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STATE OF WASHINGTON
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Supreme Court No. 97375-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAVID HAGGARD,

Appellant.

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

SUPPLEMENTAL BRIEF

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A. ISSUE PRESENTED FOR REVIEW

1. Did the trial court correctly include Mr. Haggard's 2010 conviction for disorderly conduct in his offender score even after said conviction was vacated and the complaint dismissed pursuant to RCW 3.66.067?

B. STATEMENT OF THE CASE

The trial court below calculated Mr. Haggard's offender score based on the inclusion of a 2010 conviction for disorderly conduct despite that court having allowed Mr. Haggard to withdraw his guilty plea and dismissed the complaint pursuant to RCW 3.66.067. The undersigned represented appellant in the trial court and argued that such a conviction should not be included in his offender score because it was not a "conviction" within the meaning of the Sentencing Reform Act's "wash out" provision, RCW 9.94A.525(2).

The undersigned discontinued representation of appellant at the conclusion of litigation in the trial court. However, counsel for appellant in the Court of Appeals failed to articulate several critical issues at hand, including the basic criminal procedure underpinning the statutes at hand: RCW 3.66.067

and RCW 9.96.060. Following an adverse ruling in the Court of Appeals, the undersigned once again undertook representation of appellant for the purpose of seeking discretionary review. Appellant urges this Court to focus its attention to his petition for review as the starting point for a comprehensive articulation of his arguments. Appellant intends the following legal argument to supplement the issues raised in his petition, consistent with the court rules.

D. ARGUMENT

1. **RCW 3.66.067 and RCW 9.96.060 both contemplate vacating a conviction and dismissing the underlying charging instrument.**

Below, Court of Appeals adopted respondent's insistent characterization of RCW 3.66.067 and RCW 9.96.060 as "dismissal" and "vacation" statutes, respectively:

Although the misdemeanor dismissal statutes do not explicitly state the effect of dismissal on the defendant's record, the existence of a separate procedure for vacation implies that the legislature did not intend for a dismissal to automatically have the same effect as a vacation.

State v. Haggard, ___ Wn.App. ___ 442 P.3d 628, 633, review granted, 193 Wn.2d 1037, 449 P.3d 651 (2019). The error of this conclusion lies in its misapprehension of criminal procedure.

The plain language of each statute contemplates *both* vacation of a conviction and dismissal of the underlying charging instrument:

[T]he 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 (emphasis added); and,

After a conviction, the court may impose sentence by suspending all or a portion of the defendant's sentence or by deferring the sentence of the defendant and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof. [...] 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.**

RCW 3.66.067 (emphasis added).

Notably, RCW 3.66.067 does not contain the word “vacate,” and this likely contributed to the Court of Appeals erroneous conclusion. However, a brief review of criminal procedure makes plain that RCW 3.66.067 contemplates

precisely a *vacation* of conviction as well as a dismissal of the complaint.

It is a sacrosanct feature of our criminal justice system that a trial court's authority to enter a judgment and sentence rests upon a finding of guilt either by a jury or by admission of the defendant. See RCW 10.01.050 ("No person charged with any offense against the law shall be punished for such offense, unless he or she shall have been duly and legally convicted thereof in a court having competent jurisdiction of the case and of the person.") Moreover, the legislature has defined "conviction" to mean "an adjudication of guilt pursuant to Title 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030(9). "Judgment" refers to the legal conclusion entered pursuant to the trial court's findings with respect to the allegations contained in the complaint, i.e. "guilty" or "not guilty." See RCW 10.64.015 ("When the defendant is found guilty, the court shall render judgment accordingly[.]")

