96778-4

NO.
Court Of Appeals no. 77197-3-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

HAROLD ROBERT MARQUETTE,

Respondent.

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

I. IDENTITY OF PETITIONER

The State of Washington seeks review of the decision designated in part II. The State was plaintiff in the trial court and respondent in the Court of Appeals.

II. COURT OF APPEALS DECISION

The Court of Appeals reversed the trial court and remanded for resentencing in a decision filed December 17, 2019. The decision is published in the Pacific Reporter at 431 P.3d 1040. A citation to Washington Appellate Reports is not yet available. A copy of the decision is attached as an appendix.

III. ISSUE

The defendant spent more than five years in prison for a felony committed in California. Does this period of imprisonment count as time that was spent "in the community" since the defendant's "last date of release from confinement pursuant to a felony conviction"?

IV. STATEMENT OF THE CASE

The defendant (respondent) was found guilty by a jury of possession of a stolen vehicle, committed on January 31, 2017. CP 448, 456. He has 10 prior convictions for class C felonies or equivalent crimes: taking a motor vehicle without permission (four

convictions), forgery (three convictions), second degree theft, attempting to elude a pursuing police vehicle, and third degree assault of a child. CP 32.

Following these prior convictions, the defendant pleaded guilty in California to two counts of committing lewd or lascivious acts with a child under 14 years. CP 46-47, 51. According to a post-sentence report filed with the sentencing court, the six-year-old victim told her mother that the defendant had "licked her down there," meaning her vagina. CP 232. When interviewed by police, the victim said that that the defendant had touched on her vaginal area. CP 246.

On June 20, 2007, the California court sentenced the defendant to a total of 9 years' imprisonment. The sentence granted him credit for 286 actual days in custody. CP 56-57. The plea documents indicated that he could receive up to 15% "custody conduct credits." CP 52. As a result, the soonest he could be released was May, 2014.[1]

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[1] Nine years equals 3288 days (including 3 leap days). A 15% reduction would lower this to 2795 days. Credit for 286 pre-sentencing days left at least 2509 days to serve. Counting 2509 days from the sentencing date yields an earliest possible release date of May 3, 2014.

At sentencing in the present case, the court determined that the California conviction for lewd or lascivious acts is not comparable to a Washington felony. RP 605-06. The defendant had, however, spent less than five years in the community since he was paroled for that crime. The court concluded that this prevented "wash-out" of the defendant's earlier convictions. RP 606-07. The court therefore counted all 10 of the other convictions towards the offender score. RP 607-08; see RCW 9.94A.525(20). This yielded a standard sentencing range of 43-57 months. CP 33. The court sentenced the defendant to 56 months' confinement. CP 35.

The Court of Appeals reversed. Because the California felony was not comparable to a Washington crime, the court determined that it did not interrupt or re-start the "wash-out" period. Consequently, the seven years that the defendant spent in prison in California served to "wash-out" all of the defendant's prior class C felonies.

V. ARGUMENT

THE COURT OF APPEALS' DECISIONS ALLOWS A LARGE GROUP OF OFFENDERS TO OBTAIN "WASH OUT" BY SERVING LENGTHY PRISON SENTENCES IN OTHER STATES.

The case requires interpretation of the "wash-out" provision of the Sentencing Reform Act, RCW 9.94A.525(2)(c):

> [C]lass C prior felony convictions ... shall not be included in the offender score if, since the last date of release from confinement ... pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

The rules of statutory construction are well-established. Interpretation begins with the statute's plain meaning. "Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.... If the plain language is unambiguous, the court must give it effect." If, however, the statute is susceptible to multiple meanings, the court should resort to aids to construction. State v. James-Buhl, 190 Wn.2d 470, 474 ¶ 7, 415 P.3d 234 (2018). These include the rule that statutes should be construed to effect their purpose and avoid unlikely results. State v. Smith, 189 Wn.2d 655, 662 ¶ 12, 405 P.3d 997 (2017). If the indications of legislative intent are insufficient to clarify the ambiguity, the court will interpret the statute in favor of the defendant. State v. Evans, 177 Wn.2d 186, 193 ¶ 11, 298 P.3d 724, 728 (2013).

