

No. 50821-4

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

State of Washington, Respondent

vs.

Paul M. Pena., Appellant

Appellant's Amended Opening Brief

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ASSIGNMENTS OF ERROR

1. The trial court's finding number 6, that Mr. Pena was adjudicated guilty of indecent liberties actually committed with forcible compulsion, is not supported by substantial evidence.

2. The trial court's denial of Mr. Pena's motion to seal his juvenile record is error.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where Mr. Pena's guilty plea statement to indecent liberties states that the offense was committed by forcible compulsion, but there are no other facts that would support a finding of actual forcible compulsion, was the offense committed with actual forcible compulsion for the purposes of RCW 13.50.260(4)(a)(v)?

2. If Mr. Pena does have a conviction for indecent liberties with actual forcible compulsion, does that conviction prohibit him from sealing his child molestation offense?

STATEMENT OF THE CASE

On October 25, 1993, the State charged Mr. Pena with one count of rape of a child in the first degree and one count of indecent liberties under the (1)(b)/consent prong.¹ Clerk's Papers (CP) at 13-14. As part of a plea bargain, the State "lowered" the charges to child molestation in the first degree and indecent liberties under the (1)(a)/forcible compulsion prong on December 28, 1993.² CP at 11-12. On December 28, 1993, Mr. Pena pleaded guilty in Pierce County Juvenile Court to one count of child molestation in the first degree and one count of indecent liberties by forcible compulsion. CP at 17-20. As part of the plea, Mr. Pena adopted the following statement as it relates to the indecent liberties charge: "On or about April, 1990, I had sexual contact with [D.C.], a person I am not married to, by forcible compulsion, in Pierce County, WA." CP at 19.

On October 27, 2016, he filed a motion to seal this juvenile record. CP at 1-3. On this motion, he listed his indecent liberties offense as a class A felony. CP at 2. On November 7, 2016, the State filed a response, arguing that "by forcible compulsion" included in the plea statement

¹ The State charged rape of a child against victim "G.C." and indecent liberties against victim "D.C." CP at 11-14.

² The amended information appears to state that it was signed on December 29, 1993. However, given that Mr. Pena pleaded guilty to the amended charges on December 28, 1993, this is likely a scrivener's error.

conclusively barred him from sealing the indecent liberties count under RCW 13.50.260(4)(a)(v) because the offense was committed with actual forcible compulsion. CP at 4-9. The parties proceeded to argument in front of a court commissioner on November 21, 2016. The commissioner agreed with the State and denied the motion to seal. CP at 24-26. On December 20, 2016, a sitting judge denied the motion for revision on the same basis. CP at 31-33. On January 17, 2017, Mr. Pena timely filed an appeal to this Court under cause number 49896-1. CP at 34-38.

In drafting the opening brief of that appeal, Mr. Pena realized that indecent liberties by forcible compulsion was a class B felony in 1993 and remained a class B felony under *Rivard v. State*³. He withdrew his appeal and filed another motion to seal, this time listing the indecent liberties charge as a class B felony. CP at 39-41. The State agreed that the indecent liberties remained a class B felony that could be sealed. CP at 47-54. However, the State argued that the indecent liberties charge still prevented the class A child molestation from being sealed. *Id.* The trial court agreed with the State. CP at 55-58. This appeal follows. CP at 59-64.

³ 168 Wn.2d 775, 231 P.3d 186 (2010). Indecent liberties by forcible compulsion was changed to a class A felony in 2001. Laws of 2001, 2d Spec. Sess., ch. 12, § 359.

ARGUMENT

RCW 13.50.260 allows the sealing of class A felony juvenile records if “the person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties *that was actually committed* with forcible compulsion.” RCW 13.50.260(4)(a)(v) (emphasis added). This requirement does not apply to class B felony, class C felony, or misdemeanor records.⁴ Compare RCW 13.50.260(4)(a) with RCW 13.50.260(4)(b).

In *State v. J.C.*, Division III held that trial courts must “inquire whether actual force was used in the commission of indecent liberties by forcible compulsion” when ruling on a motion to seal juvenile records for indecent liberties by forcible compulsion. 192 Wn. App. 122, 133, 366 P.3d 455 (2016).

