

NO. 46902-2-II

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

STATE OF WASHINGTON,
Respondent,

v.

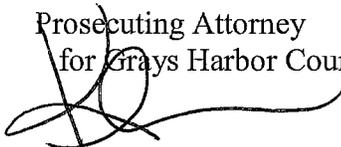
FRANKLIN H. WILCOX,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEPHEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County



WSBA #34097

OFFICE AND POST OFFICE ADDRESS

County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

T A B L E

Contents

I. COUNTERSTATEMENT OF THE CASE 1

II. RESPONSE TO ASSIGNMENTS OF ERROR 1

III. CONCLUSION 6

TABLE OF AUTHORITIES

Cases

Fasulo v. United States, 272 U.S. 620, 47 S.Ct. 200, 71 L.Ed. 443 (1926);
22 C.J.S. Criminal Law s 17 (1961)..... 4

Smith v. Greene, 86 Wash.2d 363, 545 P.2d 550 (1976)..... 4

State v. Horton (1990) 59 Wash.App. 412, 798 P.2d 813, review continued
805 P.2d 813, review denied 116 Wash.2d 1017, 807 P.2d 883). 6

Jenkins v. Bellingham Mun. Court, 95 Wash. 2d 574, 627 P.2d 1316
(1981)..... 3, 4, 5

State v. Albright, 144 Wash. App. 566, 183 P.3d 1094 (2008) 5

State v. Shipp, 93 Wash.2d 510, 610 P.2d 1322 (1980)..... 4

State v. Taylor, 97 Wash.2d 724, 649 P.2d 633 (1982) 5

Statutes

9A.44.132(1)(b) 1

RCW 1.12.018 5

RCW 1.12.028 5, 6

RCW 46.61.502 2

RCW 46.61.506 2, 3

RCW 46.90.427 2

RCW 9.94A.030..... 1, 2, 6, 7

RCW 9A.44.130..... 1, 2, 6

RCW 9A.44.132..... 1, 2, 6

RCWA 9A.36.020..... 5

RCWA 9A.36.021..... 5

I. COUNTERSTATEMENT OF THE CASE

The State agrees with the Statement of Facts presented by the Appellant.

II. RESPONSE TO ASSIGNMENTS OF ERROR

In the present case, the defendant was charged pursuant to RCW 9A.44.132(1)(b) with Failure to Register as a Sex Offender. The defendant was convicted of this charge at bench trial. The question now raised by the defendant is whether or not this conviction should be considered a “sex offense.” This determination dictates the percentage of earned early release the defendant is eligible for, the community custody imposed, and also dictates whether or not this conviction will have its own registration requirement.

In 2010, the legislature enacted several new statutes in 9A.44 that deal with the registration of sex and kidnapping offenders. Prior to the enactment of these statutes in June 2010, failure to register as a sex offender was charged under RCW 9A.44.030. After June 10, 2010, the charging statute became RCW 9A.44.132. This new statute enumerated the punishment applicable to violations of RCW 9A.44.130; however, the elements remained the same. The State still needs to prove that the

defendant “knowingly fail[ed] to comply with any of the requirements of RCW 9A.44.130.

Pursuant to RCW 9.94A.030(46) "Sex offense" means..."[a] felony violation of RCW 9A.44.132(1) (failure to register) if the person has been convicted of violating RCW 9A.44.132(1) (failure to register) on at least one prior occasion..." The defendant has been convicted on two previous occasions of failing to register as a sex offender, the last of these occurred in 2000.

The defendant argues that his offense is not a “sex offense” because his prior convictions were not for a violation of RCW 9A.44.132, but were for violating RCW 9A.44.130. At one time, this might have been a correct analysis; however, the legislature has specifically addressed this issue.

In Laws of 1979, 1st Ex.Sess., ch. 176, s 5, p. 1632, RCW 46.61.506(1) was amended. Its substance was deleted from section .506 and embodied in a new section, later codified as RCW 46.61.502. The next year the legislature enacted provisions which, by reference, made the new section a part of the Washington Model Traffic Ordinance. Laws of 1980, ch. 65, s 4, p. 153 (RCW 46.90.427).

In the interim, between the enactment of the 1979 and 1980 laws, all of the defendants were arrested by city police for driving while under the influence of intoxicants and were charged with violations of municipal ordinances. In each case the defendant contended that the City had in effect no ordinance making it unlawful to operate a vehicle while under the influence of intoxicants. *Jenkins v. Bellingham Mun. Court*, 95 Wash. 2d 574, 576, 627 P.2d 1316, 1317 (1981).

