

NO. 37906-6

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

STATE OF WASHINGTON, APPELLANT

v.

SARA MARIE MIHALI, RESPONDENT

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Appeal from the Superior Court of Pierce County  
The Honorable Ronald E. Culpepper

No. 99-1-01818-6

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**OPENING BRIEF**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court err when it granted petitioner's petition to reinstate her firearm rights pursuant to RCW 9.41.040(4)(b)(i) when petitioner had a prior felony that counted as part of her offender score under RCW 9.94A.525 and that felony would not wash out for an additional two years?

B. STATEMENT OF THE CASE.

1. Procedure

On April 27, 1999, the State charged Sara Marie Mihali, hereinafter "defendant," with unlawful manufacture of a controlled substance, methamphetamine and unlawful possession of a controlled substance, methamphetamine. CP 1-2. On October 21, 1999, defendant entered a plea of guilty to one count of conspiracy to manufacture a controlled substance, methamphetamine, a class "B" felony. CP 6-15. Defendant was sentenced on June 27, 2000, to a standard range sentence of one day in jail with 12 months community custody. CP 16-24. On October 14, 2004, a certificate and order of discharge was entered. CP 28.

On May 22, 2008, defendant petitioned the court to restore her right to possess a firearm under RCW 9.41.040. CP 25-37. The parties appeared before the Honorable Ronald E. Culpepper on June 13, 2008, for the firearm restoration hearing. RP 3. The State objected to the court

restoring defendant's firearm rights pursuant to RCW 9.41.040(4)(b)(i) because as a class 'B' felony, defendant's June 27, 2000, conviction for conspiracy to manufacture a controlled substance would not wash out until June 27, 2010. *See* RCW 9.94A.525. The court, however, determined that defendant was eligible to reinstate her firearm rights under RCW 9.41.040(b)(i) because (1) more than five years had elapsed since her conviction for conspiracy to manufacture methamphetamine; and (2) defendant has no other criminal convictions. RP 8; CP 38.

The State filed this timely appeal.

C. ARGUMENT.

1. THE COURT ERRED WHEN IT REINSTATED DEFENDANT'S RIGHT TO POSSESS A FIREARM BEFORE DEFENDANT'S JUNE 27, 2000, CONVICTION FOR CONSPIRACY TO MANUFACTURE METHAMPHETAMINE HAD WASHED OUT.

The possession of firearms has always been subject to government regulation for safety purposes. *State v. Schmidt*, 143 Wn.2d 658, 676, 23 P.3d 462 (2001). As part of its regulation of firearms, the legislature may prohibit convicted felons from possession firearms. *State v. Krzewowski*, 106 Wn. App. 638, 641, 24 P.3d 485 (2001). RCW 9.41.040(1) and (2) criminalize the possession of firearms by convicted felons. Under certain conditions, however, RCW 9.41.040(4) allows some felons to petition to reinstate their privilege to possess firearms.

Whether RCW 9.41.040(4) permits defendant to reinstate her firearm rights is a matter of statutory interpretation. Statutory interpretation is a question of law and the standard of review on appeal is *de novo*. *Nakatani v. State*, 109 Wn. App. 622, 625, 363 P.3d 1116 (2001); *State v. Salavea*, 151 Wn.2d 133, 140, 86 P.3d 125 (2004). The fundamental objective of statutory construction is to ascertain and carry out the legislature's intent. *Rozner v. City of Bellevue*, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If the statute is plain and unambiguous, its meaning must be derived from the statute's words alone. *Id.* A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001). If a statute is subject to more than one reasonable interpretation, the court should construe the statute to effectuate the legislature's intent. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Only where the legislative intent is not clear from the words of a statute may the court "resort to extrinsic aids, such as legislative history." *Biggs v. Vail*, 119 Wn.2d 129, 134, 830 P.2d 350 (1992).

