

NO. 81921-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Appellant,

v.

RACHEL M. VINCENT,

Respondent.

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SUPREME COURT
STATE OF WASHINGTON
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J. DONALD R. CARRETER
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>ISSUE PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	1
<i>SUMMARY OF ARGUMENTS</i>	1
1. FORMER RCW 26.50.110 IS NOT AMBIGUOUS.....	4
2. THE 2007 AMENDMENTS ARE NOT RETROACTIVE AND SUPPORT VINCENT'S INTERPRETATION OF FORMER RCW 26.50.110.	10
3. VINCENT ADOPTS BY REFERENCE ALL ARGUMENTS MADE BY BUNKER AND WILLIAMS.	14
B. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>All Seasons Living Ctrs v. State (In re Seahome Park Care Ctr),</u> 127 Wn.2d 774, 903 P.2d 443 (1995)	6
<u>Barstad v. Stewart Title Guar. Co.,</u> 145 Wn2d 528, 39 P.3d 984 (2002)	9
<u>Berrocal v. Fernandez,</u> 155 Wn.2d 585, 121 P.3d 82 (2005)	6
<u>City of Spokane v. County of Spokane,</u> 158 Wn.2d 661, 146 P.3d 893 (2006)	6
<u>In re the Detention of Elmore,</u> 162 Wn.2d 27, 168 P.3d 1285 (2007)	9, 10, 11
<u>State v. Azpitarte,</u> 140 Wn.2d 138, 995 P.2d 31 (2000)	4, 5, 7
<u>State v. Azpitarte,</u> 95 Wn. App. 721, 976 P.2d 1256, reconsideration denied (1999), reversed, 140 Wn.2d 139, 995 P.2d 282 (2000)	8
<u>State v. Bunker,</u> 144 Wn. App. 407, 183 P.3d 1086, review granted, 165 Wn.2d 1003, 198 P.3d 512 (2008)	2, 3, 4, 7, 8, 11
<u>State v. Hogan,</u> 145 Wn. App. 210, 192 P.3d 915 (2008)	2, 3, 5
<u>State v. Madrid,</u> 145 Wn. App. 106, 192 P.3d 909 (2008)	2, 3, 5
<u>State v. Wofford,</u> 148 Wn. App. 870, 201 P.3d 389 (2009)	2, 3, 4, 7, 8

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER

Chapter 10.99 RCW	5
Former RCW 26.50.110	2, 3, 5
Laws of 2007, ch. 173.....	8
RAP 10.1(g).....	11
RAP 10.3(b).....	1
RCW 10.31.100(2)	8, 9
RCW 10.31.100(2)(a)	3, 5, 6, 7, 10
RCW 10.31.100(2)(b).....	3, 5, 7
RCW 10.99.040(4)	4
RCW 26.50.110	1, 2, 3, 4, 5, 6, 8, 9, 11
SHB 1642	10

A. ISSUE PRESENTED

Whether no-contact order violations under former RCW 26.50.110 are criminal only if they involve: 1) an assault of or threats to the victim; 2) entering a prohibited place named in the order; or 3) involve criminal violations of foreign no-contact orders that occur in this State.

B. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b) respondent Rachel Marie Vincent agrees with and adopts by reference the "Statement of the Case" set forth in the "Brief of Petitioner" (BOP) at pages 1-3.

C. ARGUMENT

Summary of Arguments

The petitioner seeks reversal of the Pierce County Superior Court order reversing Vincent's conviction for violating a no contact order and dismissing the charge. BOP at 13. Although petitioner's brief contains no assignments of error,¹ it appears the petitioner claims the Superior Court erred by following a Court of Appeals decision that determined former RCW 26.50.110 unambiguously provided that violation of a no-contact order is not criminal unless it involves a threat or act of violence or entering specified geographic location proscribed by the order. State v. Hogan, 145

¹ RAP 10.3(a)(4) provides that the brief of petitioner should contain "A separate concise statement of each error the party contends was made by the trial court, together

Wn. App. 210, 219, 192 P.3d 915 (2008). The petitioner claims that because there are several recent conflicting Court of Appeals decisions interpreting former RCW 26.50.110, it is therefore ambiguous. BOP at 4-6 (citing State v. Wofford, 148 Wn. App. 870, 201 P.3d 389 (2009); State v. Madrid, 145 Wn. App. 106, 192 P.3d 909 (2008), State v. Bunker, 144 Wn. App. 407, 183 P.3d 1086, review granted, 165 Wn.2d 1003, 198 P.3d 512 (2008), and Hogan, *supra*).

