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Court of Appeals  
Division III  
State of Washington  
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No. 361918

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

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STATE OF WASHINGTON,

Respondent,

v.

KENT HUXEL,

Appellant.

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APPEAL FROM THE SUPERIOR COURT  
OF KLICKITAT COUNTY, STATE OF WASHINGTON  
Cause no. 07-1-00119-2

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**BRIEF OF RESPONDENT**

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**A. ISSUE PRESENTED**

1. Did the trial court err when it denied the Defendant's motion to vacate his conviction?

**B. STATEMENT OF THE CASE**

The defendant pled guilty to attempted failure to register as a sex offender, a gross misdemeanor, in Klickitat County in 2008. CP 7-12. Ten years later, in March of 2018, the defendant moved to vacate a 2002 Clark County felony conviction. RP 5-6. Shortly thereafter the defendant filed a motion to vacate the Klickitat County misdemeanor conviction. CP 22-31. The trial court denied the motion on the basis that "the Defendant has had another conviction vacated in Clark County..." CP 45. The defendant now appeals.

**C. ARGUMENT**

**1. The trial court did not err when it denied the Defendant's motion to vacate his conviction.**

At issue in this case is the application of RCW 9.96.060 – the misdemeanor vacation statute – to the appellant's request to vacate his gross misdemeanor conviction for attempted failure to register as a sex offender. Despite the fact that the appellant pled in Klickitat County Superior Court to a gross misdemeanor crime, and not a felony, the appellant, through his

court appointed appellate counsel<sup>1</sup>, urges the Court to look to RCW 9.94A.640 – the felony vacation statute – for guidance in determining whether the court erred in denying the appellant’s motion to vacate on the grounds that the appellant had already had a conviction vacated.

Issues of statutory construction are reviewed *de novo*. *State v. Smith*, 158 Wn.App. 501, 505, 246 P.3d 812 (Div. 1, 2010) (citing *City of Seattle v. Quezada*, 142 Wash.App. 42, 47, 174 P.3d 129 (2007)). The court’s objective when interpreting a statute “is to ascertain and carry out the intent and purpose of the legislature.” *Id.* (citing *Belleau Woods II, LLC v. City of Bellingham*, 150 Wash.App. 228, 240, 208 P.3d 5 (2009)); *State v. Haggard*, COA 77426-3-I, 2 (Div.1, June. 3, 2019) (citing *State v. Jones*, 172 Wn.2d 236, 242, 257 P.3d 616 (2017)) (“Our objective when interpreting a statute is to determine the legislature’s intent”). “If the meaning of a statute is plain on its face, then the court must give effect to that meaning. The plain meaning is derived from ‘the context of the statute

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<sup>1</sup> There exists no statutory or constitutional right to appointment of counsel at public expense for post conviction proceedings other than the first direct appeal as a matter of right except where the State appeals, the appeal is from a death sentence, or after the court accepts review. (See *State v. Winston*, 105 Wn.App. 318, 19 P.3d 495 (2001); *City of Richland v. Kiehl*, 87 Wn.App. 418, 942 P.2d 988 (1997)). The petitioner bears the burden of proving qualification for order of indigency under RAP 15.2(c), which, if the trial court makes a finding that the petitioner is indigent, must be forwarded to the Supreme Court for review of the court’s findings to determine if the party is seeking review in good faith, has an issue of probable merit, and is entitled to review partially or wholly at public expense. RAP 15.2(c), RAP 15.2(d). See also *State v. Devlin*, 164 Wn.App. 516, 528, 267 P.3d 369 (Div. 3, 2011). If the Supreme Court makes such a determination, then it will enter an order directing the trial court to enter an order of indigency. The State would note that did not happen in this case.

in which that provision is found, related provisions, and the statutory  
8ends.” *Id.* (citing *Belleau Woods II* at 240, 208 P.3d 5; *State v. Combs*,  
149 Wash.App. 556, 558, 204 P.3d 264 (2009)). See also *State v. Haggard*,  
COA 77426-3-I, 4 (Div.1, June. 3, 2019) (“We will give effect to the plain  
meaning of a statute if its is evident from the text of the statute itself and  
context within the statutory scheme.”)

Appellant argues that the Court must “read together and harmonize”  
the legislative intent behind the misdemeanor and felony vacation statutes  
because both statutes deal with the subject matter of vacation of convictions.  
However, in looking to the context and statutory scheme of the statutes in  
question, this Court should consider the language of the statutes themselves.  
In the past, Washington courts have looked to the inclusion or lack of  
similar or identical language in statutes as informative of the legislature’s  
intended effect.

For example, in *State v. Smith*, when interpreting the term  
“convicted” as applied to RCW 9.94A.640 and RCW 9.96.060(3), relating  
to the issue of whether a defendant’s 1995 vacated misdemeanor conviction  
was a subsequent conviction that disqualified him from obtaining an order  
vacating a 1989 felony conviction, the court considered that the language  
“released from all penalties and disabilities” was contained in both RCW  
9.96.060 and RCW 9.94A.640, the misdemeanor and felony vacation

statutes respectively, in holding that the legislature intended to prohibit all adverse consequences of a vacated conviction. *State v. Smith*, 158 Wn.App. 501 at 509 (2010). See also *State v. Breazeale*, 144 Wash.2d 829, 837, 31 P.3d 1155 (Wash. 2001) (in the context of dismissal of charges after completion of probation, the court interpreted language common to both the felony dismissal and vacation statutes, “released from all penalties and disabilities”, to be indicative of legislative intent to prohibit all adverse consequences of a dismissed conviction) (overruled in part on other grounds by *State v. Barber*, 170 Wn.2d 854, 248 P.3d 494 (Wash. 2011)). In contrast, where identical language is lacking, or additional restrictions or procedures exist in one statute but not in another, courts have found statutes not equivalent for the purpose of discerning legislative intent. See *State v. Haggard*, COA 77426-3-I, 4 (Div.1, June. 3, 2019) (in looking to the language of the misdemeanor dismissal and vacation statutes as applied to the issue of whether a misdemeanor dismissed after completion of probation counted towards the calculation of a defendant’s felony offender score for washout purposes, the court declined to read legislative intent that misdemeanor dismissal and vacation have the same effect because the vacation statute contained “numerous limitations” not present in the dismissal statute.)

