

NO. 35677-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, APPELLANT

v.

ROBERT FAILEY, RESPONDENT

07 AUG -6 PM 2:39
STATE OF WASHINGTON
BY *M* MICHELLE HYER
COURT OF APPEALS

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 06-1-01574-8

OPENING BRIEF OF APPELLANT

GERALD A. HORNE
Prosecuting Attorney

By
MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ASSIGNMENTS OF ERROR</u>	1
1.	The trial court erred in not treating the defendant’s 1974 robbery conviction as a Class A felony and in finding that the conviction washed out.....	1
2.	The State assigns error to the disputed finding of fact number one from the “Findings of Fact and Conclusions of Law Re: Sentencing” which states “That the State has taken inconsistent positions with respect to the defendant’s criminal history.”.....	1
3.	The trial court erred in failing to follow the unambiguous terms of RCW 9.94A.035, which required that the defendant be sentenced as a persistent offender.....	1
B.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	
1.	Did the trial court err when it found that the defendant’s 1974 robbery conviction washed out, failed to classify the 1974 robbery conviction as a Class A felony, and found RCW 9.94A.035 ambiguous?.....	1
2.	Did the trial court err when it found that the State had taken inconsistent positions with respect to the defendant’s criminal history?.....	1
C.	<u>STATEMENT OF THE CASE</u>	2
D.	<u>ARGUMENT</u>	2
1.	THE TRIAL COURT ERRED WHEN IT FOUND THAT THE DEFENDANT’S 1974 ROBBERY CONVICTION WASHED OUT WHEN IT FAILED TO CLASSIFY THE 1974 CONVICTION AS A CLASS A FELONY, AND WHEN IT FOUND THAT RCW 9.94A.035 WAS AMBIGUOUS.....	2

2. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE STATE HAD TAKEN INCONSISTENT POSITIONS WITH RESPECT TO THE DEFENDANT'S CRIMINAL HISTORY.....10

E. CONCLUSION.....15

Table of Authorities

State Cases

<u>In re Nichols</u> , 120 Wn. App. 425, 431, 85 P.3d 955 (2004).....	4, 10
<u>State v. Ammons</u> , 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), <u>cert. denied</u> , 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986).....	4
<u>State v. Cabrera</u> , 73 Wn. App. 165, 168-69, 868 P.2d 179 (1994).....	5
<u>State v. Cruz</u> , 139 Wn.2d 186, 985 P.2d 384 (1999).....	11, 14
<u>State v. Elgin</u> , 118 Wn.2d 551, 555, 825 P.2d 314 (1992).....	4, 10
<u>State v. Ford</u> , 137 Wn.2d 472, 479, 973 P.2d 452 (1999).....	4
<u>State v. Johnson</u> , 51 Wn. App. 836, 838, 759 P.2d 459 (1988).....	5, 9
<u>State v. Skillman</u> , 60 Wn. App. 837, 838, 809 P.2d 756 (1991)	5
<u>State v. Smith</u> , 144 Wn.2d 665, 30 P.3d 1245 (2001)	11, 14
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004).....	11

Statutes

Former RCW 9.75	5
RCW 9.75.010	6
Former RCW 9.95.010	7
Former RCW 9.75.010	5
Laws of 2000, ch. 26, § 1	11
Laws of 2000, ch. 26, § 2	10
RCW 9.94A.035	1, 3, 4, 8, 9, 15

RCW 9.94A.345	10, 14
RCW 9.94A.500(1).....	4
RCW 9.94A.525(2)(a).....	5
RCW 9.94A.525(2)(b).....	5
RCW 9.94A.525(2)(c).....	5
RCW 9.95.010	6, 7
RCW 9A.20.040	7
Title 9A RCW.....	7, 8

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in not treating the defendant's 1974 robbery conviction as a Class A felony and in finding that the conviction washed out.
2. The State assigns error to the disputed finding of fact number one from the "Findings of Fact and Conclusions of Law Re: Sentencing" which states "That the State has taken inconsistent positions with respect to the defendant's criminal history."
3. The trial court erred in failing to follow the unambiguous terms of RCW 9.94A.035, which required that the defendant be sentenced as a persistent offender.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err when it found that the defendant's 1974 robbery conviction washed out, failed to classify the 1974 robbery conviction as a Class A felony, and found RCW 9.94A.035 ambiguous?
2. Did the trial court err when it found that the State had taken inconsistent positions with respect to the defendant's criminal history?

