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COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL COSTA, Appellant

Court of Appeals # 72704-4

King County Cause No. 13-1-11983-4 KNT

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. **The State Persuaded Judge Ruhl That an Order for Relief from Disabilities Was a “Vacation Order.”**

The State argued that a dismissal with release from ‘all penalties and disabilities’ was **identical to a vacation** The State argued that the trial court should simply dismiss the case with prejudice, without including any language about release from penalties and disabilities.

The trial court declined to sign Costa’s proposed order, saying, **‘I’m not going to do a vacation order.’** RP 19.

Brief of Respondent at 5-6 (emphasis added).

The proposed order presented to Judge Ruhl by Michael Costa did not say that it would “vacate the record of conviction,” nor did it say that it would “vacate the judgment and sentence.” It did not instruct the Clerk to “transmit an order to the Washington State Patrol identification section or to the local police agency,” nor did it instruct the WSP to “immediately update their records to reflect the vacation of the conviction.” The proposed order did not even contain the word “vacate.” CP 32-34. All of the phrases quoted above are the mechanisms by which vacation of a conviction are carried out under RCW 9.96.060, the actual vacation statute. The order presented by the defense was simply not a vacation order. Judge Ruhl acted as if it were because the State persuaded him that

the only meaning of “relief from disabilities” was “identical to” vacation. The State admits as much in the excerpt taken from its opening brief. That was untrue. Unfortunately, the argument caused the trial court to commit error.

II. Relief From Disabilities is Broader in Meaning.

The State takes a selective position in its argument on vacation. RCW 9.95.240(1) includes not just a description of the effect of the Court’s actions; namely the relief from disabilities. The statute also describes the procedure that is to be utilized to achieve that end. The steps described include the withdrawal of the previously entered guilty plea and the dismissal of the underlying charge. Those steps are described variously in other statutes as “vacating the record of conviction” RCW 9.96.060(1) and “clearing the record of conviction.” RCW 9.94A.640(1). The State is judicially estopped from arguing that Judge Ruhl lacked authority to take those two steps given that the State agreed to this and even proposed the very order signed by Judge Ruhl which permitted the withdrawal of the plea and the dismissal of the charge. See C.P. 51.

What the State is focusing on is the effect of the entry of the order that permitted the withdrawal of the plea and caused the dismissal of the

charge. It has taken the position in the trial court that an order that contains the language “relief from disabilities” might confuse the Washington State Patrol and cause that agency to treat the result as a vacation of the offense preventing the dissemination of the criminal record to the public.¹ R.P. at 10.

If the legislature had intended that an order issued pursuant to RCW 9.95.240(1) would prevent the dissemination of records, then the amendment adding subsection (2) on vacation would have been superfluous. The fact that the legislature created a two-step process, with only the second step having the effects about which the State is now complaining, demonstrates that the legislature was drawing a distinction between the clearing of the court record under the first subsection, and the clearing of the criminal history record with the WSP under the second. That second step was what the legislature termed as the “vacation of the defendant’s record of conviction.” RCW 9.95.240(2).

The State’s objection to the inclusion of the language specifying a relief from disabilities stems from its two concerns that it 1) will result in a

¹ Vacation under any of the statutes authorizes the WSP to disseminate prior criminal history, even that which has been vacated, to any law enforcement agency. See e.g. RCW 9.96.060(7) & RCW 9.95.240(2)(b).

limitation on the ability to disseminate criminal history information in circumstances in which a formal vacation has not been granted, and 2) may also become a bar to the future use of the conviction in computing criminal history. That language, however, no longer serves to invoke either the removal of the conviction from criminal history or as a bar to the dissemination of the conviction record.

At an earlier time the State would have been correct in its assertion that “relief from disabilities” included the concept of vacating the criminal history. The Washington Supreme Court in *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001) interpreted the statute to include vacation.

We hold that a superior court has the statutory authority under RCW 9.95.240 to grant a petition to vacate the conviction record following dismissal of the charge under the same statute.

Id. at 838.²

However, the authority to vacate a conviction under former RCW 9.95.240 did not survive the next ensuing legislature. Laws of 2003 chapter 66 § 1 amended the statute to add a subsection (2) that specifically

²The *Breazeale* Court also noted that Professor David Boerner in his work, Sentencing in Washington §11.6 at 11-7, equated the new concept of “vacation” in the Sentencing Reform Act to the remedy provided by former RCW 9.95.240.

provided that “After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640.” The effect of the amendment was to move the mechanism of vacation from the former RCW 9.95.240, as recodified RCW 9.95.240(1), to the second section of the statute which was then codified as RCW 9.95.240(2)(a).

