

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 37985-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JACKLYNN YOUNG,

Appellant.

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

The Honorable Anne Hirsch, Judge
Cause No. 05-1-00545-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether 10.97 RCW permits the Superior Court to destroy its own records.

2. Whether Young satisfied the requirements of General Rule (GR) 15 for destroying court records.

B. STATEMENT OF THE CASE.

Although there is nothing in the record to show her charges, Young asserts that she was charged in March of 2005 with one count each of third degree assault and fourth degree assault, domestic violence. [Appellant's brief, page 3] The State dismissed those charges on October 27, 2005, because a material witness had disappeared. [CP 3-4] Third degree assault is a class C felony, RCW 9A.36.031, and the statute of limitations for this particular class C felony is three years. RCW 9A.04.080(10)(h). Young thereafter sought to have the court's records of this case destroyed. [CP 5, 7-15] Following a hearing, and the entry of Findings of Fact and Conclusions of Law, the Superior Court denied her motion. [CP41-2] She now appeals.

C. ARGUMENT.

1. General Rule 15 governs the destruction of court records. However, 10.97 RCW, on which Young bases her argument, does not provide the necessary statutory authority for doing so. Court records are not criminal history record information and thus not covered by 10.97 RCW.

The clerk of the superior court is required to keep records of, among other things, the “daily proceedings of the court,” and “all verdicts, orders, judgments, and decisions thereof, which may, as provided by local court rule, be signed by the judge.” RCW 36.23.030(4).

General Rule (GR) 15 provides the mechanism by which a person can seek to destroy, seal, or redact court records. In pertinent part, the rule provides:

(a) Purpose and Scope of the Rule. This rule sets forth a uniform procedure for the destruction, sealing, and redaction of court records. This rule applies to all court records, regardless of the physical form of the court record, the method of recording the court record, or the method of storage of the court record.

. . .

(c) Sealing or Redacting Court Records.

(1) . . . In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to seal or redact the court records. .

. .

(2) After the hearing, the court may order the court files and records in the proceeding, or any part thereof, to be sealed or redacted if the court makes and enters written findings that the specific sealing or redaction is justified by **identified compelling** privacy or safety concerns that outweigh the public interest in access to the court record. . . . Sufficient privacy or safety concerns that may be weighed against the public interest include findings that:

(A) The sealing or redaction is permitted by statute; or

...

(F) Another identified compelling circumstance exists that requires the sealing or redaction. (Emphasis in original.)

...

(h) Destruction of Court Records.

(1) The court shall not order the destruction of any court record unless expressly permitted by statute.

...

(2) . . . In a criminal case or juvenile proceeding, the court, any party, or any interested person may request a hearing to destroy the court records *only if there is express statutory authority permitting the destruction of the court records*. . . . In a criminal case, reasonable notice must also be given to the victim, if ascertainable . . . (Emphasis added.)

Young relies for statutory authority on 10.97 RCW, the Washington State Criminal Records Privacy Act. The State agrees with her that the records she seeks to destroy are nonconviction data as defined in RCW 10.97.030(2):

“Nonconviction data” consist of all the criminal history record information relating to an incident which has not led to a conviction or other disposition adverse to the subject, and for which proceedings are no longer actively pending. . . .

RCW 10.97 controls the manner in which criminal justice agencies disseminate criminal history information. In RCW 10.97.030(5), the court is included as a “criminal justice agency”:

“Criminal justice agency” means: (a) A court; or (b) a government agency which performs the administration of criminal justice pursuant to a statute

or executive order and which allocates a substantial part of its annual budget to the administration of criminal justice.

The manner in which nonconviction criminal history information can be deleted is controlled by RCW 10.97.060:

Criminal history record information which consists of nonconviction data only shall be subject to deletion from criminal justice agency files which are available and generally searched for the purpose of responding to inquiries concerning the criminal history of a named or otherwise identified individual when two years or longer have elapsed since the record became nonconviction data as a result of the entry of a disposition favorable to the defendant, or upon the passage of three years from the date of arrest or issuance of warrant for an offense for which a conviction was not obtained unless the defendant is a fugitive, or the case is under active prosecution according to a current certification made by the prosecuting attorney.

Such criminal history record information consisting of nonconviction data shall be deleted upon the request of the person who is the subject of the record: **PROVIDED, HOWEVER,** That the criminal justice agency maintaining the data may, at its option, refuse to make the deletion if:

...

