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SUPREME COURT
STATE OF WASHINGTON

No. 83377-0

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BY RONALD R. CARPENTER

IN THE SUPREME COURT OF THE STATE OF WASHINGTON
CLERK

IN RE THE PERSONAL RESTRAINT PETITION OF:

HARRY N. CARRIER,

PETITIONER.

SUPPLEMENTAL BRIEF

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A. INTRODUCTION

This case raises the question of whether a charge dismissed pursuant to RCW 9.95.240 nevertheless counts as “criminal history.” This Court should hold that a dismissed charge does not constitute a conviction.

Carrier’s pre-SRA 1981 Indecent Liberties conviction, was “dismissed and the defendant discharged” pursuant RCW 9.95.240. As the dismissal order states, on April 5, 1985, Carrier was permitted to “withdraw or set aside” the finding of guilt; enter a plea of “not guilty;” and case was dismissed—releasing Carrier from “all penalties and disabilities.”

Or, so he thought.

When Carrier was later sentenced for a subsequent crime, his dismissed charge was nevertheless included in his criminal history—resulting in a persistent offender finding and a life sentence.

In this PRP, Carrier contends that because his 1981 case ended with the charge being dismissed, it does not constitute a “conviction.”

In response, the State argues that Carrier’s life sentence is appropriate and the inclusion of his dismissed charge is proper because Carrier’s prior conviction was also not “vacated.”

However, this Court has previously stated that dismissal of pre-SRA convictions pursuant to RCW 9.95.240 does not differ from vacation and dismissal of SRA convictions. Further, RCW 9.95.240 does not and could

not reflect the intent to include dismissed convictions as criminal history under the SRA because it pre-dated the SRA and the concept of criminal history did not exist in pre-SRA sentencing.

As a result, it is clear that Carrier's life sentence is in error.

It is also clear that this Court can correct this error even though it was not identified within one year of Carrier's persistent offender judgment becoming final. Carrier's current life sentence is facially invalid. A simple review of the dismissal order—a historically unquestioned and reliable document—unmistakably shows that Carrier's prior case had been dismissed. It would elevate form over substance to a disturbing degree to conclude that Carrier must serve a wrongful life sentence because the notation "dismissed" (or some variant) did not appear on his judgment's "criminal history" section. This Court should reverse Carrier's sentence and remand this case for resentencing.

B. ARGUMENT

1. *A Dismissed Charge is Not a "Conviction."*

An offender's criminal history consists of prior convictions.

At the time Carrier was sentenced to life, a "conviction" was defined as "an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." Former RCW 9.94A.030 (12) (2006). Likewise, the definition of a

“persistent offender” requires the offender to have “been convicted.”
Former RCW 9.94A.030 (33) (2006).

Mr. Carrier’s 1981 charge did not end in conviction. Quite the opposite, it ended with dismissal. A dismissed charge is not a “conviction”—regardless of whether the dismissal was preceded at some point by a conviction.

Although it is true that Mr. Carrier was once convicted of the crime, his one-time conviction was withdrawn and set aside. It is the final outcome of a case that is relevant—not what happened at some earlier stage. Otherwise, any conviction, later overturned, could be used as criminal history—even where acquittal followed reversal and remand. Such a result would be absurd. However, that result is no different than the result urged by the State in this case.

Indeed, this Court has previously held, in an analogous context, that a person who has been granted dismissal under RCW 9.95.240 is entitled to assert that he or she has never been convicted. *In re Discipline of Stroh*, 108 Wn.2d 410, 417-18, 739 P.2d 690 (1987). Here, the State argues for just the opposite conclusion.

Certainly, the SRA could have defined “conviction” to include a one-time conviction that was later dismissed under RCW 9.95.040. For example, the Legislature did so with respect to the first-offender waiver (originally RCW 9.94A.120 (5)). That statute disqualified an offender from

eligibility where he had previously served a deferred sentence. *Former* RCW 9.94A.030 (15). *See also Adult Sentencing Guidelines Manual* (1987). Given that the Legislature did not include similar language for purposes of calculating the offender score, this Court can presume that the Legislature considered, but rejected this result. *See generally State v. Jacobs*, 154 Wn.2d 596, 115 P.3d 281 (2005).