C. STATEMENT OF THE CASE.

On April 10, 2006, ROBERT FRANK FAILEY, hereinafter “defendant,” was charged with robbery in the first degree. CP 1-2. At the time the defendant was originally charged, the State also provided notice to the defendant that a conviction would result in him being classified as a “persistent offender” and his sentence would be life without the possibility of parole. CP 5.

On December 1, 2006, all parties appeared before the court for sentencing. 1RP 2. At that time, the defendant’s criminal history was as follows:

	Crime	Date of Sentence	Sentencing Court (County and State)	Date of Crime	Adult or Juvenile (A or J)	Type of Crime
1	Burglary 2 (WASH)	12/04/73	Pierce Co.	8/22/73	A	NV
2	Robbery	9/19/94	Pierce Co.	8/29/74	A	V
3	Robbery 1	8/26/93	Pierce Co.	6/29/93	A	V
4	Theft 1	2/10/99	Pierce Co.	7/15/98	A	NV
5	UPOF 1	2/10/99	Pierce Co.	7/15/98	A	NV

At sentencing, the State requested that the defendant be sentenced as a persistent offender because of the defendant’s convictions for robbery in 1974 and 1993. 1RP 3-4. The State asserted that the maximum

sentence for the 1974 robbery conviction was 20 years, and it should be classified as a class A felony, which never washes. CP 6-10.

The defendant asserted that the 1974 robbery should be classified as a robbery in the second degree, and that the State may have conceded the issue of classifying the 1974 conviction. CP 11-43. The court agreed not to count the 1974 robbery conviction and sentenced the defendant to a standard range sentence. CP 44-56, 259-262; IRP 24-25. The court found that RCW 9.94A.035 was not applicable because it is “ambiguous, susceptible to more than one interpretation, and therefore subject to interpretation under the rule of lenity.” CP 259-262. The court also found that the State had taken inconsistent positions regarding the interpretation of the defendant’s 1974 robbery, and that the State was estopped from arguing that the conviction should be included. Id. The court declined to sentence the defendant as a persistent offender. Id.

Both parties filed timely notices of appeal. CP 226-240, 241-256. The defendant later voluntarily withdrew his appeal, and the State’s appeal follows.

D. ARGUMENT.

1. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE DEFENDANT'S 1974 ROBBERY CONVICTION WASHED OUT WHEN IT FAILED TO CLASSIFY THE 1974 CONVICTION AS A CLASS A FELONY, AND WHEN IT FOUND THAT RCW 9.94A.035 WAS AMBIGUOUS.

Interpretation of a statute is a question of law that is reviewed de novo. In re Nichols, 120 Wn. App. 425, 431, 85 P.3d 955 (2004). The court's duty when conducting a statutory interpretation is to give effect to the legislature's intent. Id., citing State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992). When a statute is plain and unambiguous, its meaning and legislative intent comes from its language. Id.

The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses. State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). The use of a prior conviction as a basis for sentencing under the SRA is constitutionally permissible if the State proves the existence of the prior conviction by a preponderance of the evidence. State v. Ammons, 105 Wn.2d 175, 186, 713 P.2d 719, 718 P.2d 796 (1986), cert. denied, 479 U.S. 930, 107 S. Ct. 398, 93 L. Ed. 2d 351 (1986). See also, RCW 9.94A.500(1) (criminal history must be proved by a preponderance of the evidence). "A trial court's sentencing authority is limited to that

expressed in the statutes.” State v. Skillman, 60 Wn. App. 837, 838, 809 P.2d 756 (1991). Under the Sentencing Reform Act of 1981 (SRA), a defendant’s criminal history is used to determine the offender score, which is then used to establish the applicable standard sentence range. State v. Johnson, 51 Wn. App. 836, 838, 759 P.2d 459 (1988). The State may satisfy its burden solely with authentic prior Washington judgments and sentences reflecting convictions from other jurisdictions, unless the defendant objects to the use of such documents. State v. Cabrera, 73 Wn. App. 165, 168-69, 868 P.2d 179 (1994).

RCW 9.94A.525(2)(a) requires that Class A felony convictions never wash out of defendant’s offender score. A Class B felony washes out after an offender has spent ten years crime-free from the date of confinement. RCW 9.94A.525(2)(b). Finally, a Class C felony washes out after an offender has been in the community crime-free for five years. RCW 9.94A.525(2)(c). After the crime of robbery was broken into degrees, robbery in the first degree was classified as a Class A felony, and robbery in the second degree was classified as a Class B felony.

