

72704-4

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FILED
COURT OF APPEALS
DIVISION ONE

FEB 12 2015

COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

MICHAEL COSTA, Appellant

Court of Appeals # 72704-4

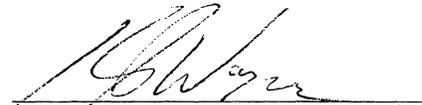
King County Cause No. 13-1-11983-4 KNT

APPELLANT'S AMENDED OPENING BRIEF

RECEIVED
COURT OF APPEALS
DIVISION ONE

FEB 12 2015

ROBERT J. WAYNE, P.S



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II. ASSIGNMENT OF ERROR

The Court erred in failing to enter an order of dismissal that incorporated the terms of RCW 9.95.240, which provides: “who shall thereafter be released from all penalties and disabilities resulting from the offense or crime of which he or she has been convicted,”

ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

- A. RCW 9.95.240 provides for the dismissal of a sentence entered under the Probation Act. The statute provides that if the Court exercises its discretion and dismisses the case, then there is a relief from disability. The Trial Court failed to make such an entry in the order and instead maintained that the Defendant’s relief from disabilities would only be available, if at all, under RCW 9.96.060.
- B. The Trial Court was under a mandatory responsibility to provide for the release from all penalties and disabilities once it granted the dismissal. This should have been reflected in the order of dismissal.

III. STATEMENT OF THE CASE

Michael Costa was charged with Possession of Depictions of a Minor Engaged in Sexually Explicit Conduct in the Second Degree under RCW 9.68A.070. CP at 1. Due to extraordinary circumstances, the parties agreed to a reduction to two gross misdemeanor offenses of Attempted Possession. CP at 6. The plea agreement bound the Defendant

to a joint recommendation which was for a two year deferred sentence on each count to be run consecutively, creating a probationary term of four years. This was to be a bench probation without supervision of the Department of Corrections. On September 12, 2013, Judge White sentenced in accord with the plea agreement, imposing a deferral of imposition sentence pursuant to The Probation Act, RCW 9.95.200, *et seq.* CP at 8. The sentencing order prepared by the State explicitly cited to that provision of the Probation Act. Judge White directed that the Defendant continue in his treatment program and set a review hearing for December 2013. That hearing was held and the Court was sufficiently satisfied that it set the next review nine months later.

By the time of the second review hearing, Judge White had retired and Judge John Ruhl had inherited his case load. At the September review hearing the Court determined that Mr. Costa had completed the requirements set by his treatment professionals and that there was no good reason to continue the probationary period, particularly since it was affecting his ability to maintain employment in the computer field. The Court indicated orally that given the unusual circumstances of the case and the substantial progress in treatment, it was granting the defense motion to

permit Mr. Costa to withdraw his guilty plea and enter a plea of not guilty and to dismiss the case with prejudice. The Court directed the parties to present an order.

The parties could not agree on a form of order. The defense proposed an order that contained the language of RCW 9.95.240(1), namely that Mr. Costa “be released from all penalties and disabilities resulting from the offense.” CP at 32.

The State objected to the inclusion of that language asserting 1) that RCW 9.95.240 was inapplicable because it applied only to pre-SRA felonies and not to misdemeanor offenses; and 2) that the inclusion of such language was a request for vacation of the conviction, which would only be available under RCW 9.96.060 three years later.¹ RP at 12.

The trial court accepted the second argument of the State and could not find a way to harmonize the relief under RCW 9.95.240 and RCW 9.96.060. The court entered an order of dismissal with prejudice, but without any language concerning relief from the disabilities resulting from conviction. CP at 51. Mr. Costa appealed to this Court. CP at 53.

¹ In fact, if RCW 9.96.060 was the only means of relief, Mr. Costa would never be eligible under that statute since it excludes crimes which are attempts under RCW 9.68A. See RCW 9.96.060(2)(d).

