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STATE OF WASHINGTON

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No. 82995-1


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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LAURA MOEURN,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. INTRODUCTION

Despite conflicting testimony and the significant doubt expressed by the State's witnesses as to Laura Moeurn's identity as the assailant in an assault, a jury convicted Mr. Moeurn of second degree assault with a deadly weapon.

The trial court found Mr. Moeurn's criminal history consisted of a single 1994 juvenile adjudication for "Attempt to Commit Assault in the Second Degree," a Class C felony. The State did not present, and the court did not find, Mr. Moeurn had any convictions in the nearly 10-year period intervening between a 1997 misdemeanor conviction and the commission of the present offense. Nonetheless, the court found this Class C felony counted as two points in Mr. Moeurn's offender score, raising his standard range from three to six months to 12 months and one day to 14 months, plus a 12 month weapon enhancement.

On appeal, Mr. Moeurn has argued his Class C felony washed out when more than five years passed between a 1997 misdemeanor conviction and the present offense. The State has conceded Mr. Moeurn's offender score was miscalculated.

The Court of Appeals, however, concluded that the wash out provisions of RCW 9.94A.525(2) are modified by the provisions of

RCW 9.94A.525(4) concerning the scoring of prior anticipatory offenses. Thus, the court concluded the applicable wash out period for Mr. Moeurn's prior Class C offense was the ten-year period applicable to Class B offenses rather than the five-year period applicable to Class C felonies.

The plain language of RCW 9.94A.525(2) provides a five-year wash out period for Class C felonies. Further, this Court has previously concluded the wash-out provisions of RCW 9.94A.525(2) are a threshold to the application of the scoring provisions in the subsequent subsections of RCW 9.94A.525. Thus, the applicable wash-out provision for a prior anticipatory offense is not affected by the provisions of RCW 9.94A.525(4).

B. ISSUE PRESENTED

A court acts without authority when imposing a sentence based on an offense that washed out because the requisite period of time passed without further criminal convictions. In the case at bar, the court used a conviction for a 1995 Class C juvenile offense when more five years elapsed prior to the commission of the current offense without any additional criminal convictions. Did the court unlawfully sentence Mr. Moeurn based upon a washed out prior conviction?

C. STATEMENT OF THE CASE

On January 13, 2007, Laura Moeurn and several friends went to the Captain's Corner bar in Aberdeen to celebrate the birthday of Julie Keov. RP 162-64. While they were enjoying their evening, one of their group, Kim Chum, became involved in a disagreement with another of the bar's patrons, Clayton Wenger. RP 106, 192, 213. After exchanging words, and perhaps shoves, Mr. Chum left the bar with Mr. Moeurn and the others in their group. Mr. Wegner, too, left the bar along with Steven Vetter and Cody Ross, who had agreed to drive Mr. Wenger home from the bar that night. RP 91, 107.

Mr. Ross described the person who had argued with Mr. Wenger inside the bar as an Asian male wearing a red shirt and red hat. RP 93. Mr. Moeurn is an Asian and was wearing a red shirt and black hat. RP 125-26 Kim Chum is also an Asian male and was wearing a red hat and red shirt RP 205, 218, 233. At least one other Asian male, Dara Phin, was with the group that evening.

The groups encountered one another again in the alley behind the bar and become involved in a fight. RP 91. According to Mr. Ross and Mr. Wenger, the individual with whom Mr. Wenger had argued inside struck Mr. Wenger in the back of the head with a

board. RP 90, 95. RP 106-07. Crystal Barnett called police when the fight began, and subsequently identified Mr. Moeurn as the person who struck Mr. Wenger. RP 25. Several individuals who had been with Mr. Moeurn and Mr. Chum that night testified Mr. Chum was the person who struck Mr. Wenger. RP 169, 197, 217-18.

The State charged Mr. Moeurn with second degree assault with a deadly weapon enhancement. CP 1-2.

At trial, Mr. Wenger was unable to describe the person who hit him beyond saying he was wearing a red shirt, and that it was the same individual he had argued with inside the bar. RP 106-07. When shown a picture of Mr. Chum and asked if that was the person who hit him Mr. Wenger responded "I don't know." RP 109.

Mr. Vetter, who testified that he was close enough to Mr. Wenger to hear the board "go by my ear," nonetheless, was unable to clearly see the face of the person who swung the board. RP 79-80. Mr. Vetter testified the person was wearing dark jeans and a sweatshirt with long red and white stripes. RP 80, 82. When police officers arrived at the scene, Mr. Vetter identified Mr. Moeurn as the person who assaulted Mr. Wenger. At trial, Mr. Vetter explained "there was a couple of people that looked alike" - an apparent

reference to the number of Asian males present in the alley. RP

84. Mr. Vetter further explained, with a noticeable lack of conviction, that he identified Mr. Moeurn because

he was pretty well at that time – be about the same – that size and the color of the jeans, and he was – the clothing that he was wearing that matched him – the description that I gave the officer.

RP 84-85.

