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NO. 80310-2

THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

HENRY GOSSAGE,

Petitioner.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH, JUDGE

SUPPLEMENTAL BRIEF OF RESPONDENT

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A. ISSUES PRESENTED FOR REVIEW

1. Whether the validity of the 1992 restitution order is law of the case where Gossage challenged the order in a prior appeal and the order was affirmed by the Court of Appeals in 1998.

2. Whether an offender is entitled to a certificate of discharge pursuant to RCW 9.94A.637 when the offender has not completed all the requirements of his sentence, as required by the plain language of the statute.

3. Whether the superior court is required to hold a hearing whenever an offender petitions for relief from the duty to register as a sex offender where the relevant statute, RCW 9A.44.140(3), does not require a hearing, and the offender has no due process liberty interest in being relieved of the requirement?

4. Whether the denial of a petition for a certificate of discharge or the denial of a petition for relief from the duty to register as a sex offender is appealable as a matter of right pursuant to RAP 2.2(a)(1) where an offender is free to renew the petition and thus denial of the petition is not a final judgment in the criminal action.

B. FACTS

In 1992, Henry Gossage was charged with two counts of incest in the first degree, one count of rape in the second degree and one count of attempted incest in the first degree. CP 1-2. The victim of all four crimes was Gossage's adopted daughter, who Gossage sexually assaulted and repeatedly raped from the time she was six years old until she was sixteen years old. CP 3-4.

Gossage pled guilty to two counts of incest in the first degree, one count of rape in the third degree and one count of attempted incest in the second degree. CP 46-61. He received a standard range sentence of 67 months of total confinement, and was ordered to pay court costs, a \$100 victims penalty assessment and restitution. CP 5-14.

On August 31, 1992, the superior court ordered Gossage to pay \$2,374.88 in restitution to reimburse the Crime Victim's Compensation fund for the victim's counseling costs. CP 63, 65. Almost four years later, on August 6, 1996, Gossage moved to strike the restitution order as untimely. CP 72-74. The superior court denied the motion to strike and Gossage appealed. CP 75; Appendix A, attached hereto. The Court of Appeals affirmed the

restitution order in an unpublished opinion filed on October 5, 1998.

Appendix A.

Gossage was released from prison in October of 1995, and agreed to pay not less than \$20 per month toward his legal financial obligations. CP 37-38. In November of 2003, the Department of Corrections advised the court that it was ceasing supervision of Gossage. CP 17. At that time, Gossage had paid only \$990.50 toward his legal financial obligations, falling far short of the repayment schedule established by the Department of Corrections. CP 18.¹

On December 9, 2005, Gossage filed a two-page "petition for certificate of rehabilitation - discharge, restoration of civil rights, relief from firearms disability, and relief from registration." CP 20-43. Gossage falsely declared, under penalty of perjury, "I have completed ALL requirements imposed by the court in the June 2002 Judgment and Sentence, to include the payment of legal financial obligations, restitution, principal and interest, as well as all applicable costs." CP 20-21 (emphasis in original). Gossage

¹ If Gossage had maintained the \$20 per month payment schedule set forth by the Department of Corrections, he would have paid \$1,940.00 by November of 2003.

provided records that showed he had been convicted of no further offenses. CP 29-36. He also provided documentation that the Department of Corrections had ceased supervision, but instructed him to continue making payments on his outstanding legal financial obligations. CP 43. He provided no information regarding his living situation or employment status.

On April 18, 2006, King County Superior Court Judge Douglass North denied Gossage's petition. CP 44. Gossage filed a notice of appeal. CP 45. The Court of Appeals affirmed the superior court's denial.

C. ARGUMENT

1. THE VALIDITY OF THE 1992 RESTITUTION ORDER WAS AFFIRMED IN A PRIOR APPEAL IN 1998 AND CONSTITUTES LAW OF THE CASE.

In his petition for review, Gossage challenges the validity of the 1992 restitution order, claiming that it was entered in an untimely manner. This issue was already decided in a prior appeal

in 1998, Court of Appeals No. 41005-9-I. See Appendix A, attached hereto. In that appeal, the Court of Appeals held that Gossage's motion to strike his restitution order, filed four years after the order was entered, was untimely. Citing this Court's decision in In re Personal Restraint of Fleming, 129 Wn.2d 529, 533-34, 919 P.2d 66 (1996), the court noted that a restitution order imposed beyond the 60-day limitation is not void and not a basis for collateral relief.

