

FILED

MAY 09 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 295044 -III

STATE OF WASHINGTON
Respondent,

vs.

GREGORY STEVEN THOMAS
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 99-8-00017-5

AMENDED BRIEF OF RESPONDENT

Kimberly S. Horner, WSBA #42534
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Attorney for Respondent

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
OTHER AUTHORITIES	iii
CONSTITUTIONAL PROVISIONS	iii
STATEMENT OF THE CASE	1
RESPONSE TO ASSIGNMENT OF ERROR	2
CONCLUSION	8

TABLE OF AUTHORITIES

CASES

1.	<u>Brower v. State</u> , 137 Wash.2d 44, 969 P.2d 42 (1998)	7, 8
2.	<u>Schneider v. Forcier</u> , 67 Wash.2d 161, 406 P.2d 935 (1965)	4
3.	<u>State v. Bell</u> , 83 Wash.2d 383, 518 P.2d 696 (1974)	4
4.	<u>State v. Bird</u> , 95 Wash.2d 83, 86, 622 P.2d 1262, 1263 (1980)	4
5.	<u>State v. Delgado</u> , 148 Wash.2d 723, 727, 63 P.3d 792, 795 (2003)	4
6.	<u>State v. Gibson</u> , 16 Wash.App. 119, 127, 553 P.2d 131, 137 (1976)	4
7.	<u>State v. Gilkinson</u> , 57 Wash.App. 861, 866, 790 P.2d 1247 (1990)	5
8.	<u>State v. Jordan</u> , 146 Wash. App. 395, 403, 190 p.3d 516, 520 (2008)	5
9.	<u>State v. Leavitt</u> , 107 Wash.App. 361, 27 P.3d 622 (2001)	7
10.	<u>State v. Martin</u> , 137 Wash.2d 149, 154-155, 969 P.2d 450 (1999)	5
11.	<u>State v. McEnry</u> , 124 Wash.App. 918, 923-924, 103 P.3d 857, 859 (2004)	2
12.	<u>State v. M.D.P.</u> , 136 Wash.App. 593, 150 P.3d 157 (2007)	4, 5
13.	<u>State v. Minor</u> , 162 Wash.2d 796, 174 P.3d 1162 (2008)	6, 7
14.	<u>State v. Moore</u> , 121 Wash.App. 889, 91 P.3d 136 (2004)	7

- | | | |
|-----|---|---|
| 15. | <u>State v. Waldon</u> , 148 Wash.App. 952, 957, 202 P.3d 325, 328 (2009) | 2 |
| 16. | <u>State v. Weaver</u> , 248 P.3d 1116 (2011) | 4 |

OTHER AUTHORITIES

- | | | |
|----|----------------------|------------------------|
| 1. | RCW 13.50.050 | 1, 2, 3, 4,
6, 7, 8 |
| 2. | RCW 13.50.050(12)(b) | 1, 5 |

CONSTITUTIONAL PROVISIONS

- | | |
|---|------|
| Article I, § 32 of Washington Constitution | 7, 8 |
| Article 1, §§ 1 – 31 of Washington Constitution | 8 |

I. STATEMENT OF THE CASE

On February 12, 1999, Appellant Gregory S. Thomas pleaded guilty to second degree incest, which is a class C felony and a sex offense. (CP 1-3) Mr. Thomas was a juvenile at that time. (CP 1)

Mr. Thomas was provided a Notice of Rights on the date he pleaded guilty. (RP 12) The Notice of Rights informed Mr. Thomas of the following:

You have a right under RCW 13.50.050 [. . .] to file a motion with the Court to vacate its order and findings in this matter and order the destruction of the official Juvenile Court file, the social file and records of the Court and of any other agency in this case, if:

- (a) You are at least 12 years of age, and
- (b) You have not subsequently been convicted of a felony; and
- (c) No proceedings is (sic) pending against you seeking a conviction of a criminal offense, and
- (d) You have never been found guilty of a serious offense. . . . (CP 13)

