

No. 45389-4-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

CLIFFORD PAYSENO

V.

KITSAP COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. Assignment of Error	1
The Superior Court erred by denying Mr. Payseno’s petition to reinstate his firearm rights	1
B. Statement of the Case	1
C. Argument	3
D. Conclusion	7

TABLE OF AUTHORITIES

Cases

<u>State v. Hall</u> , 45 Wn. App. 766, 728 P.2d 616 (1986).....	5, 7
<u>Price v. Kitsap Transit</u> , 125 Wash.2d 456, 463, 886 P.2d 556 (1994).....	6

Statutes

CrR 2.1(d).....	5
RCW 9.41.040(4).....	1, 3, 6
RCW 9.94A.360.....	4, 6
RCW 9.94A.525.....	1, 3, 4, 6

A. Assignment of Error

Assignment of Error

The Superior Court erred by denying Mr. Payseno's petition to reinstate his firearm rights.

Issue Pertaining to Assignment of Error

Did the Superior Court err by denying Mr. Payseno's petition to reinstate his firearm rights when he spent more than five years in the community from 2000-2007 without being convicted any new crimes, he was not currently charged with any crimes when he petitioned in 2013, and since 2000 he has had no subsequent convictions that count as part of the offender score under RCW 9.94A.525?

B. Statement of the Case

In 2013 Clifford Payseno filed a petition to reinstate his firearm rights pursuant to RCW 9.41.040(4). CP, 1. The Court determined his criminal history is as follows:

Date	County/Court	Cause No.	Charge/RCW
05/26/2010	Lakewood Municipal Court	10L000689	Negligent driving 1 st degree 46.61.5249
02/23/2007	Ocean Shores Municipal Court	24860	DUI 46.61.502
06/08/2000	Kitsap District Court	12239405	Negligent driving 1 st degree 46.61.5249
03/13/2000	Kitsap Superior Court	00-1- 00380-1	VUCSA 69.50.401

CP, 29. The Court determined Mr. Payseno resided in the community without being charged or convicted of any criminal offense from 2000 and 2007 (more than five years) and that he had been in the community for three years following his conviction for first degree negligent driving. CP, 30. At the time of his petition, he was not currently charged with any criminal offenses. CP, 30. Negligent driving in the first degree is a misdemeanor offense, but it does not preclude the lawful possession of a firearm.

The State of Washington objected to Mr. Payseno's petition. CP, 16. The State's position was that he must wait until 2015, five years from his last criminal conviction. The Kitsap Superior Court agreed with the State and denied the petition. CP, 31. Mr. Payseno filed a timely notice of appeal.

C. Argument

The relevant facts in this case are undisputed and the legal issue is one of first impression. The Superior Court was interpreting a poorly written statute in order to determine whether Mr. Payseno is eligible to petition to reinstate his firearm rights. RCW 9A.040(4)(ii)(A) permits a person to reinstate his or her firearm rights under the following circumstances:

If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9A.525.

Pursuant to this statute, the petitioner must show three criteria in order to qualify for firearm rights reinstatement. Mr. Payseno meets all three criteria. (1) The petitioner must have been in the community for five or more years without being convicted of any crime (felony, gross misdemeanor, or misdemeanor). Mr. Payseno was in the community from 2000 to 2007 without being convicted of any crime. (2) The petitioner may not be currently charged with any crime (felony, gross misdemeanor, or misdemeanor). In 2013, when Mr. Payseno filed his petition, he was not currently charged with a crime. (3) The petitioner cannot have any

other felony offenses that count as part of the offender score under RCW 9.94A.525. Mr. Payseno's only felony offense is the 2000 VUCSA charge. The first degree negligent driving conviction in 2010 is a misdemeanor and does not count in his offender score under RCW 9.94A.525. Because he meets all three criteria for firearm restoration, the Superior Court should have granted his petition.

In denying Mr. Payseno's petition, the Superior Court essentially added a fourth criterion to the statute. The Superior Court concluded that, after being in the community for five years crime free, if a person has a subsequent criminal conviction, the person may not restore his firearm rights. This is true even if the subsequent criminal charge does not otherwise impact firearm rights. The Superior Court concluded that to hold otherwise would lead to absurd results and contradict the legislative intent. CP, 31. The Superior Court agreed with the prosecutor's office that the requirement the petitioner not be "currently charged with any felony, gross misdemeanor or misdemeanor crimes" would be rendered moot if a person could simply wait out the charging period and file a petition. The purpose of the requirement that the petitioner not be "currently charged" is to ensure that the person is not convicted of any offenses that preclude firearm possession (hereinafter "disqualifying offenses"). Many gross misdemeanor and misdemeanor offenses are disqualifying offenses, including most domestic violence offenses. It is also well settled in Washington that the prosecutor may amend the charging document at any

time prior to trial, including by refileing a misdemeanor offense as a felony. CrR 2 1(d). Therefore, the requirement to resolve pending charges prior to reinstating firearms is to prevent petitioners from reinstating firearm rights while there is uncertainty about the ultimate conviction. There is nothing in the statute, however, that precludes a person from petitioning after the pending case is resolved, assuming the resolution involves a conviction for a non-disqualifying offense.

