

**FILED**

AUG 20 2012

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

NO. 301150

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

TROY DEAN STUBBS

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR PEND OREILLE COUNTY  
The Honorable Rebecca M. Baker

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APPELLANT'S REPLY BRIEF

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Whether confinement under a misdemeanor conviction interrupts a washout period?

B. STATEMENT OF THE CASE IN REPLY

In addition to facts presented in the opening brief, Mr. Stubbs accepts the State's correction that the second-degree arson charge should have been taking a motor vehicle without owner's permission. Mr. Stubbs also accepts that if his argument prevails, his offender score would be zero and not one.

C. ARGUMENT IN REPLY

**INTERRUPTION**

The State argues that Mr. Stubbs erroneously relies on State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). It contends that in Ervin, our Supreme Court recognized that *any crime* would interrupt a felony washout period. As we argued in the appellant's opening brief, we believe the Ervin Court held that confinement under a misdemeanor conviction would not interrupt a washout period. Only a felony conviction would interrupt a washout period. State v. Ervin, 169 Wn.2d at 825–27.

The State relies on State v. Codiga, 162 Wn.2d 912, 920, 175 P.3d 1082 (2008). It maintains that under Codiga, the Court found that *all crimes* may interrupt a washout period.

We do not believe Codiga is relevant here. The Court decided Codiga a year before it decided Ervin, yet it did not reference Codiga in its Ervin

## AMBIGUITY

The State maintains RCW 9.94A.525(2) clearly intended that *all crimes* may interrupt a washout period and should therefore be interpreted on its face. However, our Supreme Court found the statute subject to varying interpretations. State v. Ervin, 169 Wn.2d at 826. Because of the statute's ambiguity, the Court looked to the legislative intent. The Court presumed the legislature is "familiar with judicial interpretations of statutes and, absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions." State v. Bobic, 140 Wash.2d 250, 264, 996 P.2d 610 (2000).

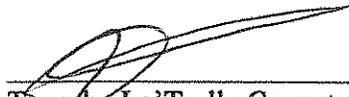
In Nichols, a 2004 case, the Court of Appeals based its holding on an interpretation of the phrase "in the community." State v. Ervin, 169 Wn.2d 815, 826, 239 P.3d 354 (2010) citing, 120 Wash. App. 425, 432, 85 P.3d 955, 85 P.3d 955 (2004). The defendant in that case had been released from confinement on a felony conviction in 1989 and was later incarcerated for 20 days based on misdemeanors taking place in 1992 and 1993. State v. Ervin, 169 Wn.2d at 826 citing, Nichols at 427-28, 85 P.3d 955. The question before the court was whether incarceration for those misdemeanors interrupted the "five consecutive years in the community without being convicted of any felonies," former RCW 9.94A.360(2) (1990). State v. Ervin, 169 Wn.2d at 826, citing 120 Wn.App. at 431-32, 85 P.3d 955. The Court of Appeals

being “in the community” for purposes of the washout provisions. State v. Ervin, 169 Wn.2d at 826, *citing* 120 Wn.App. at 432, 85 P.3d 955. From the time that Nichols was decided, the Legislature has amended RCW 9.94A.525 six times, see LAWS OF 2010, ch. 274, § 403; LAWS OF 2008, ch. 231, § 3; LAWS OF 2007, ch. 199, § 8; LAWS OF 2007, ch. 116, § 1; LAWS OF 2006, ch. 128, § 6; LAWS OF 2006, ch. 73, § 7, but has in no way altered the “in the community” language interpreted by Nichols. Based on that, the Ervin Court concluded that only confinement under felony convictions interrupt wash out periods. State v. Ervin, 169 Wn.2d at 827.

E. CONCLUSION

For the reasons set forth above, Mr. Stubbs respectfully asks this Court to reverse the sentencing court’s ruling and to remand the case for resentencing.

Respectfully submitted this 15<sup>th</sup> day of August, 2012.

  
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