Where there has been a determination of the applicable law in a prior appeal, the law of the case doctrine precludes reconsidering the same legal issue in a subsequent appeal, unless it is shown that the holding in the prior appeal is clearly erroneous. State v. Clark, 143 Wn.2d 731, 745, 24 P.3d 1006 (2001). The holding of the Court of Appeals was not clearly erroneous. Reconsideration of the validity of the restitution order is barred by law of the case doctrine.

2. BECAUSE GOSSAGE HAS NOT COMPLETED ALL REQUIREMENTS OF HIS SENTENCE HE IS NOT ENTITLED TO A CERTIFICATE OF DISCHARGE.²

RCW 9.94A.637 governs the issuance of a "certificate of discharge" when an offender has completed all the requirements of his or her sentence. The certificate of discharge has the effect of restoring all civil rights that were lost by operation of law when the offender was convicted. RCW 9.94A.637(4).

RCW 9.94A.637(1)(a) requires issuance of a certificate of discharge "[w]hen an offender has completed all requirements of the sentence, including any and all legal financial obligations."

RCW 9.94A.637(1)(a) applies when the offender has completed all the requirements of his sentence while in the custody or under the supervision of the Department of Corrections (DOC). Under that provision, the department issues the certificate of discharge. Id.

RCW 9.94A.637(b)(i) and (ii) applies to cases such as Gossage's where the offender has reached the end of supervision

² In his petition for review, Gossage appears to challenge the superior court's refusal to restore his right to possess a firearm. However, in Appellant's Reply Brief filed in the Court of Appeals, Gossage conceded that he did not qualify for reinstatement of his right to possess a firearm and stated that he was not appealing that issue. Appellant's Reply Brief at 1-2. Pursuant to RCW 9.41.040(4), conviction of a sex offense precludes an offender from petitioning the court to have his right to possess a firearm restored. For these reasons, this issue will not be addressed in this supplemental brief.

with the department and has completed all the requirements of the sentence except payment of his or her legal financial obligations. The plain language of the statute makes it clear that a certificate of discharge may not be issued until the legal financial obligations are paid in full. The statute reads:

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.

RCW 9.94A.637(b)(ii) (emphasis added).

The SRA does not define the term "satisfies." Words in a statute that are not defined should be given their common meaning, which may be determined by reference to a dictionary. Dahl-Smyth, Inc. v. City of Walla Walla, 148 Wn.2d 835, 64 P.3d 15 (2003). *Black's Law Dictionary* defines "satisfaction" as "[t]he fulfillment of an obligation; esp. the payment in full of a debt." *Black's Law Dictionary*, 1370 (8th ed. 2004). Under the common meaning of the term "satisfaction," legal financial obligations are not "satisfied" unless they are paid in full. Gossage did not satisfy his

legal financial obligations. Thus, he is not entitled to a certificate of discharge.

Gossage does not argue that he satisfied his legal financial obligations as required by RCW 9.94A.637(b). Rather, he argues that he should be granted a certificate of discharge because the court no longer has jurisdiction over the restitution order. This argument ignores the plain language of the statute. If the legislature had intended certificates of discharge to be issued upon expiration of the court's jurisdiction it would have so provided. It did not, for obvious reasons. As the Court of Appeals observed, "[s]uch a rule would give offenders an incentive not to pay and would defeat both the punitive and restorative purposes of restitution." State v. Gossage, 138 Wn. App. 298, 304, 156 P.3d 951 (2007).

Gossage relies on language from this Court's opinion in In re Personal Restraint of Sappenfield, 138 Wn.2d 588, 594, 980 P.2d 1271 (1999), to argue that his restitution order is now "void" because the superior court no longer has jurisdiction to enforce it. This argument should be rejected. Gossage's restitution order is not void. Even though the superior court's jurisdiction to punish Gossage for noncompliance with the restitution order has expired,

the legislature has provided that the victim may enforce a restitution order in the same manner as a judgment in a civil case. RCW 9.94A.753(9). See also State v. Wiens, 77 Wn. App. 651, 894 P.2d 569 (1995). Thus, the restitution order continues to have legal significance.

Moreover, in Marley v. Dept. of Labor and Industries, 125 Wn.2d 533, 538-43, 886 P.2d 189 (1994), this Court clarified that an order is "void" only if the court lacked jurisdiction when the order was entered. Gossage's restitution order is not rendered void simply because the court's jurisdiction to enforce it has expired any more than his judgment and sentence is rendered void by the expiration of statutory maximum term. To the extent that dicta in the Sappenfield opinion states otherwise, it is mistaken. Moreover, the fact remains that Gossage failed to satisfy all his legal financial obligations, whether or not the restitution order is now considered void.

