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Division II
State of Washington
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No. 53029-5-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

KYLE JUSTIN ROCKAFELLOW,

Respondent.

Appeal from the Superior Court of Washington for Pacific County

Appellant's Brief

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By:



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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it entered findings of fact and conclusions of law declaring the Respondent, Kyle Rockafellow, "has been in the community for a period greater than three (3) consecutive years since his/her disqualifying offense... and is, therefore eligible for the restoration..." CP12. It was error to approve Rockafellow's petition for restoration of his firearm rights.

II. ISSUES

1. When does the three-year crime-free period for a conviction for fourth degree assault, domestic violence, begin?

III. STATEMENT OF THE CASE

Rockafellow entered a guilty plea to fourth degree assault, domestic violence, on November 13, 2012. CP 8. Rockafellow received a suspended sentence and was placed on 24 months of bench probation and directed to engage in, among other things, crime-related treatment. CP 8. Rockafellow failed to follow the district court's orders and probation was extended through March 23, 2016,

as there were periods of supervision tolling based upon Rockafellow's warrant status.¹ CP 8.

On November 1, 2018, prior to satisfying the three-year crime-free period, Rockafellow petitioned to have his firearm rights restored. CP 2. Rockafellow asserted the three-year time period began at the time of the conviction, and not when Rockafellow completed probation. CP 5. The State opposed the petition asserting the three-year time period began at the time Rockafellow completed probation, which did not occur until March 23, 2016. CP 5. The trial court, in restoring Rockafellow's firearm rights, concluded that the three-year crime-free period began to run at sentencing rather than following the completion of the probationary period. CP 19.

The State timely appealed. CP 21.

IV. ARGUMENT

A. THE TRIAL COURT ERRED WHEN IT CONCLUDED THE THREE-YEAR CRIME FREE PERIOD BEGAN AT SENTENCING RATHER THAN UPON THE SUCCESSFUL CONCLUSION OF PROBATION.

Here, the trial court reasoned the three-year crime free prohibition began to run from the time of conviction and not following

¹ *City of Spokane v. Marquette*, 146 Wn.2d 124, 130, 43 P.3d 502 (2002)- Probation is tolled while an offender is in warrant status.

the completion of the two-year probation period.

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). When interpreting a criminal statute, appellate review will give it a literal and strict interpretation, deriving the legislative intent of the statute solely from the plain language of the provision in question, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. *State v. Dennis*, 191 Wn.2d 169, 421 P.3d 944 (2018). When interpreting a statute, the goal on review is to give effect to the Legislature's intent. *Dep't of Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If, after this inquiry, there is more than one reasonable interpretation of the plain language, then a statute is ambiguous and appellate review may rely on principles of statutory construction, legislative history, and relevant case law to discern legislative intent. *State v. Dennis*, 191 Wn.2d at 173. A statute is not ambiguous simply because different interpretations are conceivable. *Id.* Statutes must be construed to effect their purpose and to avoid strained or absurd results. *State v. Stannard*, 1201 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

2. The trial court incorrectly reasoned the three-year crime free prohibition began at the time of sentencing and not after the completion of probation.

Unlike felony firearm rights restoration, offenders whose debilitating offense is a misdemeanor or gross misdemeanor must first complete all conditions of their sentence and then complete three crime-free years “in the community” before becoming eligible to petition for firearm rights restoration. *Benson v. State*, 4 Wn.App.2d 21, 29, 419 P.3d 484 (2018) (completion of a petitioner’s sentence requirements is only relevant for those with misdemeanor convictions).

Pursuant to RCW 9.41.040(4)(a)(II)(B):

... if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section ... the individual may petition ... to have his or her right to possess a firearm restored... (B) If the conviction ... was for a nonfelony offense, after three or more consecutive years in the community without being convicted ... or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if ... the individual has completed all conditions of the sentence.

Thus, unlike restoration for felony offenses, misdemeanor offenses require the completion of “all conditions of the sentence” and then be “in the community” for three years without being charged or conviction of any offense in order to be eligible for restoration.