In the present case, the plain meaning of the statute should control. No ordinary person would say that someone is "in the

community" at the time that he is serving a 9-year prison sentence. That interpretation essentially reads the words "in the community" out of the statute.

Moreover, that interpretation conflicts with the evident purpose of the statute: to disregard old convictions after the defendant has demonstrated rehabilitation. If a defendant spends five years in freedom without committing any crime, that provides evidence of his rehabilitation. The same is not true of a person who spends five years in prison.

This court interpreted the "wash-out" statute in State v. Ervin, 169 Wn.2d 815, 239 P.3d 354 (2010). The court said that the statute was open to two interpretations. "In the community" could mean "not in confinement" (the State's interpretation) or it could mean "not in confinement pursuant to a felony" (the defendant's interpretation. Id. at 821-22 ¶¶ 10-11. Both interpretations could lead to results that were probably not intended by the legislature. Under the former interpretation, "wash out" could be prevented by a mistaken or wrongful confinement. Under the latter interpretation, "wash out" could result from a lengthy period of confinement for misdemeanors. Id. at 824 ¶¶ 15-16.

> Though both parties' interpretations could lead to unlikely results, the circumstances in which [the defendant's] interpretation will lead to unlikely results (i.e., all or a substantial portion of the offender's wash-out period is spent in jail on a misdemeanor) are far less frequent than are the circumstances in which the State's interpretation will lead to unlikely results (i.e., a person spends a small amount of time in jail during the washout period).

The court therefore held the defendant's interpretation was preferable. Id. ¶ 16.

In the present case, the defendant *was* confined in California pursuant to a felony conviction. The Court of Appeals, however, extended the rule of Ervin even further. It held that the felony conviction must also be comparable to a Washington crime. This rule is not necessary to avoid the "unlikely" result of the State's interpretation in Ervin: confinement pursuant to a valid out-of-state conviction is neither mistaken nor wrongful. It does, however, lead directly to the unlikely result of the opposing interpretation: a lengthy period of time spent in prison *does* lead to "wash-out."

Nor is there anything unusual or infrequent about this result. The laws of many states differ in small ways from those of Washington. Often, those small differences result in those crimes not being comparable. See, e.g., In re Crawford, 150 Wn. App. 787, 209 P.3d 507 (2009) (Kentucky crime of "sexual abuse" does not

require proof that defendant was not married to 11-year-old victim, so it is not comparable to Washington crime of child molestation); State v. Latham, 183 Wn. App. 390, 335 P.3d 960 (2014) (Nevada crime of voluntary manslaughter requires only "general intent," so it is not comparable to Washington crime of manslaughter); State v. Arndt, 179 Wn.2d App. 373, 383-84 ¶¶16-18, 320 P.3d 104 (2014) (Oregon crime of second degree assault covers a broader category of "serious physical injury," so it is not comparable to Washington crime). There are likely to be many cases in which defendants have served lengthy prison sentences for crimes in other states that are not comparable to other crimes.

Moreover, the Court of Appeals interpretation ignores a basic principle: the requirement that every person obey the laws of whichever state he is in. A person in California has no obligation to obey Washington laws (unless his acts affect persons or property in Washington). See RCW 9A.04.030 (setting limits on criminal jurisdiction). That person does, however, have an obligation to obey California laws. His failure to do so demonstrates that he is not a law-abiding person. This is true even if differences in the governing statutes prevent the two crimes from being considered comparable. A person who commits a serious violation of California law has

demonstrated that he has not been rehabilitated, so he should not be entitled him to the benefits of the wash-out provisions of Washington law.

The Court of Appeals decision allows "wash out" for a large category of defendants who have served lengthy prison sentences in other states. This result is contrary to both the statutory language and the legislative intent. The correctness of that decision is an issue of substantial public interest that should be determined by this court. Review should be granted under RAP 13.4(b)(4).

VI. CONCLUSION

This court should grant review, reverse the Court of Appeals, and reinstate the sentence imposed by the trial court.

