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Court of Appeals
Division I
State of Washington

No. 73491-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

Marvell M. Miller,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When sentencing a “felony firearm offender,” the court must decide whether to require the offender to register. In exercising this discretion, the court considers “all relevant factors, including but not limited to” the defendant’s criminal history, previous not guilty findings by reason of insanity, and propensity for violence. Although it was not part of the plea agreement, the State argued that the trial court should impose the registration requirement upon Mr. Miller, who pleaded guilty to two counts unlawful possession of a firearm and two counts of burglary. Failing to fairly apply the three enumerated statutory factors, which weighed against imposing the requirement, the sentencing court imposed the requirement because police recovered other firearms from Mr. Miller’s car. Because the trial court abused its discretion in imposing the registration requirement, the State breached its plea agreement, and the “all relevant factors” language is impermissibly vague in violation of due process, this Court should reverse.

B. ASSIGNMENTS OF ERROR

1. The trial court abused its discretion in requiring Mr. Miller to register as a firearm offender.

2. In violation of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and article one, section three

of the Washington Constitution, the State breached the plea agreement by advocating that the court should require Mr. Miller to register as a firearm offender.

3. The firearm offender registration statute, RCW 9.41.330, is unconstitutionally vague in violation of due process, as guaranteed by the Fourteenth Amendment to the United States Constitution and article one, section three of the Washington Constitution.

C. ISSUES

1. When making a discretionary decision guided by mandatory statutory factors, the failure to fairly consider these factors constitutes an abuse of discretion. In deciding whether to require Mr. Miller to register as a firearm offender, the court did not consider all of the factors on the record. The factors also weighed against imposing the registration requirement: Mr. Miller's criminal history was brief, he had no previous not guilty verdicts by reason of insanity, and there was no indication that he had a propensity for violence. Given the court's failure to fairly consider all the mandatory factors, did the court abuse its discretion in requiring Mr. Miller to register as a firearm offender?

2. The State must abide by a plea agreement and may not undercut it at sentencing. Concerning whether Mr. Miller should be required to register as a firearm offender, the plea agreement only stated that the court

could impose the requirement. In other words, the State would remain neutral on the issue. At sentencing, without being solicited by the court, the prosecutor identified the statutory factors and directed the court to facts purporting to establish that Mr. Miller had a propensity for violence. Did the State breach the plea agreement by advocating that the court require Mr. Miller to register as a firearm offender when this was not part of its sentencing recommendation?

3. Constitutional due process prohibits vague criminal sentencing laws. A law is impermissibly vague if it fails to give fair notice or invites arbitrary application. In deciding whether to require a firearm offender to register, the statute directs the court to consider “all relevant factors including, but not limited to” three enumerated factors. The term “relevant factors” is undefined. In requiring Mr. Miller to register, the court based its decision not on the enumerated factors, but on the fact that multiple firearms were recovered from Mr. Miller’s car. As applied in this case, is the statute impermissibly vague when it invites sentencing courts to impose the registration requirement on unspecified “relevant factors?”

D. STATEMENT OF THE CASE

Based on actions he took on January 6, 2015, Marvell Miller accepted responsibility and pleaded guilty to two counts of residential burglary and two counts of unlawful possession of a firearm. CP 25;

4/13/15RP 15. These were Mr. Miller's first felony convictions as an adult. CP 47. Mr. Miller had prior juvenile dispositions for second degree burglary and third degree assault, for which he was sentenced in 2011. CP 47. As Mr. Miller's counsel noted later at sentencing, Mr. Miller's life had been rough of late because his only parent had passed away the previous summer, resulting in Mr. Miller losing his home and leaving the young man to fend for himself:

Mr. Miller has not had an easy go of things as of late. He lost his mother in August unexpectedly. She died in her sleep and Mr. Miller has struggled to find residence. They lost their home as a result because his mother passed away and she was obviously the one helping to support him and his siblings. His siblings had a place to go because they had a father who was around and took them in and Mr. Miller does not. His father was absent from his life. So it has not been easy for him losing his only parent that was in his life and then to fend for himself at the age of 21. It was a bit of a rude awakening.

RP 8.