Mr. Ross testified the assailant wore a red hat and red shirt, RP 93, a description which matched Mr. Chum, not Mr. Moeurn.

RP 205, 218, 233. Mr. Ross testified the person with whom Mr. Wenger had argued inside was the person who struck him with the board, again matching the testimony of other witnesses describing Mr. Chum's activities that night.

In the weeks following the incident, he was shown a photographic montage containing a picture of Mr. Moeurn, Mr. Ross identified someone other than Mr. Moeurn. RP 146. During trial Mr. Ross was shown a photograph of Mr. Chum, Exhibit 11, and identified Mr. Chum as the person who struck Mr. Wegner, apparently oblivious to the fact that Exhibit 11 was not a picture of Mr. Moeurn. RP 96. Despite the fact that he had at least twice identified someone else as the assailant, Mr. Ross maintained he

was 95% certain that Mr. Moeurn was the person who hit Mr. Wenger. RP 93.

A jury convicted him as charged. CP 16.

At sentencing, the trial court found Mr. Moeurn's criminal history consistent of the single 1995 juvenile adjudication of attempted second degree assault. CP 38. The State submitted evidence that in February 2007, Mr. Moeurn was also convicted of the misdemeanor offense of No Valid Operator's License. CP 28. Finding the 1995 adjudication to be a violent offense, the court calculated Mr. Moeurn's offender score as 2. CP 38.

D. ARGUMENT

AS THE STATE CONCEDED BELOW, MR. MOEURN'S 1995 JUVENILE ADUCATION OF A CLASS C FELONY "WASHED OUT" RCW 9.94A.525(2) AND COULD NOT BE INCLUDED IN HIS OFFENDER SCORE

RCW 9.94A.525 provides in relevant part:

(2). . . . Class B prior felony convictions other than sex offenses shall not be included in the offender score, if since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent ten consecutive years in the community without committing any crime that subsequently results in a conviction. Class C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from

confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction. . . . This subsection applies to both adult and juvenile prior convictions.

....
(4) Score prior convictions for felony anticipatory offenses (attempts, criminal solicitations, and criminal conspiracies) the same as if they were convictions for completed offenses

1. RCW 9.94A.525(2) is unambiguous and requires that Mr. Moeurn's 1995 adjudication not be counted in his offender score. The meaning of an unambiguous statute must be derived from the language of the statute alone. State v. Chester, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997) (citing Cherry v. Municipality of Metro. Seattle, 116 Wn.2d 794, 799, 808 P.2d 746 (1991)). A statute is only ambiguous if it can be reasonably interpreted in two or more ways, but is not ambiguous simply because different interpretations are conceivable. State v. Keller, 143 Wn.2d 267, 277, 19 P.3d 1030, cert. denied, 534 U.S. 1130 (2001).

While second degree assault is a Class B felony, former RCW 9.94A.021(2) (1994),¹ attempted second degree assault, is a

¹ Subsequent to Mr. Moeurn's adjudication, RCW 9A.36.021 was amended to make second degree assault with sexual motivation a Class A felony. Laws 2001, 2nd Sp.Sess., ch 12 § 355. Because the sentence is determined by use of the law in effect at the time of sentencing, RCW 9.94.345,

Class C felony. RCW 9A.28.020(3)(c). By its plain terms RCW 9.94A.525(2) provides that Class C felonies "shall not be included in the offender score if, since the last date of release from confinement . . . pursuant to a felony conviction . . . or entry of judgment and sentence, the offender . . . spent five consecutive years in the community without committing any crime that subsequently results in a conviction." Thus, as the State conceded below, Brief of Respondent at 10-11, under the plain language of RCW 9.94A.525(2) Mr. Moeurn's adjudication washed out because he spent more than five years in the community without a conviction.

Despite the plain language of RCW 9.94A.525(2), the Court of Appeals concluded even though Mr. Moeurn's 1995 conviction of attempted second degree assault is a Class C felony, the five-year washout rule does not apply. Instead, the Court of Appeals concluded that because a completed second degree assault would be a Class B felony, Mr. Moeurn's Class C felony is subject to a 10-year washout rule. But nothing in RCW 9.94A.525(2) suggests that is the case. Further there is no language in RCW 9.94A.525(2)

Mr. Moeurn cites to the 1994 version of the statute. In any event, because Mr. Moeurn's 1994 conviction does not include a finding of sexual motivation, any discussion of which statute applies is unnecessary as under either version Mr. Moeurn's offense is a Class B felony.

which makes its wash-out provisions subject to the provisions of RCW 9.94.525(4) regarding scoring. Finally, nothing in RCW 9.94A.525(4) suggests the legislature intended its provisions to require courts to apply different wash-out rules, as opposed to scoring rules, for anticipatory offenses.