Here, the words “by forcible compulsion” in the plea statement are not sufficient for a finding of actual forcible compulsion and Mr. Pena is entitled to have his juvenile record sealed. Alternatively, even if Mr. Pena did commit the indecent liberties with actual forcible compulsion, he is entitled to have his juvenile record sealed because the indecent liberties

⁴ This is the only requirement in dispute. None of the other sealing requirements were contested.

charge is a class B felony and the child molestation, while a class A felony, is not on the list of offenses that cannot be sealed.

A. The indecent liberties conviction is a class B felony and can be sealed, whether with actual forcible compulsion or not.

Indecent liberties was a class B felony at the time of conviction, regardless of prong. Former RCW 9A.44.100 (1993). It remains a class B felony even though indecent liberties by forcible compulsion was later elevated to a class A felony in 2001. *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010); Laws of 2001, 2d Spec. Sess., ch. 12, § 359. RCW 13.50.260(4)(b) applies to sealing class B felonies and it does not impose the same limitation as RCW 13.50.260(4)(a)(v) for class A felonies. Thus, the indecent liberties may be sealed whether with actual forcible compulsion or not.

B. The child molestation conviction may be sealed because Mr. Pena did not commit indecent liberties with actual forcible compulsion.

Because child molestation in the first degree was and is a class A felony, RCW 13.50.260(4)(a) applies. RCW 13.50.260(4)(a)(v) states that a class A felony cannot be sealed if “[t]he person has . . . been convicted of rape in the first degree, rape in the second degree, or indecent liberties *that was actually committed* with forcible compulsion.” (emphasis added).

The State below argued that because Mr. Pena’s indecent liberties conviction was committed with actual forcible compulsion, although it was a class B felony, it prohibits the sealing of the child molestation 1 offense because that is a class A felony. However, Mr. Pena did not commit indecent liberties with actual forcible compulsion.

1. State v. J.C.

In *State v. J.C.*, the juvenile had entered a plea to indecent liberties by forcible compulsion amended from child molestation in the first degree when he was thirteen years old. 192 Wn. App. at 126, 366 P.3d 455. He moved to seal his juvenile record in August 2014. *Id.* The trial court denied the motion on the same basis as this case and J.C. appealed. *Id.* at 126-27.

Division III rejected the State’s argument that all indecent liberties by forcible compulsion convictions were ineligible for sealing. *Id.* at 129-33. Applying principles of statutory construction, the court held that the State’s interpretation “would render the word ‘actually’ meaningless and superfluous, in contradiction to well-established principles of statutory construction.” *Id.* at 132. The court thus concluded that trial courts must “inquire whether actual force was used in the commission of indecent liberties by forcible compulsion.” *Id.* at 133. It went on to state that “the

inquiry will be conclusively answered by the findings of fact if the case was tried or in the plea statement if disposition was by a plea” except in the case of an *In re Barr*⁵ plea. *Id.*

2. The plea statement’s reference to forcible compulsion is insufficient for a finding of actual forcible compulsion.

The trial court conclusion that the mention of forcible compulsion in Mr. Pena’s plea statement equates to a finding of actual forcible compulsion is flawed because it creates a categorical bar to sealing indecent liberties by forcible compulsion, in violation of RCW 13.50.260(4)(a)(v), principles of statutory construction, and *State v. J.C.* If this conclusion were to stand, every juvenile who has pleaded guilty to indecent liberties with forcible compulsion could not seal his or her record because every plea will say in the factual statement that the juvenile used forcible compulsion. That is an essential element of the crime charged and the court would not accept the plea without it. *State v. R.L.D.*, 132 Wn. App. 699, 705, 133 P.3d 505 (2006) (“A defendant must not only know the elements of the offense, but also must understand that the alleged criminal conduct satisfies those elements.”). The legislature clearly did not intend to categorically bar every juvenile with indecent liberties by

⁵ 102 Wn.2d 265, 684 P.2d 712 (1984).

forcible compulsion conviction from sealing his or her record, otherwise it would have kept the word “actually” out of RCW 13.50.260(4)(a)(v). The *J.C.* court recognized this. Nor did the legislature intend to limit sealing indecent liberties by forcible compulsion to only those juveniles who entered *In re Barr* pleas, otherwise the statutory language would have so stated.

3. The inquiry is conclusively answered by the plea statement in Mr. Pena’s favor.

In *J.C.*, the court stated that the inquiry into actual forcible compulsion would be conclusively answered by the plea statement. 192 Wn. App. at 133, 366 P.3d 455. In this case, it is conclusively answered in Mr. Pena’s favor. The factual statement is a bare recitation of the necessary elements to support the plea. It recites no facts from which a court could conclude that Mr. Pena actually used forcible compulsion.

