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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

PAUL PENA, APPELLANT

Appeal from the Superior Court of Pierce County, Juvenile Court
The Honorable Jerry Costello

No. 327641-R010

Brief of Respondent

MARK LINDQUIST
Prosecuting Attorney

By
Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Does RCW 13.50.260(4)(a) bar the sealing of all Class A offenses when the person has been convicted of the three sex offenses specified in RCW 13.50.260(4)(a)(v)?

2. Alternatively, does RCW 13.50.260(4)(a) permit the sealing of all Class A offenses, except the three sex offenses specified in RCW 13.50.260(4)(a)(v)?

3. Is offense classification irrelevant to the interpretation of RCW 13.50.260(4)(a)(v)?

4. May the juvenile offender case file in this case be partially sealed?

5. Does sufficient evidence support the trial court's factual finding that appellant committed the offense of indecent liberties that was actually committed with forcible compulsion?

6. Is the standard of review for matters of statutory interpretation *de novo*?

B. STATEMENT OF THE CASE.

Appellant, Paul Pena, moved to seal his juvenile court record by a motion filed in the superior court on October 27, 2016. CP 1-3. On November 21, 2016, after a hearing on appellant's motion to seal, the trial court found that sealing was inappropriate because

> The respondent's juvenile adjudication is Rape in the First Degree, Rape in the Second Degree, or Indecent Liberties with Forcible Compulsion that was actually committed with forcible compulsion. The respondent does not meet this requirement (RCW 13.50.260(4)(a)(v)).

CP 25. Appellant satisfied the other elements of RCW 13.50.260(4)(a). CP 24-25. Following a motion to revise, on December 30, 2016, the Superior Court entered further findings of fact:

> 5. The respondent's juvenile adjudication was for Indecent Liberties with Forcible Compulsion that was actually committed with forcible compulsion. The respondent does not meet this requirement (RCW 13.50.260(4)(a)(v)).
>
> (a) The respondent's guilty plea statement on the above listed charges is presumptively valid. Words "forcible compulsion" in plea satisfies statute.
>
> (b) Pursuant to State v. J.C., 192 Wn. App. 122 (2016) the court's analysis ends with the finding of the presumptively valid underlying guilty plea. No further inquiry shall be conducted.

CP 32. On revision, the superior court also found that the other elements of RCW 13.50.260(4) were satisfied. CP 31-32.

An appeal of these findings was taken. CP 59-64. That appeal was dismissed on May 1, 2017, without prejudice. Ruling Dismissing

Appeal (Supp. CP 78). The mandate issued on September 25, 2017. Mandate (Supp. CP 79).

After the dismissal without prejudice, but before the mandate entered, appellant filed a new motion to seal in the superior court on May 3, 2017. CP 39-41. The motion was decided on June 5, 2017. CP 55-58. The findings in this order essentially mirror the findings of the order entered on November 22, 2017. CP 55-58. The instant notice of appeal was filed on June 12, 2017 (CP 59-64).

Appellant was originally charged with rape of a child in the first degree in count one, and indecent liberties with forcible compulsion, committed upon a separate victim, in count two Supp. CP 65-66.

On December 28, 1993, appellant pled guilty to child molestation in the first degree and indecent liberties by forcible compulsion. Appellant's guilty plea included the following statement:

> On or about April 30, 1991, I had sexual contact with [G.C.] who I am not married to, then being 3 yrs [sic] younger than me in Pierce County, Washington.
>
> 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.

Plea Statement at 2 (Supp. CP 70). On April 30, 1991, Child molestation in the first degree was a Class A felony. Laws of 1990, ch 3, § 902. In April 1990, indecent liberties with forcible compulsion was a Class B

felony. Laws of 1988, ch. 146, § 2.[1] As part of his juvenile dispositional order, on January 19, 1994, 24 months of supervision by Court Probation Officer was imposed. Dispositional Order at 1 (Supp. CP 74). Appellant was relieved of his obligation to register as a sex offender on December 7, 2001. Order of December 7, 2001 (Supp. CP 77).

C. ARGUMENT.

1. RCW 13.50.260 DIRECTS THAT APPELLANT'S CHILD MOLESTATION IN THE FIRST DEGREE AND INDECENT LIBERTIES CONVICTIONS CANNOT BE SEALED.

Under the sealing laws in effect at the time of appellant's conviction,[2] sealing was appropriate if

> (1) two years had elapsed from the later of his discharge from supervision or the court's issuance of an order relating to the offense; and (2) no further criminal or diversion proceedings remained pending against the offender.

State v. D.S., 128 Wn. App. 569, 572, 115 P.3d 1047, 1048 (2005). Effective July 1, 1997, less than two years after appellant's period of supervision ended, the legislature amended RCW 13.50.050 adding a prohibition against sealing any juvenile record containing a felony sex offense. *Id.* Because appellant did not have the requisite two year crime

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[1] Indecent liberties by forcible compulsion became a Class A felony in 2001. Laws, 2001 Sp.Sess. ch 12, 359.