(2) The person who is the subject of the record has had a prior conviction for a felony or gross misdemeanor.

The trial court here denied Young's motion to destroy her records based on RCW 10.97.060(2). [CP 41] While this result was correct, the court was incorrect to rely on this statute because the

court does not have the authority under RCW 10.97.060 to destroy its own records. RCW 10.97.030(1) defines criminal history record information as follows:

(1) "Criminal history record information" means information contained in records collected by criminal justice agencies, **other than courts**, on individuals, consisting of identifiable descriptions and notations of arrests, detentions, indictments, information, or other formal criminal charges, and any disposition arising therefrom, including acquittals by reason of insanity, dismissals based on lack of competency, sentences, correctional supervision, and release. (Emphasis added.)

In short, the court cannot destroy its records because they are not "criminal history record information" as defined by the statute.

Statutory interpretation is a question of law that an appellate court reviews de novo. In re Pers. Restraint of Cruz, 157 Wn.2d 83, 87, 134 P.3d 1166 (2006). When interpreting a statute, the court must give effect to the plain meaning of the statutory language. In re Wissink, 118 Wn. App. 870, 874, 81 P.3d 865 (2003). A court may not engage in statutory construction if the statute is unambiguous, State v. Bolar, 129 Wn.2d 361, 366, 917 P.2d 125 (1996), and should resist the temptation of rewriting an unambiguous statute to suit the court's notions of what is good policy, recognizing the principle that "drafting of a statute is a

legislative, not judicial, function.” State v. Jackson, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999). While the court’s goal in statutory interpretation is to identify and give effect to the legislature’s intent, State v. Spandel, 107 Wn. App. 352, 358, 27 P.3d 613 (*citing State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996)), *review denied*, 145 Wn.2d 1013 (2001); if the language of a statute is unambiguous, the language of the statute is not subject to judicial interpretation. Id.

This division of the Court of Appeals has already concluded that the court’s authority to delete records granted by RCW 10.97.060 “clearly refers to authority a court may possess independent of the Washington State Criminal Records Privacy Act. . . . As for other statutory authority to delete records of felony convictions, [the defendant] has cited none, and we know of no such authority.” State v. Gilkinson, 57 Wn. App. 861, 864-65, 790 P.2d 1247 (1990). Citing to the House debate regarding this statute, the court found further indication that “deletion” of a record does not include expungement or destruction of those records, but rather only that such records be removed from public access. Id., at 864, fn. 2.

Gilkinson was allowed to withdraw a guilty plea to a felony after completing probation, a not guilty plea was entered, and the matter was dismissed. He obtained an order to have this record deleted and expunged, which the State appealed, and the Court of Appeals reversed. After finding that the record was not nonconviction data, nor was it subject to deletion because the finding was adverse to him, the court held that the final paragraph of RCW 10.97.060 was not a “savings clause”:

Nothing in this chapter is intended to restrict the authority of any court, through appropriate judicial proceedings, to order the modification or deletion of a record in a particular cause or concerning a particular individual or event.

“In our opinion, this ‘savings clause’ does not amount to a general grant of authority to the superior court to order deletion or modification of criminal records.” Id., at 864.

The disposition of criminal records is a matter that would appear to be related to the punishment and reformation of offenders. Such functions . . . are uniquely within the Legislature’s domain. . . . [A]bsent a statutory grant of authority, the Superior Court lacked the authority to grant the relief requested by Wilkinson.

Id., at 866.

10.97 RCW does not provide the authority for the court to destroy or otherwise delete its own records. Although the court

incorrectly relied on this statute, an appellate court can sustain a lower court's ruling on any correct ground, even if it was not considered by the court below. Nast v. Michels, 107 Wn.2d 300, 308, 730 P.2d 54 (1986). The trial court therefore should be affirmed.

a. Even if Young were seeking to expunge the records of other criminal justice agencies, her juvenile adjudication would be considered a conviction and permit the agency to exercise its discretion and deny her request.

Young argues first that the third degree theft for which she was adjudicated [CP 30-31] was not a gross misdemeanor because she was a juvenile when she committed the crime. While her disposition was called an adjudication rather than a conviction, third degree theft is a gross misdemeanor, RCW 9A.56.050, no matter who commits it.

[T]he fundamental difference between the adult criminal code and the juvenile code is not the definition of criminal activity but the penalties and procedures that attach to that activity.