IV. ARGUMENT

I. The Probation Act, RCW 9.95.200, et al, Applies to Misdemeanors.

A. Standard of Review.

This case involves the construction of several statutes and is strictly a question of law, which is reviewed *de novo*. *Millay v. Cam*, 135 Wn.2d 193, 198, 955 P.2d 791 (1998), *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001).²

B. The Probation Act Provides the Only Authority for Imposition of a Deferred Sentence by a Superior Court.

The Probation act, which is codified at RCW 9.95.200 - .250, is the sole means by which a Superior Court can grant deferral of imposition of sentence and probation for a misdemeanor offense.

There are four grants of probation power to Washington trial courts. **RCW 9.95.210 and RCW 9.95.230 apply to the superior courts, and give them the power to grant probation** for the longer of two years or the statutory maximum sentence for the defendant's crime, as well as the power to modify or revoke probation. RCW 35.20.255 applies to the municipal courts of Washington cities with population over 400,000. Cities with population under 400,000 . . . may secure a municipal department of the district court under chapter 3.46 RCW, or elect to create a municipal

² The same standard of review applies to all of the arguments raised in this appeal.

court under chapter 3.50 RCW. Thus most municipal courts derive their probation powers from either RCW 3.66.067–.069 (DISTRICT COURTS) OR RCW 3.50.320–.340 (MUNICIPAL COURTS—alternate provision); the relevant statutory language is the same in either case.

City of Spokane v. Marquette, 146 Wn.2d 124, 129-30, 43 P.3d 502, 504-05 (2002). Emphasis added.

The State argued below that the Probation Act applied only to felonies. That argument has been rejected by the Supreme Court. *State v. Davis*, 56 Wn.2d 736, 355 P2d 344, 348 (1960). It is true that prior to 1949 the Act applied only to felony offenses. But in 1949 the legislature amended the act and replaced the former language “a felony offense” with the current wording “any crime.” Laws of 1949, chapter 59. The Supreme Court noted “The obvious effect was to make the act applicable to any crime instead of only to felonies.” *Id* at 346-47.

In this case, the application of the Probation Act is not debatable. The Judgment and Sentence Non-Felony (CP at 8) prepared by the State and signed by the Court specifically stated that the sentencing was “pursuant to RCW 9.95.200 and 9.95.210,” which are the statutory codifications of the Probation Act. Perhaps the State is really arguing that

the Probation Act is severable³ and that RCW 9.95.240 should be read out of the Act and deemed inapplicable. If that is the State's argument, it did not provide any authority to the court below. If the State makes such an argument on appeal, Defendant will meet it in the reply brief. Suffice it to say, that legislative acts are to be read as a whole.

The primary goal in statutory interpretation is to ascertain and give effect to the intent of the Legislature.' ” [citation omitted] To discern legislative intent, “the court begins with the statute's plain language and ordinary meaning,” but also looks to the applicable legislative enactment as a whole, harmonizing its provisions by reading them in context with related provisions and the statute as a whole.

Quadrant Corp. v. State Growth Mgmt. Hearings Bd., 154 Wn.2d 224, 238-39, 110 P.3d 1132, 1139-40 (2005).

II. RCW 9.95.240 Provides for the Relief Denied by the Trial Court.

The relief sought by Mr. Costa was to permit him to withdraw his guilty plea, dismiss the case and have the words of the Probation Act dismissal provision included in the order of the dismissal. Those words are important because they tell all who see the order that he has been “released from all penalties and disabilities resulting from the offense.” The State

³The provision presently codified as RCW 9.95.240 was originally enacted as Section 5-e of the Probation Act. See Laws of 1939, Chapter 125 §5-e (copy attached in Appendix).

succeeded in persuading Judge Ruhl that those words were the equivalent of a “vacation” under Washington sentencing law. That is incorrect as a matter of law.

A. RCW 9.95.240 Provides for Two Separate Forms of Relief.

RCW 9.95.240 is the “carrot” at the end of a period of probation. If a defendant meets all the terms of his probation he can seek relief under that statute. If the relief is granted, the Court then permits the defendant to withdraw his or her guilty plea, enter a plea of not guilty,

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 or she has been convicted.

RCW 9.95.240 (1).

Before 2003, RCW 9.95.240 did not contain a separate provision for seeking vacation of the conviction. The Supreme Court in *State v. Breazeale*, 144 Wn.2d 829, 31 P.3d 1155 (2001) held that the pre-2003 amended statute provided the substantial equivalent of vacation.