Black's Law Dictionary defines the term "vacate" as "[t]o nulify or cancel; make void; invalidate." Black's Law Dictionary

(11th ed. 2019). In the instant case, Mr. Haggard’s “conviction” for disorderly conduct occurred when he entered his guilty plea, according to RCW 9.94A.030(9). This guilty plea was withdrawn pursuant to RCW 3.66.067 upon the completion of his deferred sentence and replaced with a not guilty plea. This is precisely within the meaning of the term “vacated.” Moreover, the legal authority for entry of the judgment and sentence no longer exists once the court vacates a guilty plea. It would be entirely without logic to conclude that the nullification of a guilty plea would not also nullify the court’s judgment and sentence; the authority to enter a judgment and sentence flows from the finding of guilt. Yet, the respondent avers that this procedure *plainly and unambiguously*¹ did not vacate said conviction or the attendant judgment and sentence.

2. The Respondent’s proposed reading of RCW 9.94A.525 yields absurd results.

Not only is the respondent’s proposed reading of the RCW 9.94A.525(2) in conjunction with RCW 3.66.067 not plainly and

¹ To avoid application of the rule of lenity, the respondent must establish that a conviction vacated pursuant to RCW 3.66.067 is plainly within the meaning of the word “conviction” as used in RCW 9.94A.525, not simply that their reading is one of several reasonable readings.

unambiguously correct, it actually yields absurd results that contravene clear legislative intent. Foremost, RCW 9.94A.525(2) read literally would include convictions reversed on direct appeal or collateral attack based on constitutional infirmities, since they did technically “subsequently result in a conviction” that was later reversed. Appellant assumes that respondent would agree that the legislature did not intend for such an absurd result. Thus, for respondent’s argument to prevail, there must exist some other rationale for the proposition that convictions vacated under RCW 3.66.067 plainly fall within the definition of a “conviction” in the “wash out” provision beyond the simple fact that they did, at one point in time, result in a conviction.

In search of such a rationale, the respondent may assert that the legislature’s failure to include an explicit provision in RCW 3.66.067 exempting such vacations from future use makes plain their intent and thus the statute’s effect. This argument fails for two reasons. First, the legislature made no specific provision that convictions reversed and vacated for

constitutional infirmities were not within the meaning of RCW 9.94A.525(2), either.

Moreover, such a reading of RCW 3.66.067 would render deferred sentences entirely meaningless. RCW 3.66.067 articulates two distinct options under which a trial court may retain the authority to circumscribe a defendant's conduct under penalty of imprisonment during a probationary period of two years:

After a conviction, the court may impose sentence by **suspending** all or a portion of the defendant's sentence or by **deferring** the sentence of the defendant and may place the defendant on probation for a period of no longer than two years and prescribe the conditions thereof.

RCW 3.66.067 (emphasis added). The respondent would apparently have this court hold that RCW 3.66.067 does not contemplate vacation of the judgment and sentence upon the defendant's withdrawal of their guilty plea, but rather simply divests a trial court of authority to impose punishment upon the conclusion of the deferral period by allowing the defendant to withdraw their plea and dismissing the complaint. This would be the exact same effect of the conclusion of the probationary period pursuant to a suspended sentence. Such a reading of the

statute plainly nullifies the legislature's intent to authorize a deferred sentence as a concept distinct from a suspended sentence. Respondent has failed in both the trial court and the Court of Appeals to articulate any meaningful difference, under their proposed reading of RW 3.66.067, between a deferred sentence and a suspended sentence. If a deferred sentence does not relieve the defendant of any disability attendant to conviction, then it would have the exact same result as a suspended sentence.

Lastly, the absurdity of the respondent's formulation of criminal procedure becomes apparent upon considering its practical application to the statutes in question. Respondent asserts that Mr. Haggard needed to separately move the trial court to apply RCW 9.96.060 to his case in order to be relieved of his conviction for the purpose of offender scoring. This is so, they aver, despite 1) the fact that the relief contemplated in RCW 9.96.060 – withdrawal of his guilty plea and dismissal of the complaint – was *already granted* pursuant to RCW 3.66.067 and 2) that neither RCW 9.96.060 nor RCW 3.66.067 references the other. It is absurd to suggest that a trial judge would readily

infer from the plain language of these statutes that RCW 9.96.060 – which contemplates withdrawal of a guilty plea and dismissal of the complaint – could apply to a case where the finding of guilt has already been vacated and the complaint has been dismissed. This is not to mention the gross unfairness of respondent's proposed reading in so far as notice to defendants is concerned.