In sum, a dismissed charge is not a conviction.

2. *Dismissal of a Pre-SRA Case is Equivalent to Vacation.*

When the SRA was passed, it eliminated deferred sentences. However, the SRA adopted a provision that allowed a conviction to be “vacated” after the completion of supervision and a designated period of time spent crime free in the community.

The vacation statute directly mirrors the pre-SRA dismissal statute. Both statutes provide that an offender can withdraw his guilty plea or permit the court to set aside the verdict and then enter a “not guilty” plea and have the case dismissed.

This Court has previously held that the Legislature intended RCW 9.95.240 and former RCW 9.94A.230 (now, .640) to have the “same practical effect.” *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). “In adopting the SRA, the Legislature provided a procedure in RCW 9.94A.640 which parallels RCW 9.95.240.” 144 Wn.2d at 835.

“We hold that the Legislature intended RCW 9.95.240 to function *in the same manner* as the later statute, [former] RCW 9.94A.230, and that both statutes provide courts with the authority to vacate records of conviction.”

Id. at 844. This Court concluded that there was virtually no difference between the statutes:

Under the SRA, the same procedure that results in a dismissal under the probation act allows the court to grant dismissal and clear the conviction record. Thus, the later statute differs in only minor respects: the court must apply the tests listed in subsection (2); the statute specifically provides for vacation of the conviction record in the same proceeding; and the statute expressly provides that the person may state that he or she has never been convicted of that crime.

Id. at 836.

On the issue of whether a dismissed pre-SRA conviction counts as criminal history, Professor David Boerner (one of the drafters of the SRA) observed, “[v]acation operates to ‘clear the record of conviction’ in the same manner as did the Probation Act [RCW 9. 95. 240].” David Boerner, *Sentencing in Washington* § 11.6, at 11-7 (1985). This Court has also repeatedly looked to the explanations of the Sentencing Guidelines Commission when interpreting the SRA. *See e.g., State v. Ha'mim*, 132 Wn.2d 834, 844, 940 P.2d 633 (1997); *In re Long*, 117 Wn.2d 292, 301, 815 P.2d 257 (1991). Since its first publication the Wash. Sentencing Guidelines Commission’s *Sentencing Guidelines Implementation Manual* has provided that “vacation of the conviction is analogous to the dismissal

obtained under RCW 9.95.240.” See 2008 *Manual*, comments following RCW 9.94A.640; 1987 *Manual*, comments following RCW 9.94A.230.

The comments to the original, current, and every intervening *Manual* expressly state: “A vacated conviction under this section cannot be used as criminal history.” *Id.*

Despite these numerous and obvious similarities, the State nevertheless argues that the statutes differ because RCW 9.95.240 states that a dismissed conviction may be “pleaded and proved” in a subsequent criminal proceeding. This language could not refer to the use of a dismissed conviction as “criminal history” under the SRA for the simple reasons that the SRA did not exist and the concept of criminal history did not exist when the statute was enacted. See PRP and Opening Brief, p. 10.

There is another reason the State’s argument on this point fails: the vacation statute contains language that is virtually identical to the Probation Act’s “pleaded and proved” language. The vacation statute provides that “(n)othing in this section prevents the use of an offender’s prior conviction in a later criminal prosecution.” RCW 9.94A.640. The State does not suggest that this language permits a vacated conviction to be used as criminal history. Thus, rather than constituting a difference between the statutes, this is yet another parallel that supports the conclusion that neither a dismissed, nor a vacated charge constitutes “criminal history.” The

Probation Act's "pleaded and proved" language does not distinguish "dismissal" from "vacation."

The fact that the vacation statute borrows language from and clearly parallels the earlier dismissal statute, coupled with the fact that the Legislature failed to define a "conviction" as including a charge that was dismissed pursuant to RCW 9.95.240, provides strong support for the conclusion that the drafters of the SRA did not intend to include a dismissed charge as criminal history.

In this case, there is undeniable evidence that the charges against Carrier were dismissed. Thus, at the time of the persistent offender proceeding Carrier was not "convicted" of the prior crime.

