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NO. 77426-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID BRENT HAGGARD,

Appellant.

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

THE HONORABLE JULIE SPECTOR, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

Does a completed deferred sentence interrupt the “wash out” period for purposes of calculating an offender score?

B. STATEMENT OF THE CASE

The State charged David Haggard with one count of second degree arson and one count of second degree burglary. CP 1-2. Haggard was convicted as charged following a bench trial. CP 104. The court sentenced Haggard within the standard range. CP 104-08. Simultaneously with this case, Haggard was sentenced on an unrelated conviction for possession of methamphetamine and second degree unlawful firearm possession. RP 634.¹

The sole issue raised on appeal is whether the sentencing court correctly calculated Haggard’s offender score.

C. LEGAL ARGUMENT

1. THE TRIAL COURT CORRECTLY CALCULATED HAGGARD’S OFFENDER SCORE BECAUSE A DISMISSED DEFERRED SENTENCE IS NOT AUTOMATICALLY VACATED.

Haggard pled guilty to disorderly conduct in 2011, interrupting the washout period for several prior felony convictions. However, the conviction was later dismissed when Haggard completed a deferred

¹ These charges are the subject of a separate appeal in No. 77427-1. That appeal raises the same offender score issue as its sole assignment of error.

sentence. Haggard argues that this dismissal also had the effect of vacating his conviction. Although this appears to be an issue of first impression in Washington, Haggard's argument is foreclosed by a plain reading of the statutory scheme.

The statutory language at issue shows that "dismissal" and "vacation" are distinct legal concepts, and only vacation prevents the interruption of a washout period following the completion of a deferred sentence. This is evidenced by the fact that there are numerous statutory limitations on motions to vacate that do not exist for deferred sentences. Because Haggard never applied to vacate the conviction, his prior felonies did not wash out, and the trial court correctly calculated his offender score.

a. Facts Relevant To Haggard's Appeal.

The facts regarding Haggard's criminal history are essentially undisputed. Haggard has three prior felony convictions in the State of California:

- People v. Haggard, #FMB004969. Haggard pled "no contest" to a charge of unlawful driving or taking of a motor vehicle on January 15, 2002.
- People v. Haggard, #FMB005756. Haggard pled guilty to possession of methamphetamine on August 17, 2004.
- People v. Haggard, #FMB007522. Haggard pled guilty to a subsequent charge of possession of methamphetamine on May 13, 2005.

CP 127.

Haggard was later charged with fourth degree assault in Snohomish County. CP 151-52. On July 11, 2011, Haggard pled guilty to an amended charge of disorderly conduct, and the court imposed a six-month deferred sentence. CP 151-52; RP 600. On March 1, 2012, the court found Haggard in compliance with the conditions of his deferred sentence, and dismissed the charge *ex parte*. CP 151-52. Haggard never petitioned to vacate the charge following dismissal. RP 622-23.

The trial court heard extensive argument regarding the calculation of Haggard's offender score. RP 597-624. The court determined that none of Haggard's convictions washed out. RP 623. Based on Haggard's three previous California convictions, and four current King County charges, the court determined that Haggard had an offender score of six on each offense. CP 105.²

b. The Washout Period Is Interrupted By Conviction For A Misdemeanor Offense.

The computation of an individual's offender score is governed by RCW 9.94A.525. Subject to exceptions not relevant here, an offender score is composed of prior felony convictions, each of which counts as a single point. An offender score is determined by tabulating the sum of a defendant's points.

² Haggard does not challenge the comparability of his prior California convictions on appeal.

However, the legislature has provided offenders with a mechanism to lower their offender score through consistent law-abiding behavior:

...Class C prior felony convictions...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.

RCW 9.94A.525(2)(c).³ This and related subsections are colloquially known as “wash out provisions.”

RCW 9.94A.525(2)(c) can be subdivided into two constituent parts: a “trigger” clause, and a “continuity/interruption” clause. State v. Ervin, 169 Wn.2d 815, 821, 239 P.3d 354 (2010) (citing In re Pers. Restraint of Nichols, 120 Wn. App. 425, 432, 85 P.3d 955 (2004)). The “trigger” is the point at which a defendant re-enters the community, thus commencing a potential washout period. Ervin, 169 Wn.2d at 821. “Continuity/interruption” refers to the substantive requirements that a defendant must satisfy in order to successfully complete the washout period. Id.

In order for a Class C felony to “wash out,” an offender must spend five crime-free years in the community. RCW 9.94A.525(2)(c).

