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SUPREME COURT
STATE OF WASHINGTON

2009 MAY 28 P 4: 31

NO. 81921-1

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SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER

v.

RACHEL MARIE VINCENT, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann van Doorninck

REPLY BRIEF OF PETITIONER

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A. ISSUES PRESENTED.

1. Should this court find that defendant's knowing violation of a domestic violence no-contact order constituted a criminal offense under former RCW 26.50.110?

- a. Since there are multiple reasonable interpretations of former RCW 26.50.110, should this court consider the statute ambiguous?
- b. Do recent decisions by Division II of the Court of Appeals indicate that the prevalent viewpoint is that former RCW 26.50.110 is ambiguous?
- c. When a statute is ambiguous, is it proper to review legislative intent to interpret the statute in order to effectuate the intent of the legislature?

B. STATEMENT OF THE CASE.

Appellant's Statement of the Case may be found in Appellant's Opening Brief.¹

¹ The State neglected to include its assignments of error in its opening brief. However, respondent is correct that the State's Assignment of Error is as follows: Did the Superior Court err in following the Court of Appeals decision in *State v. Hogan*, 145 Wn. App. 210, 219, 192 P.3d 915 (2008), and determining that defendant's actions did not constitute a crime? The State apologizes for this oversight.

C. ARGUMENT.

1. DEFENDANT'S KNOWING VIOLATION OF A DOMESTIC VIOLENCE NO-CONTACT ORDER CONSTITUTED A CRIMINAL OFFENSE UNDER FORMER RCW 26.50.110.

- a. As there are multiple reasonable interpretations of former RCW 26.50.110, it is ambiguous.

Respondent alleges that the split in divisions, and indeed a continuing split in Division II as well, does not support the position that there are multiple reasonable interpretations of former RCW 26.50.110. In fact, respondent states that the decisions in *State v. Bunker*, 144 Wn. App. 407, 183 P.3d 1086 (2008), and *State v. Wofford*, 148 Wn. App. 870, 201 P.3d 389 (2009) are wrong. However, respondent's assertion that the decisions are wrong is not persuasive as it ignores the analysis in those cases.

Both Division I and Division II have recognized that former RCW 26.50.110 was not a "virtuosic specimen of legislative drafting." *Bunker*, 144 Wn. App. at 413, *Wofford*, 148 Wn. App. at 878. The final clause of former RCW 26.50.110 "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" could be seen as modifying the phrase that immediately precedes it or all the phrases that precede it. This creates an ambiguity and leaves the statute subject to more than one reasonable interpretation.

Even though Division II in *State v. Madrid*, 145 Wn. App. 106, 192 P.3d 909 (2008) found former RCW 26.50.110 unambiguous, they stated in their opinion that the relevant part of former RCW 26.50.110 was in fact ambiguous. “A plain reading reveals that the only possible ambiguity in former RCW 26.50.110(1) is whether the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” (“arrest provision”) applied to each of the four prior antecedents of RCW 26.50.110(1), or only to the immediately preceding one.” *Madrid*, 145 Wn. App. at 114-15. That is what makes the *Madrid* decision troubling, and contradicts respondent’s assertion that *Bunker* and *Wofford* are wrong. Division I in *Bunker*, and Division II in *Wofford*, and now *State v. Allen*, Slip op. No. 36868-4-II (May 27, 2009) all realize that the “possible ambiguity” noted in *Madrid* is an actual ambiguity. Former RCW 26.50.110 is ambiguous.

- b. That former RCW 26.50.110 is ambiguous is the prevalent viewpoint of the Court of Appeals.

Respondent’s assertion that the decision in *Bunker* and *Wofford* are wrong ignores the history and timing of these decisions. A review of the cases issued by the Court of Appeals shows the reasoning by the courts in *Bunker* and *Wofford* are becoming the prevalent point of view.

Currently, there are five published cases that deal with the issue of the ambiguity of former RCW 26.50.110. The first case to be decided was *Bunker*, where Division I of the Court of Appeals held that former RCW 26.50.110 was ambiguous. *Bunker*, 144 Wn. App. 407, 420. The court then proceeded to review legislative intent as well as looking at the plain language of former RCW 26.50.110 in context with related statutes, and determined that the statute criminalized violations of domestic violence no-contact orders. *Id.* A little over a month later, Division II of the Court of Appeals published their decision in *Madrid*. In *Madrid*, Division II found former RCW 26.50.110 to be unambiguous. *Madrid*, 145 Wn. App. at 108. The opinion was authored by Judge Penoyar, and Judges Houghton and Hunt concurred. *Id.* at 108, 117. *Madrid* did not address the decision in *Bunker*.