The State argues that “release from disabilities” continues to result in an inability to count the prior conviction in criminal history calculations, citing to *In re: Carrier*, 173 Wn.2d 791, 272 P.3d 209 (2012). State’s Brief at 15. *Carrier* did not analyze the post-2003 amendment version of RCW 9.95.240(1), but rather, considered only the effect of former RCW 9.95.240. Under the former version of the statute the State would be right. But, once the 2003 amendment was passed, a formal petition for vacation of an offense under RCW 9.94A.640 or RCW 9.96.060 was required to remove the conviction from criminal history. The order that was sought from Judge Ruhl would not have removed Mr. Costa’s conviction from a future calculation of criminal history because the relief from disabilities under RCW 9.95.240(1) no longer had that effect.

The State's argument comes down to the proposition that when the legislature passed the 2003 amendment (and the 2001 enactment of RCW 9.96.060), it intended to strip away the authority of the superior courts to grant relief from disabilities under RCW 9.95.240(1). If that was the legislative intent one would expect that the language "relief of disabilities" would have been removed from RCW 9.95.240(1). Indeed, if that phrase was "identical to vacation," then the amendment creating a mechanism for vacation under RCW 9.95.240(2)(a) would have been unnecessary. The 2003 amendment found in RCW 9.95.240(2)(a) provides a means to vacate pre-SRA felonies ("the defendant may apply. . . for a vacation") and specifically refers the applicant to RCW 9.94A.640 (a provision of the SRA that governs vacation). RCW 9.94A.640 also contains the phrase "and the offender shall be released from all penalties and disabilities resulting from the offense." RCW 9.94A.640(3). Thus, if the phrase was "identical to vacation," this new statutory regime would render it not only surplusage, but redundant.

RCW 9.94A.640 provides in pertinent parts:

(1) [T]he court may clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court

setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.

(3) Once the court vacates a record of conviction under subsection (1) of this section, the fact that the offender has been convicted of the offense shall not be included in the offender's criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense.

The provisions that cause the Washington State Patrol to modify criminal history are contained in subsection 3, stating that “the offense shall not be included in the offender’s criminal history.” The mechanism for dismissing the charge is contained in subsection 1. Those portions of the statute accomplish vacation of the offense. Nevertheless, the statute goes on to recite the relief from penalties and disabilities language. If relief from penalties and disabilities is identical to vacation, then it would be redundant to have that language in a statute containing specific vacation provisions. The phrase must mean something more, particularly since the legislature has included it in three statutes that have specific provisions that on their own have the effect of vacating a conviction. See RCW 9.95.240, RCW 9.96.060 and RCW 9.94A.640.

The State's position necessarily requires acceptance of the notion that when the legislature passed the 2003 amendment to RCW 9.95.240, it intended to repeal the relief from disabilities provision. It hardly makes sense to assume that the legislature would add a new section on vacation to RCW 9.95.240(2) without being aware that it was leaving in an existing provision in the first paragraph of the statute that the State now claims is "identical to a vacation."

The legislature's choice to preserve the relief from disabilities provision is strong evidence that it still attributed a meaning to the phrase other than vacation and intended it to remain a part of the law. Since the legislature did not amend out the phrase "relief from disabilities" from the 2003 version of RCW 9.95.240(1), the State is asking this Court to do that.

Looking at the history of the interpretation of the relief from disabilities language, one can see that the courts have attributed an important meaning to the relief from disabilities provision. It is submitted that the relief provision stripped of its former power of cleansing criminal history still has an important function; the cleansing of the stigma of conviction. The language informs anyone seeing an order of dismissal under RCW 9.95.240(1) that the defendant should no longer be shunned

and subjected to the shame of the status of criminal. It is a judicial order that says, in so many words, that the penalties and disabilities that society associates with the pronouncement of guilt should no longer be deemed applicable to this individual.

One very public illustration of this principal occurred in *Matsen v. Kaiser*, 74 Wn.2d 231, 443 P.2d 843 (1968) (Hamilton, J). The former sheriff of Klickitat County, E.C. Kaiser, was convicted of misappropriating public records during his tenure in office. He was granted a deferred sentence under the Probation Act, RCW 9.95.200 *et. seq.* After serving several months of probation, he petitioned the Court for dismissal and relief from all penalties and disabilities. It is notable that he did not ask for the remedies associated with the modern term of “vacation.” He did not ask that his prior conviction cease to be considered should he commit a future offense, nor did he seek a means to deny the conviction in a future job application. Rather, his position was that the relief from disabilities restored his civil right to run for and serve in office.

This statute is a legislative expression of public policy in the field of criminal law and rehabilitation. It undertakes, in unambiguous terms, to restore a deserving offender to his preconviction status as a full-fledged citizen.