³ Class B felonies require a washout period of 10 years, and Class A felonies never wash out. RCW 9.94A.525(2)(a)-(b). Because Haggard’s prior felonies appear to be Class C felonies, the State addresses only RCW 9.94A.525(2)(c).

When the conviction date for a misdemeanor occurs subsequent to the “trigger” date, but before five years has elapsed, the misdemeanor conviction has the effect of re-starting the “trigger” date. Ervin, 169 Wn.2d at 821. The defendant must then complete a new five-year period commencing from the date of conviction before his prior felony points may wash out. Id.

While RCW 9.94A.525 does not further define “any crime,” reviewing courts use the definition promulgated in RCW 9A.04.040. State v. Crocker, 196 Wn. App. 730, 735, 385 P.3d 197 (2016). A “crime” is any offense defined by any Washington statute “for which a sentence of imprisonment is authorized.” RCW 9A.04.040(1). Disorderly conduct is a misdemeanor, punishable by up to 90 days imprisonment, and is thus a “crime” within the meaning of RCW 9.94A.525. RCW 9A.04.040(1); RCW 9A.84.030; RCW 9.92.030.

The State has the burden of proving a defendant’s criminal history by a preponderance of the evidence. State v. Priest, 147 Wn. App. 662, 196 P.3d 763 (2008). The trial court’s calculation of an offender score is reviewed *de novo*. State v. Mutch, 171 Wn.2d 646, 653, 254 P.3d 803 (2011).

c. **The “Breazeale Fix” And In Re PRP Of Carrier Do Not Compel The Conclusion That Dismissal Of A Misdemeanor Has The Same Effect As Vacation.**

In State v. Breazeale, 144 Wn.2d 829, 832-33, 31 P.3d 1155 (2001), the defendants’ 1970’s-era felony convictions had long ago been dismissed through former RCW 9.95.240, the pre-SRA dismissal statute. In the mid-1990’s, the defendants moved to vacate their convictions under RCW 9.94A.230,⁴ and the court granted their motion. Breazeale, 144 Wn.2d at 833-34. The Washington State Patrol refused to honor the court’s order, arguing that former RCW 9.95.240 did not authorize “vacation” under the SRA, and RCW 9.94A.230 did not apply because the defendants’ convictions predated the statute.⁵ Breazeale, 144 Wn.2d at 833-34. The trial court was persuaded by the Patrol, and rescinded its vacation order. Id. at 834.

The Supreme Court disagreed, finding that the legislature intended RCW 9.95.240 and RCW 9.94A.230 [.640] to have “the same practical effect.” Breazeale, 144 Wn.2d at 837. Thus, after Breazeale, dismissal of a pre-SRA offense under RCW 9.95.240 was, for all intents and purposes,

⁴ Since re-codified as RCW 9.94A.640. Act of April 13, 2001, ch. 10, § 6 (reorganizing and clarifying sentencing provisions).

⁵ “The parties do not dispute that if the underlying felonies had been committed on or after July 1, 1984, Respondents would have been eligible for vacation under RCW 9.94A.230.” Breazeale, 144 Wn.2d at 836.

also a vacation under RCW 9.94A.230 [.640]. Breazeale, 144 Wn.2d at 837-38; In re Pers. Restraint of Carrier, 173 Wn.2d 791, 806, 272 P.3d 209 (2012).

However, in response to Breazeale, the legislature amended RCW 9.95.240 to route vacation specifically through RCW 9.94A.640. This amendment added the following subsection, referred to by the parties as the “Breazeale fix:”

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 committed before July 1, 1984.

RCW 9.95.240(2)(a).

After the “Breazeale fix,” vacation of a pre-SRA felony became a two-step process, requiring dismissal and then a subsequent motion to vacate. Carrier, 173 Wn.2d at 807. The court determined that the plain language of the amendment specified RCW 9.94A.230 [.640] as the sole applicable statutory authority for vacation. Carrier, 173 Wn.2d at 807-08. Thus, the Court rejected Carrier’s argument, similar to Haggard’s, that the dismissal of a felony under RCW 9.95.240 is equivalent to vacation. Id.⁶

⁶ However, the Court granted Carrier relief on the basis that the “Breazeale fix” amendment could not be applied retroactively to his conviction, which had been dismissed in 1985. Carrier, 173 Wn.2d at 818.

The gist of Haggard’s argument vis-à-vis Breazeale and Carrier can be summarized as follows: after amending RCW 9.95.240 to include the “Breazeale fix,” the legislature did not enact any similar amendment with regard to misdemeanors. Haggard thus contends that the legislature intended for the reasoning of Breazeale, that dismissal is synonymous with vacation, to have continued applicability to misdemeanors.