3. *The Amendments Which Now Permit Vacation of a Pre-SRA Conviction Did Not Also Make a Dismissed Charge a Conviction Constituting Criminal History.*

At the time that Carrier successfully withdrew his guilty plea and had his charge dismissed, he was not statutorily able to seek vacation—the concept did not apply to pre-SRA offenses.

While it is now possible for a "dismissed" conviction to also be "vacated," there is no corresponding amendment to the definition of "conviction." In other words, that term has never been amended to include a dismissed charge. Further, the legislative history of the two relevant

amendments (RCW 9.95.240 and RCW 9.94A.640) unambiguously reveals that the Legislature did not intend change the SRA on this point.

If the Legislature had intended to amend the SRA to include dismissed convictions unless those charges were also vacated, the obvious way to do so would be to amend the definition of “conviction.” As mentioned previously, the Legislature has never done so.

When Mr. Carrier was permitted to withdraw his guilty plea, enter a not guilty plea, and have his case dismissed in 1985, he could not seek vacation because vacation existed only for SRA offenses. Indeed, the first prerequisite to vacation was “discharge under [former] RCW 9.94A.230.” Only those individuals sentenced under the SRA could be discharged under that provision. Consistent with the law in effect at the time, in 1985 Carrier sought and the Court granted him dismissal of the charge against him.

The SRA was amended 17 years later in 2002. The 2002 SRA amendments alter the definition of criminal history (but not “conviction”) by adding that “[a] conviction may be removed from a defendant's criminal history only if it is vacated,” and “[a] prior conviction that was not included in an offender score calculated pursuant to a former version of the sentencing reform act remains part of the defendant's criminal history.” *See* RCW 9.94A.030 (14) (2006). The legislative history to this amendment clearly reveals that it was not intended to revive dismissed convictions.

Instead, the intent of the amendment was to properly express the earlier intent to include prior convictions in an offender score in light of judicial decision that interpreted that earlier intent otherwise. The intent is expressed in the preamble:

The legislature considers the majority opinions in *State v. Cruz*, 139 Wn.2d 186 (1999), and *State v. Smith*, Cause No. 70683-2 (September 6, 2001), to be wrongly decided, since neither properly interpreted legislative intent. When the legislature enacted the sentencing reform act, chapter 9.94A RCW, and each time the legislature has amended the act, the legislature intended that an offender's criminal history and offender score be determined using the statutory provisions that were in effect on the day the current offense was committed.

Although certain prior convictions previously were not counted in the offender score or included in the criminal history pursuant to former versions of RCW 9.94A.525, or RCW 9.94A.030, those prior convictions need not be 'revived' because they were never vacated.

The remainder of the legislative history, which echoes this intent and does not reveal any corresponding intent to change the definition of what constitutes a "conviction" was attached to Carrier's PRP Reply Brief as Appendix A. Indeed, the brief summary of the bill contained in the House *Bill Analysis* simply states that the Bill simply "(c)larifies that amendments to the 'wash out' provisions of the SRA are retroactive." The testimony in favor of the bill before the Senate Judiciary Committee was summarized as: "This language should provide the explicit direction for which the Supreme

Court has been searching.” The testimony before the House Committee on Criminal Justice and Corrections was even more explicit:

This is not a change in sentencing policy, but rather a clarification to the court.

The State’s argument in this case completely flies in the face of this history.

RCW 9.95.240 was amended in 2003. That amendment provided that an individual whose case was dismissed could also seek vacation, provided he met the requisite tests. The State argues inferentially (because Carrier did not meet the criteria for vacation), the intent of the amendment was to include a dismissed, but not vacated charge as a conviction in an individual’s criminal history.

As noted with the previous amendment, the simplest and most direct way to express that intent would be to amend the definition of “conviction.” However, because that was not the intent of the 2003 legislation, the Legislature did not amend that section.

Instead, the legislative history for this amendment clearly indicates that the amendments were made as an attempt to clarify and codify the holding in *Breazeale*:

No statute authorizes pre-SRA felons to respond to an employment application by saying they have never been convicted of an offense. However, the state Supreme Court has recently held that the pre-SRA release from penalties provision is the functional equivalent of the SRA law with respect to vacations of records. The court held that a pre-SRA felon who has been released from all penalties and disabilities following successful completion of probation may respond on an employment application that he or she has not been

convicted of the offense. The court also held that the effect of such a release is to direct criminal justice agencies not to release the record of conviction to prospective employers.