In sum, the legislature has plainly stated that a certificate of discharge is only available to those offenders who complete all the requirements of their sentence, including payment in full of legal financial obligations. Gossage has not paid his legal financial obligations in full. Gossage has not completed all the requirements

of his sentence. The trial court properly denied his request for a certificate of discharge pursuant to the plain language of RCW 9.94A.637.

3. RCW 9A.44.140(3) DOES NOT REQUIRE THE SUPERIOR COURT TO HOLD A HEARING IN ORDER TO DETERMINE WHETHER TO GRANT OR DENY RELIEF FROM THE DUTY TO REGISTER AS A SEX OFFENDER.

In the Court of Appeals, the parties and the court addressed the issue of whether the superior court erred in refusing to relieve Gossage of his duty to register as a sex offender without holding an evidentiary hearing. However, this issue was not identified as an issue presented for review in Gossage's petition for review. Likewise, there is no briefing regarding this issue in the argument section of the petition for review. RAP 13.7(b) provides that if the Supreme Court accepts review of a Court of Appeals decision, the Court will review only the questions raised in the motion for discretionary review. See also State v. Rowe, 93 Wn.2d 277, 280, 609 P.2d 1348 (1980). Since no issue regarding relief from sex offender registration was identified or briefed in Gossage's petition for review, this Court should not review that portion of the Court of Appeals opinion.

Nonetheless, if this Court were to review this issue, the Court of Appeals properly concluded that the trial court did not err by not holding a hearing.

RCW 9A.44.140(1)(b) requires a sex offender who has been convicted of a class B sex offense to register as a sex offender for fifteen years after release from confinement if the offender is not convicted of any new offenses. Under this provision, Gossage will be required to register until October of 2010. RCW 9A.44.140(3) provides that an offender may petition the court to be relieved of the duty to register if the person has spent ten consecutive years in the community without being convicted of any new offenses and has not been determined to be a sexually violent predator. The statute states that the 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." The offender must show by "clear and convincing evidence" that future registration will not serve the purposes of the registration statutes. Other than the burden of proof, the statute sets forth no procedural requirements.

Gossage argues that the trial court should have held a hearing before denying his request to be relieved of the registration

requirement. The Court of Appeals noted that the granting of relief from the registration requirement is wholly discretionary, and thus the court held that whether an evidentiary hearing is required is also within the court's discretion. Gossage can cite to no provisions in the statute that require the court to hold a hearing.

Gossage made no argument in the Court of Appeals that due process requires the court to hold a hearing before denying a request to be relieved of the registration requirement. Any such argument would have to be rejected. As this Court has previously explained, "[t]he essence of due process is that a party in jeopardy of *losing* a constitutionally protected interest be given a meaningful opportunity to be heard. Gourley v. Gourley, 158 Wn.2d 460, 474, 145 P.3d 1185 (2006) (emphasis added). This Court's decision in In re Personal Restraint of Cashaw, 123 Wn.2d 138, 866 P.2d 8 (1994), is instructive. In Cashaw, an inmate sought review of the Indeterminate Sentencing Review Board's (ISRB) decision setting a minimum term after his parole was revoked. Id. at 140. This Court observed that an inmate possesses no protectable liberty interest in being released prior to serving the full maximum sentence. Id. at 144. A substantive statute may create a due process liberty interest if it places substantive limits on official decision-making. Id.

In order to do so, the law must contain specific directives to the decision-maker that if certain predicates are present a particular outcome must follow. Id. Applying these principles to the ISRB's decision setting a minimum term, this Court held that there was no due process right to a hearing. Id. at 146. The decision setting the minimum term involves "subjective appraisals" and "discretionary assessments of a multiplicity of imponderables." Id. Under the applicable statutes, there was no set of facts, which if shown, mandated a decision favorable to the individual. Id. Thus, the governing statutes did not place substantive limits on official decision-making, and thus created no liberty interest that would necessitate a hearing. Id. See also In re Meyer, 142 Wn.2d 608, 619, 16 P.3d 563 (2001) (holding there is no due process liberty interest created by sex offender registration classification statute).

The same is true in the present case. Gossage has no protectable liberty interest in being relieved of the registration requirement before the expiration of fifteen years. The governing statute, RCW 9A.44.140(3), contains no specific directives to the court that if certain predicates are present, a particular outcome must follow. As in the ISRB decision, there is no set of facts that requires the court to relieve the offender of the requirement. The

decision to lift the registration requirement is left to the discretion of the court, and involves the same sort of "subjective appraisal" and "discretionary assessment of a multiplicity of imponderables" as a decision setting a minimum term. RCW 9A.44.140(3) does not create liberty interest that requires a hearing.

