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NO. 58231-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

HENRY GOSSAGE,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Douglass North, Judge

APPELLANT'S REPLY BRIEF

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A. ARGUMENT

1. CONCESSIONS

a. The State properly conceded that the superior court's jurisdiction to enforce the restitution order has lapsed and the denial of Mr. Gossage's request to terminate the restitution obligation should be reversed. In his opening brief, Mr. Gossage argued that the superior court's jurisdiction to enforce the order to pay restitution and other legal financial obligations expired because 10 years had passed since his release and the court did not extend its jurisdiction prior to the termination of the 10-year period. Appellant's Br. at 8-10 (citing, inter alia, RCW 9.94A.753(4); In re Sappenfield, 138 Wn.2d 588, 591, 980 P.2d 1271 (1999)). The State properly concedes that Mr. Gossage may appeal the denial of relief from restitution as a matter of right and also that his argument is correct on the merits. Br. of Resp't at 19. Accordingly, Mr. Gossage respectfully requests that this Court reverse the trial court's denial of his motion for relief from restitution and other legal financial obligations.

b. Mr. Gossage concedes that he does not qualify for reinstatement of firearm rights. Although Mr. Gossage petitioned for reinstatement of his right to bear firearms in the superior court, he

did not raise this issue on appeal because he recognizes that he does not qualify for reinstatement of this right. See Br. of Resp't at 21; RCW 9.41.040(1), (4); RCW 9.41.010(12)(d), (h); RCW 9A.44.060. Insofar as his request for a "certificate of rehabilitation" was distinct from his petition for reinstatement of the right to possess a firearm, Mr. Gossage does not appeal its denial. See Br. of Resp't at 22.

2. CERTIFICATE OF DISCHARGE

a. The denial of a certificate of discharge is appealable as a matter of right. In his opening brief, Mr. Gossage argued that the superior court's denial of his request for a certificate of discharge is appealable as of right because it is a final order affecting substantial rights, including the right to vote. Appellant's Br. at 4-6; see RAP 2.2(a)(13). The State did not respond to this argument and apparently agreed that the issue is appealable. See Br. of Resp't at 19-21.

b. The superior court's denial of Mr. Gossage's petition for a certificate of discharge should be reversed. Mr. Gossage argues that because he has completed all requirements of his sentence he must be issued a certificate of discharge. Appellant's Br. at 10-11. The State properly notes that RCW 9.94A.637(1)(b)(ii) applies:

When the department has provided the county clerk with notice that an offender has completed all the requirements of the sentence and the offender subsequently satisfies all legal financial obligations under the sentence, the county clerk shall notify the sentencing court, including the notice from the department, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

The State argues that Mr. Gossage does not qualify for a certificate of discharge because he has not satisfied all legal financial obligations under the sentence. Br. of Resp't at 20-21. The State is mistaken.

As the State acknowledged, the superior court's jurisdiction to enforce Mr. Gossage's legal financial obligations lapsed after 10 years had passed and he had paid almost \$1,000. See Appellant's Br. at 8-10; Br. of Resp't at 2, 19. "If a court's jurisdiction over a restitution order lapses under [the statute], that restitution order becomes void." Sappenfield, 138 Wn.2d at 594. "Void" means "null." Black's Law Dictionary 1411 (5th ed. 1979). "Null" means "amounting to nothing; nonexistent." Webster's Third New International Dictionary 1548 (1993). In other words, no "legal financial obligations under the sentence" exist that would preclude discharge under RCW 9.94A.637(1)(b)(ii).

The State does not argue that any other sentencing obligations remain and indeed acknowledges that an offender is entitled to discharge even if the duty to register as a sex offender continues. Br. of Resp't at 7, 19-21 (citing RCW 9A.44.140(7)). Accordingly, Mr. Gossage must be issued a certificate of discharge and his civil rights must be restored. RCW 9.94A.637(1)(b)(ii), (4).

