

No. 50270-4-II

THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

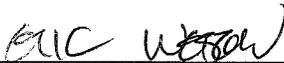
AUSTIN J. BENSON,

Appellant.

BRIEF OF RESPONDENT

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I. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. The State concedes that Robbery 2, a class B felony, is not a bar to restoration.
2. The State concedes that the appellant, Austin Benson, need not prove compliance with his sentence when the predicate conviction is a felony.
3. Mr. Benson has a concurrent felony that should be counted in his offender score that disables him from restoration of his firearm rights.
4. Therefore, Mr. Benson is ineligible to a restoration of his firearm rights.

II. STATEMENT OF THE CASE

Mr. Benson's statement of the case is adequate.

III. ARGUMENT

1. Standard of Review

Questions of statutory interpretation are reviewed de novo.

State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010).

2. Issues 1 and 2

The State concedes Issues 1 and 2 of Austin Benson's appeal. Robbery 2 is not a bar to gun rights restoration, nor must he

prove compliance with sentence conditions when the predicate conviction is a felony. However, the fact that this superior court judge got it wrong, as helped by the parties' attorneys, illustrates that RCW 9.41.040 is not plain on its face.

3. Issue 3 – Mr. Benson's concurrent offense makes him ineligible to possess, own or control a firearm.

Mr. Benson has two felony convictions that would prevent him from possessing, owning or controlling a firearm unless he is otherwise eligible. This puts him in a different position than that of the sole case on point.

Rivard v. State of Washington, 168 Wn.2d 775, 231 P.3d 186 (2010) held that where a person has one felony conviction, there are “no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525. . .”¹

The *Rivard* Court begins its analysis with the principle of statutory interpretation “to give effect to all language, so as to render no portion meaningless or superfluous.” *Id* at 783.

¹ RCW 9.41.040(4)(a)(ii)(A) 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 9.94A.525;

Subsection (4)(b)(i) specifies that felons may petition for restoration of their firearm rights if two conditions are met: first, they must have spent five crime-free years in the community, and second, they must have no prior felony convictions counted as part of the offender score. The offender score statute, RCW 9.94A.525, provides that class B felonies are included in the offender score for 10 years, if the offender spent those years crime-free in the community. Class C felonies are included for five years. Therefore, under the State's interpretation of "prior felony convictions," an offender whose disabling felony was a class B felony could petition for restoration only after 10 crime-free years had elapsed (the time at which the felony would no longer be included in the offender score). A class C felon would be eligible in five years. This interpretation thus reads the first condition of subsection (4)(b)(i) right out of the statute. Under that view, whether or not the individual spent five crime-free years in the community, as required by subsection (4)(b)(i), is irrelevant; the time frames set in RCW 9.94A.525 would control. Under our rules of statutory construction, this interpretation is not supported in the statutory language.

The trial court's interpretation—where "prior felony convictions" refers only to felonies occurring prior to the disabling offense—makes logical use of all the language in RCW 9.41.040(4)(b)(i). Under this reading, a court does not ask whether the disabling offense is included in the offender score. Instead, the court looks only at felonies committed prior to that offense. For example, if a felon had, in addition to a six-year-old disabling felony, another class B felony conviction from seven years ago, that individual would be ineligible to petition for restoration of firearm possession rights for another three years pursuant to RCW 9.94A.525, or until he had remained crime-free in the community for 10 years after the class B felony conviction. Although he had remained crime-free for the requisite five years for the purpose of his disabling felony, a prior conviction still included in his offender score delays his eligibility. However, where a felon has no convictions prior to the disabling offense, his eligibility is determined solely by the five-year period described in subsection (4)(b)(i).

Id at 783 – 784

In other words, RCW 9.41.040 allows people who have been convicted of some felonies² the ability to petition to have their firearm rights restored. They can so petition if two conditions are met: 1) they've been crime free in the community for at least five years and 2) they have no prior felony conviction that is counted as part of the SRA offender score. Given that a statute shall have no surplus language, the only way to make the first condition meaningful is if it is not identical to or a subset of the second condition. Because the second condition includes C-level felonies and this would be identical to the first condition, the court held that "prior felony convictions" could not include the disabling offense if there were no other.

Mr. Rivard's case differs from Mr. Benson's in that Mr. Rivard was convicted of one count, vehicular manslaughter, while Mr. Benson was convicted of two, Robbery 2 and VUCSA possession. Though Mr. Benson pled guilty to both on the same day, May 23, 2008, and was sentenced on the same day, May 28, 2008, the date of the possession of heroin was February 15, 2008, and the date of the robbery was April 25, 2008. CP at 3 – 4

² But not a sex offense, a class A felony, or one having a maximum sentence of at least 20 years.

“Conviction’ means an adjudication of guilty pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty.” RCW 9.94A.030(9).

“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.” RCW 9.94A.525(1)

Though the acceptance of a guilty plea on one charge must necessarily occur either before or after the acceptance of a guilty plea on another charge, it would not be “prior” by definition if it occurred on the “same date.” Instead, it or they “shall be deemed ‘other current offenses’ within the meaning of RCW 9.94A.589.”

RCW 9.94A.589(1)(a): “Except as provided in (b), (c), or (d)³ of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score:

³ Irrelevant to this discussion.