In sum, principles of due process do not require that the superior court hold a hearing before denying an offender's request to be relieved of the sexual offender registration requirement. Gossage's claim that the superior court erred in not holding a hearing should be rejected.

4. THE TRIAL COURT'S DENIAL OF GOSSAGE'S PETITION WAS NOT APPEALABLE AS A MATTER OF RIGHT PURSUANT TO RAP 2.2.

The Court of Appeals held that the trial court's order was appealable as a matter of right pursuant to RAP 2.2(a)(1) as a final judgment. This holding was in error. A trial court's order denying a request for a certificate of discharge or relief from registration requirements is not a final judgment, and thus is not appealable as a matter of right. An offender seeking review must move for discretionary review pursuant to RAP 2.3.

RAP 2.2(a)(1) provides that a party may appeal from a "final judgment entered in any action or proceeding, regardless of whether the judgment reserves for future determination an award of attorneys fees or costs." Failure to mention a particular proceeding in RAP 2.2(a) indicates this Court's intent that the matter be reviewed under the discretionary review provisions of RAP 2.3. In re Dependency of Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989). A final judgment in a criminal proceeding has been defined by this Court as a court's last action that settles the rights of the parties and disposes of all issues in controversy. State v. Taylor, 150 Wn.2d 599, 602, 80 P.3d 605 (2003). In Taylor, the charges against the defendant were dismissed without prejudice. Id. This Court held that the defendant could not appeal the court's dismissal as a matter of right because it was not a final judgment. This Court reasoned that the matter was not final upon dismissal without prejudice because the State could refile charges, and the order "leaves the matter in the same condition in which it was before the commencement of the prosecution." Id., (quoting State v. Corrado, 78 Wn. App. 612, 615, 898 P.2d 860 (1995)).

The same reasoning applies in the present case. Gossage is free to again petition the court for a certificate of discharge or

relief from the registration requirement. He is not limited to one such petition. The court's denial of his petition does not bar further petitions. It is not a final judgment and may not be appealed as a matter of right pursuant to RAP 2.2(a)(1).

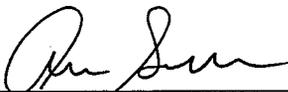
D. CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals' decision affirming the trial court's denial of Gossage's motions.

DATED this 5th day of June, 2008.

Respectfully submitted,

DANIEL T. SATTERBERG
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APPENDIX A

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record pursuant to RCW 2.06.040. IT IS SO ORDERED.

Sup C Lundy
CHIEF JUDGE

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Sup C Lundy
CHIEF JUDGE

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	No. 41005-9-1
Respondent,)	
)	
v.)	DIVISION ONE
)	
HENRY GOSSAGE,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: <u>OCT - 5 1998</u>

PER CURIAM. Henry Gossage appeals a superior court order denying his motion for a hearing to strike a previous order of restitution. He contends the restitution order is void because it was entered after the statutory 60-day limitation, and therefore the trial court abused its discretion by refusing to set a hearing on the matter. We conclude that the motion was not timely and that Gossage presents no basis for avoiding the time limit.

FACTS

Gossage pleaded guilty to several offenses in 1992 and agreed to pay restitution to all victims. His sentencing hearing was held May 29, 1992. The judgment and sentence stated that restitution was to be determined on a "date to be set." The restitution order was entered August 31, 1992, directing Gossage to pay \$2,374.88.

Four years later, on August 7, 1996, Gossage filed a motion and declaration to set a hearing to strike restitution. On August 22, 1996 the superior

court entered an order denying the motion as untimely. Gossage appeals from this order.

DECISION

Gossage contends the trial court abused its discretion by declining to set a hearing on his motion to strike the order of restitution. He contends that the order is "void" because it was untimely under former RCW 9.94A.142(1), which required that the amount of restitution be set within 60 days of sentencing.¹

We do not agree that the trial court abused its discretion. Gossage failed to appeal the restitution order. Instead, he filed a motion under CrR 7.8(b)² seeking collateral relief.³ An order of restitution imposed beyond the 60-day limitation, however, is not void and is not a basis for collateral relief.⁴ Rather, late entry is an error of law that must be challenged on direct appeal.⁵

Further, motions brought under CrR 7.8 are expressly subject to the limitation period in RCW 10.73.090.⁶ That statute bars petitions or motions for collateral attack on convictions more than one year after the judgment and

¹ The statute provided, in pertinent part: "When restitution is ordered, the court shall determine the amount of restitution due at the sentencing hearing or within 60 days." The statute was later amended to extend this period to 180 days. Laws 1995, ch. 231 § 2.