3. REGISTRATION

a. The denial of relief from registration should be appealable as a matter of right. In his opening brief, Mr. Gossage argued that his case is appealable as a matter of right because he seeks review of a "final order made after judgment which affects a substantial right." RAP 2.2(a)(13); Appellant's Br. at 4-7. Although the State conceded that Mr. Gossage has a right to appeal the denial of relief from restitution and certificate of discharge, Br. of Resp't at 19-21, it argues that Mr. Gossage may not appeal the portion of the order addressing the registration issue. Br. of Resp't at 6-15.

In acknowledging Mr. Gossage's right to appeal the denial of a certificate of discharge and relief from restitution but fighting his right to appeal the denial of relief from registration, the State acts as if there are multiple orders when in fact there is one. CP 44 ("Order Denying Defendant's Motion for Discharge and Relief from

Duty to Register as a Sex Offender”). A single order may address multiple motions. See id. The State has conceded that at least one of the motions this order disposes of has merit and its denial is appealable as a matter of right. Br. of Resp’t at 19-21. Thus, the order is appealable; there is simply no basis in the Rules of Appellate Procedure for the State’s proposed piecemeal approach.

Not only is the State’s approach not supported by the Rules, it also violates judicial economy. What starts as one case in the superior court would be split into two cases in the appellate court – one direct appeal and one motion for discretionary review. The drafters of RAP 2.2(a)(13) prevented this problem by addressing the appealability of an “order” as a whole. Because the State concedes that the denial of relief from restitution and a certificate of discharge is appealable, this Court need not reach the question of whether an order addressing only sex-offender registration would be appealable as of right.

Even if it were the only issue, the denial of relief from the duty to register should be appealable as a matter of right. The State argues that the order denying relief is not “final” and does not “affect a substantial right.” Br. of Resp’t at 6-12. The State is wrong on both counts.

The State relies on two cases for its assertion that the order denying relief from registration is not final: In re Detention of Petersen, 138 Wn.2d 70, 980 P.2d 1204 (1999) and In re Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989). Br. of Resp't at 8-10. Neither case is on point. Petersen held that there is no appeal as of right from a sexually violent predator's annual show cause hearing. 138 Wn.2d at 74. Chubb held that there is no appeal as of right from a biannual dependency review hearing. 112 Wn.2d at 724-25.

Central to Petersen and Chubb is the fact that the hearings in question were part of an "ongoing process" (both the sexually violent predator ("SVP") statute and the dependency statute mandate regular hearings at prescribed intervals). Petersen, 138 Wn.2d at 87; Chubb, 112 Wn.2d at 724. See RCW 71.09.070, .090 (SVP); RCW 13.34.138 (dependency). "Because they take place in an ongoing process, the review hearings and the orders issued from them are interlocutory: they are not final, but await possible revision in the next hearing." Chubb, 112 Wn.2d 719; Petersen, 138 Wn.2d at 87. The court in Petersen further reasoned that a decision following an SVP's probable cause hearing is "not a final order after judgment in light of the court's continuing jurisdiction over the

committed persons until their unconditional release.” 138 Wn.2d at 88.

The denial of a petition for relief from the duty to register is not a part of an “ongoing process.” Unlike the dependency and SVP statutes, the registration statute does not establish regular review hearings. See RCW 9A.44.130, .140. Rather, it is incumbent upon the individual, after meeting strict criteria, to petition for such relief. RCW 9A.44.140(3). The court does not have “continuing jurisdiction” over individuals subject to registration. Rather, the obligation to register is statutory and failure to register is simply a separate crime. See State v. Acheson, 75 Wn. App. 151, 155, 877 P.2d 217 (1994); RCW 9A.44.130(11), (12). Thus, unlike the orders at issue in Petersen and Chubb, the order at issue here is not interlocutory, but rather a final order within the meaning of RAP 2.2(a).

