

FILED

MAR 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 29504-4-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

GREGORY STEVEN THOMAS,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
120 West Main
Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENT OF ERROR

1. The trial court's denial of Gregory Steven Thomas's Motion for Order Vacating his juvenile records is contrary to existing caselaw and violates his constitutional right to fairness in judicial proceedings. (CP 15; CP 31; Conclusions of Law 1, 2, 4 and 5; Appendix "A").

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Do *State v. Minor*, 162 Wn. 2d 796, 174 P. 3d 1162 (2008), *State v. Moore*, 121 Wn. App. 889, 91 P. 3d 133 (2004), *State v. Leavitt*, 107 Wn. App. 361, 27 P. 3d 622 (2001) and Const. art. I, § 32 require reversal of the trial court's denial of Mr. Thomas' Motion for Order Vacating his juvenile records?

STATEMENT OF CASE

Mr. Thomas plead guilty to second degree incest when he was a juvenile. (CP 1)

Following Mr. Thomas's guilty plea the Juvenile Court entered its Findings and Decision, along with an Order of Disposition. The disposi-

tion order authorized Mr. Thomas to receive the Special Sex Offender Disposition Alternative. (SSODA). (CP 4; CP 6).

At the disposition hearing Mr. Thomas was provided with a Notice of Rights concerning the sealing and vacating of juvenile records. The Notice of Rights contains specific information detailing his rights including the following provision:

You have a right under RCW 13.50.050 to file a Motion with the Court to vacate its order and findings in this matter and order destruction of the official Juvenile Court file, the social file and records of the Court and any other agency in this cause, if:

- (a) You are least 23 years of age;
- (b) You have not subsequently be convicted of a felony;
- (c) No proceeding is pending against you seeking a conviction of a criminal offense;
- (d) You have never been found guilty of a serious offense... .

(Finding of Fact 3; Appendix “B”).

Mr. Thomas meets all of the requirements set forth in the Notice of Rights. (CP 13; Finding of Fact 4; Appendix “C”).

Mr. Thomas successfully completed the SSODA program. He has been relieved of his requirement to register as a sex offender. He is no longer under supervision. (CP 15)

Mr. Thomas filed a Motion for Order Vacating his juvenile records on May 13, 2010.

On June 14, 2010 a hearing was held on his motion. The Court reviewed Memoranda of Authorities as well as an e-mail from Mr. Thomas’ sister. (CP 24; CP 30; RP 1 et seq.)

On November 8, 2010 the trial court entered its Findings of Fact, Conclusions of Law, and Order Denying Defendant’s Motion to Vacate.

Mr. Thomas filed his Notice of Appeal on November 9, 2010. (CP 35).

SUMMARY OF ARGUMENT

Affirmative misrepresentation to a juvenile concerning his right to have his juvenile record vacated/sealed requires compliance with the advice given to the juvenile in his Notice of Rights.

ARGUMENT

RCW 13.40.010 provides, in part:

(2) It is the intent of the legislature ... that youth... be held accountable for their offenses and that communities, families, and the juvenile courts carry out their functions consistent with this intent. To effectuate these policies, the legislature declares the following to be equally important purposes of this chapter:

...

(c) Make the juvenile offender accountable for his or her criminal behavior;

...

(e) Provide due process for juveniles alleged to have committed an offense;

(f) Provide necessary treatment, supervision, and custody for juvenile offenders;

(g) Provide for the handling of juvenile offenders by communities whenever consistent with public safety;

...

(i) Provide for a clear policy to determine what type of offenders shall receive punishment, treatment, or both, and to determine the jurisdictional limitations of the courts, institutions, and community services...

Mr. Thomas contends that the purpose of RCW 13.40.010 is to make certain that juveniles, when being held accountable, not only comply with disposition orders, but also receive the same due process and equal protection that is fully accorded to adults.

When a juvenile does what he or she is supposed to do, and is told if he or she fully complies with what the Court orders that juvenile records can be sealed, that is a promise that should not be broken.