On May 13, 2010, Mr. Thomas filed his Motion for Order Vacating/Sealing Record of Conviction pursuant to RCW 13.50.050. (CP 15) The Superior Court denied Mr. Thomas's motion because RCW 13.50.050(12)(b) prohibits a court from sealing juvenile records of a person who has been convicted of a

sex offense. (CP 32-33) The Superior Court stated: “The request before this Court to vacate/seal the Defendant’s juvenile offense record of conviction is exclusively controlled by the provisions of RCW 13.50.050,” and “[b]ecause the offense for which the Defendant seeks to seal his juvenile offense record of conviction qualifies as a sex offense, this Court lacks the authority to grant any motion to vacate/seal the record of conviction” pursuant to RCW 13.50.050. (CP 32-33)

II. RESPONSE TO ASSIGNMENT OF ERROR

The Superior Court did not err when it denied Mr. Thomas’s Motion for Order Vacating/Sealing Record of Conviction, as RCW 13.50.050 prohibits the sealing of Mr. Thomas’s records.

Mr. Thomas filed a motion to seal his records under RCW 13.50.050, and yet that very statute prohibits the Superior Court from doing as Mr. Thomas asks. Therefore, the Superior Court acted appropriately, and clearly did not abuse its discretion,¹ when it denied Mr. Thomas’s motion to seal. In fact, it would have been an abuse of discretion had the Superior Court done what Mr. Thomas requested, because the court would have been acting in

¹ A trial court’s decision to seal records is reviewed under the abuse of discretion standard. State v. McEnry, 124 Wash.App. 918, 923-924, 103 P.3d 857, 859 (2004); State v. Waldon, 148 Wash.App. 952, 957, 202 P.3d 325, 328 (2009).

direct contravention of the express language of RCW 13.50.050,
which provides as follows:

(b) The court shall not grant any motion to seal records for class B, C, gross misdemeanor and misdemeanor offenses and diversions made under subsection (11) of this section unless:

(i) Since the date of last release from confinement, including full-time residential treatment, if any, entry of disposition, or completion of the diversion agreement, the person has spent two consecutive years in the community without being convicted of any offense or crime;

(ii) No proceeding is pending against the moving party seeking the conviction of a juvenile offense or a criminal offense;

(iii) No proceeding is pending seeking the formation of a diversion agreement with that person;

(iv) The person has not been convicted of a sex offense; and

(v) Full restitution has been paid.

(Emphasis added.)

Because Mr. Thomas has been convicted of a sex offense, the Superior Court acted appropriately in denying Mr. Thomas's motion to seal.

- A. Because Mr. Thomas has been convicted of a sex offense, RCW 13.50.050 prohibits the Superior Court from sealing Mr. Thomas's juvenile records.

It is a well settled principle that “[l]iteral and strict interpretation must be given criminal statutes.” State v. Bird, 95 Wash.2d 83, 86, 622 P.2d 1262, 1263 (1980), citing to State v. Bell, 83 Wash.2d 383, 518 P.2d 696 (1974). See also State v. Delgado, 148 Wash.2d 723, 727, 63 P.3d 792, 795 (2003). Furthermore, “[t]he legislature is presumed to intend the plain meaning of its language.” State v. Gibson, 16 Wash.App. 119, 127, 553 P.2d 131, 137 (1976), citing to Schneider v. Forcier, 67 Wash.2d 161, 406 P.2d 935 (1965). See also State v. Weaver, 248 P.3d 1116 (2011), and Delgado, 128 Wash.2d at 727-728. The literal and plain meaning of RCW 13.50.050 is clear: if a person has been convicted of a sex offense, then that person's juvenile records shall not be sealed.

In State v. M.D.P., 136 Wash.App. 593, 150 P.3d 157 (2007), Division II of this Court dealt with an issue similar to the one at hand. In that case, M.D.P., a juvenile, pleaded guilty to three counts of first degree child molestation, a sex offense. Several years later, M.D.P. moved to seal his juvenile record under RCW 13.50.050, arguing that he “entered his plea in the belief that he

would be able to seal his juvenile records.” Ultimately, the Court of Appeals held that M.D.P.’s records could not be sealed, because of his sex offense convictions. M.D.P., 136 Wash.App. at 594-596. The Court stated that “[b]ecause the disposition of criminal records is a matter ‘uniquely within the Legislature’s domain,’ the Court did not have authority to seal M.D.P.’s juvenile record.” M.D.P., 136 Wash.App. at 596, quoting State v. Gilkinson, 57 Wash.App. 861, 866, 790 P.2d 1247 (1990).