Before July 1, 1976, Washington law did not divide the crime of robbery into degrees. Under former RCW 9.75.010 (1974), “every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years.” Former chapter 9.75 RCW did

not define a maximum sentence for robbery; therefore, under RCW 9.95.010, the sentencing court would impose a maximum sentence to be “fixed at not less than twenty years.”

In the present case, the State asserted that the defendant’s 1974 robbery did not wash, and that the defendant should therefore be sentenced as a persistent offender. Defendant committed his robbery on September 19, 1974. CP 259-262. When defendant committed the robbery there was no degree distinction for the crime of robbery—it was not robbery in the first degree or robbery in the second degree, but simply robbery.¹

The maximum punishment for robbery under the applicable statute was life in the penitentiary.

Court to fix maximum sentence. When a person is convicted of any felony, except treason, murder in the first degree, or carnal knowledge of a child under ten years, and a new trial is not granted, the court shall sentence such person to the penitentiary, or, if the law allows and the court sees fit to exercise such discretion, to the reformatory,

¹ The statute in effect at the time was RCW 9.75.010, and defined robbery: Robbery is the unlawful taking of personal property from the person of another, or in his presence, against his will, by means of force or violence or fear of injury, immediate or future, to his person or property, or the person or property of a member of his family, or of anyone in his company at the time of the robbery. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. If used merely as a means of escape, it does not constitute robbery. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. Every person who shall commit robbery shall be punished by imprisonment in the state penitentiary for not less than five years.

and shall fix the maximum term of such person's sentence only.

The maximum term to be fixed by the court shall be the maximum provided by law for the crime of which such person was convicted, if the law provides for a maximum term. If the law does not provide a maximum term for the crime of which such person was convicted the court shall fix such maximum term, which may be for any number of years up to and including life imprisonment but in any case where the maximum term is fixed by the court it shall be fixed at not less than twenty years.

RCW 9.95.010.

Defendant has never contested he was convicted of robbery. CP 11-43. The statute under which defendant was convicted did not specify a maximum term, only establishing a five year minimum term. Former RCW 9.95.010 makes clear that the maximum term for such crimes is life, and if the court sets a maximum term less than life, it cannot set a term for less than 20 years.

When the new criminal code was passed by the laws of 1975, and took effect in July of 1976, the legislature enacted a provision specifying how previously unclassified felonies should be classified. RCW 9A.20.040 states:

Prosecutions related to felonies defined outside Title 9A RCW.

In any prosecution under this title where the grade or degree of a crime is determined by reference to the degree of a felony for which the defendant or another previously had been sought, arrested, charged, convicted, or sentenced,

if such felony is defined by a statute of this state which is not in Title 9A RCW, unless otherwise provided:

(1) If the maximum sentence of imprisonment authorized by law upon conviction of such felony is twenty years or more, such felony shall be treated as a class A felony for purposes of this title;

Therefore, because defendant was convicted of robbery, and his maximum sentence was for life, the robbery conviction should be treated as a Class A felony. This is consistent with RCW 9.94A.035, the portion of the SRA which defines classifications for unclassified crimes.

For a felony defined by a statute of this state that is not in Title 9A RCW, unless otherwise provided:

(1) If the maximum sentence of imprisonment authorized by law upon a first conviction of such felony is twenty years or more, such felony shall be treated as a class A felony for the purposes of this chapter.

The fact that the defendant was convicted of robbery without a specified degree does not result in the wash out of that conviction. When calculating defendant's offender score that conviction must be viewed as a Class A felony. The trial court erred when it found the robbery committed by defendant was not a Class A felony and that it washed out.² As argued above, RCW 9.94A.035 is not ambiguous. By its clear language, the

² While the court did not expressly state in its findings of fact and conclusions of law that the 1974 robbery conviction washed out, the judgment and sentence reflects the court's finding that the convicted washed. See CP 44-56.

defendant's 1974 robbery conviction should have been classified as a Class A felony, and the defendant should have been sentenced as a persistent offender.

The defendant may assert, as he did below, that under the analysis in State v. Johnson, 51 Wn. App. 836, 759 P.2d 459 (1988), the conviction washes out. In Johnson, the court held that a 1964 taking a motor vehicle conviction must be treated as a Class C felony, even though the maximum punishment for taking a motor vehicle in 1964 was 10 years. Id. at 839-841. The court concluded that because the legislature classified taking a motor vehicle in 1975 as a Class C felony, the "present classification of crimes should be used to determine the pre-SRA classification of the crime for offender score and sentencing purposes." Id. at 839. However, when the court decided Johnson, RCW 9.94A.035 had not yet been enacted. In 1996, the legislature enacted RCW 9.94A.035, which is controlling in the case at bar. As argued above, the plain language of RCW 9.94A.035 states that the statute governs over felony statutes that are not contained in the Sentencing Reform Act.