In *Jenkins*, the cities urged, however, that the effect of the action taken by the legislature in the 1979 act was to amend RCW 46.61.506. Their theory was that the “new section” was nothing more than an amendment of RCW 46.61.506, not an addition to it. There is no question but that the legislature amended the section; it did so expressly, and the new section was not an addition to RCW 46.61.506. Rather, it was an addition to the act. The Court found that the contents were not an entirely new addition, but the section itself was, and that this is the significant fact. “Whatever the amendatory effect of an added section may be, the fact is that the legislature has in these statutes made a distinction between additions and amendments. As those terms are used in legislative enactments, they have a specialized and formal meaning. The court is not free to attribute to them a meaning different from that which the

legislature obviously intended.” *Jenkins v. Bellingham Mun. Court*, 95 Wash. 2d 574, 579-80; citing *Smith v. Greene*, 86 Wash.2d 363, 545 P.2d 550 (1976).

The Court held that:

After section .506 was amended, it no longer made it an offense to drive while under the influence of intoxicants. Nevertheless, as thus amended it automatically became a part of the Washington Model Traffic Ordinance, as well as the ordinances of Everett and Bellingham. The cities would have us declare that the new section also became a part of those laws, but we can find nothing in the language of the model traffic ordinance to effect that incorporation.

It is necessary to keep in mind that we are here concerned with enactments defining offenses. They must be strictly construed (*State v. Shipp*, 93 Wash.2d 510, 610 P.2d 1322 (1980)). The court is not at liberty to create offenses through judicial construction. *Fasulo v. United States*, 272 U.S. 620, 47 S.Ct. 200, 71 L.Ed. 443 (1926); 22 C.J.S. Criminal Law s 17 (1961). Much less can we do so by supplying legislative omissions or correcting legislative oversight.

We conclude, therefore, that at the time of the arrests which were made in these cases, there was no provision in the Washington Model Traffic Ordinance, and thus no ordinance in the cities of Everett and Bellingham, making it unlawful to drive while under the influence of intoxicants.

Jenkins at 581.

Later decisions have called the rationale of *Jenkins* into doubt. “In the past, there was an ‘inflexible rule’ that this court could not ‘read into a statute that which it may believe the legislature has omitted, be it an

intentional or an inadvertent omission.” *State v. Taylor*, 97 Wash.2d 724, 728, 649 P.2d 633 (1982) (quoting *Jenkins v. Bellingham Mun. Court*, 95 Wash.2d 574, 579, 627 P.2d 1316 (1981)); see *State v. Albright*, 144 Wash. App. 566, 568, 183 P.3d 1094, 1095 (2008), as amended (Sept. 8, 2008).

Further, in order to avoid a gap in the statutory structure such as this, the legislature enacted RCW 1.12.018 the year after the decision in *Jenkins*.

“If a statute refers to another statute of this state, the reference includes any amendments to the referenced statute unless a contrary intent is clearly expressed.” RCW 1.12.028 (Deadly weapon enhancement provision, which was amended prior to effective date of repeal of former second-degree assault statute [RCWA 9A.36.020], was applicable to new assault statute [RCWA 9A.36.021] to which no citation reference was made, although it was argued that legislature made conscious choice not to apply enhancement provision to new assault statute which, unlike former statute, made being armed with deadly weapon element of crime; the new assault statute as it related to assault with a weapon was a continuation or amendment of former statute. *State v. Horton* (1990) 59 Wash.App. 412,

798 P.2d 813, review continued 805 P.2d 813, review denied 116 Wash.2d 1017, 807 P.2d 883).

In the case at bar, RCW 9A.44.132 is simply a continuation of RCW 9A.44.130. The elements that must be proven to convict a defendant of Failure to Register are identical under the two statutes. The legislature specifically referenced felony “failure to register” as being the crime that would lead to a determination that the third offense was a “sex offense.”

The plain language of RCW 9.94A.030(46)(v) supports the conclusion that the Appellant’s current convictions is a “sex offense.” The legislature specifically used “(failure to register)” after the citation to RCW 9A.44.132(1). If the legislation did not intend to include prior convictions under RCW 9A.44.130, then the language “(failure to register)” would be rendered superfluous, contradicting the basic rules statutory construction. The language at issue is clear and unambiguous, thus the Rule of Lenity does not apply.

III. CONCLUSION

Under RCW 1.12.028 changes in statute numbers are considered to trickle through the RCW. This helps to avoid absurd results in statutory

interpretation. The plain language reading of the statute supports this conclusion and the language is unambiguous.

The State asks that the Court affirm the trial court's designation of the current offense as a "sex offense" pursuant to RCW 9.94A.030.

DATED this 8th day of October, 2015.

Respectfully Submitted,



KATHERINE L. SVOBODA

GRAYS HARBOR COUNTY PROSECUTOR

October 06, 2015 - 12:40 PM

Transmittal Letter

Document Uploaded: 5-469022-Respondent's Brief.pdf

Case Name: State v. Franklin Wilcox

Court of Appeals Case Number: 46902-2

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Katherine L Svoboda - Email: ksvoboda@co.grays-harbor.wa.us

A copy of this document has been emailed to the following addresses:

jahayslaw@comcast.net