Under the plea agreement, the parties agreed that Mr. Miller should serve a total of 36 months in confinement, the lowest end of the standard range. CP 14, 17. The plea agreement correctly noted that the two counts for unlawful possession of a firearm were "felony firearm offenses." CP 18; RCW 9.41.010(8). Consequently, this meant that the sentencing court could impose a requirement that Mr. Miller register as a "felony firearm offender" upon his release. CP 18; RCW 9.41.333. In his guilty plea, Mr.

Miller admitted that he had other firearms in his car at the time of the offenses. CP 25. In addition to the firearm seized from Mr. Miller's person, police later recovered five firearms from his vehicle. CP 25, 30-32.

At sentencing, the State noted that "the firearm offender registration is not part of the plea agreement," but that the court was required to consider whether to impose it. 5/1/15RP 4-5. The State then, however, pointed to factors that it argued would support imposing the requirement. 5/1/15RP 5. The State indicated that because Mr. Miller had admitted to carrying a firearm during the two burglaries to protect himself, he therefore had a "propensity for violence," which was one of the factors for the court to consider. 5/1/15RP 5; RCW 9.41.330(2)(c).

Mr. Miller noted that he was not told by the State that it was going to be asking for the registration requirement. 5/1/15RP 9. He argued that his criminal history was not lengthy, that these were his first firearm offenses, that he had not used the firearms, that he had not resisted detainment by police, and had been cooperative. 5/1/15RP 10. Mr. Miller personally apologized to the victims, including for taking items from the homes:

I would like to apologize to the people I've hurt, the people that I did the crimes to and I know I could do better

and I should have done better and I know take [sic]
(inaudible) her kids and I apologize.

5/1/15RP 10-11.

The court accepted the agreed recommendation and sentenced Mr. Miller to 36 months of total confinement, the lower end of the standard range. 5/1/15RP 11. The court, however, imposed the registration requirement, reasoning that it was concerned about the number of firearms recovered from Mr. Miller's vehicle after his arrest. 5/11/15RP 11-12; CP 25, 31-32.

E. ARGUMENT

1. Failing to fairly consider all of the required factors and relying on an unenumerated factor that was irrelevant, the court abused its discretion in requiring Mr. Miller to register as a "felony firearm offender."

a. Background of the law.

The felony firearm registration scheme was enacted into law in 2013. Laws of 2013, ch. 183 (S.H.B. 1612). It gives a sentencing court discretion to require a defendant to register as a "felony firearm offender" when the defendant is convicted of a "felony firearm offense." RCW 9.41.330, .333. "Felony firearm offender" is defined to mean "a person who has previously been convicted or found not guilty by reason of insanity in this state of any felony firearm offense." RCW 9.41.010(7). A "felony firearm offense" consists of any felony offense under chapter 9.41

RCW (which includes unlawful possession of a firearm), drive-by shooting, theft of a firearm, possessing a stolen firearm, and any felony offense where the defendant is armed with a firearm in the commission of the offense. RCW 9.41.010(8)(a)-(e).

Upon release or after being sentenced, whichever is later, a person required to register as a firearm offender must personally register with the county sheriff for the county of the person's residence in not less than 48 hours. RCW 9.41.333(1), (5). The person is required to give information when registering, may be required to provide documentation to verify the information, and may be photographed or fingerprinted. RCW 9.41.333(2)-(4). Offenders must update their registration when moving. RCW 9.41.333(7). When moving to another county, the offender must personally register with the sheriff's office of that county. RCW 9.41.333(7). The duty to register continues for four years. RCW 9.41.333(8). A person who knowingly fails to comply with any of the registration requirements is guilty of the crime failure to register as a felony firearm offender, a gross misdemeanor. RCW 9.41.335.

Under the Act, the Washington State Patrol is required to maintain a database of registered felony firearm offenders. RCW 43.43.822(2). Once a person's duty to register has expired, the person's name and information is automatically removed from the database. RCW

43.43.822(3). The database is only for law enforcement purposes and is not subject to public disclosure. RCW 43.43.822(4).

