

82431-2

FILED

JUN 08 2007

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

25923-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

JAMES D. RIVARD, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE LINDA G. TOMPKINS

BRIEF OF APPELLANT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Appellant

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT.....3

 A. THE CLASSIFICATION OF CRIMES AT THE
 TIME A PETITION FOR RESTORATION IS
 FILED CONTROLS FOR PURPOSES OF GUN
 RIGHTS RESTORATION3

 B. THE TRIAL COURT ERRED IN CONCLUDING
 THAT THE DEFENDANT COULD HAVE HIS
 GUN POSSESSION RIGHTS RESTORED AFTER
 LESS THAN 10 YEARS7

CONCLUSION.....10

TABLE OF AUTHORITIES

WASHINGTON CASES

| | |
|---|------|
| GRAHAM V. STATE, 116 Wn. App. 185, 64 P.3d 684 (2003)..... | 8, 9 |
|---|------|

STATUTES

| | |
|--------------------------------|------|
| LAWS OF 1996 ch. 199 § 7 | 4 |
| RCW 9.41.040 | 4 |
| RCW 9.41.040(1)(a) | 3 |
| RCW 9.41.040(4)..... | 7, 9 |
| RCW 9.41.040(4)(b)(i) | 7 |
| RCW 9.94A.525..... | 8, 9 |
| RCW 9.94A.525(2)..... | 8 |
| RCW 10.01.040 | 5, 6 |

I.

ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that the defendant was entitled to the restoration of his gun rights.
2. The trial court erred in making the legal conclusion that RCW 10.01.040 takes precedence in this case and the disabling crime remains a class "B" felony. Conclusion of Law No. 1.¹
3. The trial court erred in concluding that the language of RCW 9.41.040(4)(b)(i) refers to "prior felony convictions" meaning crimes occurring prior to the disabling crime. Conclusion of Law No. 3.
4. The trial court erred in concluding that the defendant has "no prior felonies" that would prohibit possession of a firearm. Conclusion of Law No. 5.

II.

ISSUES PRESENTED

- A. DOES THE CLASSIFICATION OF A CRIME WHEN COMMITTED GOVERN THE CLASSIFICATION OF

¹ The Findings of Fact and Conclusions of Law are attached as appendix A. CP 71-74.

THE OFFENSE WHEN RESTORATION OF RIGHTS IS SOUGHT?

- B. DO THE STATUTES REQUIRE THAT A 10 YEAR PERIOD MUST PASS BETWEEN THE SENTENCING ON A CLASS "B" DISABLING OFFENSE AND THE RESTORATION OF GUN RIGHTS?

III.

STATEMENT OF THE CASE

The defendant pled guilty in June of 1997 to vehicular homicide. RP 4, CP 72. The crime was committed on December 1, 1993. RP4, CP 72. At the time of the crime, vehicular homicide was a Class B felony. RP 4, CP 72. In 1996, the legislature changed the vehicular homicide statutes and reclassified vehicular homicide as a Class A felony. RP 4, CP 72. The defendant received an order of discharge in December of 1999. RP 5.

The defendant filed a petition in Spokane County Superior Court to have his gun possession rights restored. CP 1-10. The motion was heard on December 8, 2006. CP 71. The trial court concluded that RCW 10.01.040 took precedence over all over provisions and the vehicular homicide remained a Class B felony. CP 73. The trial court

determined that since the defendant had spent five or more consecutive years in the community without further criminal involvement, he was entitled to have his gun rights restored. CP 73-74.

The State then filed this appeal. CP 77-80.

IV.

ARGUMENT

A. THE CLASSIFICATION OF CRIMES AT THE TIME A PETITION FOR RESTORATION IS FILED CONTROLS FOR PURPOSES OF GUN RIGHTS RESTORATION.

The classification of the disabling crime is relevant to both “if” and “when” a defendant becomes eligible for the restoration of his/her gun possession rights.

RCW 9.41.040 and various subsections proscribe the possession of firearms by convicted felons.

(1) (a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

However, felons with disabling convictions that are *not* a sex offense or a Class “A” felony may petition to have their rights restored:

... Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored....

RCW 9.41.040.

The operation of the statutes makes it imperative to determine the classification of the disabling statute. In this case, the disabling crime was a Class “B” felony at the time of the crime. The legislature’s reclassification of the crime of vehicular homicide to a Class “A” crime changes the defendant’s ability to seek restoration of his rights.² A defendant convicted of a Class “A” crime cannot seek restoration of his gun rights.

The classification of the crime is determined at the time of the petition for restoration. The trial court utilized the “savings clause” of RCW 10 01.040 to hold that the disabling crime in this case, vehicular

² Laws of 1996 ch. 199 § 7.

homicide, remained a Class "B" felony despite the Legislature's reclassification.