The legislature did not define what it means to be “in the community.” However, in granting the petition below the trial court found *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010) instructive. *Ervin* wrestled with the definition of “in the community” in the context of determining whether a period of incarceration on a misdemeanor offense interrupted the wash-out provisions for felony offender scoring and concluded that time spent in custody pursuant to violation of probation stemming from a misdemeanor offense did not interrupt the wash-out period. However, the *Ervin* court concluded a felony jail sentence of any length would have interrupted the wash-out period. As a result, *Ervin* is either wrongly decided or inapplicable when evaluating a misdemeanor offender seeking firearm restoration. The state asserts *Ervin* is wrongly decided and suggests support for this proposition is found in *State v. Blair*, 57 Wn.App. 512, 789 P.2d 104 (1990) (the trial court erred in ruling that confinement as a penalty for a probation violation would not as a matter of law interrupt the wash-out period for the underlying conviction) and *State v. Perencevic*, 54 Wn.App. 585, 589, 774 P.2d 558 (1989) (holding confinement for a community supervision violation was confinement pursuant to a conviction of a felony). This supports the legislature’s definition of “confinement,” which also

includes partial confinement, and does not restrict the definition to misdemeanor or felony offenses. See RCW 9.94A.030(8) defining "Confinement." Even partial confinement is not further defined by the level of offense causing the event, but instead is defined by the type of confinement, such as work release or work crew. See also *State v. Gauthier*, 189 Wn.App. 30, 354 P.3d 900 (2015), discussing *State v. Ervin*, 169 Wn.2d 815, 239 P.3d 354 (2010), holding the *Ervin* "interpretation creates an absurd scenario... which the court was "confident the legislature did not intend." Thus, the trial court's reliance was misplaced as one cannot be "in the community" while subject to the court or department's supervision, especially when RCW 9.41.040(4)(a)(II)(B) requires the completion of all of the sentence conditions and three crime-free years. As a result, *Ervin's* analysis is unhelpful with respect to misdemeanor restoration petitioners and being in the community.

Instead, the trial court should have considered *State v. Mihali*, 152 Wn.App. 879, 884, 218 P.3d 922 (2009). *Mihali* is informative as it instructed trial courts to look at the petitioner's status at the time of the petition and then determine whether the petitioner has spent the requisite crime-free period "in the community" to determine eligibility to petition for restoration. The *Mihali* court found, "the legislature

clearly intended for the trial court to look at the petitioner's criminal history when the petition was filed and not at the time of the disabling conviction." To reach this conclusion the *Mihali* court referenced the stated legislative intent which is found in the 1996 Final Bill Report where the legislature expressly noted:

In some cases, after five years in the community without a conviction or current charge for any crime, a person whose right to possess a firearm has been lost because of a criminal conviction may petition a court of record for restoration of the right. However, the person must also have passed the "washout" period under the Sentencing Reform Act before he or she may petition the court. Effectively, this means that a person with a conviction for a class A felony or any sex offense can never seek restoration of the right. Generally, in the case of a class B felony the washout period is 10 years, and in the case of a class C felony it is five years.

Thus, the legislature intended restoration to occur after an offender has completed the conditions of the sentence and then passed the washout period. Later courts agree with this analysis.

In State v. Dennis, 191 Wn.2d 169, 177, 421 P.3d 944 (2018) the court found the language of the restoration provision is clear: an offender having previously been convicted of a class C felony needs a period of five years without any convictions before he or she can petition for restoration of rights. The *Dennis* court also noted, however, that "the person must also have passed the 'washout' period under the Sentencing Reform Act before he or she may

petition the court.” *Id.* at 175. This is consistent with *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010) (“Although [an offender] had remained crime-free for the requisite 5 years for the purpose of his disabling felony, a prior conviction still included in his offender score delays his eligibility.”).

Rockafellow did not complete probation timely. Instead, because of several warrants and probation violations, probation did not conclude until March 23, 2016. CP 8. This is when the three-year, crime-free period began and the earliest he was entitled to file a petition was March 24, 2019.

V. CONCLUSION

Here, Rockafellow was convicted of fourth degree assault, domestic violence. He received a 24-month suspended sentence which required him to comply with certain crime-related provisions, which he failed to do. He was returned to court to address his probation violations, but due to warrants which issued and his inattention to the court’s directions, Rockafellow’s probation did not terminate until March 23, 2016. CP 8. He was required to go three years, crime-free, from this date before becoming eligible to petition for restoration. Thus, his petition was premature and should not have

been granted. The State, therefore, respectfully requests this Court reverse the trial court's decision.

RESPECTFULLY submitted this ^{20th} day of April, 2019.



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DECLARATION OF SERVICE BY EMAIL

Bonnie Walker declares that a copy of Appellant's Brief was served upon:

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Dated this ^{20th} day of April, 2019, at South Bend, Washington.

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