"Courts are not at liberty to speculate on legislative intent when the legislature itself has subsequently placed its own construction on prior enactments." *Anderson v. Seattle*, 78 Wn.2d 201, 203, 471 P.2d 87 (1970)(citing *State ex rel. Oregon R.R. & Navigation Co. v. Clausen*, 63 Wash. 535, 116 P. 7 (1911); *Cowiche Growers, Inc. v. Bates*, 10 Wn.2d

585, 117 P.2d 624 (1941); *Carpenter v. Butler*, 32 Wn.2d 371, 201 P.2d 704 (1949).

When a defendant petitions to restore his firearm rights, the sole issue before the court is whether the petitioner has satisfied the threshold requirements enumerated in RCW 9.41.040(4). *State v. Swanson*, 116 Wn. App. 67, 65 P.3d 343 (2003). Once the enumerated requirements have been met, the petitioned court has no discretion in whether or not to grant petitioner's petition. *Swanson*, 116 Wn. App. 67 at 75 (the only discretion [RCW 9.41.040] contemplates belongs to the petitioning individual, and that discretion concerns his decision to petition the court in the first place.).

RCW 9.41.040(4) states in the relevant part:

...Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted...of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(b)(i) If the conviction...was for a felony offense, after five or more consecutive years in the community without being convicted...or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, **if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525.**

(emphasis added).

When an individual has lost his firearm rights as the result of a felony conviction other than a sex offense or a class A felony, there are two requirements that must be met before a court may grant his petition to restore his firearm rights. First, petitioner must have spent five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor. Second, petitioner can have no prior felony conviction that prohibits the possession of a firearm counted as part of his offender score under RCW 9.94A.525. RCW 9.41.040(4)(b)(i); *see also* 13B Seth A. Fine & Douglas J. Ende, *Washington Practice Criminal Law* §2810, at 199 (2d ed. 1998)(“If the disqualifying offense was a felony, the person must (1) have spent 5 or more consecutive years in the community without being convicted or currently charged with any crime and (2) have no prior felony convictions that prohibit possession of a firearm that would be counted as part of the offender score.”).

RCW 9.41.040(4) expressly disallows the restoration of firearm rights to individuals who have been convicted of sex offenses and/or class A felonies or felonies with a penalty of maximum penalty of at least twenty years. In *State v. Graham*, 116 Wn. App. 185, 189, 64 P.3d 684 (2003), this court held that an individual whose only conviction was for child rape, a sex offense and a class A felony, was ineligible to have his

firearm rights restored. On May 5, 1995, Graham was convicted of second degree child rape. **Graham**, 116 Wn. App. 185, 186. Six years later, Graham petitioned the court to have his firearm rights reinstated. **Graham**, 116 Wn. App. 185, 186. The court granted his petition reasoning the language in RCW 9.41.040 that prohibited individuals who had “previously been convicted of a sex offense” referred to the date of the disabling conviction and not the date of the petition. *Id.* at 186-87. This court reversed, holding that the language “previously been convicted of a sex offense” referred to the time of the petition, not a conviction prior to the one that disabled the petitioner’s firearm rights. *Id.*, at 190. The court stated “any other interpretation would lead to the absurd result of allowing an individual to be convicted of two sex offenses before losing the right to own and possess firearms.” *Id.*, at 190.

Similarly, in **State v. Hunter**, 147 Wn. App. 177, 180, 195 P.3d 566 (2008), Hunter was convicted of child rape and, as a result, lost his right to possess a firearm. After Hunter successfully completed his treatment program, he filed petitions to terminate his requirement to register as a sex offender and to restore his right to possess firearms. **Hunter**, 147 Wn. App. 177, 182. The court granted Hunter’s petition to terminate his registration requirement, but denied his petition to restore his right to possess a firearm because he had numerous traffic infractions

since obtaining his driver's license. *Id.* at 182. The court denied Hunter's motion to reconsider<sup>1</sup>. *Id.*

On appeal, Hunter argued that the phrases "previously been convicted" in RCW 9.41.040(4) and "no prior felony convictions" in RCW 9.41.040(4)(b)(i) refer to convictions entered before the disabling conviction. *Id.* at 184. Division One rejected Hunter's argument noting that the courts have consistently interpreted the phrase "previously been convicted" as a reference to convictions entered before the petition for firearm restoration and not as a reference solely to convictions entered before the disabling conviction. *Id.*, at 185.