RCW 10.01.040 states, in part, that: "No offense committed and no penalty or forfeiture incurred previous to the time when any statutory provision shall be repeal, -- shall be affected by such repeal..." RCW 10.01.040. The State has no contention with the statute, only the application used by the trial court. This statute was designed to do exactly what it says: save repealed statutes. Reading the entirety of the statute clearly shows that the intent was to "keep alive" crimes committed prior to the repealing of any particular statute. There is nothing in RCW 10.01.040 that applies here. There was no repealing of anything here. The Legislature reclassified vehicular homicide to be an A felony.

RCW 10.01.040 would apply if the defendant had committed vehicular homicide and prior to conviction and sentencing, the legislature repealed vehicular homicide as a crime. This is certainly not what happened here. The trial court read the statute as "freezing" a conviction in all of its manifestations. RCW 10.01.040 says nothing of the sort.

The basic problem is the trial court's failure to recognize that RCW 10.01.040 does not apply to this case. The reason it does not apply is because of the nature of the relief sought by the defendant. A request to have gun rights restored is an entirely separate and new action. This is not

a situation that affects the disabling crime at all. RCW 10.01.040 applies to the particular crime being prosecuted, not an entirely different legal action that is not even criminal in nature. The trial court applied the statute diagonally from a long finished criminal matter to a current civil matter. The State is not seeking to modify the disabling vehicular homicide and impose more incarceration or fines or probation or anything else related to the disabling crime. The gun restoration action looks at the disabling crime and decides of what the disabling crime consisted and how the nature of the disabling crime impacts the workings of RCW 9.41.040.

The trial court pulled forward in time the vehicular homicide and then used RCW 10.01.040 to prevent the classification of vehicular homicide by today's statutes. No crime is being "saved." The trial court bent the statute all out of shape and the applied it incorrectly.

The "savings clause" statute was not meant to be used to protect a crime from all future changes. The "savings clause" was meant to keep legislative deletions from affecting crimes in the process of prosecution at the time of the legislative changes. There is no crime here which needs a "savings clause" to keep it "alive." The trial court used the statute in a way that was never meant by the legislature. This error should be corrected.

B. THE TRIAL COURT ERRED IN CONCLUDING THAT THE DEFENDANT COULD HAVE HIS GUN POSSESSION RIGHTS RESTORED AFTER LESS THAN 10 YEARS.

The State alternatively maintains that the trial court erred in restoring the defendant's gun rights when a complete 10 year period had not elapsed between the time the defendant was released from incarceration and the time of the signing of the restoration.

Obviously, if the court agrees with the State's arguments in section A, the remainder of this section is irrelevant. If the disabling crime (vehicular homicide) is classified as a Class A felony, the defendant will never become eligible to have his gun rights restored. RCW 9.41.040(4).

The statute at issue is RCW 9.41.040(4)(b)(i) which reads:

(b) (i) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, *if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525....*

RCW 9.41.040(4)(b)(i) (emphasis added).

The trial court was incorrect in its determination that five crime free years was sufficient to trigger the restoration of gun rights.

The last line in the quoted section of statute references RCW 9.94A.525. This is the standard criminal “wash out” statute. Class “B” felonies do not “wash out” for 10 years. Thus, if the defendant has a “prior felony” on his record (meaning it has not “washed out” yet) the defendant cannot have his rights restored until the felony “washes out.”

RCW 9.94A.525(2) provides that “Class A and sex prior felony convictions shall always be included in the offender score.” Class B prior felony convictions... shall not be included in the offender score, if since the last date of release from confinement... the offender had spent 10 consecutive years in the community without committing any crime....” RCW 9.94A.525(2).

Since the defendant pled guilty to a “B” felony he will have a “prior felony” on his record until 10 crime free years have elapsed.

The defendant argued before the trial court, and the trial court accepted, that “prior felony” means a felony occurring before the disabling statute. The State maintains that the plain language of the statute shows that “prior felony” means prior to the petition for reinstatement. If the trial court’s interpretation is accepted, the last part of the last sentence becomes meaningless. The court in *Graham v. State*, 116 Wn. App. 185, 64 P.3d 684 (2003) examined a very similar situation involving restoration of rights with a single disabling crime of second degree child rape.

The *Graham* court noted a legislative intent to promote the stigmatization of criminals by prohibiting their right to possess firearms.

Graham, supra at 189-90. The *Graham* court concluded:

Here, the statutory language, coupled with the legislature's express intent, leads us to conclude that the reference to "previous convictions" in the second sentence of RCW 9.41.040(4) means any conviction prior to the time of the petition, not a conviction prior to the one that disabled the petitioner's firearm rights. Such a construction is consistent with statutory intent of stigmatizing the use and possession of firearms and discouraging criminals from possessing and using firearms to commit crimes.

Graham, supra at 190.

The *Graham* decision analyzed RCW 9.41.040(4) but the section of the statutes used by the State herein is a subsection of the statute used by the *Graham* court. There is no distinction to be made between "previous convictions" and "prior convictions."

