

FILED  
November 9, 2015  
Court of Appeals  
Division I  
State of Washington

No. 72840-7-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JESSE AARON GRIENER-JACOBSEN,

Appellant.

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

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

**The conviction must be reversed because Mr. Griener-Jacobsen was denied his statutory right to be tried by 12 competent jurors**

1. *A felony offender's right to serve on a jury is not automatically restored upon the restoration of the right to vote*

By statute, a person is not qualified to serve on a jury in Washington State if he or she “[h]as been convicted of a felony and has not had his or her civil rights restored.” RCW 2.36.070(5). Under chapter 29A, the elections statute, a felon’s *right to vote* is automatically restored once he or she is no longer under the supervision of the Department of Corrections (DOC). RCW 29A.08.520(1). The State contends that the restoration of the right to vote upon release from DOC supervision satisfies the restoration of “civil rights” requirement in the juror qualification statute. In other words, according to the State, once a felon’s right to vote is restored, he or she is also automatically qualified to serve on a jury. This argument is contrary to the plain language of the controlling statutes and is therefore contrary to legislative intent.

It is well-established that the meaning of a statute must be discerned from the ordinary meaning of the language at issue, the

context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). If the statutory language is susceptible to more than one reasonable interpretation, then this Court may resort to statutory construction, legislative history, and relevant case law for assistance. Christensen, 162 Wn.2d at 372-73 (citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001)). The Court's ultimate objective is to give effect to the Legislature's intent. Christensen, 162 Wn.2d at 372-73 (citing Campbell & Gwinn, 146 Wn.2d at 9).

Although RCW 29A.08.520(1) provides that a felon's right to vote is automatically restored once the person is no longer under the authority of the DOC, another related statute provides that additional procedures must be followed before a felon's other civil rights are restored. RCW 9.94A.637(5) provides that a felon must obtain a "certificate of discharge" from the court in order for him or her to obtain restoration of his or her "civil rights not already restored by RCW 29A.08.520." See also State v. Porter, 188 Wn. App. 735, 738,

356 P.3d 207 (2015) (“A certificate of discharge restores an offender’s civil rights lost as a result of conviction.”). The offender may not obtain a “certificate of discharge” until the DOC notifies the court that “all requirements of the sentence” have been completed. RCW 9.94A.637(1)(a). Once the DOC provides notification to the court, the process of obtaining a certificate of discharge is not automatic. “Upon receiving notification from the DOC, the court still must make a factual determination whether or not an offender has complied with the terms of the sentence.” State v. Donaghe, 172 Wn.2d 253, 264, 256 P.3d 1171 (2011).

By stating in RCW 9.94A.637(5) that an offender must obtain a certificate of discharge before his or her “civil rights not already restored by RCW 29A.08.520” will be restored, the Legislature made plain its intent to treat the right to vote differently from other civil rights that are lost as a result of a felony conviction—including the right to serve on a jury. It is a fundamental principle that “[s]tatutes must be interpreted and construed so that *all* the language used is given effect, with no portion rendered meaningless or superfluous.” Judd v. American Tel. & Tel. Co., 152 Wn.2d 195, 202, 95 P.3d 337 (2004) (internal quotation marks and citations omitted). To read the statute as

the State advises would be to render the statutory phrase “civil rights not already restored by RCW 29A.08.520” in RCW 9.94A.637(5) superfluous. Read correctly, RCW 9.94A.637(5) indicates that the Legislature intended that a felony offender must obtain a certificate of discharge from the court before his or her right to serve on a jury will be restored.

The State suggests that because jury selection is historically tied to voter registration rolls, and jury source lists are based in part on voter registration lists, the Legislature must have intended to provide for automatic restoration of the right to jury service upon restoration of the right to vote. SRB at 6. But regardless of historical practice, the current practice mandated by the Legislature is that jury source lists are to be compiled not only from voter registration lists but also from “list[s] of licensed drivers and identicard holder residing in the county.” RCW 2.36.055. Undoubtedly, not all licensed drivers and identicard holders are registered to vote. This statute indicates the Legislature does not view the right to serve on a jury as coextensive with the right to vote.

In sum, before a felony offender may serve on a jury, he or she must obtain a certificate of discharge from the court, after all of the

requirements of the sentence are completed. RCW 9.94A.637. Here, it is undisputed that Juror 6 never obtained a certificate of discharge from the court. He was therefore unqualified to serve on the jury. RCW 2.36.070(5).