The reference in the statute to RCW 9.94A 525 is particularly revealing. This statute defines when a prior offense is included in the offender score. Since the earliest days of the SRA, a crime washes out of the offender score if the person has been in the community “at any time” for the requisite period of time, e.g. five years for Class C felonies. State v. Hall, 45 Wn. App. 766, 728 P.2d 616 (1986). In Hall, the defendant had a Class C felony conviction and a subsequent Class B felony soon thereafter. He went more than five years without committing any further offenses. The prosecutor argued that the Class C felony did not wash out because he did not go five years without getting a subsequent conviction. The Court of Appeals found the wash out statute (former RCW 9.94A.360, currently recodified as RCW 9.94A 525) was susceptible to two interpretations. Applying the rule of lenity, the Court adopted the position most favorable to the defense and held the Class C felony washes out if the person has a five year period “at any time.”

The legislature is presumed to be aware of the existing state of case law. Price v. Kitsap Transit, 125 Wash 2d 456, 463, 886 P.2d 556 (1994). The provision at issue in this case was first enacted in 1995 as part of Initiative 159, the so-called Armed Time for Armed Crime Initiative. At that time, the language read, “After five or more consecutive years in the community without being convicted or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.360.” It has been amended several times since 1995, including to change the statutory reference RCW 9.94A.360 to RCW 9.94A.525. The Hall interpretation of former RCW 9.94A.360 was well settled in 1995 and has remained unchanged for 27 years. The rule of lenity, which was applied in Hall to permit wash out if the person has spent five years in the community “at any time” without committing an offense should be applied to RCW 9.41.040(4) to permit firearm restoration if the person has spent five consecutive years in the community “at any time” without committing a disqualifying offense.

Although Mr. Payseno believes the language of RCW 9.41.040(4) is clear and he is eligible to reinstate his firearm arm rights, in the alternative, this Court should find that the statute is susceptible to two legitimate interpretations and apply the rule of lenity. Under one interpretation, petitioners must have been in the community for five or more consecutive years since conviction for their most recent offense

(felony, gross misdemeanor, or misdemeanor). Under the other interpretation, petitioners are eligible if they have five or more consecutive years in the community “at any time,” as long as they are not currently charged with an offense, in which case they must wait until the pending charge is resolved to ensure there is not a conviction for a disqualifying offense. Applying the rule of lenity in the same way it has been applied since 1986 in State v. Hall, this Court should adopt the interpretation most favorable to Mr. Payseno. Mr. Payseno went seven years from 2000 to 2007 without committing any disqualifying offense and he is not currently charged with any offense. He is eligible for firearm restoration and the Superior Court erred by denying the petition.

D. Conclusion

The Superior Court should reverse and remand with instructions to sign an order reinstating Mr. Payseno’s firearm rights.

Dated this 31st day of January, 2014.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver
WSBA #22488
Attorney for Plaintiff

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January 31, 2014 - 2:32 PM

Transmittal Letter

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

CLIFFORD PAYSENO)
Plaintiff,) Court of Appeals No: 45389-4-II
vs.)
KIIISAP COUNTY,) AFFIDAVIT OF SERVICE
Defendant.)

STATE OF WASHINGTON)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

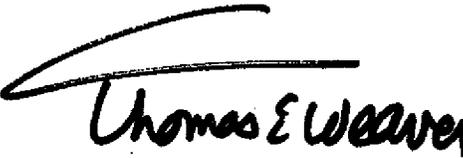
I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action,
and competent to be a witness.

On January 31, 2014, I sent the original, via ECF electronic filing system, of the BRIEF
OF APPELLANT to the Court of Appeals, 950 Broadway #300, Tacoma, WA 98402.

1 On January 31, 2014 I sent a copy, via interoffice mail, of the BRIEF OF APPELLANT
2 to the Kitsap County Prosecutor's Office, MS 35, 614 Division Street, Port Orchard, WA 98366

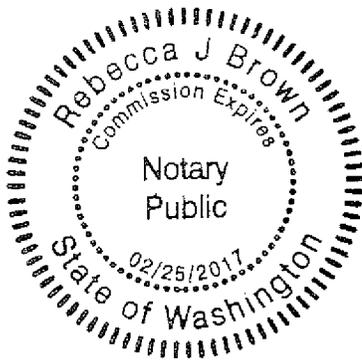
3 On January 31, 2014, I sent a copy, via first class mail, of the BRIEF OF APPELLANT
4 to the Petitioner, Clifford Payseno, PO Box 4493 South Colby WA 98384

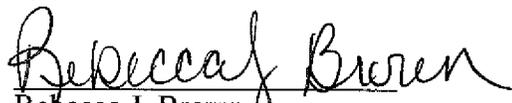
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8 Dated this 31st day of January, 2014.

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11 _____
12 Thomas E. Weaver
13 WSBA #22488
14 Attorney for Petitioner

15 SUBSCRIBED AND SWORN to before me this MONTH, DATE YEAR.



18 
19 Rebecca J. Brown
20 NOTARY PUBLIC in and for
21 the State of Washington
22 My commission expires: 02/25/2017

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