

No. 50270-4-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

Austin J. Benson, Appellant

vs.

State of Washington, Respondent

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

The Pacific County Superior Court erred when it denied Mr. Benson's petition to restore his firearm rights pursuant to RCW 9.41.040(4).

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Is an individual convicted in 2008 of two felony convictions for violation of the uniform controlled substances act and robbery in the second degree entitled to a restoration of his firearm rights under RCW 9.41.040(4) if he meets all the statutory criteria?

STATEMENT OF THE CASE

On May 28, 2008, the Cowlitz County Superior Court convicted Mr. Benson of two felonies: one count violation of the uniform controlled substances act (VUCSA), a class C felony, under cause number 08-1-00188-9; and one count robbery in the second degree, a class B felony, under cause number 08-1-00464-1. CP at 3-4. Mr. Benson has also been convicted of a misdemeanor crime of driving with a suspended license in the third degree in Pacific County Superior Court on August 21, 2009

under cause number 09-1-00080-6.¹ *Id.* This is the totality of Mr. Benson's criminal history. The two felonies mentioned above are the only reasons he's disqualified from possessing a firearm. *Id.*

On March 2, 2017, Mr. Benson filed a petition to restore his firearm rights in the Pacific County Superior Court, where he lives. *Id.* Between August 21, 2009 and March 2, 2017, Mr. Benson had not been convicted of any new crimes anywhere. *Id.* He also did not have, and does not have, any pending charges anywhere. *Id.*

The State objected, making three arguments: first, that a conviction for robbery in the second degree is an automatic bar to restoration; second, that Mr. Benson had not provided proof that he completed the conditions of his sentence for his two felony convictions; and third, that even if the robbery in the second degree is not an automatic bar, Mr. Benson could not have his firearm rights restored because his class B robbery in the second degree conviction had not yet washed as a felony point. CP at 12-14. In reply, Mr. Benson pointed out that robbery in the second degree is not an automatic bar to restoration, that Mr. Benson does not have to prove compliance with sentence conditions for restoration, and that the

¹ He also has a gross misdemeanor conviction for reckless driving in Cowlitz County District Court on September 8, 2005 under cause number C00503792, but this conviction was not made part of the trial court record and does not affect his petition in any way.

class B conviction does not count as a felony point under *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010). CP at 15-18.

The trial court denied the petition, finding that while “[t]he statute allows those convicted of certain Class B and C felonies to have gun rights restored, . . . that group does not include murderers, rapists, robbers, kidnappers, or burglars. This is common sense.” CP at 22. Mr. Benson timely filed this appeal. CP at 23-25.

ARGUMENT

Mr. Benson is entitled to a restoration of his firearm rights under RCW 9.41.040(4). Accordingly, this Court should reverse and remand with instructions to enter the restoration order.

RCW 9.41.040(1) and (2) prohibit firearm possession by anyone who has ever been convicted of any felony anywhere. Mr. Benson falls into that prohibition. However, RCW 9.41.040(4) allows for restoration of the right to possess a firearm. It contains four simple eligibility requirements for restoration based on felony predicates: first, the individual cannot have ever been convicted or found not guilty by reason of insanity of any class A felony or any sex offense, RCW 9.41.040(4)(a); second, the individual must spend five consecutive years in the community without being convicted of any crime, RCW 9.41.040(4)(ii)(A); third, the individual cannot be currently charged with

any crime anywhere, RCW 9.41.040(4)(a)(ii)(A); four, the individual must not have any prior felony convictions counted as part of the offender score under RCW 9.94A.525, RCW 9.41.040(4)(ii)(A). If a petitioner meets all the statutory criteria, he or she is entitled to a restoration and a trial court's duty is ministerial. *State v. Swanson*, 116 Wn. App. 67, 65 P.3d 343 (2003). Mr. Benson meets all the statutory criteria for restoration and is entitled to a restoration of his firearm rights under RCW 9.41.040(4).

