

80310-2

NO. 58231-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

HENRY GOSSAGE,

Petitioner,

v.

NORM MALENG,

Respondent.

2011 FEB 9 10:15
COURT OF APPEALS
WASHINGTON
DIV. #1

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DOUGLASS NORTH, JUDGE

**RESPONDENT'S BRIEF AS TO APPEALABILITY OF
ORDER DENYING PETITION FOR RELIEF FROM DUTY
TO REGISTER AS A SEX OFFENDER, AND
RESPONSE ON THE MERITS**

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A. ISSUES

1. Is an order denying a petition for relief from sex offender registration appealable as a matter of right?

2. If the order is not appealable, is discretionary review warranted?

3. If appeal or discretionary review is granted, did the trial court err in denying relief from registration?

4. What action should occur on Gossage's other petitions regarding the request for restoration of civil rights and an order of rehabilitation, and the request for restoration of the right to possess a firearm?

B. FACTS

The underlying facts in this case are mostly agreed. Henry Gossage was convicted in 1992 of incest in the first degree, rape in the third degree, incest in the first degree, and attempted incest in the first degree. He was released from confinement in 1995 and asserts that he has met all conditions of his judgment and sentence. This appears to be correct, except that Gossage has apparently paid only about half of the \$2,374.88 in restitution that

was originally ordered.¹ It also appears, however, the trial court did not enter an order extending the restitution obligation beyond the normal ten-year period, as allowed by RCW 9.94A.753(4).

And, although the unpaid restitution debt was mentioned by the federal Office of Personnel Management in rejecting Gossage's application to be an industrial hygienist, it appears that the office was primarily concerned that the job Gossage wanted required testifying as a witness, and that he would not be a credible witness for the federal government in light of his criminal convictions. See RE: KING COUNTY CASE NO. 92-1-00072-1, Appendix B-3, 4 (filed in this Court on June 15, 2006).

On December 9, 2005, Gossage filed a "petition for certificate of rehabilitation - discharge, restoration of civil rights, relief from firearms disability, and relief from registration." CP 20-43. Attached to the petition were documents purporting to show that he had paid all his legal financial obligations and that the department of corrections had released him from all confinement

¹ According to an attachment to a document Gossage filed in this Court, but not in the superior court, the restitution balance, after accruing interest for over a decade, stands at approximately \$4,000. See RE: KING COUNTY CASE NO. 92-1-00072-1, Appendix B-4 (filed in this Court on June 15, 2006). This information was not provided to the trial court in the original petition.

and supervision. The petition itself was two pages long. It does not explain in any fashion why the purposes of sex offender registration would not be met by continued registration, nor does it otherwise explain why Gossage's obligation to register as a sex offender should be relieved.

On April 18, 2006, King County Superior Court judge Douglass North signed the following order:

THIS MATTER having come on regularly before the undersigned judge of the above-entitled court upon the motion by the defendant pro se, for an order of discharge and for relief from his obligation to register as a sex offender in the above-entitled cause, and the court being fully advised in the premises; now, therefore,

IT IS HEREBY ORDERED, ADJUDGED, and DECREED that the defendant's motion is denied.

CP 44. The Court's order does not appear to address Gossage's requests for a certificate of rehabilitation, restoration of his civil rights, and relief from firearms disability.

Gossage filed a notice of appeal. CP 45. On June 16, 2006, he filed in this Court a five-page explanation for his superior court petition, but it does not appear that this more detailed explanation of his case was ever presented to the superior court. Commissioner Verellen asked the State to address the appealability of the

superior court order, the State filed a short response, and this Court subsequently appointed counsel for Gossage and set the matter for additional briefing and argument to a panel of judges.

C. ARGUMENT

Gossage argues to this Court that the superior court erred in denying his various petitions. Complicating review is the fact that Gossage brought four petitions but the trial court's order purports to address only two, i.e., 1) the request for a discharge and 2) the request to lift the sex offender registration duty. Thus, only those two subjects of his petition appear to be properly before this court. In the interests of judicial economy, however, this response will briefly touch upon the three other issues not covered by the judge's order, i.e., the request for restoration of civil rights and an order of rehabilitation, and the request for restoration of the right to possess a firearm.