RCW 13.50.050(11) states, in part:

In any case in which an information has been filed ..., the person the subject of the information ... may file a motion with the court to have the court vacate its order and findings, if any, and, subject to subsection (23) of this section, order the sealing of the official juvenile court file, the social file, and records of the court and of any other agency in the case.

RCW 13.50.050(23) is inapplicable to Mr. Thomas's case.

A motion filed pursuant to RCW 13.50.050(11) is subject to the limitations set forth in subsection (12) of that statute.

RCW 13.50.050(12) (a) provides, in part:

The court shall not grant any motion to seal records made pursuant to subsection (11) of this section that is filed on or after July 1, 1997, unless it finds that:

...

(iv) The person has not been convicted of a or sex offense;

....

At the hearing on the Motion to Vacate the State relied upon the case of *State v. M.D.P.*, 136 Wn. App. 593, 150 P.3d 157 (2007).

The *M.D.P.* case is distinguishable from Mr. Thomas's case. The factual underpinnings of the *M.D.P.* case are not clearly delineated in the decision. The decision does not discuss the basis of the juvenile's belief that he "would be able to seal his juvenile records."

Mr. Thomas asserts that the controlling authority is *State v. Minor*, *supra*. The *Minor* case postdates *M.D.P.* It is a Supreme Court decision as opposed to a Court of Appeals decision.

In *Minor* the trial court failed to check a box designating the firearm prohibition upon adjudication of a felony offense. The Court noted the State's position at 801:

While the State admits a mistake was made, it asserts that unless there is active misrepresentation, which here there was not, the court cannot provide a remedy.

The *Minor* Court determined that the State's position was untenable. It held at 804:

The predicate offense court violated former RCW 9.41.047(1) when it failed to notify Minor he was prohibited from possessing firearms and failed to check the box indicating the felony firearm prohibition. We find that the court issued a written order that was binding on Minor and that affirmatively represented to him the firearm prohibition did not apply to him. The only remedy appropriate for the statutory violation is to reverse the current conviction.

The trial court's determination that *Minor* is inapplicable is in error.

In addition to *Minor*, the case of *State v. Moore, supra*. 895, also supports Mr. Thomas' position. The *Moore* Court ruled:

The juvenile court was then required to advise Mr. Moore orally and in writing that he could no longer possess a firearm. RCW 9.41.047(1). This was not done. And the Court's failure constituted governmental mismanagement under CrR 8.3(b). *State v. Leavitt*, 107 Wn. App. 361, 371, 27 P. 3d 622 (2001).

In Mr. Thomas's case affirmative misleading information was provided to him concerning his right to have his juvenile records sealed.

The Notice of Rights form states that the only prohibition against sealing is if he has committed a "serious offense."

The disposition order in Mr. Thomas's case involves the offense of second degree incest. Second degree incest is a sex offense. However, it is not a "serious offense."

At the time Mr. Thomas entered his plea the only definition of "serious offense" was contained in LAWS OF 1997, ch. 338, § 10. A serious offender was a person fifteen (15) years of age or older who had committed a class A felony, an attempt to commit a class A felony, first degree manslaughter, or any other the following offenses:

- Second degree assault;

- First degree extortion;
- Second degree child molestation;
- Second degree kidnapping;
- Second degree robbery;
- Residential burglary;
- Second degree burglary;

but only if there was also the infliction of bodily harm or the person was armed with a deadly weapon.

Mr. Thomas is not facing a current charge. Mr. Thomas has not been currently convicted of an offense. Nevertheless, the *Minor* case applies to Mr. Thomas's situation. In a comprehensive analysis of underlying caselaw the *Minor* Court noted at 802:

... [T]he lower courts have carved a narrow exception for where a governmental entity has provided affirmative, misleading information. *See, e.g., State v. Leavitt*, 107 Wn. App. 361, 371, fn. 13, 27 P.3d 622 (2001) (finding Washington courts have rejected the general ignorance or mistake of law defense, but recognizing mistake of law created by misleading information from a governmental authority).

Mr. Thomas was affirmatively advised that his juvenile records could be sealed.

