

ORIGINAL

NO. 295117-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED

MAR 24 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

THE STATE OF WASHINGTON, Respondent

v.

DAVID KAY DABOLL, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 90-1-00349-7

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

JONATHAN J. YOUNG, Deputy
Prosecuting Attorney
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STATEMENT OF THE CASE

The parties are substantially in agreement as to the relevant facts at issue in this appeal. In 1987, Defendant was convicted of Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct (Dealing in Depictions), a felony. (CP 13-16). On November 30, 1990, Defendant was convicted of felony Communication with a Minor for Immoral Purposes (Communication with a Minor). (CP 3-6). Neither judgment and sentence was appealed. In 2010, the trial court held that the Defendant's 1987 conviction for Dealing in Depictions was not a "sex offense" as that term was defined at the time of Defendant's conviction. (CP 23-24). Though it did not meet the definition of a "sex offense," the trial court held that Defendant's 1987 conviction for Dealing in Depictions was a "sexual offense" as that term is used in RCW 9.68A.090. (CP 23-24). Accordingly, the trial court held that Defendant's 1990 conviction for Communication

with a Minor was a felony (1) because no appeal was raised within the time permitted by law, (RP 10/21/10, 7) and (2) due to Defendant's prior "sexual offense" (Dealing in Depictions). (CP 23-24). Based upon Defendant's 1990 conviction for felony Communication with a Minor, the trial court denied Defendant's 2010 Motion for Restoration of Firearm Rights pursuant to RCW 9.41.040(4). (CP 25).

ARGUMENT

A. ISSUE I

The trial court correctly refused to upset Defendant's 1990 felony conviction for Communication with a Minor. CrR 7.8 motions are subject to RCW 10.73.090 which provides:

No petition or motion for collateral attack on a judgment and sentence in a criminal case may be filed more than one year after the judgment and sentence becomes final if the judgment and sentence are valid on its face and was rendered by a court of competent jurisdiction.

Here, no attack was brought on Defendant's 1990 conviction until 2010. The trial court

noted that no appeal was timely taken. (RP 10/21/10, 7). Accordingly, the trial court's refusal to upset the final judgment and sentence, entered a decade earlier, was proper.

Moreover, the trial court correctly interpreted RCW 9.68A.090, and correctly held that Defendant's 1987 conviction for Dealing in Depictions, was a qualifying "sexual offense" for purposes of elevating Defendant's 1990 conviction for Communicating with a Minor to a class C felony. Defendant's reading of RCW 9.68A.090 is overly narrow in that it fails to give effect to all aspects of the statute itself, thus rendering parts of RCW 9.68A.090 superfluous. Defendant's interpretation also requires the Court to assume that Legislature uses different terms ("sex" and "sexual") interchangeably without attaching a different meaning to each word.

"When interpreting a statute, the reviewing court strives to give effect to the Legislature's intent." *State v. Avila*, 102 Wn. App. 882, 888,

10 P.3d 486 (2000) (citing *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000)). "The appellate court reads each provision of the statute in relation to each other and construes the statute as a whole." *Avila*, 102 Wn. App. at 888 (citing *Hubbard v. Dep't of Labor & Indus.*, 140 Wn.2d at 43, 992 P.2d 1002). "And unless there is ambiguity, this court derives the meaning of the statute from its language alone." *Avila*, 102 Wn. App. at 888 (citing *State v. Azpitarte*, 140 Wn.2d at 142, 995 P.2d 31).

RCW 9.68A.090, both as it existed in 1990 and as it appears today, identifies prior convictions which act to elevate a conviction for Communication with a Minor from a gross misdemeanor to a class C felony (hereafter "elevating offense" or "elevating offenses"). The 1990 version of RCW 9.68A.090 read:

A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted **under**

this section or of a felony **sexual offense** under chapter **9.68A, 9A.44, or 9A.64 RCW** or of **any other sexual offense in this or any other state**, in which case the person is guilty of a class C felony punishable under chapter 9A.20 RCW. (Emphasis added.)

RCW 9.68A.090 (1990).

By its plain language, a conviction for Communication with a Minor is elevated to a class C felony if the defendant had previously been convicted:

1) "under this section" (i.e., for Communication with a Minor, whether gross misdemeanor or felony¹);

2) of a sex offense² (i.e., a felony violation of chapter 9A.44 or RCW 9A.64.020 or 9.68A.090);

¹ Only felony Communication with a Minor is included within the definition of "sex offense."

² The 1987 definition of "sex offense" read:
"(a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; . . ."