Finally, given the incongruity of applying RCW 9.96.060 to convictions already vacated by RCW 3.66.067 and assuming arguendo that both have the effect of vacating a conviction, the remaining logical question is whether the legislature plainly intended for only convictions vacated by means of RCW 9.96.060 – and not RCW 3.66.067 – to be excluded from offender score calculation. This too, would be an absurd result. A deferred sentence is a measure of leniency conferred at sentencing, and it logically follows that as a group, those receiving deferred sentences are more deserving at the time of their sentencing than those who do not receive this benefit. Thus, it is inconceivable that the legislature intended to exclude those receiving deferred sentences from relief from RCW 9.94.525

while conferring the availability of such relief only to those receiving suspended sentences.

3. Minor differences in the procedural scope of RCW 3.66.067 and RCW 9.96.060 neither necessarily nor logically evidence a legislative intent for separate effects.

a. The more likely rationale for the limitations of RCW 9.96.060 is not an intent to demonstrate a separate result from RCW 3.66.067 but to promote the ends of justice in instances where defendants move for relief years or decades after the fact.

The Court of Appeals also accepted the Respondent's invitation to seize upon minor distinctions in contextual applications of RCW 9.96.060 and RCW 3.66.067 to conclude that the legislative intent for the statutes to have separate effects was clear:

The vacation statute contains numerous limitations that are not present in the dismissal statutes, including restrictions on the offenses that are eligible for vacation and the number of convictions that a person may have vacated. A defendant must also apply to the court for vacation, while dismissal can be carried out ex parte, as it was in this instance.

Haggard, 442 P.3d at 633.

Unfortunately, the court failed to expound on why additional circumscription present in RCW 9.96.060 necessarily

indicated a legislative intent for separate results. There are several cogent, logical reasons why the legislature might impose more onerous restrictions on vacating convictions years after the than it did in conferring trial courts the discretion to impose a deferred sentence at the time of sentencing that have nothing to do with an intent for the statutes to have separate results. Most likely, the legislature recognized the unique position of the trial court *at the time of sentencing* to effect justice and felt that the ability of subsequent judges to revisit the trial court's sentence, years after the fact, should be circumscribed in ways the original authority of the sentencing judge was not. Moreover, the passing of time likely diminishes the effect of victims' interests on trial courts' exercise of discretion and the restrictions of RCW 9.96.060 evince an intent to rebalance the interests of defendants and their victims. Notably, all of the proscriptions against vacating convictions present in RCW 9.96.060 that are not present in RCW 3.66.067 *relate to crimes against persons*. Additional evidence of this intent in RCW 9.96.060 is that it actually allows for the vacation of driving under the influence

convictions – crimes without a specific victim – whereas RCW 3.66.067 specifically prohibits vacation of such crimes.

b. RCW 9.96.060 is not uniformly more onerous than RCW 3.66.067 as implied in the opinion below.

Setting aside the logical inferences that can be drawn from differences in the vacation statutes, several of the appellate court's aforementioned contentions are not entirely accurate. First and foremost, the court claims there are restrictions not only on the types of offenses that may be vacated pursuant to RCW 9.96.060 but also the number. This is simply incorrect. Neither RCW 9.96.060 nor RCW 3.66.067 limit the number of times a court may apply either particular statute to a particular defendant's convictions.

Second, in proper context, the appellate court's claim reasoning RCW 9.96.060 proscribed vacation of "numerous" offenses not proscribed by RCW 3.66.067 is misrepresentative. The appellate court (and apparently counsel for appellant below) failed to mention that RCW 3.66.067 contains a critical limitation on the type of offense that may be vacated *not* contained within RCW 9.96.060. As noted above, RCW 3.66.067

explicitly forbids granting deferring sentences for convictions pursuant to RCW 46.61.5055 (proscribing driving under the influence), whereas RCW 9.96.060 actually *permits* the vacation of DUI convictions. See RCW 9.96.060(2)(d).

