

No. 48392-1-II

In the Washington State Court of Appeals, Division II

Brian K. Maloney, Appellant,

vs.

State of Washington, Respondent.

Appellant's Reply Brief

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ARGUMENT

A. Pierce County is not a party to this appeal.

The State of Washington, represented by the Pierce County Prosecutor's Office and named as defendant in the action below and as respondent here, keeps referring to itself as "Pierce County" in its response briefing. *See generally* Response at 1-3. Pierce County has never been named or served as a party to this litigation, nor would it have been appropriate to do so. Therefore, the Pierce County Prosecutor's Office either represents the State of Washington, or does not represent any party to this litigation and should withdraw.

B. Mr. Maloney's petition to restore his firearm rights is a civil proceeding.

The State initially argues that RCW 9.41.040 is a criminal statute, so a petition filed under subsection (4) of that statute must be a criminal proceeding. Response at 5. The State cites to *State v. Keeney* for the proposition that RCW 4.84 does not apply to criminal proceedings. 112 Wn.2d 140, 769 P.2d 295 (1989). But, the State exaggerates *Keeney's* holding. *Keeney* held that a successful appellant in a criminal appeal was not entitled to a statutory attorney fee under RCW 4.84.080. 112 Wn.2d at 145, 769 P.2d 295. As to costs, however, the court recognized that "[c]osts have been awarded to the successful party in criminal cases since

early statehood. . . . The State is entitled to recover statutory costs.” *Id.* at 142 (internal citations omitted). Therefore, if the State is going to rely on *Keeney*, the best outcome it can hope for is an award of costs but denial of the statutory attorney fee.

Next, the State argues that RCW 9.41.040(4) is a criminal statute since it is located in Title 9, “Crimes and Punishments,” Chapter 41, “Firearms and Dangerous Weapons.” Response at 5. The State’s argument is unpersuasive. First, labels assigned by the Washington Code Reviser are “of little use in determining legislative intent.” *State v. T.A.W.*, 144 Wn. App. 22, 26, 186 P.3d 1076 (2008). Second, RCW 9.41 has a litany of civil statutes pertaining to regulation of firearms. *See, e.g.*, RCW 9.41.070 (concealed pistol licenses); RCW 9.41.100 (dealer licensing); RCW 9.41.113 (background checks); RCW 9.41.129 (recordkeeping requirements). Likewise, just because the subsection pertaining to restoration of firearm rights is located in the same section as criminal penalties for unlawful possession of a firearm does not mean that a restoration petition is a criminal proceeding.

RCW 9.41.040(4) sets out three alternative restoration provisions: restoration pursuant to RCW 9.41.047 for involuntary commitments, restoration after five years following a felony conviction, and restoration after three years following a misdemeanor conviction. It would make no

sense to label as a criminal proceeding a petition to restore firearm rights following an involuntary commitment, so why would the same petition following a felony or misdemeanor conviction be a criminal proceeding? If petitions following an involuntary commitment were civil proceedings but petitions following a conviction were criminal convictions, that would create a senseless and arbitrary distinction without a difference. Involuntary commitment petitioners would be entitled to costs and statutory attorney fees, but convicted petitioners would not. It is far more legally sound to interpret a petition filed under a separate civil cause number and accompanied by a \$240 filing fee as a civil proceeding, regardless of the underlying disqualifying event.

The State then argues that because restorations of firearm rights were handled as motions under the underlying criminal cause number rather than new civil filings prior to September 2014, “[t]his demonstrates that the sorting of a petition under either a ‘civil’ or ‘criminal’ case number does not change the fact that the petition is brought under criminal law.” Response at 6. If a criminal proceeding can be brought under a civil cause number, as is currently the case according to the State, then it is just as likely that a civil proceeding was brought under a criminal cause number prior to September 2014. That argument fails.

Finally, the State argues that “[a]ppellant’s goal in filing the petition – the repeal of a punishment for his crimes – is not the type of remedy that can be brought in a civil proceeding.” Response at 7-8. This argument also fails. First, a prohibition on possession of firearms is not a punishment for the crime, or else it would violate the Constitution as an ex post facto law. *State v. Schmidt*, 143 Wn.2d 658, 23 P.3d 462 (2001). Second, the legislature recently passed the “Certificate of Restoration of Opportunity” (CROP) law. Laws of 2016, ch. 81. This law allows a person who is disqualified from applying for certain state licenses because of a criminal conviction to apply to a superior court for a certificate of restoration of opportunity. *Id.* § 1. Receiving such a certificate lifts the restriction on licensure. *Id.* § 3. The application must be filed in a superior court, *id.* § 2(2), and must be filed as a civil action. *Id.* § 3(6). Hence, it is quite clear that it is possible to repeal punishment for a crime through a civil proceeding.