Thereafter, it would be my view that the restoration of citizenship rights accompanying the order of dismissal would and should restore the individual's eligibility to run for public office, and if the voters, knowing of his former record, see fit to elect him to public office such should be their right.

Matsen v. Kaiser, supra at 237-38 (Hamilton, J separate opinion).

In any regard, the legislature, as a co-equal branch of government, is entitled to indulge in its own notions of what “relief from disabilities” shall continue to be. It has shorn away the notion of vacation that earlier courts attached to the statute. But, it has not thrown away the language and principal that underlie the restoration of “full-fledged” citizenship and civil dignity.

III. There Has Not Been an Implied Repeal.

The State is arguing that because of the enactment of RCW 9.96.060, the words “relief from all penalties and disabilities,” should be read out of RCW 9.95.240(1).

“The dismissal of a deferred sentence under RCW 9.95.240(1) no longer releases a defendant from all penalties and disabilities, which would be the equivalent of vacating of the conviction, because the legislature has enacted separate statutes to specifically govern vacation of convictions.”

Respondents Brief at 7.

When RCW 9.96.060 was adopted it did not contain any language amending RCW 9.94.250 or indicating that it was intended to repeal all or a portion of that statute. Article II, Section 37 of the Washington Constitution requires that an amending or repealing bill set forth in its title the intention to limit or remove existing legislation.

No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

Id. Laws of 2001, Chapter 140 (SH.B. No. 1174), the law that enacted RCW 9.96.060, did not set forth any portion of the text of former RCW 9.95.240. It did not even make a “mere reference to its title.” Assuming that the legislature did not mean to violate the constitution, it follows that there was no legislative intention to amend former RCW 9.95.240. The State is precluded by the Washington Constitution from arguing that there was an express repeal of the relief from disabilities language of RCW 9.95.240.

The State has instead argued that the enactment of both RCW 9.96.060 and the 2003 addition of a second section to RCW 9.95.240 have caused a *defacto* implied repeal of the first section’s provision for relief from disabilities. The State has advanced this position without citation to

the extensive case law on repeal by implication. Repeals by implication are not favored in the law.

We have often said that repeals by implication are not favored. *Walton v. Absher Constr. Co.*, 101 Wn.2d 238, 242, 676 P.2d 1002 (1984); *Paulson v. County of Pierce, supra*; *U.S. Oil & Ref. Co. v. Department of Ecology*, 96 Wn.2d 85, 88, 633 P.2d 1329 (1981); *Jenkins v. State*, 85 Wn.2d 883, 886, 540 P.2d 1363 (1975); *Tardiff v. Shoreline Sch. Dist.*, 68 Wn.2d 164, 166, 411 P.2d 889 (1966). This disfavor is the result of a presumption that the Legislature acts with a knowledge of former related statutes and would have expressed its intention to repeal them. *State v. Jackson*, 120 W.Va. 521, 199 S.E. 876 (1938); 1A C. Sands, *Statutory Construction* 23.10, at 231 (4th ed. 1972).

Local No. 497, Affiliated with Int'l Bhd. of Elec. Workers, AFL-CIO v.

Pub. Util. Dist. No. 2 of Grant Cnty., 103 Wn.2d 786, 788-90, 698 P.2d 1056, 1057-58 (1985).

In those circumstances in which the courts have considered an implied repeal a two prong test has been established.

The 2-pronged test employed by this court to resolve the repeal by implication issue provides that a repeal occurs when

(1) the later act covers the entire subject matter of the earlier legislation, is complete in itself, and is evidently intended to supersede prior legislation on the subject; or

(2) the two acts are so clearly inconsistent with, and repugnant to, each other that they

cannot be reconciled and both given effect by a fair and reasonable construction.

Paulson v. County of Pierce, 99 Wn.2d 645, 650, 664 P.2d 1202, *cert. denied*, 464 U.S. 957, 104 S.Ct. 386, 78 L.Ed.2d 331 (1983).

Local No. 497, supra at 788-89.

Turning to the first prong, it is apparent that RCW 9.96.060 does not concern itself with probation. The statute applies to vacation of any eligible misdemeanor regardless of whether the defendant had been committed to the full term of sentence, had been sentenced to a term with some or all of the time suspended, or had had his sentence deferred. By contrast, RCW 9.95.240 concerns only those who have been sentenced under the Probation Act, RCW 9.95.200, *et. seq.* and who have successfully completed probation. RCW 9.96.060 does not purport to cover the “entire subject matter of the earlier legislation” and “is not complete in itself.” Further, RCW 9.95.240(1) provides a means for dismissal of an information in circumstances not covered under either RCW 9.96.060 or RCW 9.94A.640. The latter statutes disqualify several classes of defendants, including Mr. Costa, who have been charged with certain statutory violations. RCW 9.95.240(1) does not limit relief from disabilities according to those statutory charges, although RCW

9.95.240(2) has the same statutory disqualifications that would bar true vacation.

