

FILED
May 08, 2017
Court of Appeals
Division III
State of Washington

No. 34851-2

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION III

State of Washington, Respondent

vs.

Kasi L. Sleater, Appellant

Appellant's Reply Brief

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Statutes

RCW 9.94A.640passim

RCW 9.96.0604-6

RCW 43.43.8305

RCW 9.94A.0305-6

Case Law

State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005)1

Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 6, 721 P.2d 1
(1986)2

ARGUMENT

Plain language.

The State argues that “a plain reading of the terms and syntax of RCW 9.94A.640(2)(d) establishes that a disqualifying ‘new crime’ is a crime for which the offender was convicted since the date of her discharge, even if the crime was committed prior to the date of discharge.” State’s Response at 8-9. This is problematic for two reasons.

First, in support of its argument that the language of the statute is “plain,” the State offers approximately nine pages of support, thick with complex technical jargon of English language construction, complete even with a visual aid. Any interpretation that requires such an effort is far from “plain.” On the other hand, Ms. Sleater’s interpretation of the plain language truly is plain: read as a whole, the phrase “convicted of a new crime . . . since the date of the offender’s discharge” naturally means that the conviction must be for a crime that occurs after the date of discharge.

Second, the State’s interpretation violates the rules of statutory construction because it renders the word “new” superfluous. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 96 (2005) (“[T]he drafters of legislation... are presumed to have used no superfluous words and we must accord meaning, if possible, to every word in a statute.”). If the legislature had intended the State’s interpretation, it would have omitted the word

“new.” The statute would then read “convicted of a crime . . . since the date of the offender’s discharge.”

“New crime.”

The State next tries to explain that the words “new crime” mean “a not old, or recent, act committed or omitted in violation of the law; or [] an act committed or omitted in violation of the law that is different from the former or the old.” State’s Response at 9-10. The problem with this approach is that the State does not offer a point a time from which the “newness” of a crime should be measured. The legislature already created a bright line rule by specifying that the crime is disqualifying if it occurs after the date of the offender’s discharge, and the State seeks to erase this bright line. The State’s interpretation would require this Court to draw some other new imaginary line, yet the State offers no suggestions. “[I]t is the duty of the court in interpreting a statute to make the statute purposeful and effective.” *Seven Gables Corp. v. MGM/UA Entm’t Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986). Adopting the State’s interpretation causes more confusion than it solves and does not help courts, lawyers, or offenders.

Statutory scheme.

The State next argues that its interpretation fits the statutory scheme for vacating convictions. State’s Response at 14. In support, it makes three arguments:

First, it states that the “Legislature intended for more recent crimes and convictions to be vacated before older ones.” *Id.* at 15. This is not accurate because vacation is triggered by the issuance of a certificate of discharge and the offender, not the court, controls when a certificate of discharge is issued. An offender may do so by withholding payment of legal financial obligations until it is advantageous. Imagine an offender who commits a vacatable felony in one year, and then commits a nonvacatable felony the next year. The offender can then pay off the fines on the vacatable offense after conviction for the nonvacatable offense and then request a certificate of discharge. Five to ten years later, depending on classification of offense, the first offense can be vacated despite the subsequent offense.

Second, it states that “offenders whose criminal activities have decreased in severity and/or who have stopped committing crimes are rewarded.” State’s Response at 16. This is also not accurate for the same reason as above. Imagine an offender who commits a vacatable class C felony in one year and a nonvacatable class A felony in the next year. That offender has escalated the severity of his or her crime, but can still vacate the first offense if he or she causes a certificate of discharge to issue after conviction for the class A offense.

Third, the State argues that adopting Ms. Sleater's interpretation would lead to a court having to undertake the onerous task of examining both the date of commission and the date of conviction of the new crime. State's Response at 17. This is also inaccurate. The court would have to examine only the date of commission of the new crime; the date of conviction is irrelevant since conviction will always follow commission. It is also very easy for a court to determine the commission date of a crime, since, as a practical matter, the charging document will include it.

Any attempt to discern an organized statutory scheme for vacating convictions inevitably ends in failure. Posit the following:

1. An unlimited amount of felonies may be vacated, assuming each one is independently eligible to be vacated, whereas only one misdemeanor may be vacated *in a lifetime*. And zero misdemeanors may be vacated if a felony is vacated prior to the misdemeanor. *Compare* RCW 9.96.060(2)(h) (prohibiting vacation of a misdemeanor if the applicant has ever had the record of another conviction vacated"), *with* RCW 9.94A.640 (absence of any such limiting language).
2. Some misdemeanor offenses cannot be vacated when their felony counterparts can. For example, a felony failure to register as a sex offender can be vacated, but a misdemeanor

attempt failure to register as a sex offender cannot be vacated.

Compare RCW 9.96.060(2)(d) (prohibiting vacation of any misdemeanors (including attempt) of RCW 9.68, 9.68A, or 9A.44 offenses), *with* RCW 9.94A.640 (felony failure to register is not considered a violent offense under RCW 9.94A.030 or a crime against persons under RCW 43.43.830).

Likewise, a felony voyeurism may be vacated, despite being a sex offense, but misdemeanor attempted voyeurism cannot.

3. An unlimited number of domestic violence felonies may be vacated, assuming each one is independently eligible to be vacated, whereas if an offender has domestic violence misdemeanors on two separate occasions, he or she cannot vacate any of them. *Compare* RCW 9.96.060(2)(e)(ii) (prohibiting vacation if applicant has previously been convicted of domestic violence), *with* RCW 9.94A.640 (absence of any such limiting language).
4. A misdemeanor conviction that is vacated “may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies,” yet no such language exists in

the felony vacate statute. *Compare* RCW 9.96.060(7), *with* RCW 9.94A.640(3).

5. A misdemeanor cannot be vacated if it is a violent offense as defined in RCW 9.94A.030, yet every single crime defined as a “violent offense” by RCW 9.94A.030 is a felony, and would continue to be a felony even if dropped to attempt. RCW 9.96.060(2)(b).

The point here is that there really is no “grand scheme” for vacating convictions. In many ways, the statutes are a nonsensical hodgepodge of competing interests between prosecutors and defense lawyers.

Rule of lenity.

As demonstrated, the State’s argument that this Court may decide in its favor based on the “plain” language of the statute does not hold up. At best, this Court should interpret the statute’s “plain” language in Ms. Sleater’s favor. At worst, this Court should hold the language ambiguous and apply the rule of lenity to resolve the ambiguity in Ms. Sleater’s favor.

CONCLUSION

Based on the foregoing, the Court should reverse the trial court's denial of Ms. Sleater's motion to vacate and remand.

Respectfully submitted,



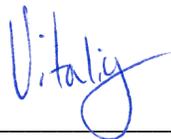
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Date: 5/5/17

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I, Vitaliy Kertchen, being of sound age and mind, declare that on 5/5/17, I served this document on the Benton County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to prosecuting@co.benton.wa.us.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Respectfully submitted,



Vitaliy Kertchen #45183
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Place: Tacoma, WA

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