The trial court did not follow RCW 9.94A.035, which would have required the defendant's 1974 robbery conviction to be classified as a Class A felony, and which would have resulted in the defendant being sentenced as a persistent offender. This court should reverse and remand

for the 1974 conviction to be correctly classified as a Class A felony and for the defendant to be sentenced as a persistent offender.

2. THE TRIAL COURT ERRED WHEN IT FOUND THAT THE STATE HAD TAKEN INCONSISTENT POSITIONS WITH RESPECT TO THE DEFENDANT'S CRIMINAL HISTORY.

As argued above, interpretation of a statute is a question of law that is reviewed de novo. In re Nichols, 120 Wn. App. 425, 431, 85 P.3d 955 (2004). The court's duty when conducting a statutory interpretation is to give effect to the legislature's intent. Id., citing State v. Elgin, 118 Wn.2d 551, 555, 825 P.2d 314 (1992).

First, the applicable law by which the trial court was bound is the Sentencing Reform Act. Specifically, RCW 9.94A.345³ which provides:

Any sentence imposed under this chapter shall be determined in accordance with the law in effect when the current offense was committed.

To be clear about its intent, the Legislature also said:

RCW 9.94A.345 is intended to cure any ambiguity that might have led to the Washington supreme court's decision in *State v. Cruz*, Cause No. 67147-8 (October 7, 1999). A decision as to whether a prior conviction shall be included in an individual's offender score should be determined by the law in effect on the day the current offense was committed. RCW 9.94A.345 is also intended to clarify the applicability of statutes creating new sentencing

³ Laws of 2000, ch. 26, § 2.

alternatives or modifying the availability of existing alternatives.

Laws of 2000, ch. 26, § 1.

In State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004), the Supreme Court applied the 2002 legislative amendments to defendants who committed their offenses after the effective date of those amendments: June 13, 2002. 151 Wn.2d at 179. The Varga court concluded that if the offense occurred after the effective date of the amendments, the SRA in effect at the time of the offense determined the offender score of the convicted individual. That court distinguished the 2002 legislative amendments from those in, State v. Smith, 144 Wn.2d 665, 30 P.3d 1245 (2001) and State v. Cruz, 139 Wn.2d 186, 985 P.2d 384 (1999). Id. at 187-93. It held that “the 2002 SRA amendments properly and unambiguously require that sentencing courts include defendants’ previously ‘washed out’ prior convictions when calculating defendants’ offender scores at sentencing for crimes committed on or after the amendments’ effective date.” Id. at 183.

At issue in the present case is whether the State is estopped from now asserting that the defendant’s 1974 robbery conviction is a most serious offense that results in a strike, when in 1999, the State indicated that the defendant’s criminal history was “unclear.” However, there is no

authority to support the trial court's conclusion that the State can be estopped from seeking to count a conviction that had previously not been counted.

In 1993, the defendant was convicted of robbery in the first degree. CP 259 (Exhibit #1). On the judgment and sentence, the sentencing court found that the 1974 robbery conviction washed out. Id. In the present case, the defendant conceded that in 1993, the State did not stipulate that the 1974 robbery conviction washed out. CP 11-43 (Defendant's Memorandum Re: Sentencing p. 17). In fact, based on the documents submitted by the defendant below, it is clear that the issue of whether the 1974 robbery conviction washed was extensively litigated and briefed in 1993. Id.

In 1999, when the defendant was convicted of theft in the first degree and unlawful possession of a firearm in the first degree, the State indicated, in part, that it was amending the charges for the following reasons:

Defendant's prior criminal history makes him a potential candidate for a life sentence (Strike Three as a Persistent Offender). However, the "washout" provisions of the Sentencing Reform Act renders the defendant's criminal history unclear. There is a likelihood that defendant could have been convicted as charged and subject only to a standard range of 57-75 months. It is even possible that the

State would be unable to satisfy the Court that a range above 41-54 months is appropriate.

CP 259.⁴

In 1999, while the State indicated that the defendant's criminal history was "unclear," the court did count the 1974 robbery conviction in the defendant's offender score. Id. The inclusion of the 1974 robbery conviction in the defendant's 1999 offender score is additional evidence to support the State's position that it did not concede that the 1974 conviction washed out.