But Breazeale was decided on principles of statutory interpretation applied to enactments not at issue here. Breazeale, 144 Wn.2d at 837. Because Breazeale did not analyze the misdemeanor statutes, but dealt exclusively with the SRA, its holding cannot be automatically imported to misdemeanors. See Matter of Detention of D.V., 200 Wn. App. 904, 908, 403 P.3d 941 (2017) (improper to use prior interpretation of intimidating a judge statute in the context of interpreting the involuntary treatment act); see In re Dependency of A.K., 162 Wn.2d 632, 649, 174 P.3d 11 (2007) (commissioner improperly relied on authority interpreting a statute that did not apply, even though two statutes were similar, because they served different purposes). This Court must analyze the misdemeanor statutes governing dismissal and vacation *de novo* to determine whether the legislature intended them to “have the same practical effect.” Breazeale, 144 Wn.2d at 837.

i. “Dismissal” is not synonymous with “vacation” for misdemeanors.

When interpreting statutes, a court’s primary goal must be to carry out the intent of the legislature. State v. Baker, 194 Wn. App. 678, 682, 378 P.3d 243 (2016). If a statute’s meaning is clear, the court must follow its directive. Id. A statute’s plain meaning is derived from the statutory text itself, and also from the text of related statutes from which the court can infer the overarching legislative intent. Id.

A reviewing court goes beyond the plain language of a statute only if its language is susceptible to multiple reasonable interpretations. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). “Reasonable” means that a statute is not ambiguous simply because variant interpretations are “conceivable.” Id.; State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). If the plain language of a statute is unambiguous, then the court should conduct no further inquiry, and consider no extrinsic evidence. State v. Gonce, 200 Wn. App. 847, 855, 403 P.3d 918 (2017); Newton v. State, 192 Wn. App. 931, 937, 369 P.3d 511 (2016). Statutory interpretation is a question of law reviewed *de novo*. Gonce, 200 Wn. App. at 855.

Subject to exceptions not relevant here, courts of limited jurisdictions have the power to impose a deferred sentence for

misdemeanor offenses. RCW 3.50.320; RCW 3.66.067.⁷ As part of a deferred sentence, the court may order any otherwise lawful combination of incarceration, probation, and conditions of release. Id. “During the time of the deferral, the court may, for good cause shown, permit a defendant to withdraw the plea of guilty, permit the defendant to enter a plea of not guilty, and dismiss the charges.” Id.

Vacation of misdemeanor offenses is governed by RCW 9.96.060, which states that:

Every person convicted of a misdemeanor...offense who has completed all of the terms of the sentence for the ...offense **may apply to the sentencing court for a vacation** of the applicant’s record of conviction for the offense. If the applicant meets the tests prescribed in subsection (2) of this section, the court may in its discretion vacate the record of conviction by (a)(i) permitting the applicant to withdraw the applicant’s plea of guilty and to enter a plea of not guilty; or (ii) if the applicant has been convicted after a plea of not guilty, the court setting aside the verdict of guilty; and (b) **the court dismissing the information, indictment, complaint, or citation against the applicant and vacating the judgment and sentence.**

RCW 9.96.060(1) (emphasis added). Once a conviction is vacated, it can no longer be used to “determin[e] a sentence in any subsequent conviction.” RCW 9.96.060(5)(a).

It is plain from this statutory language that dismissal and vacation are distinct concepts. Dismissal of a deferred sentence can in practice

⁷ RCW 3.50.320 and RCW 3.66.067 are worded almost identically and do not appear to have any material differences between them.

occur automatically when a defendant is in compliance. See RP 609-10.⁸

But RCW 9.96.060 plainly states that vacation is a benefit that must be separately applied for.

RCW 9.96.060 notes that if the court grants a motion to vacate a trial conviction, the proper procedure is to set aside the verdict, “dismiss[] the information...and vacat[e] the judgement and sentence.” This means that a successful motion to vacate automatically grants dismissal.

But nothing in the statutory language suggests that the reverse is true – that a successful dismissal automatically grants vacation. This makes sense because the vacation statute imposes a number of additional limitations not found in the statute governing deferred sentences. RCW 9.96.060(2).