As to the second prong, whether the statutes are repugnant, the two statutes can be harmonized in the manner set forth in the opening brief at pages 13-16. The State has not responded to that argument. The overwhelming evidence is that the legislature thought both concepts were sufficiently separable that it included them in two sections of the same statute, RCW 9.95.240 (RCW 9.95.240(2) by reference to RCW 9.64A.640). The legislature cannot be said to have been unmindful of the effects of the two provision, nor can there be a valid claim that by enacting the vacation statutes, it meant to repeal RCW 9.95.240(1).

IV. It Is Necessary to Remand to Provide the Trial Court with the Opportunity to Enter the Order Free of its Prior Error.

The State's final contention in its brief is that the Court below was not required to include the requested language of relief from disabilities. This argument is premature. The reason that Judge Ruhl did not enter the order as drafted appears in the record. He did not say that he was exercising discretion not to enter the order because of the merits. He said,

‘I’m not going to do a vacation order.’ RP 19. The Court was operating under a misunderstanding of the legal effect of the language precipitated by the arguments presented by the State.

The argument is also incorrect. RCW 9.95.240 gives the Court discretion to grant or deny dismissal of the case following successful completion of probation. Judge Ruhl exercised his discretion to do so. Thereafter, the statute is mandatory in declaring that once the case is dismissed the defendant “shall thereafter be released” from all penalties and disabilities. It makes no sense to legislate such a result and then leave it to the discretion of the Court whether to include the mandatory consequence of the dismissal in the order. What purpose would be served by making that discretionary? If anything, it would create confusion when two separate orders are later reviewed and one says yes there is a release and the second is silent. What inference is to be drawn from the silence? Such a result would only confuse those who later review records following the successful completion of probation.

Finally, the State argues that it would be disingenuous to enter an order containing the language attesting to relief from all disabilities because there had not yet been a vacation. The State insists that this

would be “inaccurate and misleading.” State’s brief at 21. The phrase “released from all penalties and disabilities” is a term of art. It does not truly mean a complete expungement under any of the laws of this state. The vacation statutes, RCW 9.96.060 and RCW 9.64A.640, purport to release a defendant “from all penalties and disabilities,” but at the same time they preserve the criminal history record for use by law enforcement and specifically allow the use of the prior “vacated” conviction in a subsequent criminal prosecution to prove some element of the new crime. The use of the release from penalties and disabilities language in an order entered under RCW 9.95.240(1), as requested by Mr. Costa, is no more inaccurate or misleading than the use of that language in an order entered pursuant to one of the vacation statutes.

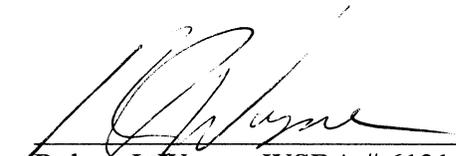
There is no true expungement in this state and no full second chance. The best that the law can currently do is provide a successful probationer with a piece of paper that tells others that the charge was not just dismissed on some technicality, but that he has been restored to full fledged citizenship. That is what Mr. Costa requested and now this Court can see how far the State will go to prevent that one last measure of civil decency.

CONCLUSION

Mr. Costa did everything he was instructed to do by the judge who sentenced him to probation. He made a timely application and the Court indicated that it would grant an early termination of the probation and dismiss the case. The State drafted the order that was signed, withdrawing the plea and dismissing the case with prejudice. Now we are debating whether a mandatory provision in the Probation Act should be given meaning and whether it should have been written in the Order. In light of the preservation of the relief from disabilities language by the legislature, it is up to the Courts to follow the statutory dictates and enter an order substantially in the form presented by the defense.

This Court should reverse and remand with instructions to enter an order granting dismissal with relief from disabilities pursuant to RCW 9.95.240(1).

Respectfully submitted this 17th day of June, 2015.


Robert J. Wayne, WSBA # 6131
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Appellant / Defendant

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that on this 17th day of June, 2015 he caused a copy of Appellant's Reply Brief to be served upon the office of the King County Prosecuting Attorney, 516 Third Avenue, #554, Seattle, WA 98104 by U.S. Mail Postage Prepaid and to be sent by email to defendant Michael Costa.

Dated this 17th day of June, 2015 at Seattle, WA.

ROBERT J. WAYNE, P.S.

A handwritten signature in black ink, appearing to read 'R. Wayne', is written over a horizontal line.

ROBERT J. WAYNE, Attorney
For Defendant, Michael Costa
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