The State incorrectly contends that the order here is not final because it does not “alter the status quo,” citing In re Marriage of Greenlaw, 67 Wn. App. 755, 840 P.2d 223 (1992), rev’d on other grounds, 123 Wn.2d 593, 869 P.2d 1024 (1994). Br. of Resp’t at 14. The State has taken the “status quo” rule out of context – it applies to motions for discretionary review, not appeals of right.

RAP 2.3(b)(2). Thus, after deciding for other reasons that Ms. Greenlaw did not have a right to appeal, the court analyzed her case as a motion for discretionary review by determining whether the lower court's order altered the status quo: "That rule [RAP 2.3] permits this court to grant discretionary review in cases where it appears that the superior court has committed probable error which substantially alters the status quo." Greenlaw, 67 Wn. App. at 759.

Like Chubb and Petersen, Greenlaw is inapposite. First, the order in question was a temporary order transferring custody of a child "pending further proceedings." Id. at 758 (emphasis added). Second, Ms. Greenlaw had already achieved one level of review through a motion to modify the commissioner's order. Id. In Mr. Gossage's case, the superior court did not label its order temporary and did not designate further proceedings at which to finally decide the matter. And Mr. Gossage's order was not issued by a commissioner whose ruling was then subject to a motion to modify.

In sum, the order Mr. Gossage appeals is a final order. Unlike the orders in Chubb, Petersen, and Greenlaw, it is not part of an "ongoing process" in which future hearings are scheduled. Mr. Gossage's petition was decided on the merits and denied, and he has a right to appeal its denial. RAP 2.2(a)(13).

The State also argues that the denial of relief from the duty to register as a sex offender does not affect a substantial right. Br. of Resp't at 11-12. It contends that the right in question is not substantial because sex-offender registration is not punitive, citing State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994). Br. of Resp't at 11. Ward held that the sex offender registration statute does not violate the prohibition against ex post facto laws because it does not constitute punishment. Id. at 495. But that is not the question here. Whether or not the burden one seeks to avoid is punitive, it may be substantial. Unlike the prohibition against ex post facto laws, RAP 2.2(a)(13) is not limited to the criminal context.

The right to maintain privacy, and to avoid disclosure of one's name and address to the government, is a substantial right. See, e.g., State v. Rankin, 151 Wn.2d 689, 692, 92 P.3d 202 (2004) (passenger's identification is "private affair" subject to protections of state constitution). It is at least as important as other rights deemed substantial and therefore appealable. See, e.g., Russell v. LaBelle, 88 Wn. App. 973, 975, 947 P.2d 782 (1997) ("Orders removing a personal representative have been deemed appealable as decisions affecting substantial rights").

The State finally argues that there is no right at issue at all, let alone a substantial one, because Mr. Gossage lost the right to avoid having to tell the government where he lives upon conviction. Br. of Resp't at 11-12. The State misunderstands the issue. RAP 2.2(a)(13) is not limited to the initial deprivation of a substantial right. It applies to an order that "affects a substantial right." RAP 2.2(a)(13) (emphasis added). The order Mr. Gossage seeks to appeal affects a substantial right that Mr. Gossage once had and now petitions to restore. As such, it is appealable as a matter of right.

Without elaboration, Division Two of the Court of Appeals has held that the denial of relief from the registration requirement is appealable as of right. State v. Munds, 83 Wn. App. 489, 493, 922 P.2d 215 (1996). For all of the reasons stated above and in Appellant's Opening Brief, this Court should similarly rule.

b. The trial court's order denying relief from registration should be vacated and remanded for a hearing. In his opening brief, Mr. Gossage argued that he should be granted an evidentiary hearing on his petition for relief from sex-offender registration. Appellant's Br. at 13-14. The State responded that the trial court did not abuse its discretion in denying a hearing because Mr.

Gossage's "petition was perfunctory and he did not establish by clear and convincing evidence that registration would be meaningless." The State misses the point.