RCW 9.95.240 was enacted as part of the Probation Act in 1939, long before the 1981 adoption of the Sentencing Reform Act. Once the SRA went into effect, deferred sentences in felony cases became a thing of the past. The Probation Act was not repealed. Rather, it continued to apply

to gross misdemeanors and to pre-SRA felonies. A person who had been granted a deferred sentence before the effective date of the SRA in n 1984 could apply for relief under RCW 9.95.240. The provisions of the SRA that extended a means for seeking vacation of post-SRA cases were unavailable to those sentenced before the effective date of the SRA. Thus, when the Supreme Court considered the state of deferred sentences in *Breazeale* it treated the release from disabilities as the equivalent of vacation.

The legislature reacted to *Breazeale* and amended RCW 9.95.240 to create a subsection 2 that provided an additional step to achieve vacation. The amendatory legislation took pains to equate the steps required for vacation both pre and post SRA. In the new subsection 2 of RCW 9.95.240, the legislature required a trial court to treat the consideration of vacation just as if the application had been made by a post-SRA applicant.

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.

9.95.240(2)(a).

By its terms, this means of vacation is unavailable to a person convicted of a misdemeanor because RCW 9.94A.640(2) and the rest of the SRA are only applicable to felony conviction. The only relief that is provided to a misdemeanant under RCW 9.95.240 is that contained in subsection 1 of the statute. The language Mr. Costa sought to have included in his order of dismissal is contained in subsection 1. As will be seen *infra* the relief from disabilities provided by RCW 9.95.240(1) is not the equivalent of a vacation. Indeed, if the legislature had intended it to be the same then there would have been limited utility in amending the statute after *Breazeale*.

In addition to being inapplicable to misdemeanants, subsection 2 of the statute is not available to anyone until “[a]fter the period of probation has expired.” Mr. Costa’s period of probation was four years and it would not have expired until September 12, 2017. Assuming *arguendo* that he had wanted to apply for relief under subsection 2, he would not have met the passage of time requirement.

What was requested was the relief provided under subsection 1 of RCW 9.95.240:

Every defendant who has fulfilled the conditions of his or her probation **for the entire period** thereof, **or who shall have been discharged from probation prior to the termination of the period thereof**, may at any time prior to the expiration of the maximum period of punishment for the offense for which he or she has been convicted be permitted in the discretion of the court to withdraw his or her plea of guilty and enter a plea of not guilty

Here, Mr. Costa made application for discharge before the entire period of his probation had run and was discharged from probation prior to the termination of the period. In short, he met the timing requirement for relief under subsection 1, but not under subsection 2.

The relief that he sought included having the language of the statute included in his order so that all persons would see that he had, in the words of that law, “[**been**] released from all penalties and disabilities resulting from the offense or crime of which he or she [**had**] been convicted.”

Emphasis added. That relief is provided for in subsection 1 of the statute; a subsection that does not even mention the concept of vacation.

Nevertheless, the State persisted in arguing to the lower court that the above highlighted language was tantamount to being a vacation.

B. Relief from Penalties and Disabilities under RCW 9.95.240 Is Not a Vacation of the Conviction.

The most recent Supreme Court consideration of this statute was in *In re: Carrier*, 173 Wn.2d 791, 272 P.3d 209 (2012). Carrier had been sentenced under the Persistent Offender Accountability Act, the three strikes law. One of the strikes was a pre-SRA 1981 conviction for indecent liberties. Carrier maintained that the prior could not be used because he had received relief from disabilities under RCW 9.95.240. The Court held that the prior could not be counted because the statute as it existed at the time of Carrier's conviction was the sole means of vacating a conviction. That all changed, however, in 2003.