Mr. Thomas has fully complied with all of the requirements of the disposition order.

Mr. Thomas has been relieved of the sex registration requirement.

RCW 9A.44.143 addresses the basis for relieving a juvenile offender of the need to register as a sex offender.

RCW 9A.44.143(4) states, in part:

In determining whether the petitioner is sufficiently rehabilitated to warrant removal from the central registry of sex offenders... the following factors are provided as guidance to assist... in making [a] ... determination, to the extent the factors are applicable considering the age and circumstances of the petitioner;

- (a) The nature of the registrable offense committed including the number of victims and the length of the offense history;
- (b) Any subsequent criminal history;
- (c) The petitioner's compliance with supervision requirements;
- (d) The length of time since the charged incident(s) occurred;
- (e) Any input from community correction officers, juvenile parole or probation officers, law enforcement, or treatment providers;
- (f) Participation in sex offender treatment;
- (g) Participation in other treatment and rehabilitative programs;
- (h) The offender's stability in employment and housing;
- (i) The offender's community and personal support system;
- (j) Any risk assessments or evaluations prepared by a qualified professional;
- (k) Any updated polygraph examinations;
- (l) Any input of the victim;
- (m) Any other factors the court may consider relevant.

State v. Stratton, 130 Wn. App. 760, 765, 124 P. 3d 660 (2005)

provides:

The purpose of the sex offender registration statute is to assist law enforcement agencies' efforts to protect their communities against sex offenders who reoffend. *State v. Pray*, 96 Wn. App. 25, 28, 980 P. 2d 240 (1999) (citing *LAWS OF* 1990, ch. 3, § 401). Specifically, registration provides law enforcement agencies with an address where they can contact a sex offender. *Pray*, 96 Wn. App. at 28-29 (emphasis added).

It is apparent that Mr. Thomas complied with multiple requirements, including the successful completion of a sex offender treatment program, in order to be relieved of his obligation to register.

When RCW 9A.44.130 was originally enacted, a policy statement was set forth by the Legislature:

The legislature finds that sex offenders often pose a high risk of reoffense, and that law enforcement's efforts to protect their communities, conduct investigations, and quickly apprehend offenders who commit sex offenses, are impaired by the lack of information available to law enforcement agencies about sex offenders who live within the law enforcement agency's jurisdiction. Therefore, this state's policy is to assist local law enforcement agencies' efforts to protect their communities by regulating sex offenders by requiring sex offenders to register with local law enforcement agencies... .

Laws of 1990, ch. 3 § 402.

Relief from the requirements of the sex offender registration law means that the legislative policy no longer has any import for law enforcement or the community.

Laws of 2010, ch. 150, § 2 amended RCW 13.50.050(12)(a) which now allows for sealing juvenile records that involve Class A offenses. The only remaining prohibition under the law pertains to sex offenses.

The sex offense prohibition is in effect whether the sex registration requirement has been removed or not.

Mr. Thomas recognizes that “sex offenders are not a suspect class for purposes of equal protection review.” *State v. Ward*, 123 Wn. 2d 488, 516, 870 P. 2d 295 (1994).

Nevertheless, the fact that more serious class A and class B felonies can be sealed/vacated infers a legislative bias toward the less onerous class C sex offenders.

Const. art. I, § 32 states: “A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government.”

When a promise is made to a juvenile by a judicial officer that promise should be kept. A judicial promise is a fundamental principle bearing constitutional implications in the criminal justice system.

When the legal system asks a juvenile to comply with the terms and conditions of an order of disposition, and the juvenile fully complies, the juvenile should be entitled to have his or her juvenile record sealed in accord with the Notice of Rights given to him.

Const. art. I, § 32 was interpreted in *Brower v. State*, 137 Wn. 2d 44, 69, 969 P. 2d 42 (1998):

This provision has primarily been viewed as an interpretative mechanism in connection with individual rights... . [Citation omitted]. The court has reasoned that the provision emphasizes the importance of individual rights provided in Const. art. I, § § 1-31. *Doe v. Puget Sound Blood Center*, 117 Wn. 2d 772, 780-81, 819 P. 2d 370 (1991).

