration, as was at issue in Beckles, T.J.S.-M., and Baldwin. The felony firearm registration requirement is a component of a criminal sentence that, when imposed, augments the length of the sentence and the mandates of the sentence. It requires registrants to physically appear at the sheriff’s office following any term of incarceration to personally register and requires them to maintain registration and a current address on at least an annual basis for a four-year period. RCW 9.41.333(6)–(8). If the registrant fails to comply with any aspect of the registration requirements, the registrant faces additional prosecution and incarceration. RCW 9.41.335. Because it fixes additional time and conditions to the sentence, the felony firearm offender registration statute is subject to a challenge on Fourteenth Amendment due process vagueness grounds.

The registration requirement at issue in this case is more like Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed 2d 569 (2015), than like Beckles. In Johnson, the Court confirmed that the void for vagueness doctrine “appl[ies] not only to statutes defining elements of crimes, but also to statutes fixing sentences.” 576 U.S. at 596. The

sentencing court reviewed in Johnson was required to determine under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. § 924, whether Johnson had three or more “violent felon[ies]” which were defined as “conduct that presents a serious potential risk of physical injury to another.” Johnson, 576 U.S. at 593-94. If the sentencing court answered this question in the affirmative, then the maximum 10-year sentence was converted into a sentence of a minimum of 15 years with a maximum of life. Id. at 593. After concluding that the language of the statute led to arbitrary results, the Court held that the statute in question “both denies fair notice to defendants and invites arbitrary enforcement by judges. Increasing a defendant’s sentence under the clause denies due process of law.” Johnson, 576 U.S. at 597.

Likewise, increasing a defendant’s sentence under the felony firearm registration statute, RCW 9.41.330, also denies due process of law. The statute tells the sentencing court to consider criminal history, whether the person had a previous not guilty by reason of insanity (NGRI) finding, and evidence of a propensity of violence. RCW 9.41.330(2)(a)–(c). Where, as here, defendants have no NGRI finding or little history of violence, the trial court may impose the requirement based solely on criminal history. This statute is even more standardless than the statute at issue in Johnson. It invites nothing but arbitrary enforcement depending on what any given judge

thinks about any given criminal history. Under the statute, a judge would be every bit as justified in imposing the registration requirement on a defendant without any criminal history than on a defendant with a lengthy and violent criminal history. The firearm registration statute is completely standardless. Beckles itself recognized that laws “must specify the range of available sentences” with sufficient clarity. 137 S. Ct. at 892. RCW 9.41.330 fails to do so.

Like Johnson, the registration statute serves to lengthen the time and effect of the criminal penalty. Mr. Rashahid was sentenced to a 41-month standard range sentence. CP 50, 52. Based on the arbitrary registration requirement imposed without ascertainable standards, Mr. Rashahid must register and maintain at least annual in-person registration for a four-year period. RCW 9.41.333(6)–(8). This increases the impact of the criminal sentence: Mr. Rashahid will still be under state surveillance (of some kind or another) for four years after his standard range sentence is complete. The registration requirement also augments the requirements of the sentence: Mr. Rashahid must perform affirmative conduct as a result of the arbitrarily imposed requirement.

In this way, the requirement is more like other conditions of sentence, which are subject to vagueness attack. See, e.g., State v. Nguyen, 191 Wn.2d 671, 425 P.3d 847 (2018); State v. Bahl, 164 Wn.2d 739, 193

P.3d 678 (2008). The sentencing court certainly has broad discretion in fashioning crime-related conditions that prescribe or proscribe certain conduct—or not—but conditions that are imposed are still subject to attacks on account of their vagueness. Similarly, the firearm registration requirement imposed requires affirmative conduct and is therefore subject to claims that the requirement is vague because it is imposed arbitrarily.

The felony firearm registration statute is not a mere sentencing guideline about the discretionary length of a term of incarceration. It is a substantive sentencing requirement that increases the length and the requirements of a criminal sentence. Consistent with Johnson, the statute is subject to an attack based on vagueness. This is an important constitutional question that should be reviewed by the Washington Supreme Court pursuant to RAP 13.4(b)(3).