RCW 9.96.060(2)(f) states “[a]n applicant may not have the record of conviction for a misdemeanor or gross misdemeanor offense vacated if...less than three years has passed since the person completed the terms of the sentence...”⁹ Thus, a person who completed the terms of their deferred sentence less than three years ago would be eligible for dismissal,

⁸ “Judge Spector: ...[w]e know here [the disorderly conduct charge] was dismissed. The Court entered a minute order. [Haggard] wasn’t present. I don’t even know if the judge was present. I think it was just done by the clerk according to the docket. There was no judicial discretion utilized. It was just a clerk’s note. He complied with the conditions. There were no further criminal law violations. He paid his \$148. It looks like he completed all of his drug and alcohol stuff. Boom, ‘case dismissed.’” RP 617.

⁹ A misdemeanor conviction involving domestic violence is not eligible for vacation until five years have passed. RCW 9.96.060(2)(e)(iv).

but ineligible for vacation. Because dismissal and vacation cannot occur simultaneously within that time, the legislature cannot have intended for the terms to be interchangeable.

There are numerous other limitations on vacation within RCW 9.96.060. For example, misdemeanor vacation is expressly prohibited for violent and sex offenses. RCW 9.96.060(b)-(c). Domestic violence misdemeanors cannot be vacated if, among other things, the prosecutor's office has not been notified in writing of the petition. RCW 9.96.060(e)(i). A defendant is also ineligible for vacation if they are subject to an active protection order. RCW 9.96.060(i).¹⁰

But none of these burdens enumerated in RCW 9.96.060 are applicable to dismissal pursuant to a deferred sentence. Except for driving under the influence offenses, a court can defer and subsequently dismiss any misdemeanor, regardless of the defendant's past or current criminal behavior. RCW 3.66.067; RCW 3.50.320. Furthermore, a person can only ever have one conviction vacated. RCW 9.96.060(2)(h). There is no limit on the amount of deferred sentences a person can receive. RCW 3.66.067; RCW 3.50.020.

¹⁰ This list is illustrative, not exhaustive. RCW 9.96.060 contains several other limitations not listed here.

Only when a misdemeanor has been vacated is the charge no longer included “in the person’s criminal history for purposes of determining a sentence in any subsequent conviction.” RCW 9.96.060(5). RCW 9.94A.525(2)(c) states that the washout period is interrupted by any *conviction* for a crime. Any finding of guilt is a conviction. RCW 9.94A.030(9). Thus, offenses where the defendant pled guilty and where the charges have only been dismissed are still included in the offender’s criminal history.

Deferred prosecutions for DUI offenders are analogous, in that they continue to count as criminal history under the SRA. A deferred prosecution allows a defendant to engage in court monitored substance abuse treatment in lieu of prosecution. RCW §§ 10.05.010-.05.170. If a defendant is in compliance with the program, the court must dismiss the DUI charge after five years have passed. RCW 10.05.120.

However, a dismissed deferred prosecution still counts as a “prior offense” for sentencing purposes upon subsequent convictions for DUI. City of Kent v. Jenkins, 99 Wn. App. 287, 290-91, 992 P.2d 1045 (2000); RCW 46.61.5055(14)(a)(xiv). If a dismissed deferred prosecution is properly used as a “prior offense,” it necessarily follows that the charge was not vacated. There is no authority to suggest that this Court’s statutory

interpretation in Jenkins was erroneous, but that conclusion would be compelled if Haggard's argument is accepted.

In sum, the plain language of the statutory scheme reveals that "dismissal" and "vacation" are distinct concepts. This is evidenced by each being available to different, albeit sometimes overlapping, classes of offenders. Furthermore, vacation confers material benefits that do not flow from dismissal alone. Because "vacation" is different than "dismissal," Haggard's argument fails, since it is undisputed that Haggard did not apply for vacation.

The legislature plainly did not intend RCW 3.50.320 and RCW 3.66.067 to have the same effect as RCW 9.96.060. Haggard argues that the rule of lenity compels his interpretation. But courts do not apply the rule of lenity where, as here, the statutory language is unambiguous. State v. McDaniel, 185 Wn. App. 932, 938, 344 P.3d 1241 (2015).

That Breazeale reached a different conclusion upon consideration of two completely different statutes is not relevant, let alone dispositive. Unlike in Breazeale, these statutes do not "differ[] in only minor respects." Breazeale, 144 Wn.2d at 836. Because Haggard's disorderly conduct conviction has not been vacated, his California offenses did not wash out of his offender score. The trial court properly computed Haggard's score as six.

D. CONCLUSION

The State respectfully requests this Court affirm Haggard's sentence.

DATED this 1 day of August, 2018.

Respectfully submitted,

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