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No. 97375-0

NO. 77426-3-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DAVID HAGGARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding that appellant's 2002, 2004, and 2005 California convictions did not wash for sentencing purposes.

2. The trial court sentenced appellant based on a miscalculated offender score.

Issue Pertaining to Assignments of Error

Appellant was convicted of three felonies in California between 2002 and 2005. Between 2005 and the convictions at issue in this case, appellant committed only one new offense for disorderly conduct which was subsequently dismissed pursuant to a successful deferred sentence. Appellant argued that the three prior California convictions washed out for offender score purposes because the disorderly conduct charge was dismissed. The trial court disagreed, concluding that although the disorderly conduct charge was dismissed it was never vacated. The trial court accordingly included appellant's three California convictions when calculating his offender. Is remand for resentencing required where the trial court improperly concluded appellant's California convictions did not washout and therefore sentenced appellant based on a miscalculated offender score?

B. STATEMENT OF THE CASE

1. Procedural History.

The King County prosecutor charged appellant David Haggard with one count each of second degree burglary and second degree arson, for incidents alleged to have occurred on June 5, 2016. CP 1-12.

The trial court denied Haggard's motion to suppress evidence discovered during searches of two different residences. The trial court also denied Haggard's motion to suppress finding they were spontaneous and the result of custodial interrogation. CP 154-165; RP¹ 405-06, 527-28.

Haggard waived his right to a jury trial. RP 566, 581-83. The trial court found Haggard guilty as charged following a bench trial. CP 104-12; RP 597-98.

Haggard was sentenced jointly on the same day on the second degree burglary and second degree arson under this cause number, and for one count each of second degree unlawful possession of a firearm and violation of the uniform controlled substances act for possessing

¹ This brief refers to the consecutively paginated verbatim report of proceedings as follows: RP – July 31, August 1, 2, 3, September 7, 8, 15, 2017.

methamphetamine under cause number 16-1-03423-0 SEA.² See RP 630-70.

Based on an offender score of six, the trial court sentenced Haggard to concurrent prison sentences of 39 months on the second degree arson and 29 months on the second degree burglary. The trial court ran the sentences concurrent to the sentences imposed under cause number 16-1-03423-0 SEA. The trial court also imposed 18 months of community custody. CP 104-12; RP 664-69.

The trial court waived all nonmandatory legal financial obligations, imposing only a \$500 victim penalty assessment and \$100 DNA collection fee. CP 104-12; RP 665-67.

Haggard timely appeals. CP 116-25.

2. Sentencing.

Prior to sentencing, Haggard argued that each of the three prior California convictions washed out for offender score purposes because his only intervening criminal offense in 2010 for disorderly conduct was dismissed following compliance with conditions of a deferred sentence. CP 98-103. The offense was committed in Snohomish County in December 2010. Although originally charged as fourth degree assault,

² The convictions at issue in 16-1-03423-0 SEA are the subject of a pending appeal in case number 77427-1-I.

Haggard pled guilty to a reduced charge of disorderly conduct in July 2011 pursuant to a deferred sentence. Haggard successfully completed the conditions of his deferred sentence and the case was dismissed ex parte on March 1, 2012. The case file was closed in April 2012 and destroyed in June 2015. RP 600-01; CP 126-153.

Defense counsel argued that “dismissal” and “vacation” under the misdemeanor statute were interchangeable and had the same practical effect. RP 607-08, 616. Counsel argued that “dismissal” was the procedure that applied when the court still had jurisdiction over a defendant whereas “vacation” was the process that applied when the trial court had lost jurisdiction by virtue of the expiration of the probation period. RP 607-08, 613, 618-19.

Citing RCW 9.96.060(5)(a), the State responded that vacation of a misdemeanor conviction had to occur in order for it not to be counted toward the washout period. RP 605-06. The State argued the vacation statute was unambiguous as to the procedure that was required. RP 621. The State maintained that because Haggard’s conviction was dismissed but not vacated, the disorderly conduct conviction interrupted the five year washout period. RP 605-06; CP 126-153.