1. Robbery 2, a class B felony, is not a bar to restoration.

Robbery in the second degree is a class B felony. RCW 9A.56.200. By its plain language, RCW 9.41.040(4) allows restoration for all non-sex class B felonies. The State interpreted the first sentence of RCW 9.41.040(4)(a) to mean that any robbery conviction prohibits restoration, and apparently the trial court agreed. This is a gross and blatant misreading of the statute. The first sentence of RCW 9.41.040(4)(a) states:

Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9.95.200, and who received a dismissal of the charge under RCW 9.95.240, shall not be precluded from possession of a firearm as a

result of the conviction or finding of not guilty by reason of insanity.

This language automatically restores firearm rights to individuals who received probationary sentences with a subsequent dismissal, unless the offense was for one of the enumerated offenses. Probationary sentences under RCW 9.95.200 are not allowed for felony offenses committed after July 1, 1984. RCW 9.95.900(1). Thus, this language pertains only to individuals with offenses that predate the Sentencing Reform Act of 1981, Laws of 1981, ch. 137, § 32. Mr. Benson's convictions occurred in 2008. This language is wholly irrelevant to Mr. Benson and robbery in the second degree is not a bar to restoration.

2. Mr. Benson does not need to prove compliance with sentence conditions when the predicate conviction is a felony.

RCW 9.41.040(4)(a)(ii)(B), which controls restoration of firearm rights for nonfelony² convictions, imposes an additional requirement that “the individual has completed all conditions of the sentence.” This language is missing from RCW 9.41.040(4)(a)(ii)(A), which controls

² The only nonfelony convictions that prohibit firearm possession are the misdemeanor crimes enumerated in RCW 9.41.040(2)(a)(i) when committed by one family or household member against another.

restoration of firearm rights for felony convictions.³ “[A] fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms.” *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). Thus, proof of sentence requirements would only be required for restoration if Mr. Benson had nonfelony predicate convictions. Mr. Benson only has felony predicate convictions. Therefore, he does not need to prove compliance with sentence conditions.

3. Mr. Benson does not have any prior felony convictions counted as part of his offender score.

Rivard is dispositive. 168 Wn.2d 775, 231 P.3d 186. There, our supreme court held that only felony convictions that occur prior to the most recent felony conviction count as part of the offender score for the purposes of RCW 9.41.040(4)(a)(ii)(A). *Id.* Because Mr. Benson was sentenced on both offenses at the same time, neither of those offenses count toward his offender score for the purposes of RCW 9.41.040(4)(a)(ii)(A). *Id.*; *see also* RCW 9.94A.525(1) (“A prior conviction is a conviction which exists before the date of sentencing for

³ The only other difference between the two is that a felon must wait five years but a misdemeanor must only wait three years.

the offense for which the offender score is being computed. Convictions entered or sentenced on the same date as the conviction for which the offender score is being computed shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.”). Mr. Benson does not have any prior felony convictions counted as part of his offender score.

4. Mr. Benson is entitled to a restoration of his firearm rights.

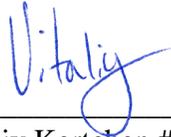
Mr. Benson has never been convicted of a class A felony or any sex offense. He has spent at least five consecutive years in the community without being convicted of any crime. He has no pending charges. He has no prior convictions counted as part of his offender score. He meets all the statutory criteria and is entitled to a restoration of his firearm rights.

Swanson, 116 Wn. App. 67, 65 P.3d 343. This Court should reverse the trial court’s denial of Mr. Benson’s petition and remand with instructions to enter an order restoring Mr. Benson’s firearm rights.

CONCLUSION

Based on the foregoing, this Court should reverse and remand.

Respectfully submitted,



Vitaliy Kertchen #45183

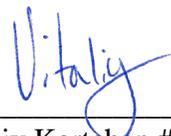
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DECLARATION OF SERVICE

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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: 7/7/17

Place: Tacoma, WA

KERTCHEN LAW, PLLC

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