The discretionary nature of the firearm offender registration statute makes it distinct from Washington law on registration of sex offenders and kidnapping offenders. That law imposes a registration requirement on all persons “found to have committed or has been convicted of any sex offense or kidnapping offense, or who has been found not guilty by reason of insanity under chapter 10.77 RCW of committing any sex offense or kidnapping offense.” RCW 9A.44.130.

It also makes it distinct from similar “gun” or “deadly weapon” offender registration statutes enacted in other jurisdictions, all of which appear to be mandatory. For example, Connecticut requires registration for “[a]ny person who has been convicted or found not guilty by reason of mental disease or defect of an offense committed with a deadly weapon.”¹ Cities which have imposed mandatory registration schemes upon “gun

¹ Conn. Gen. Stat. Ann. § 54-280a.

offenders” include New York,² Chicago,³ Baltimore,⁴ and the District of Columbia.⁵

Also unlike Washington’s registry, which is restricted to use by law enforcement, some of the registries in other jurisdictions are open to search by the public.⁶

b. The court abused its discretion in requiring Mr. Miller to register as a firearm offender.

Sentencing courts have discretion on whether to require a felony firearm offender to register:

[W]henever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

RCW 9.41.330(1). In exercising this discretion, the court must consider (1) “all relevant factors including but not limited to” (2) the person’s

² New York City Code § 10-603.

³ Chicago City Code § 8-26-020.

⁴ Baltimore City Code, art. 19, §§ 60-1(d)(1), 60-1(f), 60-3(a).

⁵ D.C. Code § 7-2508.04.

⁶ This includes Chicago and Baltimore.

http://gis.chicagopolice.org/CLEARMap_rgo/startPage.htm (last accessed January 5, 2016) <https://data.baltimorecity.gov/Public-Safety/Gun-Offenders/aivj-4x23> (last accessed January 5, 2016).

criminal history, (3) whether the person has been found not guilty by reason of insanity, and (4) the person's propensity for violence:

In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330(2). No reported decisions have interpreted this provision.

Questions of statutory interpretation are reviewed *de novo*. State v. Conover, 183 Wn.2d 706, 355 P.3d 1093, 1096 (2015). The primary purpose is to effectuate the intent of the lawmaker. Id. Intent is determined from the statute's plain language, which considers the text, context of the statute, related provisions, amendments, and the whole statutory scheme. Id.

Discretionary decisions are reviewed for an abuse of discretion. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without

doing so arbitrarily or capriciously.” Id. A trial court abuses its discretion when its ruling is manifestly unreasonable or based on untenable grounds. Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). A ruling based on an erroneous legal interpretation is necessarily an abuse of discretion. Id. A decision that “does not evidence a fair consideration” of the requisite statutory factors also constitutes an abuse of discretion. In re Marriage of Mathews, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

The parties briefly discussed the factors at sentencing. 5/1/15RP 5, 9-10. However, in explaining its decision to impose the registration requirement, the court did not consider all of the factors. Rather, “the reason” the court imposed the requirement was because multiple firearms were recovered from Mr. Miller’s vehicle:

As a second issue is going to be whether or not I require you to register with the county sheriff for the county of your residence when you get out of custody and that’s - - that’s just register that you’re there. I am going to do that and the reason that I’m going to do that is my concern - - I mean your criminal history is one thing. Certainly there’s not any suggestion that you’ve been found guilty by - - not guilty by reason of insanity but I am concerned just with the presence and number of weapons which were recovered. Not only the one on your person and according to the search there was a loaded magazine and the weapon, no rounds in the chamber but still a loaded handgun and then three rifles, a pistol, a shotgun and Sig Sauer. I’m concerned about those.

RP 11-12.

This discussion does not show any consideration of “[e]vidence of the person’s propensity for violence that would likely endanger persons.” RCW 9.41.330(2)(c). The statute’s use of the word “shall,” mandates that the court consider this factor. State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (“we treat the word ‘shall’ as presumptively imperative—we presume it creates a duty rather than confers discretion.”). Thus, because the court did not consider all the mandatory factors, the court abused its discretion in imposing the registration requirement.

The judgement and sentence includes a boilerplate finding stating that the court considered the requisite statutory factors in requiring Mr. Miller to register as a firearm offender. CP 43. However, this is inadequate as our Supreme Court’s recent decision in State v. Blazina indicates. There, the court held that before a sentencing court may impose discretionary legal financial obligations on a defendant, the court must engage in an on the record individualized inquiry into the defendant’s ability to pay.

