

COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION III

**FILED**

JAN 13 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

STATE OF WASHINGTON,|

Petitioner / Respondent,

vs.

JACOB CUNNINGHAM,

Respondent / Appellant.

COA NO. 328091

SUPERIOR COURT  
NO. 08-8-00517-4

BRIEF OF APPELLANT

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### Assignment of Error

The Trial Court erred in denying the motion to seal juvenile records because the use of actual force is required to be established by statute to disqualify a record being sealed for a conviction of Indecent Liberties by Forcible Compulsion.

## Statement of the Case

In 2008 Jacob Cunningham was charged with one count each of First Degree Rape of a Child and Attempted First Degree Rape of a Child in 2008. (CP 4) As the result of a negotiated settlement the State amend the charges to Indecent Liberties by Forcible Compulsion and Indecent Exposure. (CP 5) The State also supported a motion for a disposition under the Special Sex Offender Disposition Alternative (SSODA). He was 13 years old at the time of conviction. He completed the SSODA program and all other requirements and released from supervision by the Juvenile Rehabilitation Administration. He was relieved of the requirement to file as a Sex Offender in early 2014.

Cunningham moved the court for an order sealing this file under RCW 13.50.050 (11) and (12) or in the alternative GR 15(c) on September 17, 2014. (CP 6-7) The motion was denied as the charge of Indecent Liberties by Forcible Compulsion is excluded from the list of sealable offenses. (CP 8-10) This appeal follows. (CP 11-14)

## Argument

Under the Juvenile Justice Act of 1977 each statutory offense for which a juvenile can be sanctioned by the court is subject to one of five Sentencing Options. **RCW 13.40.0357**. Option A is considered the Standard Range and is used as the starting point for calculating the type of sanction to be imposed should a juvenile be found guilty of a crime.<sup>1</sup> This option is structured as a grid, with Criminal History Points<sup>2</sup> on the X-axis and Disposition Offense Category<sup>3</sup> on the Y-axis. The standard range disposition is determined by the intersection of the two. **Id.**

Cunningham was initially charged with First Degree Rape of a Child, classified as an “A-” offense, and Attempted First Degree Rape of a Child, a “B+” offense. All offenses in these two categories have a standard range disposition that result in a commitment to the Juvenile Rehabilitation Administration (JRA). **Id.** Given his age and lack of

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<sup>1</sup> Option B is the Suspended Disposition Alternative, Option C the Chemical Dependency Disposition Alternative, and Option D permits the court to impose an exceptional sentence to avoid a Manifest Injustice. A Mental Health Disposition Alternative is also available under **RCW 13.40.167**.

<sup>2</sup> Each prior felony adjudication counts as one point. Each prior violation, misdemeanor, and gross misdemeanor adjudication counts as 1/4 point. Fractional points are rounded down. **RCW 13.40.0357, note 2**.

<sup>3</sup> Offenses are given a value from a high of A+ for First and Second Degree Murder to E for a simple Misdemeanor. **RCW 13.40.0357**

criminal history, Cunningham faced a 15 to 36 week commitment on each count of the original information.

Between May and July 2008 a negotiated settlement occurred in the case, wherein Cunningham would plead guilty to one count of Indecent Liberties and one count of Indecent Exposure<sup>4</sup>. Indecent Liberties is a “B+” offense and carries the same standard range disposition as the original charges. **RCW 13.40.0357**. In this type of plea settlement, the State receives the benefit of the same sanctions and a conviction of a sex offense. The benefit to the juvenile is an amendment of the charge from First Degree Rape of a Child to Indecent Liberties on their criminal history. This makes the charge of conviction more innocuous than the original but otherwise gives no advantage to the juvenile.

At the time of Cunningham’s conviction in July 2008 no Class A Felony or Sex Offense could be sealed under **RCW 13.50.050 (12)**. The statute was amended in 2011 to permit sealing of all juvenile records if “[t]he person has not been convicted of rape in the first degree, rape in the second degree, or indecent liberties that was actually committed with forcible compulsion. (emphasis added) **RCW 13.50.050 (12) (a) (v)**. "Forcible compulsion" means physical force which overcomes resistance,

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<sup>4</sup> A “D+” offense with a range of Local Sanctions.

or a threat, express or implied, that places a person in fear of death or physical injury to herself or himself or another person, or in fear that she or he or another person will be kidnapped. **RCW 9A.44.010 (6)**.

That the conviction for indecent liberties be actually committed with forcible compulsion is of great significance. This language requires the Court to consider the specific facts of the case in making a determination of whether actual forcible compulsion was used. In this case, the police reports show no use of physical force. There are no indications that threats, express or implied, were made that would have placed the victim in fear of death or physical injury to himself or another person, nor is there any indication of fear on the part of the victim that he or another person will be kidnapped. (CP 1-3) For the purposes of sealing records, Cunningham meets the requirements of sub-part (v).

The court gave no indication that the facts surrounding the charge of conviction supported a finding of actual compulsion. The motion was denied based on a facial exclusion. The record clearly shows no threats occurred, thereby allowing the court to seal the record.

Conclusion

The Court determination the file was not eligible for sealing because Indecent Liberties is excluded by statute. The requirement that actual physical compulsion occurred in the conviction was not considered nor is it supported by the record. Had the current statute been in place at the time Cunningham was originally charged there would have been no rational basis for counsel to recommend pleading to an amended charge that would place the client in a negative position when seeking to seal their record. The ruling should be reversed and the record sealed.

RESPECTFULLY SUBMITTED

  
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