FILED
JAN 25 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By_____

COURT OF APPEALS,
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DAVID DABOLL, Appellant

BRIEF OF THE APPELLANT
COURT OF APPEAL NO. 29511-7-III

John Jensen

Attorney for Appellant

7014 W. Okanogan Pl.
Kennewick, WA 99336
509-735-8529
WSBA No. 23455

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ASSIGNMENTS OF ERROR

1. The trial court erred by defining the Appellant's 1990 conviction for Communication With a Minor as a felony sex offense.

2. The trial court erred by denying the Appellant's motion to restore his firearm rights.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The trial court held that the Appellant's 1987 conviction for Dealing in Depictions of a Minor Engaged in Sexually Explicit Conduct was not a "sex offense" as defined in 1987. However, the court held that the conviction was a "sexual offense" for the purposes of elevating the Appellant's 1990 conviction of Communicating with a Minor for Immoral Purposes to a felony.

2. The trial court denied the Appellant's Motion for Restoration of Firearm Rights based on the finding that the 1990 conviction of Communicating with a Minor for Immoral Purposes was a felony. Felony Communication

with a Minor is a prohibitive Sex Offense under the restoration statute.

STATEMENT OF THE CASE

On March 31, 1987, the Appellant was convicted of, Count 1: Dealing in Depictions of Minors Engaged in Sexually Explicit Conduct, (Dealing in Depictions), and Count 2: Possession of Depictions of Minors Engaged in Sexually Explicit Conduct. CP 13-16. Count 2 was a non-sex offense misdemeanor and is not an issue in this appeal. On November 30, 1990, the defendant was convicted of Communication with a Minor for Immoral Purposes, (Communication With a Minor).CP 3-6. The Judgment and Sentence listed that offense as a felony, presumably based on the defendant's 1987 conviction for Dealing in Depictions of Minors. Id.

On August 31, 2010, and October 21, 2010, the Trial Court heard arguments related to the definition of the defendant's criminal history. 08/21/2010 RP 1-23, 10/21/2010 RP 1-9. The Trial Court ruled that the Appellant's a1987 conviction for Dealing in Depictions was a non-sex offense as defined by RCW 9.94A.030. CP 23-24. The Trial Court further ruled that the 1987 conviction for Dealing in Depictions was a "Sexual Offense" as defined by RCW 9.68A.090(2). Id.

The Trial Court held that the 1990 conviction of Communicating with a Minor was a felony because the Appellant had a previous conviction for a "Sexual Offense." Id. Lastly, the Trial Court denied the Appellant's Motion for Restoration of Firearm Rights based on the fact that the 1990 conviction of Communicating with a Minor was a "sex offense" under the restoration statute, RCW 9.41.040 (4). CP 25.

ARGUMENT

Issue I

The 1987 version of RCW 9.94A.030 (33) did not include "Dealing in Depictions" in the definition of "sex offense."

> (a) A felony that is a violation of chapter 9A.44 RCW or RCW 9A.64.020 or 9.68A.090 or that is, under chapter 9A.28 RCW, a criminal attempt, criminal solicitation, or criminal conspiracy to commit such crimes; . . .

The Appellant's 1987 conviction for Dealing in Depictions falls under RCW 9.68A.050 and therefore was not a "sex offense." The classification of the conviction is determined by the statute in effect at the time of the offense. State v. Rivard,168 Wn.2d 775, at 780-81, 231 P.3d 186 (Wash. 2010). The Trial Court correctly ruled that the conviction for Dealing in Depictions was not a "sex offense." CP 23-24.

The current version of RCW 9.68A.090 reads as follows:

> (1) Except as provided in subsection (2) of this section, a person who communicates with a minor for immoral purposes, or a person who communicates with someone the person believes to be a minor for immoral purposes, is guilty of a gross misdemeanor.
>
> (2) A person who communicates with a minor for immoral purposes is guilty of a class C felony punishable according to chapter 9A.20 RCW if the person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other felony sexual offense in this or any other state or if the person communicates with a minor or with someone the person believes to be a minor for immoral purposes through the sending of an electronic communication.

The 1990 version of RCW 9.68A.090 read as follows:

> A person who communicates with a minor for immoral purposes is guilty of a gross misdemeanor, unless that person has previously been convicted under this section or of a felony sexual offense under chapter 9.68A, 9A.44, or 9A.64 RCW or of any other sexual offense in this or any other state, in which case the person is guilty of a class C felony punishable under chapter 9A.20 RCW.

For the issues relevant to the appeal, the current version and 1990 version appear to be essentially the same. A person is guilty of a felony Communication if they had previously been convicted of Communication With a Minor or if they had previously been convicted of a felony "sexual offense" under RCW 9.68A, 9A.44, or 9A.64 or if they were convicted of any other "sexual offense" in this or any other state.

The Trial Court ruled that the Appellant's 1987 conviction, while not a "sex offense," it was a "sexual offense" under RCW 9.68A.090 and therefore the 1990 conviction for Communication with a Minor was a felony.

Webster's online dictionary defines "sexual" as:

> 1: of, relating to, or associated with sex or the sexes <sexual differentiation> <sexual conflict>
> 2: having or involving sex <sexual reproduction>

Sexual is the adjective form of the word sex. An adjective is typically a modifier of a noun. In this case the word "sexual" would modify the word "offense." Webster's defines a modifier as:

> a word or phrase that makes specific the meaning of another word or phrase

In the phrase "sexual offense" the word "sexual" is giving the word "offense" a specific meaning of relating to or associating with sex. This is simply a different way of stating "sex offense."