In this case, the court's interpretation of RCW 9.41.040(4)(b)(i) ignores the plain language of the statute, is inconsistent with case law interpreting RCW 9.41.040(4), and undermines the legislative intent to stigmatize criminals and deter them from carrying and using deadly weapons. *See* Laws of 1995, ch. 128, §1(1)(c).

The plain language of RCW 9.41.040(4)(b)(i) allows a felon who has not been convicted of a sex offense or a class A felony to petition the court to reinstate his firearm rights if two conditions have been met: (1)

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<sup>1</sup> At the motion for reconsideration hearing, the State acknowledged it had incorrectly argued that Hunter's traffic infractions made him ineligible to reinstate his right to possess a firearm, but that Hunter was statutorily ineligible because his disabling offense was a class A sex offense.

the felon has five or more consecutive years in the community without being convicted or currently charged with a crime; and (2) the felon has no prior felony convictions that prohibit the possession of a firearm counted as part of his offender score. If these two conditions have not been met, then the felon may not petition the court for reinstatement. Here, defendant's 2000 class B felony will not wash until 2010. Therefore, defendant cannot satisfy the second requirement of RCW 9.41.040(4)(b)(i) and is ineligible to reinstate her privilege to possess a firearm.

Defendant may argue that the offender score language in RCW 9.41.040(4)(b)(i) refers to petitioner's offender score on June 27, 2000, the day she was sentenced for conspiracy to manufacture methamphetamine, and not the day she petitioned the court for reinstatement. In fact, at the restoration hearing, the court appeared to believe the relevant date for purposes of calculating defendant's offender score was the date of her disabling conviction. *See* RP 4-8. At the hearing, in response to the State's argument that the offender score language in RCW 9.41.040(4)(b)(i) referred to defendant's offender score on the date defendant petitioned the court to reinstate her firearm rights, the court asked:

But since she's not being sentenced today for anything and there is no offender score today for anything, doesn't that refer to the offender score at the time of the conviction we're talking about?

RP 5. The court then ruled that because defendant "has no conviction or no current charges, I think she does meet the criteria, so I'm going to grant the motion to restore firearms [sic] over the State's objections." RP 8.

While the court did not specifically state in its ruling that it believed the offender score language in RCW 9.41.040(4)(b)(i) referred to her offender score on the date petitioner was sentenced on her disabling offense, the only way the court could have found that the petitioner satisfied the requirements of RCW 9.41.040(4)(b)(i) would be if the offender score was calculated on the date petitioner was sentenced. If the court had used the date petitioner petitioned for reinstatement of her firearm rights, the court could not have found she met the criteria of RCW 9.41.040(4)(b)(i) because her class B felony had not washed and she did have a "prior felony conviction[] that prohibit[ed] the possession of a firearm counted as part of the offender score under RCW 9.94A.525."

The court's interpretation of RCW 9.41.040(4)(b)(i) is contrary to the plain language of the statute, which requires petitioners to have five or more consecutive crime free years in the community *and* no prior felonies

prohibiting the possession of a firearm as part of the petitioner's offender score.

The court's belief that the relevant date for purposes of calculating defendant's offender score under RCW 9.41.040(4)(b)(ii) is the date of defendant's disabling conviction is also inconsistent with *State v. Graham* and *State v. Hunter*. In both of those cases the defendants asserted that the section in RCW 9.41.040(4) that states "has not previously been convicted...of a sex offense" referred to defendant's criminal history at the time he was sentenced for his disabling offense. As noted above, the courts rejected both Graham's and Hunter's arguments holding that the relevant date is the date the defendant petitioned for reinstatement and not the date defendant was convicted of the disabling offense.