Defense counsel noted that the misdemeanor vacation and dismissal statutes did not reference one another, and therefore a defendant

would have no notice that dismissal of a criminal case was insufficient to clear the conviction from his criminal record. RP 608-10, 613. Defense counsel noted that the legislature had remedied a similar problem with the felony vacation statute following the Washington Supreme Court's opinion in State v. Breazeale, 144 Wn.2d 829, 31 P.3d 1155 (2001). Defense counsel argued that in the absence of a similar fix with the misdemeanor vacation and dismissal statutes, the legislature's intent was ambiguous and had to be interpreted in Haggard's favor. RP 614-16; CP 98-103.

The trial court acknowledged there was no "Breazeale fix" with respect to the misdemeanor statutes. RP 601, 612. The trial court explained however, that it believed the legislature's failure to take similar action with the misdemeanor statutes evidenced a different legislative intent. RP 603-04, 613. Accordingly, the trial court concluded the misdemeanor statutes were not ambiguous. RP 622-23. As the trial court explained:

So here, because the Legislature did a fix specifically for felonies, it's clear that they knew what their role was. And the other thing that is very clear to this Court, having done prior statutory interpretation, is courts are not supposed to dictate criminal law. That's left to the Legislature and I'm not doing that here and I won't do that here. I think it would be inappropriate in my role as a judge.

RP 603.

C. ARGUMENT

THE TRIAL COURT SENTENCED HAGGARD BASED ON A MISCALCULATED OFFENDER SCORE BECAUSE THE INTERVENING CONVICTION FOR DISORDERLY CONDUCT WAS DISMISSED PURSUANT TO A COMPLETED DEFFERED SENTENCE AND THEREFORE WASHED OUT.

RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in the offender score. The statute provides in relevant part:

[C]lass 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 judgement and sentence, the offender had spent five years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c).

The statute contains a "trigger" clause which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements a person must satisfy during the five-year period. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). Any offense committed after the trigger date that *results in a conviction* resets the five-year clock. Ervin, 169 Wn.2d at 821 (emphasis added).

When calculation of an offender score includes out-of-state convictions, the statute provides: "Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). In this context, the relevant comparison is to Washington criminal statutes in effect when the foreign crime was committed. State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998).

Offender score calculations are reviewed de novo. State v. Cross, 156 Wn. App. 568, 587, 234 P.3d 288 (2010), review granted and remanded on other grounds, 172 Wn.2d 1009, 260 P.3d 208 (2011). The State bears the burden of proving prior criminal history for the purpose of calculating the offender score under the washout provision. Cross, 156 Wn. App. at 586-87. "[A] conviction that has washed out is not relevant to the calculation of an offender score." State v. Moeurn, 170 Wn.2d 169, 176, 240 P.3d 1158 (2010).

Here, Haggard's three prior convictions from California in 2002, 2004, and 2005, were each counted as one point toward his offender score, resulting in a total offender score of six. This was based on the trial court's conclusion that Haggard's 2011 deferred sentence for disorderly conduct -- later dismissed based on Haggard's compliance with the

conditions of probation -- interrupted the washout period. RP 622-23, 662-64.

RCW 3.66.067 and RCW 3.50.320 provide the mechanism by which courts of limited jurisdiction may enter deferred sentences in misdemeanor matters. Both statutes permit the trial court, “for good cause shown, permit a defendant to withdraw the plea of guilty and to enter a plea of not guilty, and the court may dismiss the charges.” RCW 3.66.067; RCW 3.50.320. There can be no dispute that Haggard complied with the conditions of his 2011 deferred sentence for disorderly conduct and subsequently had his conviction dismissed. CP 126-153. Rather, the question is whether dismissal of the conviction has the same legal effect that vacating a conviction does for purposes of calculating the offender score wash-out period.

Even where an offender is convicted of a subsequent crime which would interrupt the wash-out period, if the subsequent conviction qualifies for a discharge or vacation, and the court vacates the record of the conviction, “the person shall be released from all penalties and disabilities resulting from the offense and the fact that the person has been convicted of the offense shall not be included in the person’s criminal history for purposes of determining a sentence in any subsequent conviction.” RCW 9.96.060(5)(a); RCW 9.94A.640(3).