Practically speaking, this imperative under RCW 10.01.160(3) means that the court must do more than sign a judgment and sentence with boilerplate language stating that it engaged in the required inquiry. The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important

factors, as amici suggest, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

Blazina, 182 Wn.2d at 838. Thus, as in Blazina, the court's signing of a judgment and sentence with a boilerplate finding stating that it engaged in the required inquiry is inadequate.

Additionally, the record does not "evidence a fair consideration" of all the factors. Mathews, 70 Wn. App. at 123. In Mathews, this Court held that the trial court had abused its discretion in awarding maintenance to one spouse. Similar to the statute at issue here, Washington's maintenance statute permits the trial court to order maintenance for either spouse "after considering all relevant factors including but not limited to" six enumerated factors. RCW 26.09.090.⁷ Because the trial court in

⁷ This provision reads:

(1) In a proceeding for dissolution of marriage or domestic partnership, legal separation, declaration of invalidity, or in a proceeding for maintenance following dissolution of the marriage or domestic partnership by a court which lacked personal jurisdiction over the absent spouse or absent domestic partner, the court may grant a maintenance order for either spouse or either domestic partner. The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to misconduct, after considering all relevant factors including but not limited to:

(a) The financial resources of the party seeking maintenance, including separate or community property apportioned to him or her, and his or her ability to meet his or her needs independently, including the extent to which a

Mathews had not fairly considered the statutory factors, it abused its discretion. Mathews, 70 Wn. App. at 123.

Likewise, the court in this case did not fairly consider the statutory factors. As for the first enumerated factor, criminal history, the court noted this factor but did not discuss it. 5/1/15RP 11. This factor plainly did not weigh in favor of imposing a registration requirement because Mr. Miller's criminal history was not lengthy. CP 47. Moreover, it was juvenile criminal history. See State v. S.J.C., 183 Wn.2d 408, 428, 352 P.3d 749 (2015) (noting that recent Supreme Court decisions "have clearly

provision for support of a child living with the party includes a sum for that party;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find employment appropriate to his or her skill, interests, style of life, and other attendant circumstances;

(c) The standard of living established during the marriage or domestic partnership;

(d) The duration of the marriage or domestic partnership;

(e) The age, physical and emotional condition, and financial obligations of the spouse or domestic partner seeking maintenance; and

(f) The ability of the spouse or domestic partner from whom maintenance is sought to meet his or her needs and financial obligations while meeting those of the spouse or domestic partner seeking maintenance.

RCW 26.09.090.

reaffirmed that there are measurable and material differences between juveniles and adults that have constitutional implications.”); Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2464-65, 183 L. Ed. 2d 407 (2012) (children are different from adults).

On the second enumerated factor, the court correctly acknowledged that Mr. Miller had no previous not guilty by reason of insanity findings. Thus, this factor also did not support imposing the registration requirement.

As for the third enumerated factor (which was not referred to by the court in its oral ruling), the record does not show “evidence of [Mr. Miller’s] propensity for violence that would likely endanger persons.” When confronted by police on the street as a suspect, Mr. Miller submitted to detainment without resistance. CP 30. He was cooperative, admitting to the police what he had done and disclosing other pertinent information. CP 31. While Mr. Miller had been armed with a firearm, there was no evidence that he had intended to use it except for self-defense. As for the other firearms, they were found in his car, not on his person. CP 25. And while Mr. Miller was admittedly not supposed have any firearms, his actions did not demonstrate violent or aggressive behavior. Moreover, the possession of multiple firearms does not rationally indicate a propensity for violence. See State v. Rupe, 101 Wn.2d 664, 708, 683 P.2d 571

(1984) (“we take judicial notice of the overwhelming evidence that many nonviolent individuals own and enjoy using a wide variety of guns.”).

Thus, none of the enumerated factors supported the court’s decision.

