

No. 50270-4

IN THE WASHINGTON STATE DIVISION II

Austin J. Benson, Appellant

vs.

State of Washington, Respondent

Appellant's Reply Brief

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ARGUMENT

The State initially argued below that: 1) robbery in the second degree barred firearms restoration categorically; 2) Mr. Benson had to prove compliance with sentence conditions, and he had not done so; and 3) that he had prior felony convictions counted as part of his offender score. The State now concedes the first two points and argues only that because Mr. Benson was convicted and sentenced to two offenses, he has prior convictions counted as part of his offender score. The State's argument is belied by the plain language of the pertinent statutes and settled case law.

RCW 9.41.040(4)(a)(ii)(A) states that a person may have his or her firearm rights restored "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 9.94A.525 . . .*" (emphasis added). This language invokes "prior conviction" under RCW 9.94A.525 only. It does not reference RCW 9.94A.589, and it does not concern itself with whether sentences are run concurrent or consecutive. Sentencing is wholly immaterial to the

restoration statute and the State's reliance on RCW 9.94A.589 is misplaced.

RCW 9.94A.525(1) states: "A prior conviction is a conviction which exists before the date of sentencing for 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." Because Mr. Benson pleaded guilty to both charges on the same day and was sentenced on both charges on the same day (although the sentencing occurred five days after the pleas), neither conviction is a "prior conviction." Both are "other current offenses." Thus, Mr. Benson has no "prior convictions" counted as part of his offender score.

But even if the Court were to accept the State's argument that both convictions could legally be "prior convictions" despite the plea and sentencing occurring at the same time but on different dates, the class C felony VUCSA could not be a "prior conviction" in this instance because it has washed. RCW 9.94A.525(2)(a)(c) states that a class C felony conviction washes after five years in the community without being convicted of any crime. Mr. Benson's last conviction occurred in August of 2009 for misdemeanor driving with a suspended license. The class C

felony conviction washed in August of 2014. Thus, even accepting the State's argument, Mr. Benson still only has the robbery in the second degree class B felony counted as part of his offender score and no other offenses.

Although Mr. Benson's robbery in the second degree class B felony point still counts as part of his offender score until August 2019 if he were to commit a new offense, it does not count for the purposes of RCW 9.41.040(4)(a)(ii)(A). *Rivard v. State* is dispositive. 168 Wn.2d 775, 231 P.3d 186 (2010). There, our supreme court ruled that a single felony counted as part of the offender score does not prohibit restoration of firearm rights. *Id.* The language in RCW 9.41.040(a)(ii)(A) regarding prior convictions counted in the offender score is dormant unless there are multiple convictions counted in the offender score. *Id.* The State's entire argument, thus, boils down to "*Rivard* is wrongly decided." That is not for this Court to decide.

Mr. Benson has demonstrated that he meets all the statutory requirements of RCW 9.41.040(4) to restore his firearm rights, and he is thus entitled to the restoration, *State v. Swanson*, 116 Wn. App. 67, 65 P.3d 343 (2003). This Court should reverse the trial court's denial of his petition to restore his firearm rights.

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CONCLUSION

Based on the foregoing, this Court should reverse the trial court's denial of Mr. Benson's petition to restore firearm rights.

Respectfully submitted,



Vitaliy Kertchen #45183

Date: 9/5/17

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 9/5/17, I served this document on the Pacific County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to mmclain@co.pacific.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,



Vitaliy Kertchen #45183

Date: 9/5/17

Place: Tacoma, WA

KERTCHEN LAW, PLLC

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