Whether a misdemeanor conviction subsequently dismissed pursuant to RCW 3.66.067 or RCW 3.50.320 counts toward computing the washout period for calculating offender scores appears to be a question of first impression in Washington. The Washington Supreme Court however, has analyzed the interplay between parallel statutes governing 'dismissal' and 'vacation' of felony convictions in State v. Breazeale³ and State v. Carrier.⁴

Breazeale addressed the interplay between the pre-SRA dismissal statute, former RCW 9.95.240, and the SRA vacation statute, former RCW 9.95.230.⁵ 144 Wn.2d at 832-33. Upon successful completion of probation, the court could, under former RCW 9.95.240, set aside a finding or plea of guilty, allow the defendant to plead not guilty, and then dismiss the information. Under that statute, the court could then exercise its discretion to dismiss the information and the defendant is “released from all penalties and disabilities”. Former RCW 9.95.240.⁶

³ 144 Wn.2d 829, 31 P.3d 1155 (2001).

⁴ 173 Wn.2d 791, 272 P.3d 209 (2012).

⁵ RCW 9.94A.230 was later recodified as RCW 9.94A.640.

⁶ Former 9.94A.240 provided:

Every defendant who has fulfilled the conditions of his probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof,

In Breazeale, two defendants who had their convictions dismissed under former RCW 9.95.240 petitioned the trial court to vacate their convictions. 144 Wn.2d at 833-34. They sought vacation to prevent the Washington State Patrol from continuing to share their conviction data with prospective employers. Id. The patrol refused to halt its dissemination of the records, arguing that dismissal under former RCW 9.95.240 did not equate vacating a conviction under the SRA. Id. at 836-37. In other words, the question before the Court was whether a “dismissal” under RCW 9.95.240 had the same effect as a “vacation” under RCW 9.95.230. The Court disagreed with the State, explaining that the legislature intended RCW 9.95.240 and RCW 9.95.230 “to have the same practical effect.” Breazeale, 144 Wn.2d at 837.

may at any time prior to the expiration of the maximum period of punishment for the offense for which he has been convicted be permitted in the discretion of the court to withdraw his plea of guilty and enter a plea of not guilty, or if he has been convicted after a plea of not guilty, the court may in its discretion set aside the verdict of guilty; and in either case, the court may thereupon dismiss the information or indictment against such defendant, who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he has been convicted. The probationer shall be informed of this right in his probation papers: PROVIDED, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.

In response to Breazeale, the legislature amended former RCW 9.95.240 to include a new subsection which prevented RCW 9.95.240 from having the same effect as RCW 9.95.230. The new subsection to the dismissal statute states:

After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640. The court may, in its discretion, clear the record of conviction if it finds the defendant has met the equivalent of the tests in RCW 9.94A.640(2) as those tests would be applied to a person convicted of a crime before July 1, 1984.

Carrier, 173 Wn.2d at 807 (quoting Laws of 2003, ch. 66, § 1(2)(a)).

In Carrier, the defendant made a similar argument to the one Haggard makes here. Carrier argued that his dismissed felony conviction should not be counted in his offender score because the trial court's dismissal of his sentence under former RCW 9.95.240 had the same legal effect as if the trial court had vacated the conviction under RCW 9.94A.640.

The Court disagreed with Carrier because it found the post Breazeale legislative amendment controlling. Carrier, 173 Wn.2d at 807-08. The Court specifically noted that the amendment "routes defendants through former RCW 9.94A.640 rather than relying solely on former RCW 9.95.240 for authority to vacate the conviction. This is significant

because former RCW 9.94A.640 makes it harder to vacate convictions than former RCW 9.95.240." Id. Absent the Breazeale fix however, the Carrier court noted that it would have reached the opposite result:

Were we deciding this case strictly under Breazeale, Carrier would succeed in his claim that the trial court wrongly included his dismissed conviction in his criminal history.

Carrier, 173 Wn.2d at 806-07.