The question was whether "vacation" and "relief from disabilities" were the same thing. The *Carrier* Court made it clear that, at least since the 2003 amendment, they are not. The 2003 amendment separated the act of relief from disabilities from the concept of vacation. In order to obtain vacation the offender would have to make a second application to the court for vacation under subsection 2 of RCW 9.95.240. That subsection then harmonized the circumstances under which vacation would be allowed by referring the defendant to RCW 9.94A.640(2). As noted by the Supreme Court:

The 2003 amendment to former RCW 9.95.240 changes the analysis for defendants with pre SRA felony convictions in two ways. First, it requires defendants who have obtained a dismissal to take the further step of petitioning the court to vacate the conviction, whereas under *Breazeale* and the pre-amendment version of former RCW 9.95.240, a dismissed conviction was considered the same as a vacated conviction.

Second, 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.

173 Wn.2d at 807-08. It is apparent that since 2003, dismissal and relief from disabilities under RCW 9.95.240 on the one hand does not provide the same relief as does an order expressly granting vacation of a conviction.

Thus, while former RCW 9.95.240 releases the defendant from all penalties and disabilities associated with the conviction, it does not erase the fact of the conviction itself. Nor does it restrict the State's ability to use the conviction in a later prosecution for at least some limited purposes.

Id at 803.

A conviction released from disabilities under RCW 9.95.240 remains criminal history, while a conviction that has been vacated can no longer be used for that purpose. Both felony vacation under RCW 9.94A.640 and misdemeanor vacation under RCW 9.96.060 have the

benchmark effect of preventing the vacated conviction from being used as criminal history in a subsequent criminal proceeding.

Once the court vacates a record of conviction under this section, 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) emphasis added. Thus, vacation embraces the concept of freeing the individual from the future sentence enhancing effects of a prior. Release from disabilities standing on its own does not provide that relief. If Mr. Costa sought vacation he would have to make a second application to the Court; an application that would be denied due to the exemption from eligibility contained in RCW 9.96.060(2)(d). That is not to say that “relief from disabilities” does not confer significant benefits. *See e.g. State v. Smith*, 158 Wn.App. 501, 246 P.3d 812 (2010) and *Matsen v. Kaiser*, 74 Wn.2d 231, 234, 443 P.2d 843 (1968)(eligibility for public office).

C. RCW 9.95.240 and RCW 9.96.060 Can be Harmonized.

The Court below saw an inconsistency in the two statutes and could not see how they could be harmonized. As asserted above, the two statutes have differing legal effect. RCW 9.95.240 permits a person who has been convicted to be relieved of disabilities and regain certain civil rights.

RCW 9.96.060 provides a means to remove the conviction from criminal history. There is an overlap between the statutes in that they both include the language “released from penalties and disabilities.”

RCW 9.96.060 needs to have that language included because it covers circumstances that are beyond the ambit of RCW 9.95.240. A convicted misdemeanant can apply for relief under the former statute even when he or she was denied probation. The statute reaches all convictions for misdemeanors. If the particular misdemeanor offense does not amount to a disqualification for relief under the statute, then it makes no difference whether the applicant had been granted probation.

The provisions of RCW 9.95.240 are limited to those who were sentenced under the Probation Act. The benefit of relief from disabilities provides an incentive to fully comply with the terms of probation. A successful applicant can obtain the relief even if vacation under other statutes is unavailable. In this way, the two statutes can be harmonized and their application achieves policy goals.

It is notable that when RCW 9.96.060 was adopted in 2001 it was titled “Misdemeanors – Vacating Records: An Act Relating to the vacation of records of conviction for misdemeanor and gross misdemeanor offenses,

and adding a new section to chapter 9.96 RCW.” Laws of 2001, Chapter 140 (SH.B. No. 1174). No mention was made either in the title or in the body of the act that it was intended to amend or limit RCW 9.95.240. If the legislature had intended that there be a revision or amendment of an existing statute than it would have had to have included the test of the statute it intended to amend in the newly proposed act in order to comply with Washington Constitution Article II, Section 37.

The first purpose of this provision is to avoid [] confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume.' *Flanders v. Morris*, 88 Wn.2d 183, 189, 558 P.2d 769 (1977) (quoting *State ex rel. Gebhardt v. Superior Ct.*, 15 Wn.2d 673, 685, 131 P.2d 943 (1942)); see *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 54 Wn.2d 545, 342 P.2d 588 (1959). Stated more succinctly, this purpose is to disclose the effect of the new legislation. *State v. Thorne*, 129 Wn.2d 736, 753, 921 P.2d 514 (1996). The result of compliance with art. II, 37 should be that no further search will be required to determine the provisions of such section as amended.' *Flanders*, 88 Wn.2d at 189, 558 P.2d 769 (quoting *Gebhardt*, 15 Wn.2d at 685, 131 P.2d 943).

