

NO. 35534-5-I

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

STATE OF WASHINGTON,

Appellant,

vs.

DEAN WILLIAM HOGAN,

Appellant.

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APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Wm. Thomas McPhee, Judge
Cause No. 06-1-00803-4

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

The Respondent has no objection to the Appellant's Statement of the Case, except to the extent the Appellant's Statement of the Case attempts and purports to summarize and describe the legal and factual arguments made by respondent's counsel either in the pleadings or in the oral argument at the trial court level. The pleadings in question, and the transcript of the oral argument, are before this court, and speak for themselves without the Appellant State of Washington summarizing or characterizing the contents thereof.

B. ARGUMENT

The plain and unambiguous language of RCW 26.50.110(1) establishes that the Appellant's actions did not constitute a crime.

The Information in this matter alleged four counts, each of which was identical in language except as to the date of the alleged offense. Count I reads as follows:

VIOLETION OF NO CONTACT, PROTECTION, OR RESTRAINING ORDER/DOMESTIC VIOLENCE - THIRD OR SUBSEQUENT VIOLETION OF ANY SIMILAR ORDER - RCW 26.50.110(1), RCW 10.99.020, RCW 10.99.050(2)(B) - CLASS C FELONY.

In that the defendant, DEAN WILLIAM HOGAN, in the State of Washington, on or about January 2, 2006, with knowledge that the Thurston County Superior Court had previously issued a protection order, restraining order, or no contact order, pursuant to Chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW in state law Cause No. 06-1-00009-2, did violate the order while the order was in effect by knowingly violating the restraint provisions

therein by having contact with Lisa Holloway, his girlfriend, and furthermore, the defendant has at least two prior convictions for violating the provisions of a protection order, restraining order, or no contact order issued under 10.99, 26.09, 26.10, 26.26, 26.50, 26.52, or 74.34 RCW, or a valid foreign protection order as defined in RCW 26.52.020.

Each of the alleged offenses charged in Counts I through IV involve an alleged violation of a No Contact Order issued by the Court as a part of a sentence imposed in cause number 06-1-00009-2. The No Contact Order in effect prohibited the Defendant/Appellant from having contact with his wife, Lisa Holloway. Each of the charges in this matter arise from the Defendant/Appellant allegedly having contact with his wife on four occasions when she came to visit him in the Thurston County Jail, where he was serving a sentence in cause number 06-1-00009-2. The statutes recited in the charging portion of each of the four counts are RCW 26.50.110(1), RCW 10.00.020, and RCW 10.99.050(2)(b).

RCW 10.99.050(2)(a) states that a willful violation of a court order issued under that particular section is punishable under RCW 26.50.110. RCW 26.50.110(1), the exact statute which is specified in the charging language, states in part:

Whenever an order is granted under this chapter, chapter 10.99, 26.09, 26.10, 26.26, or 74.34. RCW, or there is a valid foreign protection order as defined in RCW 26.52.020, and the respondent or person to be restrained knows of the order, a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime, for which an arrest is required under RCW 10.31.100(2)(a) or (b), is a gross misdemeanor except as provided in subsections (4) and (5) of this section.

The courts have held, as a corollary to the last antecedent rule, that the presence of a comma before the qualifying phrase is evidence that the qualifier is intended to apply to all antecedents instead of only the immediately preceding one. *In re Smith*, 139 Wn. 2d 199, 204, 986 P. 2d 131, 133 (1999); *In re Sehome Park Care Ctr., Inc.*, 127 Wn. 2d 774, 781, 903 P. 2d 443 (1995). Therefore, the phrase “for which an arrest is required under RCW 10.31.100 (2)(a) or (b)” in RCW 26.50.110(1) applies to all the antecedents that come before it. In other words, it was and is intended to apply to all of the antecedents, to-wit:

...a violation of the restraint provisions, or of a provision excluding the person from a residence, workplace, school, or day care, or of a provision prohibiting a person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or of a provision of a foreign protection order specifically indicating that a violation will be a crime...

Further evidence that the phrase in question was intended to apply to all of the antecedents instead of only the immediately preceding one is from the fact that only RCW 10.31.100(2)(b) applies to foreign protection orders, yet the phrase in question includes reference to RCW 10.31.100(2)(a), which applies specifically to the type of protection/restraining/no contact orders existent in the instant case. To conclude that the phrase in question is intended to apply only to the immediately preceding clause regarding foreign protection orders would render the inclusion and specific mention in the phrase of RCW 10.31.100(2)(a) of no meaning whatsoever. Such a result is totally contrary to the rules of statutory construction so liberally cited in the Appellant’s Brief.

Applying this phrase to all antecedents in this section, it is logical to conclude

that unless an arrest is required under RCW 10.31.100(2)(a) or (b), the actions taken by the restrained person are not a gross misdemeanor (or class C felony) punishable under RCW 26.50.110.