A petition to restore firearm rights filed under a civil cause number and accompanied by a \$240 filing fee is a civil proceeding.

C. Mr. Maloney is the prevailing party.

The State argues that Mr. Maloney cannot be the prevailing party because the State did not oppose Mr. Maloney’s petition. Response at 9. For that proposition, the State cites several cases. *AllianceOne Receivables*

Mgmt., Inc. v. Lewis is inapposite because it dealt with 1) definition of prevailing party under RCW 4.84.250, not RCW 4.84.010; and 2) involved a *plaintiff's* voluntary dismissal. 180 Wn.2d 389, 325 P.3d 904 (2014). Mr. Maloney in this case is not proceeding under RCW 4.84.250 for a full award of attorney's fees. He is proceeding under RCW 4.84.010 for costs, and RCW 4.84.080 for \$200 statutory attorney fee award. RCW 4.84.250 is not implicated, and the court in *AllianceOne* did not even cite RCW 4.84.010 once. The same applies to *Cork Insulation Sales Co., Inc. v. Torgeson*. 54 Wn. App. 702, 775 P.2d 970 (1989). The issue there was also RCW 4.84.250. *Id.* Finally, *Somerville v. Johnson* is an 1891 case that interpreted statutes no longer in existence and nowhere close to being similar to RCW 4.84.010. 3 Wash. 140, 28 P. 373 (1891). The quote the State attributes to this case is made in the context of a plaintiff who asked for a dismissal in order to refile and introduce more evidence, but wanted defendants to pay costs of the original suit. That is nothing like this petition. The State's reliance on these cases is misplaced.

The State's logic that Mr. Maloney is not a prevailing party because the State did not put up a fight is flawed. The State did not put up a fight only because he happened to qualify for restoration. If he did not qualify, the State would have absolutely opposed the restoration. CP at 34. The State's position as a party to this proceeding and in the Petitioner-

Court-State dynamic is inherently adversary. *Id.* The State is more or less the “gate keeper” of restoration. The Court relies on the State for its input in every single restoration, and the State is expected to object if it believes the petitioner does not qualify. Acquiescence in a particular circumstance due to statutory eligibility does not change this dynamic or State’s ultimate role in these proceedings.

If a petitioner prevailed on a contested petition, for example if there was an issue of statutory construction, would he or she then properly be considered a prevailing party? So, a petitioner who faces no opposition is not a prevailing party and does not get costs, but a petitioner who faces opposition and wins is a prevailing party and does get costs? The State is asking the Court to draw an arbitrary and unnecessary line. The fact remains that Mr. Maloney sued the State of Washington in a civil proceeding for restoration of his firearm rights, and received that restoration, making him the prevailing party.

D. The order restoring Mr. Maloney’s firearm rights is a “judgment.”

The State argues that the Court did not issue a judgment in petitioner’s favor because the Court did not exercise any judgment in restoring petitioner’s firearm rights. Response at 10-11. This argument fails because the State confuses the different meanings of the word “judgment.” Under the definition of “judgment” in CR 54(a)(1), the order

restoring Mr. Maloney's firearm rights is clearly a judgment, even if the issuing court did not exercise any discretion in issuing it.

E. Award of costs is mandatory under RCW 4.84.010 and RCW 4.84.190 does not apply.

The State argues that Mr. Maloney has not identified any applicable section of RCW 4.84 that specifically pertains to this proceeding, therefore RCW 4.84.190 applies. Response at 12. On the contrary, Mr. Maloney has identified an applicable section of RCW 4.84 that pertains to this proceeding, and it is RCW 4.84.010. RCW 4.84.010 states that in a civil action, the prevailing party upon a judgment *shall be awarded* costs. As outlined above, this is a civil action, the Mr. Maloney has prevailed, and the court has entered a judgment.

To the extent the State argues that Mr. Maloney waived this issue by failing to argue it, it seems that spending the entire twelve pages of the opening brief arguing that RCW 4.84.010 applies to this proceeding is sufficient, especially where Mr. Maloney explicitly assigned error to the trial court's application of RCW 4.84.190 instead of RCW 4.84.010. Opening Brief at 4.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court and enter an award of costs in Mr. Maloney's favor.

Respectfully submitted,

/s/

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May 16, 2016

AFFIDAVIT OF SERVICE

I, Vitaliy Kertchen, being of sound age and mine, declare that on May 16, 2016, I served this document (Appellant's Reply brief) on the Pierce County Prosecutor's Office by uploading it to the Court of Appeals, Division II using the Court's COA2 e-filing application and emailing a copy of the document using that process to pcpatvecf@co.pierce.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,

/s/

Vitaliy Kertchen #45183
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Date: 5/16/16
Place: Tacoma, WA

KERTCHEN LAW, PLLC

May 16, 2016 - 2:43 PM

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