Two days after *Madrid* was decided, Division II decided *State v. Hogan*, 145 Wn. App. 210, 192 P.3d 909 (2008). In *Hogan*, Division II noted its decision in *Madrid*, and ruled in accord that former RCW 26.50.110 was unambiguous. *Id.* at 212, 218, fn. 4. The court also noted that it was deciding in direct opposition to *Bunker*. *Id.* at 218, fn. 4. Judge Bridgewater authored the opinion, and Judge Hunt concurred. *Id.* at 212, 220. Judge Quinn-Brintnall dissented and in her dissent, noted that she agreed with the decision in *Bunker*. *Id.* at 220-1.

After the case at bar was accepted for review by this court, Division II reconsidered their position. In *Wofford*, which was decided in February of this year, Division II agreed with the decision in *Bunker*, and held that former RCW 26.50.110 was ambiguous and that legislative intent and statutory construction showed that Wofford's actions constituted criminal conduct. *Wofford*, 148 Wn. App. at 884. Judge Armstrong authored the opinion, and Judge Houghton, who had been on the panel in *Madrid*, reconsidered her decision in *Madrid* and concurred with Armstrong. *Id.* at 873, 884. Judge Bridgewater, who authored the opinion in *Hogan*, dissented. *Id.* at 884.

On May 27, 2009, Division II issued its decision in *State v. Allen*. Again, this decision showed a reconsideration of the Division's earlier decisions in *Hogan* and *Madrid*. In *Allen*, the court ruling comported with the rulings in *Wofford* and *Bunker*. Judge Armstrong also authored this opinion with Judge Houghton concurring. In addition, Judge Hunt, who was on the both the *Madrid* panel, and in the majority on *Hogan*, reconsidered her earlier position and concurred with the ruling in *Allen*.

This means that the majority of the judges, four out of seven, in Division II now agree with the position of Division I. Only one judge remains committed to the original position in *Hogan*, Judge Bridgewater, and only one judge remains committed to the holding in *Madrid*, Judge Penoyar. As Division II has continued to refine their position and analyze

the situation, it has become clear that the correct interpretation of former RCW 26.50.110 is that it is ambiguous and legislative intent must be reviewed.

- c. When a statute is ambiguous, case law dictates that the court must turn to a review of legislative intent in order to effectuate the intent of the legislature.

When a statute is ambiguous, the court is expected to turn to legislative intent. In discerning and implementing the legislative intent, a court considers the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose a statutory scheme as a whole. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). “Unlikely, absurd or strained consequences resulting from a literal reading should be avoided.” *State v. McDougal*, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992). This Court does “[n]ot add to or subtract from the clear language of a statute *unless that is imperatively required to make the statute rational.*” *State v. Sullivan*, 143 Wn.2d 162, 175, 19 P.3d 1012 (2001) (emphasis added).

Further, despite respondent’s arguments, a court may turn to a statute’s subsequent history in order to clarify the original intent of the statute. See *State v. McKinley*, 84 Wn. App. 677, 681, 929 P.2d 1145 (1997) (citing *Littlejohn Constr. Co. v. Department of Labor & Indus.*, 74 Wn. App. 420, 427, 873 P.2d 583 (1994) (citing *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347-48, 804 P.2d 24 (1991))).

Respondent is correct that RCW 26.50.110 was amended in 2007. Respondent, however, is incorrect that this amendment supports her position. The legislature was clear in their amendment that it was not changing the substantive law or broadening the scope of law enforcement. Laws of 2007, ch. 173, § 1. The intent was to clarify the meaning of the statute. *Id.* The reason it had to be clarified is due to the confusion as to the meaning of the same section that is at issue in the case at bar. As respondent points out in her brief, there was a division as to the statute's interpretation at the trial court level. The House Bill Report states that "some trial courts have interpreted the statute to require that the violation of a restraint provision be one for which an arrest is required." House Bill Report- SHB 1642 at 2. There was a problem with uniformity at the trial court level in that not all courts were interpreting the statute the same way. The 2007 amendment was necessary to eliminate the ambiguity. It was a clarification of what the legislative intent was and always had been. Respondent's interpretation of former RCW 26.50.110 is not supported.

Given the reconsiderations that have taken place, the statute is clearly subject to differing interpretations, but it is also clear that the interpretation that is supported is that former RCW 26.50.110 is ambiguous, legislative intent and statutory construction must be reviewed, and that the legislature always intended the violation of a no contact order to be criminal.

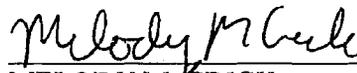
The willful violation of a no-contact order is a crime and has been a crime under RCW 26.50.110. Both Division I and now Division II (in their most recent cases- *Wofford* and *Allen*) have found the legislative intent clear. This court should affirm that interpretation.

D. CONCLUSION.

For the forgoing reasons, the State respectfully requests this court reverse the Superior Court's ruling by finding that former RCW 26.50.110 criminalized violations of domestic violence no-contact orders and affirm defendant's conviction.

DATED: May 28, 2009

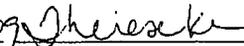
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5.29.09 
Date Signature