The petitioner asserts that because former RCW 26.50.110 is ambiguous, its true meaning must be gleaned by ascertaining the Legislature's intent. The petitioner then claims legislative intent shows the statutory language leading to the result in Hogan is superfluous and when interpreted without the superfluous language, all no-contact order violations are criminal under former RCW 26.50.110. BOP 6-10. The petitioner also asserts any other interpretation leads to absurd results. BOP at 10-13.

The petitioner's claims should be rejected. Former RCW 26.50.110 unambiguously provides that no-contact order violation are criminal only if they involve threats or acts of violence, entering specified geographic locations proscribed by the order, or involve criminal violations of foreign no-contact orders that occur in this State. Moreover, to the extent there is some ambiguity, the rules of grammar and statutory interpretation lead to the

with issues pertaining to the assignments of error."

conclusion that there is no superfluous language in the statute, and that the courts in Hogan and Madrid correctly found that not all no-contact order violations were criminal under former RCW 26.50.110.

This Court should reject the petitioner's invitation to ignore language in the statute. This Court should affirm the order reversing Vincent's conviction and dismissing the charge.

1. FORMER RCW 26.50.110 IS NOT AMBIGUOUS.

Just because there are two appellate court decisions concluding former RCW 26.50.110 is ambiguous (Bunker and Wofford), and two concluding it is not (Madrid and Hogan), does not mean the statute is ambiguous. What it does mean is that two of the decisions are wrong, i.e., Bunker and Wofford.

The results reached in both Bunker and Wofford stem from at least two erroneous conclusions. First, they erroneously concluded RCW 26.50.110(1) is ambiguous as to which preceding clauses the phrase "for which an arrest is required under RCW 10.31.100(2)(a) or (b)" is meant to modify. Wofford, 148 Wn. App. at 878; Bunker, 144 Wn. App. at 415. Second, in attempting to resolve the perceived ambiguity, the Bunker and Wofford courts erroneously relied on recent amendments to the statute and other related statutory provisions to reach a result that unnecessarily renders

some language in the statute superfluous. Wofford at 879-81; Bunker at 415-17.

Because former RCW 26.50.110(1) is not ambiguous, the Bunker and Wofford courts erred by looking beyond the language of the statute to discern its meaning. Moreover, to the extent any ambiguity does exist, it can be resolved without rendering superfluous language in the statute.

When the plain language of a statute is clear, the court assumes the Legislature meant exactly what it said. State v. Azpitarte, 140 Wn.2d 138, 141, 995 P.2d 31 (2000). Absent ambiguity, a statute's meaning is derived from its language alone. Id. at 142.

In Azpitarte, the issue was "[w]hether a second degree assault can serve as the predicate assault that enhances violation of a no-contact order from a gross misdemeanor to a felony under RCW 10.99.040(4)." Id. at 140. The statute at issue in Azpitarte provided:

(a) Willful violation of a [no-contact] order is a gross misdemeanor except as provided in (b) and (c) of this subsection (4) . . .

(b) Any assault that is a violation of an order issued under this section and that does not amount to assault in the first or second degree . . . is a class C felony .

(c) A willful violation of a [no-contact order] is a class C felony if the offender has at least two previous convictions for violating the provisions of a no-contact order . . .

Former RCW 10.99.040(4) (emphasis added).

Azpitarte argued the statute precluded a first or second degree assault from serving as the predicate offense elevating a no-contact order violation from a gross misdemeanor to a class C felony. The issue turned on whether the statute was ambiguous on this point, and the Court noted that "[a]n ambiguity exists if the language at issue is susceptible to more than one reasonable interpretation." 140 Wn.2d at 141. The Court concluded the statute "clearly excludes" second degree as a basis to elevate a violation for a gross misdemeanor to a felony. *Id.*

Like the statutory language at issue in *Azpitarte*, there is no ambiguity here. *Hogan*, 145 Wn. App. at 218 n.4; *Madrid*, 145 Wn. App. at 114. Former RCW 26.50.110 clearly states violation of a no-contact order is criminal only if the violation requires an arrest under RCW 10.31.100(2)(a) or (b):

Whenever an order is granted under . . . chapter 10.99 . . . and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, work place, school, or day care, or of a provision prohibiting a person from knowingly coming within or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

Former RCW 26.50.110 (emphasis added).