See House Judiciary Committee Bill Report. Put another way, the bill was intended to address two identified problems: “Two restrictions on the current release from disabilities provisions for pre-SRA felons are removed. A felon need no longer apply for a release prior to the expiration of the maximum term of sentence, and the statement that a release does not prohibit use of the conviction in a subsequent prosecution is eliminated.” Once a conviction was dismissed and vacated: “The effect of a vacation is also the same as for an SRA felony, including allowing the offender to respond on an employment application that he or she has not been convicted of the crime.” *Id.*

There is no mention anywhere in the legislative history of increasing the burden on an offender whose prior conviction has been dismissed by now requiring him to also vacate that dismissed charge before it can be removed from his criminal history. Because there is no mention anywhere in any of the reports or discussion of the bill of the State’s claimed intent—to require an individual who has previously obtained dismissal of charges to also obtain vacation before the dismissed charge is eliminated from the person’s criminal history—this Court should not read into the law something that was clearly not intended.

4. *The Rule of Lenity*

If this Court concludes that the statutory scheme is ambiguous and subject to more than one reasonable interpretation, then it should apply the rule of lenity.

Questions of statutory interpretation are reviewed *de novo*. *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). “The ‘plain meaning’ of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). If after examination of a statute a court finds that it is subject to more than one reasonable interpretation, the statute is ambiguous. *Id.* at 600-01. However, a statute is not ambiguous merely because more than one interpretation is conceivable. *Agrilink Foods, Inc. v. State Dep’t of Revenue*, 153 Wn.2d 392, 396, 103P.3d 1226 (2005) (citing *State v. Hahn*, 83 Wn. App. 825, 831, 924 P.2d 392 (1996)). If after applying rules of statutory construction this Court concludes that a statute is ambiguous, “the rule of lenity requires us to interpret the statute in favor of the defendant absent legislative intent to the contrary.” *Jacobs*, 154 Wn.2d at 601 (citing *In re Post Sentencing Review of Charles*, 135 Wn.2d 239, 249, 955 P.2d 798 (1998)). The rule states that an ambiguous criminal statute cannot be interpreted to increase

the penalty imposed. *State v. Adlington-Kelly*, 95 Wn.2d 917, 920-21, 631 P.2d 954 (1981).

5. *Even Assuming that a Crime Must Now Be Dismissed and Vacated In Order to Remove it From an Offender's Criminal History, that New Rule Should Not Apply Here Because Carrier's Charge Had Already Been Dismissed and Any Subsequent Changes to the SRA Did Not Revive His Dismissed Charge.*

When Carrier's charge was dismissed, he could not seek vacation—at the time, vacation applied only to SRA offenses. Just as importantly, there was no reason to seek vacation, since it did not differ from the relief afforded under RCW 9.95.240.

If the amendments to the vacation and dismissal statutes are construed in the manner advanced by the State, then those statutes retroactively alter the underlying legal consequences of Carrier's previously "dismissed" conviction. As a result, he can claim a vested right in the "dismissed/vacated" status of his prior conviction.

This Court held in *State v. Varga*, 151 Wn.2d 179, 86 P.3d 139 (2004), that the 2002 amendments (discussed above) could not achieve the intended result—that once a conviction washed out a vested right attached. This Court rejected that argument by distinguishing the statute at issue in *State v. T.K.*, 139 Wn.2d 320, 323-24, 987 P.2d 63 (1999). In *T.K.*, this Court considered whether T.K. had a vested right to expunge his 1993