3) of other felony *sexual offenses* contained within *chapter 9.68A or 9A.64 RCW* (the only "sex offense[s]" found within chapter 9.68A and 9A.64 RCW are codified at RCW 9A.64.020 and 9.68A.090 (see footnote "2")); or

4) "*of any other sexual offense in this or any other state,*"

The plain language of RCW 9.68A.090 therefore includes some elevating offenses which are "sex offense[s]" and other elevating offenses which do not meet the definition of a "sex offense." Specifically, a misdemeanor conviction for Communication with a Minor is not a "sex offense," but is an elevating offense under RCW 9.68A.090. Likewise, elevating sexual offenses within chapter 9.68A and 9A.64 RCW are not limited to the two "sex offense[s]" within those chapters (i.e., Incest pursuant to RCW 9A.64.020; and felony Communication with a Minor pursuant to RCW 9.68A.090). Finally, the Legislature clearly intended that in addition to sex offenses, "other

sexual offenses in this and any other state" should also be considered elevating offenses. To limit the applicable elevating offenses in RCW 9.68A.090 to just "sex offenses" would render much of the statute superfluous; accordingly, Defendant's proposed reading of RCW 9.68A.090 is not a reasonable one.

As there is only one reasonable interpretation of RCW 9.68A.090 that gives effect to the statute as a whole, the rule of lenity is inapplicable. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 242, 59 P.3d 655 (2002) ("The statute is not necessarily ambiguous simply because of two different interpretations. The question, however is whether those interpretations are sufficiently reasonable to warrant further inquiry."); *State v. Fisher*, 139 Wn. App. 578, 585, 161 P.3d 1054 (2007) (The rule of lenity does not apply when a statute is unambiguous.)

Setting aside the fact that Defendant's interpretation does not give meaning to the entire statutory text of RCW 9.68A.090, *arguendo*, even the authority cited by the Defendant supports the conclusion that a "sexual offense" is broader than a "sex offense." Defendant cites to RCW 10.58.090, and cases interpreting RCW 10.58.090, in support of the contention that Legislature and the Court use the terms "sexual offense" and "sex offense" interchangeably. (Defendant's Brief at 6-7.) But notably, RCW 10.58.090 only uses the term "sexual offense" after clarifying that "[f]or purposes of this section, uncharged conduct is included in the definition of "sex offense.'" RCW 10.58.090(5). Moreover, and again *arguendo*, Defendant offers no support for the contention that Legislature intended the terms "sex offense" and "sexual offense" to be used interchangeably. "When the legislature uses different words within the same statute, we recognize that a different meaning is

intended." *State v. Beaver*, 148 Wn.2d 338, 343, 60 P.3d 586 (2002). "[W]hen 'different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.'" *Simpson Inv. Co. v. Dep't of Revenue*, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (quoting *State ex rel. Pub. Disclosure Comm'n v. Rains*, 87 Wn.2d 626, 634, 555 P.2d 1368 (1976)). See also: *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005).

Here, the plain language of RCW 9.68A.090 reveals that sex offenses and other sexual offenses will elevate a defendant's conviction from a gross misdemeanor to a felony. As Defendant's 1987 conviction for Dealing in Depictions was a felony conviction of a sexual nature codified within RCW 9.68A, the trial court properly concluded that it was an elevating offense for purposes of Defendant's 1990 Communication with a Minor conviction. The trial court therefore properly held that Defendant's

1990 conviction for Communication with a Minor was a felony violation of RCW 9.68A.090.

B. Issue II

RCW 9.41.040(4) is a regulatory statute; therefore, the relevant inquiry is whether a defendant should be able to possess a firearm at the time of his petition, not whether he would have been able to possess one at the time of his conviction. *Rivard v. State*, 168 Wn.2d 775, 780, 231 P.3d 186 (2010). The 2010 version RCW 9.41.040(4) prohibits restoration of a defendant's firearm rights where a defendant has been convicted of a class A felony or a "sex offense." The 2010 version of RCW 9.94A.030(45)(a)(iii) defines sex offense as "A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080."

As the Defendant's 1990 conviction for Communicating with a Minor, RCW 9.68A.090, was a felony, it is a "sex offense" and a prohibitive offense for purposes of restoring firearm rights.

Defendant's Motion for Restoration of Firearm Rights was therefore properly denied by the trial court.

CONCLUSION

The trial court correctly refused to upset Defendant's 1990 felony conviction for Communication with a Minor because no appeal, or collateral attack was raised within the time permitted by law.

Moreover, the trial court correctly interpreted the plain language of RCW 9.68A.090, which elevates a conviction for Communication with a Minor to a felony when a defendant has previously been convicted of a "sex offense" or another "sexual offense." Defendant's 1987 conviction for Dealing in Depictions was properly held by the trial court to be an elevating offense for purposes of RCW 9.68A.090, and Defendant's 1990 conviction for Communication with a Minor was properly classified as a felony. Accordingly, the trial court was correct in

denying Defendant's Motion for Restoration of Firearm Rights. The trial court's order denying Defendant's Motion for Restoration of Firearm Rights should be AFFIRMED.

RESPECTFULLY SUBMITTED this 23rd day of March 2011.

ANDY MILLER

Prosecutor



JONATHAN J. YOUNG, Deputy
Prosecuting Attorney

Bar No. 35648

OFC ID NO. 91004

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STATE OF WASHINGTON,

NO. 295117

Respondent,

vs.

DECLARATION OF SERVICE

DAVID KAY DABOLL,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on March 23, 2011.

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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.

EXECUTED at Kennewick, Washington, on March 23, 2011.



PAMELA BRADSHAW