Amalgamated Transit Union Local 587 v. State, 142 Wn. 2d 183, 245, 246, 11 P.3d 762, 800-01 (2000), as amended (Nov. 27, 2000), opinion corrected, 27 P.3d 608 (Wash. 2001). A second purpose of the

constitutional provision is to make sure that legislators are aware of the proposed act's impact on existing law. *Id.*

III. The Relief From Disabilities is a Mandatory Consequence of the Dismissal Order.

RCW 9.95.240 provides the trial court with discretion as to whether to permit a withdrawal of plea and dismissal of a prosecution. The statutory language is that the application may “be permitted in the discretion of the court.” However, if the court grants the relief the statute provides that the defendant “**shall** thereafter be released from all penalties and disabilities” Emphasis added. While Judge Ruhl had complete discretion as to whether to permit the withdrawal of the plea and the dismissal of the case, once he granted the request the relief from disabilities became mandatory.

It is apparent from the record below that Judge Ruhl's order was intended to provide only the first half of the relief requested. The State fought hard to prevent Mr. Costa from having the benefit of the statute and the court went along with that limitation. Under RCW 9.95.240 Mr. Costa is entitled to have the full benefit under the statute.

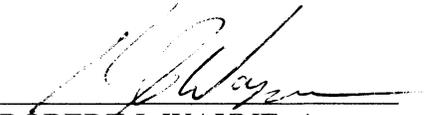
V. CONCLUSION.

Michael Costa entered a plea to a crime under extraordinary circumstances and was placed on probation. He was successful in meeting the conditions placed upon him and was entitled to the benefits of the Probation Act including the relief from all disabilities. An order was presented that contained the statutory language and the State sought and succeeded in blocking it. This Court should reverse with a direction to the lower Court to enter an order that contains the relief from disabilities language of RCW 9.95.240. As noted by our Supreme Court, "As a remedial statute, RCW 9.95.240 must be construed liberally so as to give effect to its purpose." *Breazeale, supra* at 838.

Dated this 12th day of February, 2015.

Respectfully submitted,

ROBERT J. WAYNE, P.S.


ROBERT J. WAYNE, Attorney
For Defendant, Michael Costa
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VI. APPENDIX

RCW 9.95.240

RCW 9.96.060

Laws of 1939, Chapter 125

RCW 9.95.240**Dismissal of information or indictment after probation completed —
Vacation of conviction.**

(1) Every defendant who has fulfilled the conditions of his or her probation for the entire period thereof, or who shall have been discharged from probation prior to the termination of the period thereof, may at any time prior to the expiration of the maximum period of punishment for the offense for which he or she has been convicted be permitted in the discretion of the court to withdraw his or her plea of guilty and enter a plea of not guilty, or if he or she 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 or she has been convicted. The probationer shall be informed of this right in his or her 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.

(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. 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.

(b) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

(3) This section does not apply to chapter 18.130 RCW.

[2008 c 134 § 27; 2003 c 66 § 1; 1957 c 227 § 7. Prior: 1939 c 125 § 1, part; RRS § 10249-5e.]

Notes:

Finding -- Intent -- Severability -- 2008 c 134: See notes following RCW 18.130.020.

Severability -- 1939 c 125: See note following RCW 9.95.200.

Gambling commission -- Denial, suspension, or revocation of license, permit -- Other provisions not applicable: RCW 9.46.075.

Juvenile courts, probation officers: RCW 13.04.040, 13.04.050.

State lottery commission -- Denial, suspension, and revocation of licenses -- Other provisions not applicable: RCW 67.70.090.

RCW 9.96.060

Misdemeanor or gross misdemeanor offenses, persons convicted of prostitution who committed the offense as a result of being a victim of trafficking, promoting prostitution in the first degree, promoting commercial sexual abuse of a minor, or trafficking in persons, or of violating a certain statute or rule regarding the regulation of fishing — Vacating records.