Unlike the Breazeale fix, which Carrier found "significant" to resolving the issue, the current versions of RCW 3.66.067 and RCW 3.50.320 do not reference RCW 9.96.060. Nor does RCW 9.96.060 reference RCW 3.66.067 and RCW 3.50.320. Compare RCW 9.95.240(2)(a) (After the period of probation has expired, the defendant may apply to the sentencing court for a vacation of the defendant's record of conviction under RCW 9.94A.640); RCW 9.94A.640(1) (Every offender who has been discharged under RCW 9.94A.637 may apply to the sentencing court for a vacation of the offender's record of conviction). Thus, the misdemeanor statutes pertaining to dismissal are analogous to their felony counterparts prior to the legislature's response to Breazeale.

The legislature's decision to amend only the felony dismissal and vacation statutes in response to Breazeale demonstrates the legislature intended only for the Breazeale fix to apply to those felony statutes. This

court presumes "the legislature is 'familiar with judicial interpretations of statutes, and absence any indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions.'" State v. Ervin, 169 Wn.2d 815, 825, 239 P.3d 354 (2010) (quoting State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000)). Since the Supreme Court's opinion in Carrier in 2012, the legislature has amended each of the misdemeanor statutes at issue at least once. See e.g. RCW 9.96.060 (Laws of 2017, ch. 336 § 2; Laws of 2017 ch. 272 § 9; Laws of 2017, ch. 128 § 1; Laws of 2014, ch. 176 § 1; Laws of 2014, ch. 109 § 1); RCW 3.50.320 (Laws of 2013 2nd sp.s., ch. 35 § 5); RCW 3.66.067 (Laws of 2013 2nd sp.s., ch. 35 § 5). The legislature however has not adopted a Breazeale fix in the misdemeanor context to route defendants who have had their misdemeanor convictions dismissed pursuant to RCW 3.66.067 and RCW 3.50.320, through the vacation statute, RCW 9.96.060.

This court's primary duty in construing a statute is to determine the legislature's intent. State v. Conover, 183 Wn.2d 706, 711, 355 P.3d 1093 (2015). Statutory interpretation begins with the statute's plain meaning, which is discerned from the ordinary meaning of the language used in the context of the entire statute, related statutory provisions, and the statutory scheme as a whole. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d

516, 526, 243 P.3d 1283 (2010). If, after this examination, the provision is still subject to more than one reasonable interpretation, it is ambiguous. Conover, 183 Wn.2d at 711-12 (citing State v. Jacobs, 154 Wn.2d 596, 600-01, 115 P.3d 281 (2005)). The rule of lenity requires an ambiguous statute to be interpreted in the defendant's favor absent legislative intent to the contrary. Id. at 712.

Statutory interpretation is a question of law reviewed de novo. Conover, 183 Wn.2d at 711. The legislature's acquiescence to Carrier's interpretation of the outcome in the absence of any Breazeale fix favors Haggard's interpretation of the misdemeanor dismissal and vacation statutes. Even if the statutes are ambiguous, the rule of lenity requires interpretation in Haggard's favor.

The face of the judgment and sentence (and the statement on criminal history) shows that absent the dismissed 2011 disorderly conduct charge, Haggard had no other intervening convictions between the 2005 conviction for possession of methamphetamine and the offenses at issue here. Each of the prior three California convictions for Class C felonies should not have been included in his offender score. As a result, the offender score for each of the current convictions in both cases lowers by three points. See RCW 9.94A.510 (sentencing grid setting forth standard range sentences based on seriousness level of offense). Reversal of

Haggard's sentence and remand for resentencing is required. See State v. Wilson, 170 Wn.2d 682, 691, 244 P.3d 950 (2010) (resentencing is remedy for miscalculated offender score).

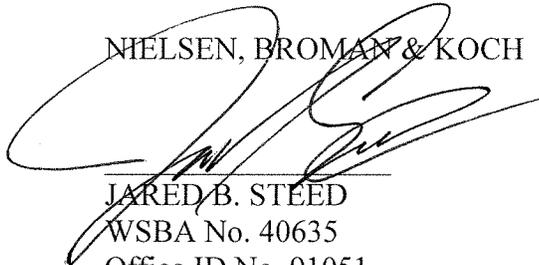
D. CONCLUSION

For the reasons discussed above, this Court should find that Haggard's 2002, 2004, and 2005 California convictions wash, reverse his judgment and sentence, and remand for resentencing based on an offender score of three.

DATED this 5th day of June, 2018.

Respectfully submitted,

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