juvenile conviction from his record after two crime-free years provided that he committed no new offenses. *Id.* at 327. At the time T.K. committed his juvenile offense, former RCW 13.50.050(11) (1992) required trial courts to expunge such convictions upon filing of a motion. *Id.* at 325, 987 P.2d 63. However, in 1997 the legislature amended RCW 13.50.050(11) to effectively remove T.K.'s ability to petition a court to expunge his record. *Id.* at 324 (Laws of 1997, ch. 338, § 40). This Court concluded that T.K. had a vested right under the former statute to expunge his conviction. because T.K. had met the statutory conditions under the former statute that required courts to expunge his conviction and that T.K. could petition the court to expunge his record. *Id.* at 334. This Court further noted that there are many cases, however, in which a preamendment version of a statute will continue to govern in cases arising prior to the amendment, particularly where vested rights or contractual obligations are affected. *See, e.g., In re F.D. Processing, Inc.*, 119 Wn.2d 452, 461-62, 832 P.2d 1303 (1992) (in action relating to statute extending lien protection to agricultural processors, pre-amendment version of statute governs because amendment to definition of agricultural products affected bank's vested right in a security interest and, therefore, not retroactively applied); *Ashenbrenner v. Department of Labor & Indus.*, 62 Wn.2d 22, 25, 380 P.2d 730 (1963) (rights of workmen's compensation claimants are controlled by law in force at time of injury rather than by law which becomes effective subsequently);

Procter & Gamble Co. v. King County, 9 Wn.2d 655, 656, 115 P.2d 962 (1941) (in foreign corporation's action to recover taxes paid to county under protest, court held that rights had accrued and were not modified or

terminated by repeal of that statute so that corporation was not required to prove it "had never conducted any business" in the state); *see also* Norman J. Singer, 2 *Statutes and Statutory Construction* §§ 41.05-.07 (5th ed.1997).

The issue here is not, as the State misconstrues it, whether Carrier's right to vacation vested prior to the amendment of the statute. The issue is whether Carrier's right to have his prior conviction removed from the category of "conviction" vested prior to the 2003 amendments which, according to the State, now require both dismissal and vacation.

The answer is clearly "yes." Carrier's case was dismissed. At that juncture he was told that he could claim, to an individual or a court, that he had not been convicted of that offense. It would be hard to imagine a more compelling case of "vesting."

6. *Carrier's Current Judgment is Facially Invalid*

Carrier can attack his sentence despite the fact that it has been more than one year because it is "facially invalid."

This Court has never strictly limited the facial invalidity requirement to the face of judgment, but instead has permitted consideration of other

historical documents to determine whether the judgment contains invalidity. See *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 100 P.3d 301 (2004).

The “facial invalidity” rule finds its roots in this State’s long-standing rule of law that a trial court retains the power and duty to correct an invalid sentence. See *State Smissaert*, 103 Wn.2d 636, 639, 694 P.2d 654 (1985); *McNutt v. Delmore*, 47 Wn.2d 563, 565, 288 P.2d 848 (1955) (“When a sentence has been imposed for which there is no authority in law, the trial court has the *power and duty* to correct the erroneous sentence, when the error is discovered”). (emphasis added). Sentencing provisions outside of the authority of the trial court have historically been described as “illegal” or “invalid.” *Smissaert*, 103 Wn.2d at 639.

The error in *Smissaert*, like this case, concerned the maximum possible punishment. In *Smissaert*, a jury found the defendant guilty of murder, and the court sentenced him to a maximum term of 20 years in prison. The Board of Prison Terms and Paroles later notified the court that the relevant statute required a maximum sentence of life imprisonment. Approximately two years after the initial sentencing, the trial court corrected the sentence to reflect the statutorily required maximum term. *Smissaert*, 103 Wn.2d at 638. In affirming the entry of a corrected sentence, this Court relied on the trial court's authority to correct an invalid sentence, even if the correction involved a more onerous judgment.

Smissaert. 103 Wn.2d at 639. See also *In re Pers. Restraint of Carle*, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980) (“Because the trial court herein imposed an erroneous sentence, and since the error has now been discovered, the court has both the power and the duty to correct it.”).

Because Carrier’s judgment is invalid, his petition is timely.

C. CONCLUSION

Based on the above, this Court should vacate Carrier’s persistent offender sentence and remand this case for resentencing.

DATED this 4th day of August, 2010.

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CERTIFICATE OF SERVICE

I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on August 4, 2010, I served the parties listed below with a copy of Petitioner's Court Ordered Supplemental Reply as follows:

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Aug 4, 2010 Sea, WA
Date and Place


Vance G. Bartley