. . .⁴ Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535. . . .”

Thus an “other current offense” shall be treated as a “prior offense” for purpose of the offender score in RCW 9.94A.589 (Consecutive or concurrent sentence), and thus it counts in the offender score as it would for RCW 9.94A.525 (Offender score).

Because the “other current offense” of robbery 2 continues to count as a prior in the offender score, it also prohibits Mr. Bennett from legally possessing a firearm.

But what about making the first clause meaningful? If a person had multiple C-level felonies and they all washed out with five years of crime free behavior, wouldn't this be the same result as if it were just one C-level felony, thus rendering the first clause meaningless? Why should a person with concurrent C- and B-level felonies be treated any differently?

Let us take six hypothetical defendants. Please assume that all have led crime-free lives in the community since the dates cited.

⁴ Deleted as irrelevant: “PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.”

1) Adam pled guilty and was sentenced to forgery, a C-level felony, in Asotin County on January 4, 2010. (One count, one county, one date.)

2) Barbara pled guilty in Benton County to forgery on January 4, 2010, and theft 2, a C-level felony, on February 4, 2010, and was sentenced on March 4, 2010. (Two counts, two plea dates, one sentence date, one county.)

3) Clark pled guilty in Chelan County to 10 counts of forgery and 10 counts of robbery 2, a B-level felony, on January 4, 2010, and was sentenced that day. (20 counts of two different level felonies, one date, one county.)

4) Douglas pled guilty to forgery on January 4, 2010, in Ferry County. Pending sentencing on that charge, Douglas pled guilty in Franklin County to forgery and was sentenced on February 4, 2010. He then returned to Ferry County and was sentenced on March 4, 2010. Douglas had two good defense attorneys who were able to persuade each judge that, pursuant to RCW 9.94A.589(4) he should have the sentence run concurrently. (Two counts, two plea dates, two sentencing dates with the second sentence preceding sentencing on the first plea, two counties, time to run concurrently.)

5) Garfield pled guilty to forgery on January 2, 2010, in Grant County. Pending sentencing on that charge, Garfield pled guilty to forgery and was sentenced in Grays Harbor County on February 3, 2010. Garfield was transported back to Grant County and was sentenced there on March 4, 2010. The Grant County judge chose to run the sentence consecutive to the Grays Harbor sentence. (Two counts, two plea dates, two sentencing dates, two counties, time to run consecutively.)

6. Jefferson pled guilty to forgery and was sentenced in Island County on January 2, 2010. He then pled guilty to forgery and was sentenced in Island County on February 3, 2010. (Two counts, two plea dates, two sentencing dates, one county.)

If *Rivard* stands for the proposition that all crimes sentenced on the same date should never count as “prior offenses” for each other (as the appellant is likely to argue), then of the above hypothetical defendants, numbers 1, 2, and 3, would be able to reacquire their gun rights in 2017, whereas 4, 5, and 6 would not. A person with 10 counts of robbery 2 would be able to have guns, while a person with two counts of forgery sentenced at different times (whether in one or more counties) would not.

This is an absurd result.

If *Rivard* stands for the proposition that only one crime cannot be a “prior offense” for purposes of reacquiring gun rights, then only #1 of the hypothetical is eligible. This is the only sensible result.

When the meaning of a statute is “plain on its face,” a court must give effect to that meaning. *State v. Ervin*, 169 Wn.2d at 820. RCW 9.41.040 is anything but plain on its face. This court shall turn to other principles of interpretation when the plain language of a statute is ambiguous. *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). “But this basic rule of statutory interpretation applies so long as it does not produce an absurd result.” *In Matter of Dependency of D.L.B.*, 186 Wn.2d 103, 116, 376 P.3d 1099 (2016).

As noted above, this court will avoid an absurd result even if it must disregard unambiguous statutory language to do so. *State v. McDougal*, 120 Wn.2d 334, 351–52, 841 P.2d 1232 (1992). But we must always apply this canon of construction ‘sparingly,’ consistent with separation of powers principles. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 311, 268 P.3d 892 (2011). The purpose of the ‘absurd results’ canon is to prevent obviously inept wording from thwarting clear legislative intent. *Id.* We may not invoke that canon just because we question the wisdom of the legislature’s policy choice. *Id.*

In re DLB, at 119.

This Court is not being asked to question the wisdom of the legislature’s policy choice. This Court is being asked to interpret one of the state’s most convoluted statutes. To avoid the absurd result,

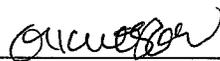
this Court should distinguish the scope of *Rivard* by interpreting RCW 9.41.040(4)(B)(i) to mean that “prior conviction” includes “concurrent conviction” as it does in the rest of the Sentencing Reform Act.

This Court should deny Mr. Benson’s appeal. He should not yet have his gun rights restored.

IV. CONCLUSION

This Court is presented with having to resolve two principles of statutory interpretation. The first is whether the court shall make every clause meaningful, the other is whether the court shall avoid absurd results. The Court should avoid absurdity. Please deny Mr. Benson’s request.

RESPECTFULLY submitted this 31st day of August, 2017.



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August 31, 2017 - 4:26 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50270-4
Appellate Court Case Title: Austin J. Benson, Appellant v. State of Washington, Respondent
Superior Court Case Number: 17-2-00051-7

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