Finally, review should be granted to address this claim because the Court of Appeals refuses to do so with any substance. In issuing a per curiam decision in this case, the Court of Appeals implies that this issue is somehow now settled in our state. It is true that the Court of Appeals has rejected this claim before, but only in unpublished opinions with little to no substantive analysis and none that addresses Mr. Rashahid's actual arguments about Johnson and Beckles. See, e.g., State v. Chase, noted at 14 Wn. App. 2d 1041, 2020 WL 5757666, at *3 (Sept. 28, 2020), review denied

___ Wn.2d ___, 479 P.3d 701 (2021); State v. Hernandez, noted at 13 Wn. App. 2d 1129, 2020 WL 4049771, at *2 (Jul. 20, 2020), review denied, 196 Wn.2d 1029, 476 P.3d 579 (2020); State v. Miller, noted at 195 Wn. App. 1026, 2016 WL 4087307, at *1 (Aug. 1, 2016). If Mr. Rashahid is so incorrect in his reading of United States Supreme Court law about the applicability of the vagueness doctrine and is so incorrect to suggest that a firearm registration statute differs from a standardized sentencing range or guideline, then the appellate court system should have the guts to explain why in a published decision. Division One's fecklessness extends far beyond the issue in this case, undermines the functioning of the appellate process to resolve constitutional claims and arguments, and presents an issue of public import that merits review under RAP 13.4(b)(4).

E. CONCLUSION

Because RAP 13.4(b)(3) and (4) are satisfied, review should be granted.

DATED this 3rd day of March, 2021.

Respectfully submitted,

NIELSEN KOCH, PLLC

A handwritten signature in black ink, appearing to read "Kevin A. March", written over a horizontal line.

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APPENDIX

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

STATE OF WASHINGTON,

Respondent,

v.

DEMARCUS RASHAHID,

Appellant.

No. 80723-4-I

DIVISION ONE

UNPUBLISHED OPINION

PER CURIAM — Demarcus Rashahid was convicted by a jury of first degree unlawful possession of a firearm under RCW 9.41.040(1). The trial court imposed a low-end standard range sentence of 41 months, and also imposed the requirement that Rashahid register as a felony firearm offender.

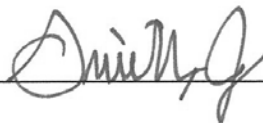
Rashahid appeals, arguing that RCW 9.41.330, the felony firearm offender registration statute, is unconstitutionally vague because it lacks guidance for determining whether a person’s criminal history should require registration as a felony firearm offender. But, as the State notes, the Washington Supreme Court held in State v. Baldwin, 150 Wn.2d 448, 459, 78 P.3d 1005 (2003), that the due process void-for-vagueness doctrine is not applicable to sentencing guidelines because they neither “define conduct nor . . . allow for arbitrary arrest and criminal prosecution by the State.” See also State v. Brush, 5 Wn. App. 2d 40, 63, 425 P.3d 545 (2018); State v. DeVore, 2 Wn. App. 2d 651, 664, 413 P.3d 58

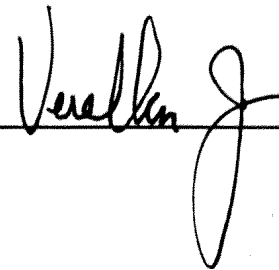
(2018) (aggravating factors in RCW 9.94A.535(3) are not subject to a vagueness challenge because they do not specify the sentence that must be imposed nor limit the trial court's discretion during sentencing). Similarly, because RCW 9.41.330 does not fix sentencing aspects, and it neither proscribes nor prescribes criminal conduct, the void-for-vagueness doctrine does not apply to RCW 9.41.330.

Affirmed.

For the Court:







NIELSEN KOCH P.L.L.C.

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