Additionally, a statute must be read as a whole. Every provision must be viewed in relation to other provisions and harmonized, if at all possible. *In re Estate of Kerr*, 134 Wn.2d 328, 335, 949 P.2d 810, citing *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 425, 799 P.2d 235 (1990). Thus, RCW 9.41.040(4)(b)(i) and (b)(ii) must be read as a whole and harmonized. RCW 9.41.040(4)(b)(ii) applies to persons whose disabling conviction was a nonfelony:

(b)(ii) If the conviction...was for a nonfelony offense, after three or more consecutive years in the community without being convicted...or currently charged with any felony,

gross misdemeanor, or misdemeanor crimes, **if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525** and the individual has completed all conditions of the sentence.

(emphasis added). Thus, under RCW 9.41.040(4)(b)(ii) before a person whose disabling offense was a nonfelony can petition to reinstate his firearm rights, that individual must: (1) have three consecutive years in the community without a conviction or currently being charged with an offense; (2) have no felonies that prohibiting the possession of a firearm as part of his offender score; and (3) have completed all conditions of sentence. All three requirements must be met after the person's conviction for the disabling offense, but before the individual can petition to reinstate the privilege to possess a firearm. It would be illogical to read these requirements to mean that the individual should have three years of crime free behavior and have completed all conditions of sentence from the disabling offense, but then look back to determine whether or not the individual had any felonies counted as part of his offender score at the time he was convicted of his disabling offense. Because the court must harmonize the language of RCW 9.41.040(4)(b)(i) with the identical language in (b)(ii), it is clear that the offender score language in RCW 9.41.040(4)(b)(i) refers to the date the individual petitions the court to reinstate his firearm rights.

Finally, the in the 1996 Final Bill Report<sup>2</sup>, the legislature expressly stated that before an offender could petition the court for reinstatement of his firearm rights under RCW 9.41.040, the offender would have had to pass the washout period:

In some cases, after five years in the community without a conviction or current charge for any crime, a person whose right to possess a firearm has been lost because of a criminal conviction may petition a court of record for restoration of the right. *However, the person must also have passed the "washout" period under the Sentencing Reform Act before he or she may petition the court.* Effectively, this means that a person with a conviction for a class A felony or any sex offense can never seek restoration of the right. Generally, in the case of a class B felony the washout period is 10 years, and in the case of a class C felony it is five years....

House Bill Report on SHB 2420 (1996) (emphasis added).

In the present case, defendant is not eligible to petition the court to reinstate her right to possess a firearm because she cannot meet the second condition under RCW 9.41.040(b)(i). Here, defendant's sole felony conviction is for conspiracy to manufacture methamphetamine, a class B felony. Defendant was sentenced on her drug charge to one day in jail with credit for time served on June 27, 2000. Defendant's class B felony will not wash until she has spent 10 consecutive years in the community

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<sup>2</sup> The 1996 version of RCW 9.41.040(4)(b) is substantially the same as the current version of that statute.

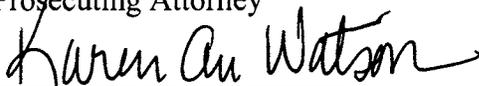
without having committed any crime that subsequently results in a conviction. *See* RCW 9.94A.525(2)(b). Assuming defendant commits no crimes that result in a conviction during the ten year statutory period, the earliest defendant could petition the court to reinstate her right to possess a firearm would be June 27, 2010. Because defendant had a felony that counted as part of her offender score on June 13, 2008, when defendant petitioned the court to reinstate her right to possess a firearm, the court erred when it reinstated defendant's right to possess a firearm. RP 4; CP 38.

D. CONCLUSION.

For the reasons stated above, the State respectfully asks this court to reverse the trial court and remand for entry of an order denying defendant's petition to restore her firearm rights.

DATED: January 2, 2009.

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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.

12/09 Johnson  
Date Signature

CO JIM - 2 PM 2/14  
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DEPUTY  
COUNTY CLERK  
TACOMA, WA