Instead if one reads RCW 9.94A.525 as a whole it is clear that its provisions were intended to be applied sequentially in the order they appear. The statute begins with a description of "offender score." The first three subsections describe generally the universe of relevant prior convictions and other current convictions which can be included in an a offender score. RCW 9.94A.525(1) defines prior conviction and describes how other current offense are to be treated. RCW 9.94A.525(2) defines which prior offense may be included. RCW 9.94A.525(3) describes which foreign convictions may be included, and also includes language regarding the how foreign convictions are a scored. From that point. The remaining subsections, beginning with RCW 9.94A.525(4), provide specific rules regarding the actual calculation of the offender score based upon the prior and current offenses which remain after application of the first three subsections.

Thus applied properly, the wash-out provisions of RCW 9.94A.525(2) are a threshold to application of the subsequent provisions of RCW 9.94A.525. In fact, this Court has previously recognized

Under the SRA a defendant's offender score is determined by the "offenses for which the defendant was convicted and by the defendant's 'criminal history' as that term *is defined* in the SRA." In re Personal Restraint of Williams, 111 Wash.2d 353, 357-58, 759 P.2d 436 (1988) (emphasis added). See also [D. Boerner, Sentencing in Washington, § 5.4 (1985)] ("[T]here are three steps involved in determining the 'offender score'; determining the number and nature of past convictions *which may* be included, including any other current convictions, and then determining the score or weight to be given to each such conviction.") (emphasis added). Part of the definition of "criminal history" is the washout provision. Former RCW 9.94A.360(2) (1988 Supp.).

State v. Cruz, 139 Wn.2d 186, 193, 985 P.2d 384 (1999).

That conclusion is consistent with this Court's interpretation of similar language in the definition of "Persistent Offender" found in RCW 9.94A.030. See e.g., Keller, 143 Wn.2d at 277-79; see also, State v. Hern, 111 Wn.App. 649, 45 P.3d 1116 (2002) (concluding offense which has washed out would not be included in offender score and is thus not a prior most serious offense"). Keller concluded the language in the definition of "persistent offender" in RCW 9.94.030 requiring that the person have two prior convictions

of most serious offenses “which would be included in the offender score” meant only that the offense had not washed out. 143 Wn.2d at 279.

Keller pointed to Cruz and reiterated that if an offense “washed out [it is] no longer part of his criminal history and [can]not be included his offender score.” 143 Wn.2d at 279-80 (citing Cruz, 139 Wn.2d at 193). Again the wash-out provisions or RCW 9.94A.525(2) are a threshold to the scoring provisions in the subsequent subsections of RCW 9.94A.525 and not vice-versa.

Under the Court of Appeals’s application of the statute, however, a court does not determine if an offense has washed out before it is scored, rather a court must score an offense to determine whether it washes out. That interpretation does not comport with the procedural structure implicit in the SRA and recognized in Cruz and Keller, that only after determining what a person’s criminal history is (and whether an offense has washed out) can a court score the relevant criminal history. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”

Davis v. Dep’t of Licensing, 137 Wn.2d 957, 963, 977 P.2d 554 (1999) (quoting, Whatcom County v. City of Bellingham, 128 Wn.2d

537, 546, 909 P.2d 1303 (1996)). The interpretation of the Court of Appeals does not give effect to RCW 9.94A.525(2).

Only after determining what offenses would be included in Mr. Moeurn's criminal history, applying RCW 9.94A.525(2), could the court determine how those offenses would be scored, applying RCW 9.94A.525(4). Because Mr. Moeurn's prior Class C felony washed out, i.e., could not be included in his offender score, there is no offense to "score" pursuant to RCW 9.94A.525(4)

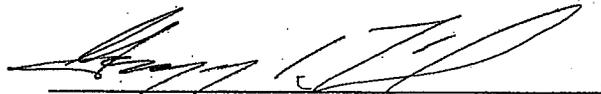
2. If RCW 9.94A.525 is ambiguous, the rule of lenity requires the court to adopt the reading most favorable to Mr. Moeurn. Alternatively, the rule of lenity requires the Court construe the statute in the manner suggested by Mr. Moeurn. The rule of lenity provides that where a penal statute is subject to more than one reasonable interpretation, the interpretation most favorable to the defendant must be employed. In re Post Sentencing Review of Charles, 135 Wn.2d 239, 240-50, 955 P.2d 798 (1998). "A statute is ambiguous if it can be reasonably interpreted in more than one way." McFreeze Corp. v. Dep't of Revenue, 102 Wn.App. 196, 200, 6 P.3d 1187 (2000) (citing Vashon Island Comm'n for Self-Gov't v. Washington State Boundary Review Bd., 127 Wn.2d 759, 771, 903 P.2d 953 (1995)).

While Mr. Moeurn contends his interpretation of the statute is required by its plain language, at a minimum it is a reasonable interpretation. The State's concession indicates the reasonableness of his interpretation. Thus, lenity requires the court adopt the interpretation advanced by Mr. Moeurn and conclude his 1995 adjudication washed out and cannot be included in his offender score.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Moeurn's sentence and remand for resentencing based upon an offender score of "0."

Respectfully submitted this 27th day of October, 2009.



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