[2] The term "conviction" is used in this brief only because that is the term used in RCW 13.50.260. Otherwise, respondent would use the term "disposition" to describe the entry of an order of disposition in a juvenile offense case.

free period before July 1, 1997, sealing pursuant to former RCW 13.50.050 was not available to him. ***State v. T.K.***, 139 Wn.2d 320, 987 P.2d 63 (1999). The restrictive sealing provisions of RCW 13.50.050 controlled the sealing of appellant's sex offense convictions until RCW 13.50.050 was amended in 2011. Laws 2011, Ch. 338, § 4. The relevant provision has since been recodified in RCW 13.50.260. Laws 2014, ch. 175, § 4; Laws 2015, ch. 265, § 3.

The standard of review for this case, involving the interpretation of RCW 13.50.260 is *de novo*. ***Watson v. Seattle***, 189 Wn.2d 149, 158, 401 P.3d 1, 5 (2017).

a. RCW 13.50.260(4)(a)(v) addresses convictions of the person seeking sealing, not the juvenile offense sought to be sealed.

Prior to 2011, no juvenile sex offense could be sealed. *See* ***State v. D.S.***, 128 Wn. App. 569, 572, 115 P.3d 1047, 1048 (2005). While RCW 13.50.260 represents a pronounced relaxation of sealing prohibitions in juvenile court for sex offenses, it remains strict for certain offenses. RCW 13.50.260(4) unambiguously states that Class A sex offenses, such as child molestation in the first degree, may be sealed only if "[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." RCW 13.50.260(4)(a)(v).

In this case "the person"—appellant—had been convicted of indecent liberties that was "actually committed with forcible compulsion." Therefore, appellant's Class A offense of child molestation in the first degree could not be sealed. This is the result directed by the plain language of RCW 13.50.260(4)(a)(v).

Had the legislature intended the narrow construction of RCW 13.50.260(4)(a)(v) suggested by appellant, it would have used language such as this:

> The court shall grant any motion to seal records for class A offenses made pursuant to subsection (3) of this section if . . . (v) the motion to seal is not for the offense of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion.

The legislature did not make this choice. Instead of focusing upon the offense sought to be sealed, the legislature focused upon the offenses committed by the person seeking sealing. The plain language of the statute ought to be given effect in this case.

b. Offense classification is irrelevant to the interpretation of RCW 13.50.260(4)(a)(v).

RCW 13.50.260(4)(a)(v) focuses upon the elements of indecent liberties committed with forcible compulsion—not its offense classification. This conclusion is highlighted by the use of the word "actually" in RCW 13.50.260(4)(a)(v):

> The person has not been convicted of Rape in the First Degree, Rape in the Second Degree, or Indecent Liberties with Forcible Compulsion <u>that was actually committed</u> with forcible compulsion.

(emphasis added). In RCW 13.50.260(4)(a)(v), the legislature directs the trial court to "actually" consider the elements of the specified offenses. The offense classifications of rape and indecent liberties with forcible compulsion are irrelevant to this inquiry.

This focus on elements, not classification, distinguishes ***Rivard v. State***, 168 Wn.2d 775, 781–82, 231 P.3d 186 (2010), where offense classification was outcome determinative on the right to possess a firearm issue.

In 2011, when the provision in question was enacted,[3] indecent liberties with forcible compulsion was a Class A offense, and had been since 2001. Laws, 2001 Sp.Sess. ch 12, § 359. Nothing in the record suggests any legislative intent to distinguish consideration of pre-2011 indecent liberties with forcible compulsion cases from post-2011 indecent liberties with forcible compulsion cases.

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[3] The "actually committed with forcible compulsion" language was first enacted in 2011 and codified in RCW 13.50.050. Laws 2011, Ch. 338, § 4. RCW 13.50.260 was enacted in 2014. Laws 2014, ch 175, § 4.

c. The legislative intent expressed in RCW 13.50.260(4)(a)(v) should not be defeated by unauthorized partial sealing of appellant's indecent liberties offense.

When appellant committed the offense of indecent liberties with forcible compulsion, appellant committed a Class B offense. The 2001 reclassification of that offense as a Class A offense did not alter that offense classification. ***Rivard v. State***, 168 Wn.2d 775, 781–82, 231 P.3d 186 (2010). RCW 13.50.260(4)(b) permits the sealing of Class B offenses. If appellant's indecent liberties with actual forcible compulsion were considered in a vacuum, petitioner could seal it pursuant to RCW 13.50.260(4)(b).