The *Graham* decision and the plain reading of the statutes support the conclusion that the trial court was incorrect when it found that "prior felony convictions" meant convictions prior to the disabling crime. The phrase "prior felony convictions" means no prior felonies at the time of the petition. The defendant does have a "prior felony conviction" as per RCW 9.94A.525. Thus he is not yet eligible to have his gun rights restored.

V.

CONCLUSION

For the reasons stated, the decisions of the trial court should be reversed and the petition of the defendant denied.

Dated this  day of June, 2007.

STEVEN J. TUCKER
Prosecuting Attorney



Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Appellant

APPENDIX A

FILED

JAN 26 2007

THOMAS R. FALLQUIST
SPOKANE COUNTY CLERKIN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SPOKANE

| | | |
|-----------------------|---|----------------------|
| |) | Case No. 06-204172-5 |
| |) | |
| IN RE THE PETITION OF |) | FINDINGS OF FACT |
| |) | AND CONCLUSIONS |
| JAMES DOUGLAS RIVARD, |) | OF LAW |
| _____ |) | |

This matter came on for hearing before the above-entitled court on December 8, 2006 on a petition to restore firearm rights under RCW 9.41.040(4) brought by James Douglas Rivard. Julia A. Dooris appeared on behalf of Mr. Rivard. Deputy Prosecuting Attorney John Grasso appeared on behalf of the State.

Mr. Rivard submitted Petitioner's Memorandum in Support of Motion for Restoration of Right to Possess Firearms along with several attachments and exhibits filed on September 20, 2006; Petitioner's Supplemental Memorandum in Support of Petition to Restore Right to Possess Firearms filed on November 7, 2006; and Petitioner's Reply to State's Response to Supplemental Memorandum filed on December 7, 2006.

Findings of Fact and
Conclusions of Law

1

Gemberling & Dooris, PS
PO Box 20129
Spokane, WA 99204
(509) 838-8585

The State submitted State's Response to Supplemental Memorandum in Support of Petition to Restore Gun Rights filed on December 6, 2006.

The Court, after reviewing the files and records herein, and considering the arguments presented by the parties, NOW THEREFORE finds and concludes as follows:

FINDINGS OF FACT

- 1. The Court has jurisdiction over the parties and the subject matter of his petition.
- 2. On December 1, 1993, Mr. Rivard was the driver of an automobile that struck James Mecsko. Mr. Mecsko later died from his injuries.
- 3. On February 8, 1994, Mr. Rivard was charged with Vehicular Homicide under former RCW 46.61.520.
- 4. At the time of the incident, Vehicular Homicide was classified as a Class B felony.
- 5. In 1996, the Legislature reclassified Vehicular Homicide as a Class A felony.
- 6. On June 20, 1997, Mr. Rivard entered a guilty plea.
- 7. Under the terms of the plea agreement, he was given a sentence under the First Time Offender Option.
- 8. The First Time Offender Option was unavailable to a defendant convicted of a Class A felony. (Former RCW 9.94A.030(22)(a); former RCW 9.94A.030(38)(a))

Findings of Fact and
Conclusions of Law

Gemberling & Dooris, PS
PO Box 20129
Spokane, WA 99204
(509) 838-8585

9. Mr. Rivard complied with all the requirements of his judgment and sentence, including completion of his sentence, payment of all fines, and fulfillment of his 24-month period of community supervision.

10. On November 30, 1999, Mr. Rivard received a Certificate and Order of Discharge, which was filed on December 2, 1999.

11. Other than the Vehicular Homicide, Mr. Rivard has no criminal history.

The Court having entered its Findings of Fact, NOW THEREFORE makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The Savings Clause, RCW 10.01.040, takes precedence in this case. As a result, Mr. Rivard's conviction for Vehicular Homicide remains a Class "B" felony.

2. The language in RCW 9.41.040(4)(b)(i) referring to conviction of a felony means the classification of the felony at the time of conviction, not any subsequent reclassification of the crime.

3. The plain meaning of the portion of RCW 9.41.040(4)(b)(i) that refers to "prior felony convictions" is other previous felony convictions, or felony convictions that were incurred previously, and in addition to the disabling felony.

4. Mr. Rivard has spent five or more consecutive years in the community without being convicted or currently charged with any other crimes.

Findings of Fact and
Conclusions of Law

5. Mr. Rivard has "no prior felony convictions" that would prohibit possession of a firearm counted as part of the offender score under RCW 9.94A.525.

6. Mr. Rivard has fulfilled all the requirements of RCW 9.41.040 and is eligible for restoration of his right to possess firearms.

DONE IN OPEN COURT on this 24 day of January, 2007.



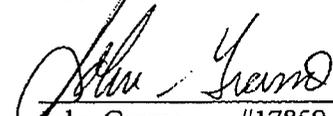
Judge Ellen Kalama Clark

Presented by:



Julia A. Dooris #22907
Attorney for James D. Rivard
Gemberling & Dooris
PO Box 20129
Spokane, WA 99204
(509) 838-8585

Approved as to form:



John Grasso #17859
Deputy Prosecuting Attorney

Findings of Fact and
Conclusions of Law