

68033-1

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NO. 68033-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LYDIA TAMAS,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HOLLIS HILL

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

A superior court is vested with the discretion to grant or deny an offender's motion to vacate the record of her conviction, and the court's decision will not be overturned absent a showing that the court acted manifestly unreasonably and without any tenable grounds. Here, the court concluded that although the offender was statutorily eligible to file a motion to vacate, the underlying facts of the crime of conviction – which involved the offender's extensive plotting to murder a romantic rival, including the recruitment of a paid assassin – were so grave that expungement of all official record of her conviction was inappropriate. Did the trial court properly exercise its legislatively-granted discretion?

B. STATEMENT OF THE CASE

The defendant, Lydia Tamas a.k.a. Diana Smith a.k.a. Diana Johnson, was charged by information in King County Superior Court in June 2001 with one count of Solicitation to Commit Murder in the Second Degree. CP 1-2. The accompanying certification for determination of probable cause described Tamas's extensive recent efforts to recruit an assassin to murder the wife of a man she wanted to marry, which included her meeting with an undercover special agent posing as an available killer, providing him with

information about the target's daily schedule, and negotiating an agreeable fee arrangement. CP 3-5.

On October 12, 2001, Tamas pleaded guilty to an amended charge of attempted second-degree assault, with a firearm enhancement. CP 9-15. At her sentencing hearing on November 5, 2001, Tamas was ordered by King County Superior Court Judge Douglas McBroom to serve a total of 27 months of confinement to be followed by 18 to 36 months of community custody. CP 24-28.

On November 2, 2011, Tamas filed motions in King County Superior Court for a certificate of discharge and to vacate the record of her conviction. CP 34-47. The State supported Tamas's motion for a certificate of discharge, but opposed her effort to vacate her conviction. CP 59-61.

Following a hearing on November 9, 2011, King County Superior Court Judge Hollis Hill granted the requested discharge. CP 55. However, although the court found Tamas statutorily eligible for vacation, it denied, as a matter within its discretion, Tamas's motion for vacation of the record of her conviction with prejudice. RP 13-15; CP 65-66. This appeal follows.

C. **ARGUMENT**

1. **THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING TAMAS'S MOTION TO VACATE HER CONVICTION**

Tamas appeals on several grounds the denial of her motion to vacate her 2001 conviction for attempted assault in the second degree. She asserts that the superior court erred by concluding that her crime of conviction was a "serious" offense under RCW 9.94A.030, that the legislature's inclusion of attempted second-degree assault as a "most serious offense" under RCW 9.94A.030(28) renders the entire statute in irredeemable conflict, and that the superior court abused its discretion by declining to grant her motion. See Brief of Appellant at 8, 13, 17.

Examination of the record demonstrates that this Court need not consider the first two arguments that Tamas raises. Neither the lower court nor the State has ever disputed Tamas's eligibility, under RCW 9.94A.640, for vacation of her conviction, recognizing that her crime of conviction does not necessarily bar her from relief. See CP 59-60. And the superior court did not otherwise base its decision on a parsing of the language within the Sentencing Reform Act's definitional statute, RCW 9.94A.030.

Rather, as the superior court explained, it denied Tamas's motion in an exercise of discretion granted to it by RCW

9.94A.640(1):

THE COURT: ...On the assault 2 charge, I will provide a certificate of discharge nunc pro tunc to the date that – in 2005 when evidently that – the parties seem to agree that should have been done.

I am not going to vacate the conviction in that case. I'm exercising my discretion based on the seriousness of that case.

And, Ms. Johnson, I want you to understand that this is no reflection on how you have conducted yourself, your life at the present time. But I find it appropriate not to vacate that particular conviction.

RP 13. Later in the hearing, the court further described its reasoning:

THE COURT: Thank you, counsel, for presenting this matter so well. I did think a lot about it. I thought about it for quite some time after reading everything. I apologize I didn't have the one declaration at the time, but my main – my – the main issue that I addressed internally was the discretion on the Assault 2.

RP 15.

It should be noted that the superior court was correct in holding that the decision to deny Tamas's motion was a matter of discretion. RCW 9.94A.640(1) allows an offender to seek to have the record of her conviction vacated if she meets a number of criteria identified later in the same statute. Although an offender's *eligibility* as a candidate for vacation depends upon her satisfaction of those criteria, this does not mean that a superior court must grant her motion simply because she is eligible:

If the court finds the offender meets the tests prescribed in subsection (2) of this section, the court *may* clear the record of conviction by: (a) Permitting the offender to withdraw the offender's plea of guilty and to enter a plea of not guilty; or (b) if the offender has been convicted after a plea of not guilty, by the court setting aside the verdict of guilty; and (c) by the court dismissing the information or indictment against the offender.

RCW 9.94A.640(1) (emphasis added).¹

The legislature's use of the term "may" when referring to the superior court's *authority* to clear an offender's record, and not merely the means by which the court can do so, is key. It is a

¹ The "tests prescribed in subsection (2) of this section" include whether there are any pending criminal charges against the offender at the time she seeks vacation, whether her crime of conviction was a violent offense under RCW 9.94A.030 or a crime against persons under RCW 43.43.830, and whether the timing of her motion to vacate satisfies certain specific criteria. See RCW 9.94A.640(2).

matter of well-established law that the word “may,” when used in a statute, is generally permissive and operates to confer discretion.