Here, Mr. Thomas, like M.D.P., believed that his sex offense conviction would not preclude him from being able to have his juvenile records sealed. However, RCW 13.50.050(12)(b) clearly provides that the Court shall not seal Mr. Thomas’s juvenile records, as he has been convicted of a sex offense. [“The legislature’s use of the term ‘shall’ is mandatory and a court acting without having complied with the statutory mandate does so without authority.” State v. Jordan, 146 Wash. App. 395, 403, 190 P.3d 516, 520 (2008), citing to State v. Martin, 137 Wash.2d 149, 154-155, 969 P.2d 450 (1999).] The Superior Court is bound by the mandatory language of RCW 13.30.050(12)(b), and therefore does not have the authority to seal Mr. Thomas’s records.

- B. Mr. Thomas has provided no authority which would allow the Superior Court to seal his juvenile records in direct contravention of the express language in RCW 13.50.050.

Although Mr. Thomas cites to multiple Washington cases in his appellate brief, none of those cases provides the Court with the authority to disregard the express language of RCW 13.50.050. For instance, Mr. Thomas appears to rely heavily on State v. Minor, 162 Wash.2d 796, 174 P.3d 1162 (2008), the facts of which are distinguishable from those of the instant case.

In Minor, Mr. Minor had been convicted of residential burglary, a crime for which the legislature had prohibited firearm possession. However, Mr. Minor had not been given notice of his loss of firearm rights, and in fact the court had affirmatively misled Mr. Minor to believe that he would subsequently be allowed to possess firearms. Mr. Minor was later convicted of unlawful possession of a firearm. He appealed, arguing that his conviction was a result of his reliance on the court's representation that he was allowed to possess firearms. His conviction for unlawful possession of a firearm was ultimately overturned. Minor, 162 Wash.2d at 799-804.

The facts of Minor are significantly different than the facts of Mr. Thomas's case. Mr. Minor was affirmatively misled by the

predicate court, and as a result was later convicted of an additional crime. Here, Mr. Thomas has not been charged with any crime as a result of not being informed that a sex offense conviction would preclude the sealing of his juvenile records. Mr. Thomas is not facing additional criminal punishment; he is merely being informed that he is unable to take advantage of a benefit to which he believed he would be entitled. An additional difference between these cases is that Mr. Minor was not asking the court to violate the express language of a controlling statute by requesting that his conviction be overturned, whereas here, Mr. Thomas has asked the court to act in complete contravention of RCW 13.50.050. These differences are crucial; thus, State v. Minor has little import to Mr. Thomas's case.²

Mr. Thomas also contends that his position is supported by Article I, § 32 of the Washington Constitution, which states: "A frequent recurrence to fundamental principles is essential to the security of individual right and the perpetuity of free government." However, in Brower v. State, 137 Wash.2d 44, 969 P.2d 42 (1998),

² Mr. Thomas also asserts that State v. Moore, 121 Wash.App. 889, 91 P.3d 136 (2004) and State v. Leavitt, 107 Wash.App. 361, 27 P.3d 622 (2001) support his position. However, both of these cases follow the same general fact pattern as State v. Minor, supra, and are therefore also starkly distinguishable from the case at hand.

our Supreme Court held that this Constitutional provision “has primarily been viewed as an interpretative mechanism in connection with individual rights . . .” provided in Const. art I, §§1-31, and that “Article I, section 32 has not been interpreted as providing substantive rights in and of itself.” Brower v. State, 137 Wash.2d at 69. Because Mr. Thomas has not asserted that any of his rights pursuant to Const. art I, §§1-31 have been violated, Const. art. I, § 32 is entirely inapplicable to his case.

In sum, RCW 13.50.050 clearly prohibits the sealing of Mr. Thomas’s juvenile records, as Mr. Thomas has been convicted of a sex offense. Mr. Thomas has not provided any authority by which the Court could circumvent the requirements of RCW 13.50.050. Had the Court granted the motion presented by Mr. Thomas, such would have constituted a clear abuse of discretion.

CONCLUSION

Mr. Thomas has asked the Superior Court to seal his records under RCW 13.50.050, and yet that statute itself precludes such action; thus, the Superior Court acted appropriately when it declined to seal Mr. Thomas’s records. Therefore, the State respectfully requests that this Court affirm the decision of the Superior Court.

DATED this 6th day of MAY, 2011.

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