Mr. Gossage does not argue that he has already proved by clear and convincing evidence that his continued registration would not serve the purposes of the statute. He merely seeks a hearing at which he may present such evidence. His petition – with its many appendices – was sufficient to establish that a hearing is warranted.

Mr. Gossage's petition and its appendices clearly showed that he meets the strict threshold criteria for consideration of relief from the duty to register. First, he attached documentation showing that his crime was a class B felony committed in 1992, not a class A felony committed with forcible compulsion after June 8, 2000, which would have triggered an irrevocable duty to register. CP 30; see RCW 9A.44.140(3). Second, Mr. Gossage attached his criminal history and his order of release and/or transfer to community custody, which together showed that he had been crime-free for over 10 consecutive years since his release from confinement, as required in order to be relieved of the duty to register. CP 29-43; see RCW 9A.44.140(3)(a).

Given that Mr. Gossage's petition and appendices clearly indicate that he satisfied the strict threshold requirements, the court should have granted a hearing. Under the statute, "[t]he court shall consider the nature of the registrable offense committed, and the criminal and relevant noncriminal behavior of the petitioner both before and after conviction, and may consider other factors." RCW 9A.44.140(3)(a) (emphasis added). The use of the word "shall" indicates that the duty to consider this evidence is mandatory. See Rios v. Wash. Dep't of Labor & Indus., 145 Wn.2d 483, 501, 39 P.3d 961 (2002).

In order for the court to fulfill its mandatory duty to consider the petitioner's behavior both before and after conviction, it must grant a hearing. Absent an opportunity to present witnesses, a petitioner would never be able to prove his case by clear and convincing evidence, and RCW 9A.44.140(3)(a) would be rendered superfluous. Had a hearing been held here, Mr. Gossage could have testified about his behavior before and after conviction and could have presented other witnesses to testify about behavior they observed. The State could have presented its own evidence in opposition to the petition. The trial court could have weighed the credibility of the witnesses and the relevance of all evidence

presented and made a determination as to whether Mr. Gossage's continuing registration would serve the purposes of the statute. See RCW 9A.44.140(3)(a). As the State noted:

Given the nature of this question, the superior court's decision will hardly be formulaic; in fact, the decision involves a high degree of discretion by the superior court, as it weighs the particulars of Gossage's past crime, the success or failure of his efforts to obtain treatment, his assertions about his current situation, and any evidence presented on these topics by the State.

Br. of Resp't at 16. Because this analysis did not occur here, remand for an evidentiary hearing is appropriate.

B. CONCLUSION

For the reasons set forth above, Mr. Gossage respectfully requests that this court reverse the superior court's order denying his motion for relief from restitution and other legal financial obligations, and that a certificate of discharge be issued. Mr. Gossage further requests that the denial of his petition for relief from sex-offender registration be remanded for an evidentiary hearing.

DATED this 20th day of February, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lila J. Silverstein", written over a horizontal line.

Lila J. Silverstein – WSBA 38394
Washington Appellate Project
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	NO. 58231-3-1
Respondent,)	
)	
v.)	
)	
HENRY GOSSAGE,)	
)	
Appellant.)	

CERTIFICATE OF SERVICE

I, MARIA ARRANZA RILEY, CERTIFY THAT ON THE 20TH DAY OF FEBRUARY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THE **APPELLANT'S REPLY BRIEF** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

- | | | |
|--|-------------------|-------------------------------------|
| <input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY
APPELLATE UNIT
KING COUNTY COURTHOUSE
516 THIRD AVENUE, W-554
SEATTLE, WA 98104 | (X)
()
() | U.S. MAIL
HAND DELIVERY
_____ |
| <input checked="" type="checkbox"/> HENRY GOSSAGE
9421 JOHNSTON PT LP NE
OLYMPIA, WA 98516 | (X)
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() | U.S. MAIL
HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 20TH DAY OF FEBRUARY, 2007.

X _____ *me*

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