The language used in the misdemeanor and felony vacation statutes

reflects a policy decision made by the legislature, and the court should decline to “harmonize” the statutes by reading legislative intent or statutory effect into the vacation statutes where language indicating such is lacking. *State v. Smith*, 158 Wn.App. 501 at 511-12.

It is a fact that the appellant knowingly, intelligently, and voluntarily pled to attempted failure to register as a sex offender, a gross misdemeanor. VRP 6-11; CP 8-17. The misdemeanor vacation statute therefore controls the appellant’s motion to vacate his conviction. It is also a fact that the defendant had a Clark County felony conviction vacated prior to moving to vacate his gross misdemeanor conviction. VRP 21-26, 32, 34-35; CP 1-7 CP 41-44; CP 46-49, 55.

The misdemeanor vacation statute is clear and unambiguous, and by its plain language it places limitations on what types of convictions, and how many convictions, may be vacated. See *State v. Smith*, 158 Wn.App. 501 at 511; *State v. Haggard*, COA 77426-3-I, 4 (Div.1, June. 3, 2019). Pertinently, section (2)(d) of the misdemeanor vacation statute precludes the vacation of certain misdemeanor or gross misdemeanor violations of chapter 9A.44 RCW, including attempted failure to register as a sex offender. RCW 9.96.060(2)(d). See also *State v. Gebhardt-Steadman*, COA 76440-3-I, 2 (Div.1, June 25, 2018) (unpublished) (appellant’s vacation of conviction for attempted failure to register as a sex offender reversed

because vacation was precluded by RCW 9.96.060(2)(d)'s prohibition against vacation of misdemeanor or gross misdemeanor offense records arising under chapter 9A.44 RCW). Additionally, section (2)(h) of RCW 9.96.060, enacted in 2001, limits the vacation of misdemeanors by providing that a person may not have a misdemeanor conviction vacated if "the applicant has ever had the record of another conviction vacated." RCW 9.96.060(2)(h); *State v. Haggard*, COA 77426-3-I, 3 (Div.1, June. 3, 2019). See also *State v. Smith*, 158 Wn.App. 501 at 511.

In *Smith*, in response to the argument that under the misdemeanor vacation statute, "persons convicted of particular felonies are provided a greater opportunity to clear their criminal history than person convicted of certain misdemeanors," in light of the difference between the misdemeanor and felony vacation statutes as to the number of vacations permitted, the court quoted *State v. Madrid*, 145 Wash.App. 106, 117, 192 P.3d 909 (2008), saying "this is the result of the language that the legislature used and it is not for us to find a different effect of these statutes than that which the legislature expressed." *State v. Smith*, 158 Wn.App. 501 at 511-12. The court also made note of the legislature's choice not to amend the felony vacation statute to place restrictions on the number of felonies which could be vacated, and presumed that the legislature was aware that no such restrictions existed when it did so. *Id.* at 512. Nine legislative sessions later,

and still no such restricting amendment has been made to the felony vacation statute.

Because the appellant's conviction was for a gross misdemeanor, and because the appellant had previously had a conviction vacated, the trial court did not err in its reliance on the misdemeanor vacation statute in denying the defendant's motion to vacate. Additionally, such vacation would have been precluded by the misdemeanor vacation statute as the offense to which the appellant pled, attempted failure to register as a sex offender, falls under chapter 9A.44 RCW.

#### **D. CONCLUSION**

The misdemeanor vacation statute, RCW 9.96.060, controls the appellant's motion to vacate his conviction of attempted failure to register as a sex offender, a gross misdemeanor. Because the appellant had previously had the record of another conviction, his 2002 Clark County felony, vacated the appellant is precluded from having his gross misdemeanor vacated by the plain language of RCW 9.96.060(2)(h). Additionally, as the gross misdemeanor offense in question is a violation of chapter 9A.44 RCW, vacation is precluded by RCW 9.96.060(2)(d). The trial court's denial of the appellant's motion to vacate should be affirmed.

*Samantha J. Gouveia*

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Deputy Prosecuting Attorney

**COURT OF APPEALS OF WASHINGTON  
DIVISION III**

**STATE OF WASHINGTON**  
**Respondent,**  
vs.  
**KENT JEROME HUXEL,**  
**Appellant**

**NO. 36191-8-III**  
**Superior Court No. 07-1-00119-2**  
**CERTIFICATE OF SERVICE**

I, Samantha J. Gouveia, declare that on June 24, 2019, I emailed per agreement a copy of the Brief of Respondent to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24<sup>th</sup> day of June, 2019.

KLICKITAT COUNTY  
PROSECUTING ATTORNEY

  
Samantha J. Gouveia,  
WSBA No. 51398  
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# KLICKITAT COUNTY PROSECUTING ATTORNEY

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## Transmittal Information

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### Comments:

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