² CrR 7.8 (4), (5) provides for relief from judgment on the grounds that the judgment is void, or for any other reason justifying relief.

³ See State v. Brand, 120 Wn.2d 365, 369-370, 842 P.2d 470 (1992).

⁴ In re Fleming, 129 Wn.2d 529, 533-34, 919 P.2d 66 (1996).

⁵ See State v. Dennis, 67 Wn. App 863, 865-66, 340 P.2d 909 (1992).

⁶ See State v. Brand, RCW 120 Wn.2d at 365.

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sentence becomes final. In this case, Gossage filed the motion nearly four years after his judgment and sentence became final. He argues, however, that he came within the statutory exception to the one-year limit because of a significant, retroactive change in the law.⁷ He contends this change occurred with the Washington Supreme Court decisions in State v. Krall⁸ and State v. Moen.⁹ This contention is without merit.

Whether there is a significant and material change is determined by asking if a defendant could have argued the same issue before the change in the law.¹⁰ Gossage does not meet this test. The defendant in Krall argued the word "shall" in RCW 9.94A.142(1) is mandatory and restitution orders may not be entered beyond the limitation period. Even if we assume, arguendo, that Krall represented a change in the law, Gossage could have made this same argument at his restitution. Consequently, Krall did not represent a change in the law that would exempt him from the one-year time limit.

⁷ RCW 10.73.100(6). This statute provides that the one-year limit specified in RCW 10.73.090 does not apply to a petition or motion alleging "[t]here has been a significant change in the law . . . material to the . . . sentence." This rule applies to restitution orders entered beyond the 60-day period. State v. Krall, 125 Wn.2d 146, 881 P.2d 1040 (1994); State v. Moen, 129 Wn.2d 535, 919 P.2d 69 (1996).

⁸ In Krall, a direct appeal from a late entry of restitution order, the court held that the word "shall" in RCW 9.94A.142(1), supra, is mandatory. Thus, a court may not order restitution beyond the limitation period.

⁹ In Moen, the Court held that the issue of an untimely restitution order could be raised for the first time on appeal.

¹⁰ State v. Olivera-Avila, 89 Wn. App. 313, 321, 949 P.2d 824, 826 (1997).

Finally, Gossage has filed a pro se supplemental brief "seeking relief in the correction of the official length of time" that community placement restrictions were effective. Although his argument is not clear, he also requests "restoration of civil [r]ights as per statute, with an Official Release date of May 1997." Apparently, Gossage was granted relief in 1994, pursuant to a personal restraint petition, from one sentence in this matter that exceeded the statutory maximum. Gossage states that the sentence was corrected. Those post-trial proceedings are not part of the appellate record.

Gossage does not claim he is still serving community placement. It appears that he asks only for correction of his record to show a changed date of release from community placement reflecting the length of the corrected sentence. We are unable to grant relief, however, because we cannot tell what, if any, action the superior court took below in regard to this request. Because we are unable to discern any error, the request is denied.

The order denying Gossage's motion for a hearing to strike restitution is affirmed. We also deny his request for relief regarding community placement.

CERTIFICATION OF SERVICE

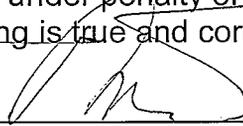
Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Lila Silverstein, Washington Appellate Project, at the following address: 1511 Third Avenue, Suite 701, Seattle, WA 98101, attorneys for the petitioner, containing a copy of the Supplemental Brief of Respondent in State v. Henry Gossage, No. 80310-2, in the Supreme Court of the State of Washington.

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

Name

Done in Seattle, Washington

Date


06/05/2008

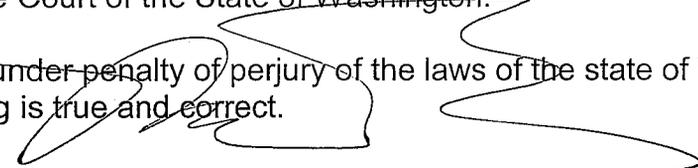
Today I deposited in the mails of the United States of America, a properly stamped and addressed envelope directed to Henry Gossage, at the following address: 9421 Johnson Point Loop NE, Olympia, WA 98516, petitioner, containing a copy of the Supplemental Brief of Respondent in State v. Henry Gossage, No. 80310-2, in the Supreme Court of the State of Washington.

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

Name

Done in Seattle, Washington

Date


06/05/2008