With respect to those limitations present in RCW 9.96.060 and not RCW 3.66.067, some additional context is also necessary. RCW 9.96.060 entirely proscribes the vacation of sex offenses and violent offenses (or attempts to commit them). Every single violent offense enumerated by RCW 9.94A.030(56) is at least a class B felony. Thus, an attempt of such an offense would always be a felony. Therefore, this distinction between RCW 9.96.060 and RCW 3.66.067 is entirely meaningless.

The statute further places additional requirements to vacate domestic violence and prostitution offenses not present in RCW 3.66.067. However, the disparate requirements for vacating a domestic violence offense are not much more likely indicative of a legislative intent to ensure that victim input will be considered and that bad actors who continue to perpetuate domestic violence and harassment will be prohibited from the vacation of their convictions. See RCW 9.96.060(f). Such

provisions are built into RCW 3.66.067 through the Crime Victim's Bill of Rights² and the ability of a trial court to impose a two year probationary period requiring good behavior prior to vacating the judgment.

c. RCW 3.66.067 subjects defendants seeking a deferred sentence the same exercise of discretion by the court and adversarial process as RCW 9.96.060.

The appellate court and the respondent focus on the fact that the district court withdrew Mr. Haggard's plea and dismissed the complaint ex parte as evidence of legislative intent for separate results. Apparently, this irregularity indicated that pleas withdrawn pursuant to deferred sentences are somehow suspect because the procedure is performed in a closed, smoke-filled room without the benefit of adversarial process. In fact, the trial court must exercise its discretion, granted by the legislature, *at the time of sentencing*, in open court, potentially with victim input³, in determining whether to defer or suspend a sentence. Moreover, the prosecution has ample recourse to ensure that undeserving defendants may not

² See RCW 7.69.030(13); providing for the right to submit a victim impact statement to be considered before sentencing.

³ RCW 7.69.030(13)

have their sentences vacated under RCW 3.66.067, just as they do pursuant to RCW 9.96.060. They may appeal a sentence where a trial court abuses its discretion. They may also move to revoke a deferred sentence where the defendant has failed to comply. See RCW 3.66.069.

RCW 3.66.067 states that a defendant must show cause prior to being permitted to withdraw their guilty plea pursuant to a deferred sentence:

During the time of the deferral, the court may, **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 (emphasis added). The phrase “for good cause shown” suggests that someone – presumably the defendant – must show cause before the court may vacate a conviction. That the district court in Mr. Haggard’s case may not have strictly followed the procedure prescribed by RCW 3.66.067 is immaterial to the validity of its final order vacating the conviction for the purposes of determining Mr. Haggard’s offender score. See State v. Ammons, 105 Wn.2d 175, 177, 713

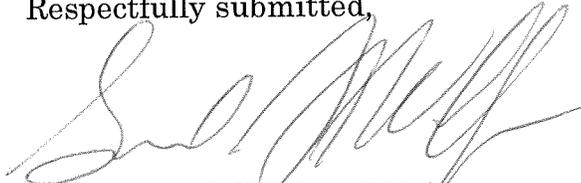
P.2d 719, 721 (1986), amended, 105 Wn.2d 175, 718 P.2d 796 (1986).⁴

E. CONCLUSION

David Haggard respectfully requests that this honorable Court hold that his vacated 2010 conviction for disorderly conduct may not be included within his offender score.

DATED this 18th day of November, 2019.

Respectfully submitted,



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⁴ A party may not collaterally attack criminal history at sentencing held pursuant to the Sentencing Reform Act. Any assertion that the vacation of Mr. Haggard's conviction is invalid for procedural reasons would seem to squarely fall within the purview of *Ammons*.

**KING COUNTY DEPARTMENT OF PUBLIC DEFENSE NORTHWEST DEFENDERS
DIVISION**

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