Respectfully submitted on January 15, 2019.

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

THE STATE OF WASHINGTON, Petitioner. v. HAROLD ROBERT MARQUETTE, Respondent.	No. _____ COURT OF APPEALS NO. 77197-3-I DECLARATION OF DOCUMENT FILING AND E-SERVICE

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PETITION FOR REVIEW

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and to Washington Appellate Project; wapofficemail@washapp.org; oliver@washapp.org;

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

Dated this 10th day of January, 2019, 2018, at the Snohomish County Office.

Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office

431 P.3d 1040
Court of Appeals of Washington, Division 1.

STATE of Washington, Respondent,
v.
Harold Robert MARQUETTE, Appellant.

No. 77197-3-I
|
Argued 10/29/2018
|
FILED: December 17, 2018

Synopsis

Background: Defendant was convicted in the Snohomish Superior Court, David A. Kurtz, J., of possession of a stolen vehicle. Defendant appealed.

The Court of Appeals, Appelwick, C.J., held that defendant's prior conviction in California was not comparable to any Washington crime, and thus did not re-start five year period to "wash out" defendant's prior felony convictions from his offender score.

Reversed and remanded.

Appeal from Snohomish Superior Court, No. 17-1-00376-4, David A. Kurtz, Judge

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PUBLISHED OPINION

Appelwick, C.J.

¶ 1 A jury found Marquette guilty of possession of a stolen vehicle. He appeals the trial court's calculation of his offender score. He argues that a prior out-of-state conviction, which is not factually or legally comparable to a Washington criminal offense, and his subsequent confinement, do not interrupt the washout period under RCW 9.94A.525(2)(c). We reverse and remand to the trial court for resentencing.

FACTS

¶ 2 A jury found Harold Marquette guilty of possession of a stolen vehicle. At sentencing, the State introduced documents showing 10 convictions prior to 2007 for class C felonies or equivalent crimes: 3 convictions for forgery (1988 and 1990), 2 Washington convictions for taking a motor vehicle without permission (1990), 1 conviction for second degree theft (1993), 1 conviction for attempting to elude a pursuing police vehicle (1994), 1 conviction for third degree assault of a child (1996), and 2 California convictions for taking a motor vehicle without permission (2001 and 2004).

¶ 3 The State also introduced evidence that, following these 10 convictions, on May 4, 2007, Marquette pleaded guilty in Shasta County, California to 2 counts of lewd or lascivious acts with a child under 14 years old. The California court sentenced Marquette to 9 years of confinement. It granted him credit for 286 actual days in custody, plus 42 days for "custody conduct credit."

¶ 4 At sentencing in this case, the trial court determined that Marquette's 2007 California offenses of lewd and lascivious conduct could not be included in his Washington offender score. But, the court agreed with the State that the noncomparable California offense had "resulted in conviction and ... significant incarceration," and therefore prevented washout of any of his previous offenses under RCW 9.94A.525(2)(c). The court therefore counted all 10 of the other felony convictions towards the offender score. Since the 4 convictions for taking a motor vehicle counted triple, his offender score was 18. RCW 9.94A.525(20). The court sentenced Marquette to a standard range sentence of 56 months of confinement. Marquette appeals

DISCUSSION

¶ 5 The key issue in this case is whether an out-of-state conviction can prevent washout of a defendant's prior felony convictions under RCW 9.94A.525(2)(c). The issue is a question of statutory interpretation, which is a question of law this court reviews de novo. State v. Ervin, 169 Wash.2d 815, 820, 239 P.3d 354 (2010). When interpreting a statute, the court's objective is to determine the legislature's intent. State v. Jones, 172 Wash.2d 236, 242, 257 P.3d 616 (2011). We give effect to the statute's plain meaning when it can be determined from the statute's text. Id. If the statute is still susceptible to more than one interpretation after we conduct a plain meaning review, then the statute is ambiguous and we rely on statutory construction, legislative history, and relevant case law to determine legislative intent. Id.