State v. Cheatham, 80 Wn. App. 269, 276, 908 P.3d 381 (1996).

"The distinguishing feature between a juvenile offense and an adult offense is its consequences, not its definition." Id.

Young also relies on RCW 13.04.240, which provides:

An order of court adjudging a child delinquent or dependent under the provisions of this chapter shall in no case be deemed a conviction of a crime.

She argues that her adjudication in juvenile court cannot be considered a conviction. If that was ever the case, the differences between an adjudication and a conviction are disappearing. In 1997, the legislature added the definition of adjudication to the Sentencing Reform Act, giving it the same meaning as “conviction.” When courts calculate the offender scores for adult offenders, they now include juvenile adjudications in the criminal history. A juvenile offender determined to be a serious, continuing threat to the safety of others can be transferred to the Department of Corrections. State v. Diaz-Cardona, 123 Wn. App. 477, 485-86, 98 P.3d 136 (2004). The legislature has also made it more difficult to remove or expunge juvenile records. Id., at 486.

More importantly, the juvenile statutes govern sentences only within the juvenile system.

The adult and juvenile statutes govern only sentences within the system to which the respective statutes apply. . . . [T]he juvenile statute is properly concerned with preventing an adjudication of guilt from being considered a crime while one is still a juvenile, as this approach furthers its rehabilitative purpose. Similarly, the adult statute allows consideration of prior juvenile

adjudications in sentencing an individual who is now an adult and has committed a crime as an adult because the SRA is primarily concerned with punishing all adult offenders who have the same criminal history to the same extent. Each statute treats prior offenses in a manner appropriate to its purpose, and they are not contradictory as between the two systems.

State v. Johnson, 118 Wn. App. 259, 262-63, 76 P.3d 265 (2003).

Because Young is no longer a juvenile, she no longer falls under the juvenile statute. Even if RCW 10.97.060 applied to her motion, her adjudication would be considered a conviction for purposes of her motion to expunge and destroy her court files, and the court would have been correct in the ruling it made.

2. Young has failed to establish grounds to have her records in the Superior Court sealed or redacted. Because there is no statute allowing the court to destroy its records, she cannot have them destroyed.

As argued above, 10.97 RCW does not provide authority for the court to destroy its own records, and there does not appear to be any other statute that allows such destruction. Certainly she has not identified any. Therefore, under the plain language of GR 15(h), quoted above, the files cannot be destroyed.

It does appear possible, however, that Young could have her records sealed or redacted under GR 15(c), also quoted above in pertinent part, if she met the requirements of the rule. She failed to

do so in the court below. Pursuant to subsection (c), she must identify a compelling privacy or safety concern, which the court must then weigh against the public interest in having those records available. The court must find that the sealing or redaction is either permitted by statute, which we have seen is not the case, or that at least one of several enumerated conditions applies. State v. Noel, 191 Wn. App. 623, 628-29, 5 P.3d 747 (2000). None of those appear to apply to Young, except for the catchall subsection (F), “Another identified compelling circumstance exists that requires sealing or redaction.”

The Public Disclosure Act does not apply to court case files, but the public has a common law right of access to them. Nast v. Michels, *supra*, at 303-04. This common law right, while “fundamental to a democratic state,” is not absolute. *Id.*, at 304. The legislature has excluded certain types of files from public access, such as juvenile court files, artificial insemination records, paternity action files, adoption records, and mental commitment files. *Id.*, at 306-07. See also Spokane & Eastern Lawyer v. Tompkins, 136 Wn. App. 616, 150 P.3d 158 (2007).

GR 15 was addressed in Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). There the Seattle Times

challenged an order of a King County Superior Court judge closing a pretrial hearing in a murder case and sealing the record of that proceeding. The Supreme Court noted that the Washington Constitution establishes a right of access to court proceedings, but also recognized that the public's right of access is not absolute. Id., at 36. It is, however, to be given great weight. Ishikawa held that each time a person seeks to restrict access to court records, the court must follow five steps:

1. The proponent must make some showing of the need for the restriction. Unless the restriction is sought to protect a defendant's right to a fair trial, a "serious and imminent threat to some other important interest' must be shown." Id., at 37.
2. Anyone present when the sealing motion is made must be given an opportunity to object to the proposed restriction. Id., at 38.
3. The court, as well as both the proponents and objectors, should analyze whether the requested method for restricting access is the least restrictive means for protecting the interest threatened. Id., at 38.
4. The court must weigh the competing interests of the proponent and the public and consider any alternative methods suggested. Id., at 38.
5. The order must be no broader in application or duration than necessary to serve its purpose. If the court seals records, it must specify a time period, at the end of which the proponent must justify continued sealing. Id., at 39.