As for other “relevant factors,” the court did not discuss any. As argued, Mr. Miller’s possession of other firearms did not rationally indicate that he would likely pose a danger in the future. Neither did it indicate that he would reoffend. Thus, the court’s consideration of an irrelevant factor could not support its decision. Even if relevant, this did not excuse the court from its duty to fairly consider the specific enumerated factors.

The trial court did not consider all of the enumerated statutory factors and its consideration was not fair. Accordingly, the court abused its discretion. This Court should reverse and remand for a new hearing on registration requirement. Resentencing should be before a different judge because the judge in this case has already expressed its view on whether Mr. Miller should be required to register. See State v. Sledge, 133 Wn.2d 828, 846 n.9, 947 P.2d 1199 (1997) (remanding before a new judge in light of the trial court’s already-expressed views on the disposition).

2. By advocating that the court require Mr. Miller to register as a firearm offender, the State violated the plea agreement.

a. The State must abide by the plea agreement and may not undercut it by advocating for additional punishment.

When the State enters into a plea agreement, it has a contractual duty of good faith. State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015). This requires that the State “not undercut the terms of the agreement, either explicitly or implicitly, by conduct evidencing intent to circumvent the terms of the plea agreement.” Id. Additionally, “constitutional due process ‘requires a prosecutor to adhere to the terms of the agreement’ by recommending the agreed upon sentence.” Id. (citing Sledge, 133 Wn.2d at 839.). A “defendant can raise the issue of the prosecutor’s breach for the first time on appeal.” State v. Xaviar, 117 Wn. App. 196, 199, 69 P.3d 901 (2003).

b. The State undercut the plea agreement by asking the court to require Mr. Miller to register as a firearm offender when it agreed earlier to remain neutral on the issue.

Here, the plea agreement was silent as to the prosecutor’s position on whether the court should require Mr. Miller to register as a firearm offender. CP 18. It simply noted that the court could impose the requirement. CP 18. Thus, the agreement did not contemplate that the State would advocate for imposition of the requirement at sentencing.

At sentencing, the State initially appeared to take a neutral position, as mandated by the plea agreement. However, the State crossed the line when the prosecutor identified which factors applied and noted facts purporting to establish that Mr. Miller had a propensity for violence:

MS. ADAMS: . . .

Additionally because this is a firearm offense as appropriately defined, the court must consider whether to impose a firearm registration requirement under RCW 9.41.330. This is a fairly new statute so I can forward a copy for Your Honor.

THE COURT: Thank you.

MS. ADAMS: The factors for the court to consider in determining the actual -- the firearm offender registration is not a part of the plea agreement in this case but it is a required -- required by the legislature that the court consider whether or not to impose it.

I would suggest for the court to look at the defendant's criminal history as is required under 2(a) and look at evidence of the defendant's propensity for violence (inaudible) endanger persons under 2(c). With respect to that factor I would ask the court to note in the certification that the defendant acknowledged that he carried the pistol that was found on his body with him during the burglaries to protect himself from possible harms that he may encounter.

5/1/15RP 4-5 (emphasis added). Hence, the prosecutor did more than simply identify the statute and the factors for the court. The prosecutor argued that two of the factors supported imposition of the requirement and identified facts to support its argument. By doing so, the prosecutor

breached the plea agreement and violated Mr. Miller's right to due process of law.

The United States Supreme Court decision in Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L.Ed.2d 427 (1971) supports this conclusion. There, the State promised the defendant in a plea agreement that it would not recommend what sentence for the court to impose. Santobello, 404 U.S. at 259. At sentencing, however, the prosecutor recommended the maximum one-year sentence and supported the recommendation by citing the defendant's criminal record and his possible connection with organized crime. Id. The trial court, though stating it was not influenced by the prosecutor's recommendation, sentenced the defendant to the one-year maximum. Id. at 259-60. Because the prosecutor breached the agreement, the United States Supreme Court reversed. Id. at 262. The court further held that if the defendant sought specific performance of the agreement, resentencing should be before a different judge. Id.

Here, the State promised to make a sentencing recommendation which did not include advocating for imposition of the firearm offender registration requirement. By doing so, the State promised to remain neutral on the issue. This is similar to Santobello where the State promised to be neutral as to what sentence the court would impose. As in

Santobello, the prosecutor did not remain neutral. Like the prosecutor in Santobello, who cited facts to support a harsher sentence, the prosecutor here cited facts that arguably supported imposition of the registration requirement.