4. Alternatively, the Court should treat Mr. Pena’s case as an *In re Barr* plea.

An *In re Barr* plea allows a defendant to plead guilty to lesser charges for which there is no factual basis so long as there is a factual basis for the original charges. 102 Wn.2d 265, 684 P.2d 712. Here, the State initially charged Mr. Pena with rape of a child in the first degree and

indecent liberties under the (1)(b)/consent prong. CP at 13-14. On the day of his plea, the State filed an amended information, charging him with child molestation in the first degree and indecent liberties under the (1)(a)/forcible compulsion prong. CP at 11-12.

However, a factual basis did not exist for the (1)(a)/forcible compulsion prong. The probable cause affidavit states, in pertinent part, “Victim [DC] reported to her mother that on August 9, 1992, the respondent was with her in her bedroom. The victim stated that he touched her under her clothes on her chest and inside her pants. She indicated that the respondent attempted to kiss her, and she was fighting him by kicking and hitting.” CP at 15. Thus, there are two distinct acts that could form the basis for indecent liberties, but neither by forcible compulsion.

First, touching under her clothes on her chest and inside her pants. There is no mention of resistance or force, both requirements of forcible compulsion. RCW 9A.44.010(6). Second, attempting to kiss and fighting by kicking and hitting. The inclusion of the word “attempted” indicates that Mr. Pena was not successful, seemingly due to the fighting and kicking. This shows that there was resistance and that resistance was *not* overcome by force. Forcible compulsion requires overcoming resistance by force. *Id.*

Because there was no factual basis for the (1)(a)/forcible compulsion prong, Mr. Pena's plea was essentially an *In re Barr* plea.

C. Even if Mr. Pena committed indecent liberties with actual forcible compulsion, he can still seal his child molestation charge.

In 1997, RCW 13.50.050 categorically prohibited juveniles with class A or sex offenses from sealing records. Laws of 1997, ch. 338, § 40. In 2011, the legislature amended this statute to allow juveniles with class A felony offenses to seal those records, so long as “[t]he person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion.” Laws of 2011, ch. 338, § 4. In 2014, the legislature took the sealing language out of RCW 13.50.050 and put it into a new section, RCW 13.50.260. Laws of 2014, ch. 175, §§ 3-4.

The original Senate bill in 2011 when the legislature reintroduced sealing sex offenses did not have any limiting language in it regarding rape 1, rape 2, or indecent liberties. S.B. 5204, Laws of 2011. The Washington Association of Prosecuting Attorneys (WAPA) objected to this, asking that “rape in the first degree, rape in the second degree, and forcible indecent liberties be exempt from these provisions” because “[t]hese are crimes of violence in addition to sex crimes and we therefore

believe there is a benefit to tracking those for a lengthier period of time.” Senate Bill Report S.B. 5204, dated 2/9/11. The legislature capitulated and included that language (but also added the “actual forcible compulsion” requirement to indecent liberties) in the final version of what is now RCW 13.50.260(4)(a)(v).

Thus, the clear purpose of the legislature’s intent was to allow prosecutors to continue tracking these violent sex offenses. Child molestation is not a violent sex offense, does not fall within the ambit of the offenses WAPA sought to track, and does not fall within the ambit of the legislature’s intent. *See J.C.*, 192 Wn. App at 136, 366 P.3d 455 (Korsmo, J., concurring) (“The legislature intended that the sealing statute would apply to juveniles who committed first degree child molestation.”). Thus, even if Mr. Pena committed indecent liberties with actual forcible compulsion, he can still seal his child molestation charge.

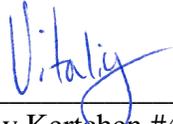
D. Request to change case caption

In the event this Court issues a favorable opinion, Mr. Pena requests this Court also issue an order changing the case caption to State v. P.M.P. Having the trial court record sealed while this case remains public bearing his full name would be counterintuitive.

CONCLUSION

Based on the foregoing, Mr. Pena is eligible to seal his indecent liberties and child molestation charges. This Court should reverse and remand.

Respectfully submitted,



Vitaliy Kertchen #45183

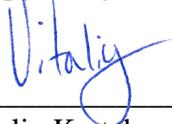
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,



Vitaliy Kertchen #45183

Date: 9/28/17

Place: Tacoma, WA

KERTCHEN LAW, PLLC

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