(1) Every person convicted of a misdemeanor or gross misdemeanor offense who has completed all of the terms of the sentence for the misdemeanor or gross misdemeanor offense may apply to the sentencing court for a vacation of the applicant's record of conviction for the offense. If the court finds 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.

(2) An applicant may not have the record of conviction for a misdemeanor or gross misdemeanor offense vacated if any one of the following is present:

(a) There are any criminal charges against the applicant pending in any court of this state or another state, or in any federal court;

(b) The offense was a violent offense as defined in RCW 9.94A.030 or an attempt to commit a violent offense;

(c) The offense was a violation of RCW 46.61.502 (driving while under the influence), 46.61.504 (actual physical control while under the influence), 9.91.020 (operating a railroad, etc. while intoxicated), or the offense is considered a "prior offense" under RCW 46.61.5055 and the applicant has had a subsequent alcohol or drug violation within ten years of the date of arrest for the prior offense;

(d) The offense was any misdemeanor or gross misdemeanor violation, including attempt, of chapter 9.68 RCW (obscenity and pornography), chapter 9.68A RCW (sexual exploitation of children), or chapter 9A.44 RCW (sex offenses);

(e) The applicant was convicted of a misdemeanor or gross misdemeanor offense as defined in RCW 10.99.020, or the court determines after a review of the court file that the offense was committed by one family member or household member against another, or the court, after considering the damage to person or property that resulted in the conviction, any prior convictions for crimes defined in RCW 10.99.020, or for comparable offenses in another state or in federal court, and the totality of the records under review by the court regarding the conviction being considered for vacation, determines that the offense involved domestic violence, and any one of the following factors exist:

(i) The applicant has not provided written notification of the vacation petition to the prosecuting attorney's office that prosecuted the offense for which vacation is sought, or has not provided that notification to the court;

(ii) The applicant has previously had a conviction for domestic violence. For purposes of this subsection, however, if the current application is for more than one conviction that arose out of a single

incident, none of those convictions counts as a previous conviction;

(iii) The applicant has signed an affidavit under penalty of perjury affirming that the applicant has not previously had a conviction for a domestic violence offense, and a criminal history check reveals that the applicant has had such a conviction; or

(iv) Less than five years have elapsed since the person completed the terms of the original conditions of the sentence, including any financial obligations and successful completion of any treatment ordered as a condition of sentencing;

(f) For any offense other than those described in (e) of this subsection, less than three years have passed since the person completed the terms of the sentence, including any financial obligations;

(g) The offender has been convicted of a new crime in this state, another state, or federal court since the date of conviction;

(h) The applicant has ever had the record of another conviction vacated; or

(i) The applicant is currently restrained, or has been restrained within five years prior to the vacation application, by a domestic violence protection order, a no-contact order, an antiharassment order, or a civil restraining order which restrains one party from contacting the other party.

(3) Subject to RCW 9.96.070, every person convicted of prostitution under RCW 9A.88.030 who committed the offense as a result of being a victim of trafficking, RCW 9A.40.100, promoting prostitution in the first degree, RCW 9A.88.070, promoting commercial sexual abuse of a minor, RCW 9.68A.101, or trafficking in persons under the trafficking victims protection act of 2000, 22 U.S.C. Sec. 7101 et seq. may apply to the sentencing court for vacation of the applicant's record of conviction for the prostitution offense. An applicant may not have the record of conviction for prostitution vacated if any one of the following is present:

(a) There are any criminal charges against the applicant pending in any court of this state or another state, or in any federal court, for any crime other than prostitution; or

(b) The offender has been convicted of another crime, except prostitution, in this state, another state, or federal court since the date of conviction.