Further, the prosecutor's comments were unsolicited. If the court had inquired as to the factors or asked if there was evidence that supported imposing the registration requirement, then the prosecutor's comments might have been appropriate. That they were unsolicited indicates an attempt to undercut the plea agreement. See State v. Williams, 103 Wn. App. 231, 238, 11 P.3d 878 (2000) (though State was not recommending an exceptional sentence, "the prosecutor made unsolicited references to statutory aggravating factors justifying an exceptional sentence and thereby advocated for those factors."); State v. Jerde, 93 Wn. App. 774, 782, 970 P.2d 781 (1999) (without prompting from the court, prosecutors highlighted aggravating factors that supported exceptional sentence, thereby undercutting its recommendation of a mid-range sentence).

The State breached the plea agreement. The firearm offender registration requirement should be reversed. This Court should remand for a new sentencing hearing on the firearm offender registration issue before a different judge. See Sledge, 133 Wn.2d at 846.

3. The statute used to decide which firearm offenders must register, RCW 9.41.330, is unconstitutionally vague in violation due process.

a. To comply with due process, sentencing statutes cannot be vague.

The state and federal constitutions prohibit the deprivation of life, liberty, or property without due process of law. Const. art. I, § 3 (“No person shall be deprived of life, liberty, or property, without due process of law.”); U.S. Const. amend. V (“No person shall be . . . deprived of life, liberty, or property, without due process of law.”). When “a criminal law [is] so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement,” it violates due process. Johnson v. United States, __ U.S. __, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015). The void for vagueness doctrine applies “not only to statutes defining elements of crimes, but also to statutes fixing sentences.” Id. at 2557. The doctrine applies whenever a vague law deprives a person of life, liberty, or property without due process. See State v. Bahl, 164 Wn.2d 739, 753, 193 P.3d 678 (2008) (vagueness doctrine applies to sentencing conditions); Mays v. State, 116 Wn. App. 864, 868-69, 68 P.3d 1114 (2003) (vagueness doctrine applies to civil commitments).

- b. By requiring the sentencing court to examine “all relevant factors” in deciding whether to impose a registration requirement upon a firearm offender, RCW 9.41.330 invites arbitrary application, making it void for vagueness.**

“[T]he most meaningful aspect of the vagueness doctrine is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.” Smith v. Goguen, 415 U.S. 566, 574, 94 S. Ct. 1242, 39 L. Ed. 2d 605 (1974). Absent meaningful standards, enforcement or application of the law is arbitrary. For example, the phrase “contemptuous treatment,” as used in a statute punishing misuse of a flag, was “of such a standardless sweep [that it] allow[ed] policemen, prosecutors, and juries to pursue their personal predilections.” Id. at 575.

As outlined earlier, in deciding whether to exercise discretion and require a firearm offender to register, the sentencing court must consider

all relevant factors including, but not limited to:

- (a) The person’s criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person’s propensity for violence that would likely endanger persons.

RCW 9.41.330(2).

The term “relevant factors” is undefined. Undefined terms are given their ordinary meaning. State v. Jenkins, 100 Wn. App. 85, 90, 995 P.2d 1268 (2000). “Relevant” means “bearing upon or properly applying to the matter at hand: affording evidence tending to prove or disprove the matters at issue or under discussion.” Webster’s Third New International Dictionary, 1917 (1993); see also ER 401 (defining “relevant evidence” as meaning “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”).

In essence, by telling sentencing courts to consider “all relevant factors,” the legislature has said that sentencing courts must consider all factors tending to prove or disapprove whether a firearm offender should be required to register. This is circular and sets no “minimal guidelines.” Goguen, 415 U.S. at 574. The language is of “such a standardless sweep” that it lets judges sentence firearm offenders to the registration requirement based on their own “personal predilections.” Id. at 575.

“Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law.” Id. As stated by the Supreme Court, the concern for minimal guidelines is longstanding:

“It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could

be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.”