Even though the SRA is not applicable to juvenile offenders, Mr. Thomas contends that the purpose clause of the SRA should also be given consideration in conjunction with the underlying intent of Ch. 13.40 RCW and Const. art. I, § 32.

RCW 9.94A.010 provides, in part:

The purpose of the chapter is to make the criminal justice system accountable to the public by developing a system for the sentencing of felony offenders which structures, but does not eliminate, discretionary decisions affecting sentences, and to

...

(2) Promote respect for the law by providing punishment which is just;

...

(4) Protect the public;

- (5) Offer the offender an opportunity to improve him or her self;
- ...
- (7) Reduce the risk of reoffending by offenders in the community.

Mr. Thomas has met all the requirements imposed upon him by the juvenile court. He successfully completed the SSODA program. He has fully rehabilitated himself.

The likelihood of Mr. Thomas reoffending is nil. If a risk continued to exist he would still be required to register as a sex offender.

Now, it is time for the Court to live up to its promise and show Mr. Thomas that the respect he has shown to the juvenile justice system is being returned.

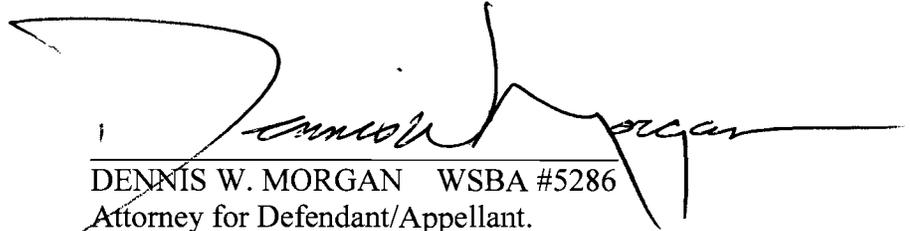
CONCLUSION

Mr. Thomas is entitled to fulfillment of the promise made to him when the Juvenile Court entered its disposition order.

The Order denying his Motion to Vacate should be reversed and the case remanded with directions to seal Mr. Thomas' juvenile records.

DATED this 1st day of March, 2011.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan". The signature is written in a cursive style with a large initial "D" and a long horizontal stroke at the end.

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APPENDIX "A"

1. The request before this Court to vacate/seal the Defendant's juvenile offense record of conviction is exclusively controlled by the provisions of RCW 13.50.050.
2. RCW 13.50.050(12)(d) provides in relevant part that "the court shall not grant any motion to seal records made pursuant to subsection (11) of this section
4. Because the offense for which the Defendant seeks to seal his juvenile offense record of conviction qualifies as a sex offense, this Court lacks the authority to grant any motion to vacate/seal the record of conviction pursuant to RCW 13.50.050(12)(d). State v. M.D.P., 136 Wn.App. 593, 150 P.3d 157 (2007).
5. The holdings in the matters of State v. T.K., 139 Wn2d 320, 987 P.2d 63 (1999) and State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008) are distinguishable and inapplicable to the facts of this matter, nor do either of these authorities compel this Court to grant the Defendant's motion in contravention of the prohibition contained in RCW 13.50.050(12)(d).

APPENDIX "B"

3. A standard form document titled "Notice of Rights Relating to Juvenile Records" was signed by, and provided to, the Defendant at the time of conviction, which provided in relevant part as follows:

You have a right under RCW 13.50.050 to file a motion with the Court to vacate its order and findings in this matter and order destruction of the official Juvenile Court file, the social file and records of the Court and any other agency in this case, if:

- (a) You are at least 23 years of age, and*
- (b) You have not subsequently convicted of a felony, and*
- (c) No proceeding is pending against you seeking a conviction of a criminal offense, and*
- (d) You have never been found guilty of a serious offense.*

APPENDIX "C"

4. The Defendant was over twenty three (23) years of age at the time of filing his motion to vacate/seal his juvenile offense record of conviction, had not been subsequently convicted of a felony, and was not the subject of a proceeding seeking conviction of a criminal offense.