Under the last antecedent rule, a rule of both grammar and statutory interpretation, the presence of a comma before the qualifying phrase means the qualifier is intended to apply to all antecedents instead of only the immediately preceding one, unless a contrary intention appears in the statute. City of Spokane v. County of Spokane, 158 Wn.2d 661, 673, 146 P.3d 893 (2006); Berrocal v. Fernandez, 155 Wn.2d 585, 600, 121 P.3d 82 (2005)(C. Johnson, J., dissenting)(the common rules of grammar, which include the last antecedent rule, are used to construe the meaning of a statute); All Seasons Living Ctrs v. State (In re Seahome Park Care Ctr), 127 Wn.2d 774, 781-82, 903 P.2d 443 (1995). Therefore, the phrase “for which an arrest is required under RCW 10.31.100(2)(a) or (b)” in RCW 26.50.110 modifies the entire sentence, not merely the last phrase, because the qualifying phrase is preceded by a comma and there is no contrary intent appearing in the statute.

The language referring to RCW 10.31.100(2)(a) and (b) is not susceptible to two or more interpretations when properly read by correctly applying the rules of grammar. Either an arrest is required under those provisions or not. If no arrest is required, then the violation is not a gross misdemeanor or a Class C felony. It may be subject to civil sanctions, as provided under former RCW 26.50.110(3), but it is not criminal.

RCW 10.31.100(2)(b) applies only to foreign protection orders and does not apply here. Subsection (2)(a) requires arrest only if a person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location . . .

RCW 10.31.100(2)(a). Thus, Vincent's order violation was not criminal unless it involved (1) an act or threat of violence or (2) entering or remaining in a prohibited location. RCW 10.31.100(2)(a).

There is no evidence Vincent's order violation met either criteria. To the contrary, the violation was based on Vincent being a passenger in Howard Seaworth's car when Seaworth was pulled over by police for driving with expired license tabs. See Petitioner "State of Grounds for Direct Review" at Appendix A ("Parties Agreed Stipulation to Facts at Trial"). There was no evidence of acts or threats of violence by Vincent toward Seaworth, and nothing to conclude Seaworth's car constitutes a location Vincent is prohibited from entering. An arrest was therefore not required and the violation was not criminal.

As in *Azpitarte*, there is no ambiguity in the statute at issue here. The analysis in *Bunker* and *Wofford* is flawed in a manner similar to the flawed analysis in *Azpitarte*. It found ambiguity where none exists.

Compare Bunker, 144 Wn. App. at 415 and Wofford, 145 Wn. App. at 878 (by ignoring last antecedent rule, courts conclude the "for which an arrest is required" language could apply exclusively to any number of the preceding clauses) with State v. Azpitarte, 95 Wn. App. 721, 726-29, 976 P.2d 1256, reconsideration denied (1999), reversed, 140 Wn.2d 139, 995 P.2d 282 (2000) (assumes an ambiguity exists without identifying what it is, and then looks beyond the plain language to interpret and resolve the assumed ambiguity). Because there is no ambiguity, there is no need to look beyond the plain language of the statute to discern the statute's meaning. This Court should therefore affirm the Pierce County Superior Court order reversing Vincent's conviction and dismissing the charge.

2. THE 2007 AMENDMENTS ARE NOT RETROACTIVE AND SUPPORT VINCENT'S INTERPRETATION OF FORMER RCW 26.50.110.

In 2007, the Legislature amended RCW 26.50.110 by deleting the phrase "for which an arrest is required under RCW 10.31.100(2)." Laws of 2007, ch. 173. The Bunker and Wofford courts relied on this amendment to conclude the Legislature never intended the former version to be interpreted as Vincent does and should be retroactively applied. Bunker, 144 Wn. App. at 415-16; Wofford, 145 Wn. App. at 876-77, 879-81. Decisions by this Court show the Bunker and Wofford courts are wrong.