Even the Supreme Court has used the terms interchangeably. In a case that dealt with the issue of whether the previous conviction was an element of the crime or an aggravating factor the Court made the following statement:

> For example, here, if Roswell had had no prior felony **sex offense** convictions, he could not have been charged or convicted of felony communication with a minor for immoral purposes. If all

> other elements had been proved he could have been convicted of only a misdemeanor. See RCW 9.68A.090(1). Despite the similarities between an aggravating factor and a prior conviction element, under RCW 9.68A.090(2), a prior **sexual offense** conviction is an essential element that must be proved beyond a reasonable doubt. The prior conviction is not used to merely increase the sentence beyond the standard range but actually alters the crime that may be charged.
> State v. Roswell, 165 Wn.2d 186 at 192, 196 P.3d 705 (Wash. 2008).

The legislature has also failed to make any distinction between the term "sex offense" and "sexual offense." RCW 10.58.090 deals with the admissibility of prior sex offenses in criminal action in which the accused is charged with a sex offense. That statute reads as follows:

> 1) In a criminal action in which the defendant is accused of a **sex offense**, evidence of the defendant's commission of another **sex offense** or **sex offenses** is admissible, notwithstanding Evidence Rule 404(b), if the evidence is not inadmissible pursuant to Evidence Rule 403.
>
> (2) . . . .
>
> (3) This section shall not be construed to limit the admission or consideration of evidence under any other evidence rule.
>
> (4) For purposes of this section, "**sex offense**" means:
>
> (a) Any offense defined as a **sex offense** by RCW 9.94A.030; . . . .
>
> (5) For purposes of this section, uncharged conduct is included in the definition of "**sex offense**."
>
> (6) When evaluating whether evidence of the defendant's commission of another **sexual offense** or **offenses** should be

> excluded pursuant to Evidence Rule 403, the trial judge shall consider the following factors: . . . .

The court in State v. Kintz, 81688-3, 81689-1 (WASC) held: "When interpreting any statute, our primary objective is to 'ascertain and give effect to the intent of the Legislature.'" Koenig v. City of Des Moines, 158 Wn.2d 173, 181, 142 P.3d 162 (2006) (quoting Nat'l Elec. Contractors Ass'n v. Riveland, 138 Wn.2d 9, 19, 978 P.2d 481 (1999)). In order to determine legislative intent, we begin with [an examination of] the statute's plain language, according it its ordinary meaning. Id. "[W]e may discern the plain meaning of nontechnical statutory terms from their dictionary definitions." State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006) (citing State v. McDougal, 120 Wn.2d 334, 350, 841 P.2d 1232 (1992)). . . . If a criminal statute is ambiguous, the rule of lenity requires us to construe the statute in favor of the defendant absent legislative intent to the contrary. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005) (citing In re Post Sentencing Review of Charles, 135 Wn.2d 239, 249, 955 P.2d 798 (1998); State v. Roberts, 117 Wn.2d 576, 585, 817 P.2d 855 (1991)). Id.

The term "sexual offense" and "sex offense" are used interchangeably by the Legislature and the Court. The Legislature does not separately define the term "sexual offense." It can be presumed that if

they meant a different definition for "sexual offense" they would have defined it. Even if the court finds usage of the term "sexual offense" to be ambiguous, then the rule of lenity requires the court to find in favor of the defendant.

Issue II

RCW 9.41.040(4) prohibits restoration if a defendant has been convicted of an A class felony or a "sex offense." The Appellant's 1987 conviction for Dealing in Depictions was not a "sex offense" in 1987. Since the 1987 conviction was not a previous "sex offense" or "sexual offense," then the Communication With a Minor conviction would only be a misdemeanor.

The 2010 version of RCW 9.94A.030 defines sex offenses as follows:

> (45) "Sex offense" means:
>
> . . . .
>
> (iii) A felony that is a violation of chapter 9.68A RCW other than RCW 9.68A.080;
>
> . . . .

The 1990 definition of "sex offense" was no more inclusive with regards to Communication With a Minor convictions. The Appellant's 1990 conviction for Communication With a Minor is not a "sex offense"

as it is only a misdemeanor. Because the Appellant's 1987 conviction for Dealing in Depictions and the 1990 conviction for Communication are not "sex offenses" under their respective definitions, then the Appellant should be allowed to restore his firearms rights.

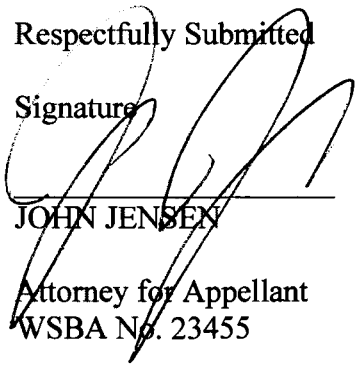
CONCLUSION

The Appellant's 1987 convictions were not "sex offenses" as defined in 1987. The 1987 conviction can not be considered a "sexual offense" for the purposes of RCW 9.68A.090. The Appellant's 1990 conviction for Communication With a Minor is not felony. Because the Communication With a Minor conviction is not a felony it is not a "sex offense" as defined by the current version of RCW 9.94A.030. Therefore the Appellant does not have a prohibitive "sex offense" under the restoration statute and his firearm rights should be restored.

January 24, 2011

Respectfully Submitted

Signature



JOHN JENSEN

Attorney for Appellant
WSBA No. 23455