RCW 10.31.100(2)(a) requires arrest when:

An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person.

On its face, and without any ambiguity whatsoever, this statute requires arrest when (1) the person has violated the terms of the order restraining the person from acts or threats of violence or (2) the person has violated the order restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location.

In the instant case, none of those things happened. The Defendant/Appellant was visited by Ms. Holloway in the Thurston County Jail while he was an inmate there. There were no acts or threats of violence. No prohibitions restraining a person from entering or remaining at a location were violated. Nothing occurred which requires arrest under RCW 10.31.100(2)(a) or (b). As such, under RCW 26.50.110, the actions alleged to have been taken by Dean William Hogan (viz. visiting with Ms. Holloway in the Thurston County Jail) are not punishable as gross misdemeanors (or

as Class C felonies due to the existence of prior convictions). He may have violated a court order for which he could be held in contempt or for which conditions of release could be modified, but he did not commit a crime within the clear and unambiguous statutory definition.

**RCW 26.50.110(1), and not RCW 10.99.050, defines the
elements and punishment of the crime of Violation
of a Non Contact Order.**

The State's Brief attempts, time after time, to argue that it is RCW 10.99.050 which defines the elements of the crime of Violation of a Non Contact Order, and that RCW 26.50.110(1) simply "identifies the penalties applicable to that crime depending on certain circumstances..." (Brief of appellant, page 12). That is the gist of the entire argument set forth by the Appellant State of Washington. However, that argument simply ignores the plain and unambiguous wording of the statutes in question.

RCW 10.99.040 and 10.99.050 are what can best be called "enabling" statutes. In other words, they enable or authorize the Court to issue no contact orders, consistent with the general policy of that Chapter as set forth in RCW 10.99.010. These sections authorize the issuance of no contact orders, and they inform the Court what provisions the orders may or must contain, and they tell the court what to do with the No Contact Order once it has been issued.

RCW 10.99.050 (the statute with which this matter is concerned) is clear that one must refer to RCW Chapter 26.50 to determine both the elements for the criminal offense for violating the order **and** the punishment therefore. The required legend, which must be in every such order under RCW 10.99.050(2)(b) states that violation of the order "is a criminal offense under Chapter 26.50 RCW..." If, indeed, as the State

argued, if it is RCW 10.99.050 which defines the crime and sets for the elements of the crime, why insert the words “under Chapter 26.50. RCW”? The answer is clear, i.e., it is RCW 26.50.110 which sets forth the elements of the crime and defines when a violation is a gross misdemeanor or a felony.

The very language of RCW 26.50.110(1) can lend itself to no other valid reading. If, as the State posits, that statute was intended **only** to define punishment, then **why** does the statute contain what are essentially elements of the crime itself? The statute itself is drafted to clearly set forth the elements of the offense of Violation of a Non Contact Order: (1) a validly issued order under one of several statutes which **authorize or enable** the issuance of such orders (RCW 10.99 being among those enumerated); (2) knowledge of the order by the person restrained; and (3) a violation of the provisions of the order, for which an arrest is required under RCW 10.31.100(2)(a) or (b). This language in RCW 26.50.110(1) has nothing whatever to do with mere punishment. Indeed, this language has everything to do with defining when a violation of a provision of a No Contact Order is a crime at all. Under its clear terms, such a violation (i.e., for which an arrest is required under RCW 10.31.100(2)(a) or (b)) is a gross misdemeanor unless it falls within the ambit of RCW 26.50.110(4) (dealing with violations which involve actual assault of a substantial risk of death or serious physical injury) or RCW 26.50.110(5) (dealing with a violation by a person with two or more prior convictions for no contact order violations), in which case the violation is a Class C felony. It is conceded that, by its very terms, RCW 26.50.110(1) deals with punishment. However, it also defines when a violation of a No Contact Order is crime at all. To read the statute otherwise would

render a large portion of it completely superfluous and meaningless, and would ignore the plain and simple language of the statute. Simply put, the State's argument that RCW 10.99.050 defines the elements of the crime is inconsistent with the plain language of the statutes involved.

C. CONCLUSION

The trial court's order granting arrest of judgment should be upheld and affirmed. It did nothing more than follow the clear language of the statutes in question, in holding that RCW 26.50.110(1) requires that a violation of a No Contact Order be one for which an arrest is required under RCW 10.31.100(2)(a) or (b) before it will be considered a criminal offense. The statute is clear and unambiguous in this regard.

DATED: May 18, 2007.



ROBERT M. QUILLIAN,
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WSBA #6836

CERTIFICATE

I certify that on the date set forth below, I placed a copy of the Brief of Respondent, postage prepaid, in the United States mail, addressed to:

Mr. James C. Powers
Deputy Prosecuting Attorney
2000 Lakeridge Dr. SW
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DATED: May 18, 2007.



ROBERT M. QUILLIAN

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