¶ 6 RCW 9.94A.525(2)(c) governs when class C felony convictions may be included in a person's offender score. That statute provides, in relevant part,

> [C]lass C prior felony convictions ... shall not be included in the offender score if, since the last date of release from confinement ... pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c). In construing this section, our courts have broken it down into two clauses: a " 'trigger' " clause, which identifies the beginning of the five year period, and a " 'continuity/interruption' " clause, which sets forth the substantive requirements an offender must satisfy during the five year period. [1] Ervin, 169 Wash.2d at 821, 239 P.3d 354 (quoting In re Pers. Restraint of Nichols, 120 Wash. App. 425, 432, 85 P.3d 955 (2004)).

¶ 7 Marquette argues that he must be resentenced, because the trial court improperly calculated his offender score by failing to recognize that his prior felony convictions "washed out" pursuant to RCW 9.94A.525(2)(c). He argues that only an offense that is comparable to a Washington crime can interrupt the washout period for felonies under RCW 9.94A.525(2)(c). And, he asserts that, because his 2007 California conviction is not factually comparable to a Washington crime, the washout period for his earlier convictions ran from his 2007 release from felony confinement, and therefore he must be resentenced based on an offender score of zero.

¶ 8 The State disagrees with Marquette's framing of the case. It does not address the "continuity/interruption" clause argument. Instead it argues the issue involves application of the "trigger" clause of the statute. The State asserts that the trigger date is Marquette's 2015 release from custody in California for the lewd or lascivious offense. It argues that, because Marquette was confined in California for over a year, this satisfies the definition of a felony in RCW 9A.04.040(2).

¶ 9 It is the sole province of our state legislature to define criminal conduct in our state. See McInturf v. Horton, 85 Wash.2d 704, 706, 538 P.2d 499 (1975) ("The power to decide what acts shall be criminal, to define crimes, and to provide what the penalty shall be is legislative."). It defined crimes and classes of crimes:

> (1) An offense defined by this title or by any other statute of this state, for which a sentence of imprisonment is authorized, constitutes a crime. Crimes are classified as felonies, gross misdemeanors, or misdemeanors.
>
> (2) A crime is a felony if it is so designated in this title or by any other statute of this state or if persons convicted thereof may be sentenced to imprisonment for a term in excess of one year.

RCW 9A.04.040. The plain language of this statute does not encompass crimes defined by the law of other states or federal law that are not crimes under Washington law.

¶ 10 By contrast, when the legislature was addressing scoring offenses not committed in Washington for purposes of sentencing, it specifically addressed how to treat out-of-state convictions and federal convictions:

> Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the

> comparable offense definitions and sentences provided by Washington law. If there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute.

RCW 9.94A.525(3). The test for whether out-of-state crimes are also crimes in Washington—comparable crimes—is addressed in State v. Morley, 134 Wash.2d 588, 952 P.2d 167 (1998) and In re Pers. Restraint of Lavery, 154 Wash.2d 249, 111 P.3d 837 (2005). The court uses a two-part test. Lavery, 154 Wash.2d at 255, 111 P.3d 837.

¶ 11 First, the court analyzes legal comparability by comparing the elements of the out-of-state offense to the most comparable Washington offense. Morley, 134 Wash.2d at 605-06, 952 P.2d 167. Here, the parties agreed that Marquette's 2007 offense did not satisfy the legal prong of the test.

¶ 12 Second, if the offenses are not legally comparable, the court analyzes factual comparability. See Lavery, 154 Wash.2d at 255-57, 111 P.3d 837. Offenses are factually comparable when the defendant's conduct would have violated a Washington statute. Morley, 134 Wash.2d at 606, 952 P.2d 167. The court may rely on only facts that were admitted, stipulated, or proved to the fact finder beyond a reasonable doubt. Lavery, 154 Wash. 2d at 258, 111 P.3d 837. The State concedes that Marquette's guilty plea did not include facts that would make the offense comparable to child molestation in Washington. And, at sentencing, the trial court agreed with Marquette that, under Lavery, it could not look beyond the facts acknowledged in the guilty plea. Thus, the second prong of the test was not satisfied either.