Appellant's indecent liberties conviction, however, is not presented in a vacuum. It is presented in a case alongside his child molestation in the first degree conviction, and the legislature has clearly directed that appellant's Class A felony of child molestation in the first degree must not be sealed because appellant had been "convicted of . . . indecent liberties with forcible compulsion that was actually committed with forcible compulsion."

In this case, partial sealing would defeat the clear legislative intent expressed in RCW 13.50.260(4)(a)(v). If the indecent liberties charge is

sealed, then it is as if the indecent liberties charge never occurred,[4] and the child molestation in the first degree charge would have to be sealed. As a plain and practical matter, partial sealing in this case would necessarily result in total sealing of the record—and total sealing of the record defeats the legislative intent expressed in RCW 13.50.260(4)(a)(v).

Alternatively, the legislature has the duty of establishing sealing provisions for juvenile records. ***State v. S.J.C.***, 183 Wn.2d 408, 428, 352 P.3d 749 (2015). RCW 13.50.260 does not provide for partial sealing. RCW 13.50.260(6)(a) provides:

> If the court enters a written order sealing the juvenile court record pursuant to this section, it shall, subject to RCW 13.50.050(13), order sealed the official juvenile court record, the social file, and other records relating to the case as are named in the order. ...

RCWA § 13.50.260. There is no provision for redaction or selective sealing of a case file. This Court has no basis to redraft legislation to create a selective sealing process in this case, and this Court should decline to do so for this alternative reason.

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[4] RCW 13.50.260(6)(a); ***Nelson v. State***, 120 Wn. App. 470, 85 P.3d 912 (2003).

d. Sufficient evidence supports the trial court's factual finding that appellant has been convicted of indecent liberties that was actually committed by forcible compulsion.

In ***State v. J.C.***, 192 Wn. App. 122, 366 P.3d 455 (2016), after discussing the legislature's goals in enacting the sealing statute, came to this conclusion:

> These goals, in tandem with the ordinary meaning of the word "actually," the context of the statute and its related provisions, the statutory scheme as a whole, and the legislature's stated intent behind the 2014 amendments to chapter 13.50 RCW, support interpreting RCW 13.50.260(4)(a)(v) as requiring trial courts to inquire whether actual force was used in the commission of indecent liberties by forcible compulsion. Except in the instance of a ***Barr*** plea, 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.

State v. J.C., 192 Wn. App. at 133.

Appellant has not demonstrated that the plea to indecent liberties with forcible compulsion in this case was taken pursuant to ***In re Barr***, 102 Wn.2d 265, 684 P.2d 712 (1984) because appellant pled to indecent liberties as charged and admitted the charged conduct. Supp. CP 68. The distinguishing characteristic of an ***In re Barr*** plea is that the accused expressly pleads guilty to a crime that he knows is supported by insufficient evidence because he believes that there is sufficient evidence to convict him of the offenses originally charged *and* he desires to take

advantage of the State's plea offer. *See* ***In re Barr***, 102 Wn.2d at 269-71. In this case, appellant entered a straight plea of guilty to indecent liberties with forcible compulsion, as originally charged.

Alternatively, appellant's claim that the plea in this case was an ***In re Barr*** plea must fail because appellant cannot demonstrate that he ever presented that argument to the trial court. *See* CP 42-46.[5] RAP 2.5(a).

Appellant has not challenged the validity of his guilty pleas to child molestation in the first degree and indecent liberties with forcible compulsion. While he notes that his plea statement only recapitulates the elements of the offenses charged, it amply supports the trial court's factual finding that he committed "Indecent Liberties with Forcible Compulsion that was actually committed with forcible compulsion" because appellant himself said that he committed the offense with forcible compulsion. CP 56. The record on appeal is devoid of any indication that contrary evidence was proffered.

D. CONCLUSION.

The threshold question presented by this appeal is significant both to the litigants in this case, and to future litigants in sealing proceedings in the juvenile courts of this State: Does RCW 13.50.260(4)(a)(v) bar the

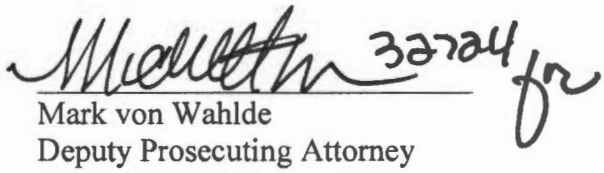
[5] Appellant has not presented a transcript of the sealing hearing.

sealing of all Class A offenses when the person has been convicted of the three specified sex offenses, or are all Class A offenses subject to sealing, except the three sex offenses specified in RCW 13.50.260(4)(a)(v)? Resolution of that threshold question dictates the outcome of the other two questions presented.

The trial court correctly decided not to seal the record in this case and should be affirmed.

DATED: December 20, 2017.

MARK LINDQUIST
Pierce County Prosecuting Attorney



Mark von Wahlde
Deputy Prosecuting Attorney
WSB # 18373

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