Unless the interest to be protected is the right to a fair trial, the proponent of sealing the records bears the burden of proving to the court that his or her interests outweigh the public's right to access. *Id.*, at 38. See also State v. McEnry, 124 Wn. App. 918, 103 P.3d 857 (2004).

When a person seeks to seal or redact records pursuant to GR 15, the court has the duty and the discretion to determine what is a compelling interest, and its decision is reviewed for abuse of discretion. McEnry, *supra*, at 923-24, 926.

Although the trial court here relied on RCW 10.97.060 to deny Young's motion to expunge or destroy, it would have been correct to deny the motion directly on the basis of GR 15. While Young did not seek an order sealing or redacting her court file, even if she had done so she failed to establish a compelling interest in sealing her records. Apart from her own self-serving hearsay statements and unsupported assertions, she provided the court with no reason to find that her interest in keeping the public from seeing her file outweighed the public's interest in having access to court files. She asserted, by way of a declaration, that she had been denied housing and jobs after prospective landlords and employers conducted a criminal background check and discovered

the dismissed charges. [CP 14-15] She provides no proof whatsoever that (1) such persons even checked her criminal history, (2) if they did, that they searched the court files, or (3) if she was denied housing or employment it was on the basis of that dismissed case, rather than some other reason. In her response to the State's objection to her motion, she asserted that she would file "statements" she received that show prejudice, [CP 21] but the record does not show that she ever did so.

In her memorandums to the trial court, Young asserted that the record of her dismissed charges is accessible on the internet [CP 13], with no mention of any specific internet site where her claims could be verified. She states, without authority, that the Washington State Patrol frequently does not include the disposition of cases in its criminal history information. [CP 12] She seems to acknowledge that the State Patrol does not disseminate nonconviction data to landlords and employers, and "potential employers and landlords can only verify information they receive through the court records," [CP 36] yet still maintains that some unspecified "background checks" have, in multiple instances, disclosed this information. [CP 8] In her opening brief, at page 7, she claims that although she has a right to sue or seek criminal

charges against persons who disseminate her nonconviction data, she cannot do so because she cannot identify the persons who access it on the internet. It is not clear why she would have to identify the persons who receive the information in order to identify the persons who disseminate it. An illegal posting on the internet is an illegal posting, regardless of who accesses that site.

Young claimed before the trial court, in her amended motion, that she is treated with disdain in social situations when private citizens learn of the charges. [CP 8] One cannot help but suspect that the average social contact is not going to the courthouse to read Young's court file. While people may "Google" their acquaintances, Young has still not identified any internet sites available to non-criminal justice agencies that would be disseminating nonconviction information.

Young asserts in her brief, at page 9, that the public has no need to know the contents of her file. She did not establish that to the court. Under circumstances where the prosecution was thwarted because a material witness could not be located, the public might have some legitimate interest. The burden, and it is a high burden, was on Young to prove to the court that her interests outweigh the public right of access, and she simply did not do so.

The court would have been correct to deny any motion to seal or redact.

D. CONCLUSION.

The trial court was correct to deny Young's motion to expunge or destroy her court files. GR 15(h) requires statutory authority to destroy records, and there does not appear to be a statute which allows destruction under these circumstances. Young might be able to have her records sealed or redacted under GR 15(c) if she were to ask for that relief, and if she carries her burden of showing a compelling interest that outweighs the public right to access.

The State respectfully asks this court to affirm the Superior Court ruling.

Respectfully submitted this 13th day of March, 2009.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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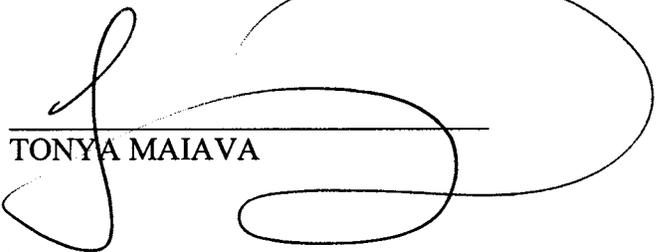
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DEPUTY

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

Dated this 13th day of March, 2009, at Olympia, Washington.



TONYA MAIAVA