The trial court in the present case erroneously found that the State had taken inconsistent positions regarding whether the defendant's 1974 robbery conviction washed. The trial court's analysis is incorrect in several ways. First, the State did not concede that the defendant's 1974 conviction washed out in either 1993 or 1999. In 1993, it appears that the State argued that it should not wash out. In 1999, the State merely indicated that the defendant's criminal history was "unclear."

The State was not inconsistent when it asserted that the defendant's criminal history was unclear in 1999, in contrast to the present case. At

⁴ CP 259 is the exhibit record. The exhibit record consists of one exhibit, identified as "DOCUMENTS—SENTENCING, CHARGING, AND MISC." Contained in that exhibit, is the prosecutor's statement regarding amended information from the defendant's 1999 conviction. A copy of that statement is attached for convenience of reference as Appendix "A."

best, the State had no position with respect to the 1974 robbery conviction in 1999. Second, there is no authority whatsoever for the proposition that the State is precluded from taking a different position in different cases. As stated above, the defendant's sentence in the case at bar should have been "determined in accordance with the law in effect when the current offense was committed." See RCW 9.94A.345. The "law in effect when the current offense was committed" dictates that the defendant's 1974 robbery conviction be treated as a Class A felony and a strike offense. The trial court should have classified the defendant's 1974 conviction as a Class A felony, and sentenced him as a persistent offender.

Moreover, in 1999, the state of the law regarding offender scoring was in turmoil. Due to court's rulings in Cruz, supra, Smith, supra, and the legislature's subsequent actions, in 1999 the State may have correctly determined that the defendant's criminal history was unclear. Such turmoil, however, does not exist today. Under the law in effect in the present case, the defendant's prior 1974 robbery should have been classified as a Class A felony, and he should have been sentenced as a persistent offender. The trial court had no authority to find that the State was estopped from challenging the defendant's offender score or classification of the 1974 conviction. The authority that the trial court was required to follow is the Sentencing Reform Act. Under the express terms

of RCW 9.94A.035, the defendant's 1974 robbery conviction must be classified as a Class A felony, which would then result in the defendant being a persistent offender. The mere fact that the State indicated approximately eight years ago that the defendant's criminal history was "unclear" does not alter the trial court's obligation to follow the law at the time of this case. Moreover, as argued above, the 1999 trial court found that the 1974 robbery conviction did not wash out. The trial court should be bound to the law in effect at the time of the current case, which would require reversal and remand to sentence the defendant as a persistent offender. Under the express terms of the sentencing reform act, the defendant's 1974 robbery conviction is a Class A felony, which cannot wash out.

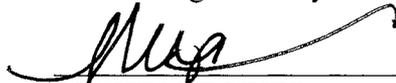
E. CONCLUSION.

For the aforementioned reasons, the State respectfully requests that this court reverse the trial court below, and find that the defendant's 1974 robbery conviction is a Class A felony. The State requests that this court

reverse and remand for the defendant to be sentenced as a persistent offender.

DATED: AUGUST 6, 2007

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHELLE HYER
Deputy Prosecuting Attorney
WSB # 32724

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8/6/07 J. Johnson
Date Signature

APPENDIX "A"

Prosecutor's Statement Regarding Amended Information

FILED
CRIMINAL DIV. 1
IN OPEN COURT
FEB 10 1999
TED RUTT, Clerk
By *[Signature]*
DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

STATE OF WASHINGTON,

Plaintiff,

vs.

ROBERT FRANK FAILEY,

Defendant.

CAUSE NO. 98-1-03135-4

PROSECUTOR'S STATEMENT
REGARDING AMENDED INFORMATION

FEB 10 1999

The State requests the Court to consider accepting a plea to the filing of an Amended Information pursuant to RCW 9.94A.090 for the following reasons: Defendant's prior criminal history makes him a potential candidate for a life sentence (Strike Three as a Persistent Offender). However, the "washout" provisions of the Sentencing Reform Act renders the defendant's criminal history unclear. There is a likelihood that defendant could have been convicted as charged and subject only to a standard range of 57-75 months. It is even possible that the State would be unable to satisfy the Court that a range above 41-54 months is appropriate. The amended information and the stipulation from the defense allows for an agreed prison sentence of recommendation of 120 months. The victim has been notified of the amended Information.

2/9/99
Date

[Signature]
DEPUTY PROSECUTING ATTORNEY