¶ 13 The trial court applied that test and properly concluded that Marquette's 2007 lewd and lascivious conviction is not comparable to any Washington crime. But, the court then agreed with the State that the noncomparable California offense had "resulted in conviction and ... significant incarceration," and therefore prevented washout of any of his previous offenses under RCW 9.94A.525(2)(c). This was error.

¶ 14 While the length of imprisonment referenced in RCW 9A.04.040(2) may make a crime a felony as opposed to a misdemeanor, the threshold question is whether the conduct is in fact a crime—a crime recognized under Washington law—not merely conduct that is criminal in nature. RCW 9A.04.040(1); RCW 9.94A.525(3). That determination is properly made under the comparability analysis. Under the comparability analysis, Marquette's crime in California was not a crime—let alone a felony crime—in Washington. Therefore, the State's argument that because Marquette's 2007 California conviction resulted in a sentence for more than a year, the underlying crime is a felony for purposes of the "trigger" clause, fails.

¶ 15 For the same reason, Marquette's argument, that the California offense is not comparable to a Washington crime and does not interrupt the washout period, is correct. The issue is addressed in State v. Crocker, 196 Wash. App. 730, 385 P.3d 197 (2016). In Crocker, the defendant had an Oregon drug conviction from March 2000, and an Oregon offensive littering conviction from September 2009. Id. at 733, 385 P.3d 197. The issue was whether the defendant's 2009 Oregon offensive littering conviction prevented his 2000 drug conviction from washing out under RCW 9.94A.525(2)(c). Id. at 734, 385 P.3d 197. On appeal, this court stated,

> When our legislature enacted the offender score statute, RCW 9.94A.525, it intended to "[treat] defendants with equivalent prior convictions in the same way, regardless of whether their prior convictions were incurred in Washington or elsewhere." Therefore, the legislature's intent that offenders be treated the same way applies equally to the washout provision. When an out-of-state conviction is alleged to interrupt the washout period under RCW 9.94A.525(2)(c), the trial court must determine whether the out-of-state crime or conviction is legally or factually comparable to a Washington offense.

Id. at 736, 385 P.3d 197 (alteration in original) (footnote omitted) (citation omitted) (quoting State v. Weiand, 66 Wash. App. 29, 34, 831 P.2d 749 (1992)). The parties agreed that Crocker's Oregon offensive littering conviction was not legally or factually comparable to a Washington felony or misdemeanor, and the only comparable Washington offense was a civil infraction.

Id. at 736-37, 385 P.3d 197. Therefore, this court held that the out-of-state conviction was not "any crime" that interrupted the washout period. Id. at 737, 385 P.3d 197.

¶ 16 Here, the trial court correctly concluded that the 2007 California conviction was not comparable to a Washington crime, and therefore could not be included in his offender score. Under the same reasoning, that crime is not a comparable Washington crime for purposes of the washout statute—for either the trigger clause or the continuity/interruption clause. It would be incongruous if only "comparable" out-of-state crimes are adequate to commence a washout period by virtue of the commission of a continuity/interruption "crime" (consistent with Crocker and Ervin), but a "noncomparable" out-of-state felony may trigger a washout period by virtue of a release from confinement pursuant to a "felony conviction." As a result, the trial court erred in finding that the substantial incarceration of the noncomparable California conviction precluded washout under RCW 9.94A.525.

¶ 17 Further, in supplemental briefing, Marquette argues that, because of his indigence, the trial court erred under State v. Ramirez, 191 Wash.2d 732, 426 P.3d 714 (2018) in imposing discretionary legal financial fees. On remand, the trial court should reconsider the criminal filing fee and criminal lab fee imposed on Marquette in light of Ramirez.

¶ 18 We reverse and remand to the trial court for resentencing.

WE CONCUR:

Smith, J.

Verellen, J.

All Citations

431 P.3d 1040

Footnotes

1 A conviction for any crime which interrupts the five year period, does not simply pause the running of that period during incarceration, it starts a new five year period running upon return to the community. See Ervin, 169 Wash.2d at 821, 239 P.3d 354 ("Because Ervin was then convicted, this crime implicated the continuity/interruption clause, effectively resetting the five-year clock.").

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