State v. McMillan, 152 Wn. App. 423, 426-27, 217 P.3d 374 (2009).

As the state supreme court noted in 1909:

The question whether the word “may” is to be construed as mandatory or discretionary has been much discussed, but the general rule is that the ordinary meaning of the word is: That there is involved a discretion, and it is to be construed in a mandatory sense only when such construction is necessary to give effect to the clear policy and intention of the Legislature; that, where there is nothing in the connection of the language or in the sense or policy of the provision to require an unusual interpretation, it will be given its ordinary meaning; and that where, by the use in other provisions of the statute of mandatory words, it appears that the Legislature intended to distinguish between these words and “may,” “may” will not be construed as imperative.

State v. Gault, 56 Wash. 140, 143-44, 105 P. 242 (1909) (citations omitted).

Neither Tamas nor common sense provides any reason to construe the term “may” in RCW 9.94A.640(1) as imposing a requirement on a superior court to either automatically grant a motion to vacate an offender’s record of conviction or otherwise

treat such a motion as presumptively justified simply because that offender is statutorily eligible to submit such a motion. Not only has the legislature clearly demonstrated its ability throughout RCW Chap. 9.94A to impose requirements on the courts through its use of the term “shall,”² it has demonstrated that ability within RCW 9.94A.640 itself. See RCW 9.94A.640(3) (providing that if a court vacates a record of conviction, the fact of that conviction “shall not be included in the offender’s criminal history for purposes of determining a sentence in any subsequent conviction, and the offender shall be released from all penalties and disabilities resulting from the offense.”)³

Given, therefore, that the superior court had the authority to choose whether to vacate Tamas’s record of conviction, the sole issue before this Court is whether the court abused its discretion in

² See, e.g., RCW 9.94A.345; RCW 9.94A.505(1), (2)(a); RCW 9.94A.589.

³ The structure of RCW 9.94A.640 mirrors that of other statutes within RCW Chap. 9.94A that give trial court’s discretionary authority rather than imposing mandatory burdens. Compare RCW 9.94A.640 and RCW 9.94A.650 (defining which types of defendants are eligible for first-time offender waiver and then providing that a sentencing court “may” waive imposition of a standard-range sentence) and RCW 9.94A.660 (describing criteria that determine whether a defendant is eligible for a drug offender sentencing alternative (DOSA) and then providing that a judge “may” impose such an alternative). Washington courts have regularly found those similarly-designed statutes as investing trial courts with discretionary power. See, e.g., State v. Boze, 47 Wn. App. 477, 480-81, 735 P.2d 696 (1987) (concerning trial court’s refusal to grant request for first-time offender waiver); State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005) (observing that the decision to give or refuse a DOSA is a decision left to the broad discretion of the trial judge).

denying her motion. When a court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists. State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

The superior court's conclusion that vacation was inappropriate due to the seriousness of the underlying facts of Tamas's offense was entirely reasonable. Tamas pleaded guilty to an attempt to assault her victim with a firearm in order to inflict substantial bodily harm. CP 14-15. The charge to which Tamas pleaded had been reduced pursuant to plea negotiations from a count of solicitation to commit second-degree murder, and the superior court that considered her motion to vacate was evidently aware of the facts of the original charge. RP 15. Those facts, as described in the certification for determination of probable cause that accompanied both the original information and Tamas's statement on plea of guilty, include Tamas's repeated efforts to recruit an assassin to murder the wife of her (purported) romantic partner. CP 3-5, 16-18. Tamas not only sought a killer's assistance, but provided logistical information about the intended target's daily whereabouts and negotiated a payment plan with the undercover agent posing as the assassin. CP 5, 18.

As the superior court explained to Tamas, it did not deny her motion to vacate arbitrarily or due to unjustifiable concerns about her current behavior or lifestyle, but because of the gravity of the crime for which she sought to eliminate all official record.⁴ It is impossible to characterize the trial court's decision as one that lacked any tenable basis.

D. CONCLUSION

The superior court did not abuse its discretion in denying Tamas's motion to vacate the record of her conviction for attempted second-degree assault. Tamas's appeal of that decision should thus be rejected.

⁴ Not only does the vacation of a record of conviction bar the use of the vacated offense in any future sentencings and permanently release the offender from all crime-related penalties, RCW 9.94A.640(3) expressly provides that an offender may state, for all purposes, including employment applications, that she has *never been convicted* of the crime which has been vacated.

DATED this 13th day of June, 2012.

RESPECTFULLY submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Derek T. Conom, the attorney for the appellant, at 20016 Cedar Valley Rd., Suite 201, Lynnwood, WA 98036, containing a copy of the Brief of Respondent, in STATE V. LYDIA TAMAS AKA DIANA SMITH, Cause No. 68033-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

6/14/12
Date