(4) Every person convicted prior to January 1, 1975, of violating any statute or rule regarding the regulation of fishing activities, including, but not limited to, RCW 75.08.260, 75.12.060, 75.12.070, 75.12.160, 77.16.020, 77.16.030, 77.16.040, 77.16.060, and 77.16.240 who claimed to be exercising a treaty Indian fishing right, may apply to the sentencing court for vacation of the applicant's record of the misdemeanor, gross misdemeanor, or felony conviction for the offense. If the person is deceased, a member of the person's family or an official representative of the tribe of which the person was a member may apply to the court on behalf of the deceased person. Notwithstanding the requirements of RCW 9.94A.640, the court shall vacate the record of conviction if:

(a) The applicant is a member of a tribe that may exercise treaty Indian fishing rights at the location where the offense occurred; and

(b) The state has been enjoined from taking enforcement action of the statute or rule to the extent that it interferes with a treaty Indian fishing right as determined under *United States v. Washington*, 384 F. Supp. 312 (W.D. Wash. 1974), or *Sohappy v. Smith*, 302 F. Supp. 899 (D. Oregon 1969), and any posttrial orders of those courts, or any other state supreme court or federal court decision.

(5) Once the court vacates a record of conviction under this section, 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. For all purposes, including responding to questions on employment or housing applications, a person whose conviction has been vacated under this section may state that he or she has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

(6) All costs incurred by the court and probation services shall be paid by the person making the motion to vacate the record unless a determination is made pursuant to chapter 10.101 RCW that the person making the motion is indigent, at the time the motion is brought.

(7) The clerk of the court in which the vacation order is entered shall immediately transmit the order vacating the conviction to the Washington state patrol identification section and to the local police agency, if any, which holds criminal history information for the person who is the subject of the conviction. The Washington state patrol and any such local police agency shall immediately update their records to reflect the vacation of the conviction, and shall transmit the order vacating the conviction to the federal bureau of investigation. A conviction that has been vacated under this section may not be disseminated or disclosed by the state patrol or local law enforcement agency to any person, except other criminal justice enforcement agencies.

[2014 c 176 § 1; 2014 c 109 § 1. Prior: 2012 c 183 § 5; 2012 c 142 § 2; 2001 c 140 § 1.]

Notes:

Reviser's note: This section was amended by 2014 c 109 § 1 and by 2014 c 176 § 1, each without reference to the other. Both amendments are incorporated in the publication of this section under RCW 1.12.025(2). For rule of construction, see RCW 1.12.025(1).

Effective date -- 2012 c 183: See note following RCW 2.28.175.

CHAPTER 125.

[S. S. B. 254.]

PROBATION.

AN ACT relating to crimes, the granting and regulating of probation, creating probation officers, permitting suspension of imposition and execution of sentences, dismissal of information or indictment in certain cases; amending chapter 114 of the Laws of 1935, being sections 10249-1 to 10249-8, both inclusive, of Remington's Revised Statutes; repealing section 6 of chapter 114 of the Laws of 1935, being section 10249-6 of Remington's Revised Statutes; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

SECTION 1. That chapter 114 of the Laws of 1935, the same being sections 10249-1 to 10249-8, both inclusive, of Remington's Revised Statutes, be amended by adding thereto the following sections immediately after section 5 thereof:

Adds §§ 5a, 5b, 5c, 5d, 5e, 5f, to ch. 114, Laws 1935.

Section 5-a. After conviction by plea or verdict of guilty of a felony offense, the court upon application or its own motion, may summarily grant or deny probation, or at a subsequent time fixed may hear and determine, in the presence of the defendant, the matter of probation of the defendant, and the conditions of such probation, if granted: *Provided, however,* Probation shall not be granted to any person who is not eligible under the law to receive a suspended sentence. The court may, in its discretion, prior to the hearing on the granting of probation refer the matter to the Board of Prison Terms and Paroles or such officers as the Board may designate for investigation and report to the court at a specified time, upon the circumstances surrounding the crime and concerning the defendant, his prior record, and his family surroundings and environment. In case there are no regularly employed parole officers working under the supervision of the Board of Prison Terms and Paroles in the

Court may grant or deny probation.

county or counties wherein the defendant is convicted by plea or verdict of guilty, the court may, in its discretion, refer the matter to the prosecuting attorney or sheriff of the county for investigation and report.

Court may suspend imposing of sentence.

Section 5-b. The court in granting probation, may suspend the imposing or the execution of the sentence and may direct that such suspension may continue for such period of time, not exceeding the maximum term of sentence, except as hereinafter set forth and upon such terms and conditions as it shall determine.