Kolender v. Lawson, 461 U.S. 352, 358 n.7, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) (quoting United States v. Reese, 92 U.S. 214, 221, 23 L. Ed. 563 (1875)). Here, through its requirement that courts must consider “all relevant factors,” the legislature has effectively delegated to the courts unfettered discretion to decide which firearm offenders should be required to register. This “inordinate amount of discretion” makes the statute unconstitutional. See State v. Myles, 127 Wn.2d 807, 812, 903 P.2d 979 (1995) (“only if the statute invites an inordinate amount of discretion is it unconstitutional.”).

That the statute has three enumerated factors which are concrete does not save the statute. The statutory language, “all relevant factors including, **but not limited to**,” explicitly untethers it from the enumerated factors. It means that the other “relevant” factors relate to matters outside of the enumerated factors. In other words, regardless of the defendant’s criminal history, previous findings of not guilty by reason of insanity, or propensity for violence, the court may impose the registration requirement on unspecified factors that it deems “relevant.” This is arbitrary. Further, the language “leaves persons of common intelligence guessing at the meaning and application” of the statute. Jenkins, 100 Wn. App. at 91.

As applied to Mr. Miller, the statute is unconstitutional. See City of Spokane v. Douglass, 115 Wn.2d 171, 181, 795 P.2d 693 (1990) (discussing as applied versus facial challenges to statutes). The record shows that the court was not basing its decision on any of the three enumerated factors. Rather, the court stated “the reason” it was requiring Mr. Miller to register was because multiple firearms were recovered from his car. 5/11/15RP 11-12. Hence, the court was relying on the impermissibly vague aspect of the law. But even if Mr. Miller’s challenge was a facial one, the result is the same. As the United States Supreme Court recently recognized, its “*holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision’s grasp.” Johnson, 135 S. Ct. at 2561.

RCW 9.41.330 is unconstitutionally vague in violation of due process. The statute should be declared unconstitutional and the requirement for Mr. Miller to register reversed.

4. Any request that costs be imposed on Mr. Miller for this appeal should be denied because the trial court determined that Mr. Miller did not have the ability to pay discretionary legal financial obligations.

The trial court found that Mr. Miller did not have the present or future ability to pay discretionary legal financial obligations. CP 43.

Accordingly, the court waived courts cost, attorney’s fees, and incarceration costs. CP 43.

If Mr. Miller does not substantially prevail in this appeal, the State may request appellate costs. RAP 14.2. A “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2 (emphasis added). In interpreting this rule, our Supreme Court has held that this rule allows for the appellate court itself to decide whether costs should be allowed:

Once it is determined that the State is the substantially prevailing party, RAP 14.2 affords the appellate court latitude in determining if costs should be allowed; use of the word “will” in the first sentence appears to remove any discretion from the operation of RAP 14.2 with respect to the commissioner or clerk, but that rule allows for the appellate court to direct otherwise in its decision.

State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000) (emphasis added).

This interpretation is consistent with the permissive language used by the statute authorizing the appellate courts to impose costs upon a defendant. RCW 10.73.160(1) (“The court of appeals, supreme court, and superior courts may require an adult offender convicted of an offense to pay appellate costs.”) (emphasis added).

Here, an award of appellate costs becomes part of the judgment and sentence. RCW 10.73.160(3). Because the trial court determined that

Mr. Miller does not have the present or future ability to pay discretionary legal financial obligations, it does not make sense for this Court to add significant legal financial obligations to the judgement and sentence. Thus, exercising its discretion, this Court should direct that no costs will be allowed. RAP 14.2.

F. CONCLUSION

The trial court abused its discretion in requiring Mr. Miller to register as felony firearm offender, the prosecutor breached the plea agreement by advocating for imposition of the registration requirement, and the statute is void for vagueness. For these reasons, the requirement that Mr. Miller register as a firearm offender should be reversed.

DATED this 8th day of January, 2016.

Respectfully submitted,

/s/ Richard W. Lechich
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Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73491-1-I
)	
MARVELL MILLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF JANUARY, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] MARVELL MILLER	(X)	U.S. MAIL
DOC# 382506	()	HAND DELIVERY
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SIGNED IN SEATTLE, WASHINGTON THIS 8TH DAY OF JANUARY, 2016.

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