2. *Mr. Griener-Jacobsen did not waive his right to challenge the qualifications of Juror 6*

The State contends Mr. Griener-Jacobsen waived his right to challenge the qualifications of Juror 6. But there is no authority for the State's argument that Mr. Griener-Jacobsen waived his statutory right to be tried by a qualified jury under the circumstances of this case.

As argued in the opening brief, the jury selection process must substantially comply with the controlling statutes, including RCW 2.36.070, which specifies the qualifications that any juror must have. See State v. Tingdale, 117 Wn.2d 595, 600, 817 P.2d 850 (1991). If there is a material departure from the statute, prejudice is presumed. Id.; see also W.E. Roche Fruit Co. v. Northern Pac. Ry Co., 18 Wn.2d 484, 487, 139 P.2d 714 (1943) (“a litigant is entitled to have his case submitted to a jury selected in the manner required by law; . . . if the selection is not made substantially in the manner required by law, an error may be claimed without showing prejudice, which will be presumed”). There should be no doubt that a juror's wholesale failure

to meet any of the qualifications required by RCW 2.36.070 is a “material departure” from the statute.

The statute requires that before a felony offender may serve on a jury, his or her civil rights must be restored. RCW 2.36.070(5). Here, Juror 6 was a felony offender but his civil rights were not restored. His presence on the jury was a “material departure” from the controlling statute. Therefore, prejudice is presumed. Tingdale, 117 Wn.2d at 600.

The State relies on State v. Cleary, 166 Wn. App. 43, 47, 269 P.3d 367 (2012) and State v. Clark, 34 Wash. 485, 491-92, 76 P. 98 (1904) to argue that the statutory right to qualified jurors may be waived. But those cases are distinguishable.

In Cleary, two jurors indicated on a questionnaire that they had been convicted of a felony but the record did not indicate whether they had received a certificate of discharge or whether their civil rights had been restored. Cleary, 166 Wn. App. at 47, 49. Thus, the Court of Appeals could not conclude that the jurors were “actually unqualified.” Id. at 49. Here, by contrast, the record is clear that Juror 6 *was* unqualified because his right to serve on a jury had not been restored. Thus, an actual error occurred and Cleary is not controlling.

Moreover, Cleary relied on the doctrine of “invited error” to hold that any error was waived. Id. at 49. But as argued in the opening brief, the doctrine of “invited error” does not apply in this case because counsel did not contribute to the error. She simply failed to object until after the error was discovered.

Likewise, State v. Clark is also distinguishable because it was unclear in that case whether any error occurred. The jurors were not questioned about their statutory qualifications in that case. Clark, 34 Wash. at 491. Thus, “[i]t d[id] not appear here that any of the jurors were in fact incompetent or disqualified under the statute.” Id. at 492. In contrast, in this case, again, it is undisputed that Juror 6 *was* unqualified to serve and an actual error occurred.

In addition, the waiver analysis in Clark is not controlling because it rests on a statute that is no longer in effect. The Clark opinion, decided in 1904, is more than 100 years old. The opinion cites an outdated statute that provided that an appeal of a jury verdict on the grounds of jury qualifications could only be made on the specific challenge for cause made below. Clark, 34 Wash. at 491-92 (citing Section 5940, Pierce’s Code). In a much later opinion, the Court of Appeals characterized the statute relied upon in Clark as “long-defunct”

and not controlling. See State v. Boiko, 138 Wn. App. 256, 266, 156 P.3d 934 (2007). Thus, this Court may not rely upon Clark to hold that Mr. Griener-Jacobsen waived his challenge to Juror 6’s qualifications in this case.

In short, the record is plain that Mr. Griener-Jacobsen was denied his statutory right to be tried by 12 competent jurors. Once the error was discovered, his attorney promptly objected. The error is presumed prejudicial and waiver analysis does not apply. The error was not “invited” because counsel did not affirmatively contribute to it. Mr. Griener-Jacobsen’s conviction must be reversed.

**B. CONCLUSION**

As argued above and in the opening brief, Mr. Griener-Jacobsen was denied his statutory right to be tried by a panel of 12 competent jurors. His conviction must be reversed and remanded for a new trial.

Respectfully submitted this 9th day of November, 2015.

/s/ Maureen M. Cyr

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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JESSE GRIENER-JACOBSEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10<sup>TH</sup> DAY OF NOVEMBER, 2015, I CAUSED THE ORIGINAL **REPLY 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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