Imprisonment or fine.

The court in the order granting probation and as a condition thereof, may in its discretion imprison the defendant in the county jail for a period not exceeding one (1) year or may fine defendant any sum not exceeding one thousand dollars (\$1,000) plus the costs of the action, and may in connection with such probation impose both imprisonment in the county jail and fine and court costs. The court may also require the defendant to make full or partial restitution and may require bonds for the faithful observance of any and all conditions imposed in the probation. The court shall order the probationer to report to the Board of Prison Terms and Paroles or such officer as the Board may designate and as a condition of said probation to follow implicitly the instructions of the Board of Prison Terms and Paroles. The Board of Prison Terms and Paroles will promulgate rules and regulations for the conduct of such person during the term of his probation.

Restitution.

Probation revoked for violation of terms.

Section 5-c. Whenever the state parole officer or other officer under whose supervision the probationer has been placed shall have reason to believe such probationer is violating the terms of his probation, or engaging in criminal practices, or is abandoned to improper associates, or living a vicious

life, he shall cause the probationer to be brought before the court wherein the probation was granted. For this purpose any peace officer or state parole officer may re-arrest any such person without warrant or other process. The court may thereupon in its discretion without notice revoke and terminate such probation. In the event the judgment has been pronounced by the court and the execution thereof suspended, the court may revoke such suspension, whereupon the judgment shall be in full force and effect, and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory as the case may be. If the judgment has not been pronounced, the court shall pronounce judgment after such revocation of probation and the defendant shall be delivered to the sheriff to be transported to the penitentiary or reformatory, in accordance with the sentence imposed.

Section 5-d. The court shall have authority at any time during the course of probation to (1) revoke, modify, or change its order of suspension of imposition or execution of sentence; (2) it may at any time, when the ends of justice will be subserved thereby, and when the reformation of the probationer shall warrant it, terminate the period of probation, and discharge the person so held.

Authority of court.

Section 5-e. 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, 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

Release from penalties and disabilities.

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.

State parole and probation officers.

Section 5-f. In order to carry out the provisions of this act the state parole officers working under the supervision of the Board of Prison Terms and Paroles shall be known as state parole and probation officers.

Repeals § 6, ch. 114, Laws 1935.

SEC. 2. That section 6 of chapter 114 of the Laws of 1935, the same being section 10249-6 of Remington's Revised Statutes, be and the same is hereby repealed.

Partial invalidity.

SEC. 3. If any section or provision of this act shall be adjudged to be invalid or unconstitutional, such adjudication shall not affect the validity of this act as a whole, or of any section, provision or part thereof not adjudged invalid or unconstitutional.

Effective date.

SEC. 4. This act is necessary for the immediate support of the state government and its existing public institutions and shall take effect April 1, 1939.

Passed the Senate February 21, 1939.

Passed the House March 5, 1939.

Approved by the Governor March 15, 1939.

COURT OF APPEALS DIVISION ONE
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

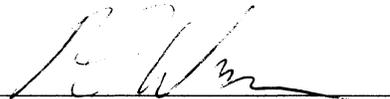
MICHAEL COSTA, Appellant

Court of Appeals # 72704-4

King County Cause No. 13-1-11983-4 KNT

CERTIFICATE OF SERVICE OF AMENDED OPENING BRIEF

ROBERT J. WAYNE, P.S



Robert J. Wayne, WSBA # 6131
Attorney for Appellant
Michael Costa

2013 DEC 12 11:38 AM
COURT OF APPEALS
DIVISION ONE
STATE OF WASHINGTON

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that on this 12th day of February, 2015 he caused a copy of Appellant's Opening Brief to be served upon the office of the King County Prosecuting Attorney, 516 Third Avenue, #554, Seattle, WA 98104 and to be sent by email to defendant Michael Costa.

Dated this 12th day of February, 2015 at Seattle, WA.

ROBERT J. WAYNE, P.S.

A handwritten signature in black ink, appearing to read 'R. Wayne', written over a horizontal line.

ROBERT J. WAYNE, Attorney
For Defendant, Michael Costa
WSBA # 6131