This Court recently addressed whether amendments to RCW 71.09.090, purporting to clarify when persons involuntarily committed as sexually violent predators were entitled to a new commitment trial, were retroactive. In re the Detention of Elmore, 162 Wn.2d 27, 168 P.3d 1285 (2007). The Court first noted there is a presumption against retroactive application of statutory amendments, but this presumption may be overcome by showing:

(1) the legislature intended to apply the amendment retroactively, (2) the amendment is curative and “clarifies or technically corrects *ambiguous* statutory language,” or (3) the amendment is remedial in nature. Barstad v. Stewart Title Guar. Co., 145 Wn2d 528, 536-37, 39 P.3d 984 (2002) . . .

A court may only consider an amendment curative and remedial if the amendment “clarifies ... an *ambiguous* statute without changing prior case law constructions of the statute.” *Id.*

168 P.3d at 1289 (emphasis added). Thus, under Elmore, a statutory amendment may apply retroactively only if (1) the Legislature intended retroactive application, (2) the amendment clarifies “ambiguous” language in the former version of the statute, and (3) the amendment does not contravene prior judicial interpretation of the ambiguous language.

As discussed above, the pre-2007 version of RCW 26.50.110 unambiguously provided that only violations requiring an arrest under RCW 10.31.100(2) were criminal. Thus, to the extent the 2007 amendments were

intended to "clarify," no clarification was needed and therefore the amendments do not apply under the rule for retroactivity set forth in Elmore.

Similarly, there is no clear express legislative intent that the amendment be applied retroactively. See SHB 1642, attached as Appendix A. To the contrary, the legislative intent is to "restore and make clear its intent" that any willful violation of a no-contact order is criminal. Appendix A at 2 (emphasis added). The reason for use of the term "restore" is apparent from reviewing the legislative reports associated with SHB 1642. For example, the House Bill Report notes that "[s]ome trial courts have interpreted the statute to require that the violation of a restraint provision be one for which an arrest is required under RCW 10.31.100(2)(a) or (b) in order for the violation of the order to be a gross misdemeanor." House Bill Report -SHB 1642 at 2 (attached as Appendix B).

Notably, those testifying before the House in support of the amendment urged that without the proposed amendment, some violation of a no-contact order will continue to not be criminal. Appendix B at 3. Similarly, those testifying against the amendment argued it has been the Legislature's reasoned intent since 2000 *not* to criminalize all violations, only those that involve actual danger to the protected person or involve invasion of a particular location by the perpetrator. Appendix B at 3.

The Senate Bill Report (attached as Appendix C) is even more revealing. Those testifying before the Senate in favor of the amendment noted that before 2000 all violations of a no-contact order were criminal, but this changed in 2000, when amendments created "a mandatory arrest situation . . . before the violation can be considered a gross misdemeanor." Appendix C at 3. This reveals that by using the term "restore" in expressing its intent, the 2007 Legislature was seeking to restore the pre-2000 standard for criminalizing no-contact order violations.

There may be no published appellate decisions directly contravened by the 2007 amendment. Both the House and Senate Bill Reports, however, show the amendments are intended to contravene how trial courts were enforcing no-contact orders in light of the unambiguous mandatory arrest provisions in the post-2000/pre-2007 version of the statute. Appendix B at 2; Appendix C at 2. As such, like the amendments at issue in *Elmore*, the 2007 amendments to RCW 26.50.110 apply prospectively only and should not influence this Court's decision here.

3. VINCENT ADOPTS BY REFERENCE ALL ARGUMENTS MADE BY BUNKER AND WILLIAMS.

Pursuant to RAP 10.1(g), Vincent adopts all arguments presented in the joint Petition for Review filed in this matter by petitioners Leo Bunker and Donald Williams.

B. CONCLUSION

For the reasons stated herein, this Court should affirm the order reversing Vincent's conviction and dismissing the charge.

DATED this 29th day of April, 2009.

Respectfully submitted,

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 81921-1
vs.)	
)	
RACHEL VINCENT,)	
)	
Petitioners.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 29TH DAY OF APRIL 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF RESPONDENT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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ADDRESS UNKNOWN

SIGNED IN SEATTLE WASHINGTON, THIS 29TH DAY OF APRIL 2009.

x *Patrick Mayovsky*