Moreover, and complicating matters further, Gossage brought these petitions under the criminal cause number, even though they appear to have been civil proceedings. Their nature as civil or criminal arguably affects their appealability under the Rules

of Appellate Procedure, but that issue has not yet been addressed by Gossage.

In general, there are two avenues to appellate review – review as a matter of right, called "appeal," and permissive review granted by the court, called "discretionary review." RAP 2.1. Two provisions of this rule might be relevant here. Appeal can follow: "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action," RAP 2.2(a)(3); or "[a]ny final order made after judgment that affects a substantial right." RAP 2.2(a)(13). Gossage has argued only under RAP 2.2(a)(13).

The appealability of an order depends on "a careful review of the nature of the proceedings" below. See In re Petersen, 138 Wn.2d 70, 85, 980 P.2d 1204 (1999). Thus, the nature of the petition filed by Gossage must be analyzed.

1. AN ORDER DENYING A PETITION TO BE RELIEVED OF SEX OFFENDER REGISTRATION IS NOT AN APPEALABLE ORDER, BUT THE ORDER WAS PROPER IN ANY EVENT.

a. RAP 2.2(a)(13) Does Not Apply

Gossage argues, relying on RAP 2.2(a)(13), that he has a right to appeal the superior court's order denying his petition for relief from the sex offender registration obligation. He is mistaken. The superior court's order denying relief from registration was not a "final order ... affecting a substantial right." RAP 2.2(a)(13).

Generally, a final judgment is "one which ends the litigation and leaves nothing for the court to do but execute the judgment." Catlin v. United States, 324 U.S. 229, 233, 65 S. Ct. 631, 633, 89 L. Ed. 911 (1945). "[T]rial court orders are appealable when they have some ring of finality, marking a termination of all or some substantial and discrete portion of trial court proceedings." Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash.L.Rev. 1541, 1542-43 (1986). Thus, a final order is an order which permanently fixes a defendant's rights and obligations. An order is not final if

the superior court may still change its ruling on the underlying question.

The duty to register as a sex offender is triggered by conviction for a sex offense, whether the conviction was imposed in Washington, out-of-state, or in federal court. RCW 9A.44.130(1)(a). The duty to register exists even after an offender has served his prison time, after his community custody or placement term has expired, and even after he is entitled to discharge under RCW 9.94A.637. See RCW 9A.44.140(1), (7). The length of time a sex offender must register depends on the nature of his conviction. RCW 9A.44.140(1). For an offender like Gossage who was convicted of a class B felony² the registration requirement will expire fifteen years after release from final confinement, including full-time residential treatment. RCW 9A.44.140(1)(b).

An offender convicted of certain sex offenses may petition to be relieved of the registration duty before the statutory period has run, but only if he has lived ten years crime-free in the community. RCW 9A.44.140(3). The offender has the burden to prove by clear and convincing evidence that the purposes of registration will no

² Incest in the first degree is a class B felony. RCW 9A.64.020(6).

longer be served in his case. Id. Absent this showing, the court may not lift the duty, and the duty to register continues until expiration of the statutory period. Id. In considering a RCW 9A.44.140(3) petition, the superior court shall consider the nature of the original offense, as well as criminal and relevant non-criminal behavior that occurred before and after the offense. Id.

The statute seems to create a special civil proceeding distinct from the criminal case, since it provides that a petition be filed in superior court, albeit in the court where the conviction was obtained. The local county prosecutor is to be designated the “respondent,” instead of the State of Washington being a party as is true in a criminal action. Petitions that pertain to offenders who register pursuant to out-of-state or federal convictions must be filed in Thurston county. RCW 9A.44.140(3). The statute does not expressly place a limit on the number of petitions that may be filed, so an offender can presumably re-petition a denial if and when his circumstances change.

In In re Petersen, supra, the Supreme Court analyzed the appealability of orders somewhat similar to the petition in this case. Petersen, 138 Wn.2d 84-88. Petersen, who had been found to be a sexually violent predator, was indefinitely committed for sex

offender treatment. By statute, the superior court had continuing jurisdiction over Petersen until he was unconditionally released. Id. (citing RCW 71.09.090(3)). Still, Petersen had a statutory right to petition the court for a "show cause" hearing, wherein Petersen could attempt to persuade the judge that his condition had changed sufficiently to hold a full hearing on whether he remained a sexually violent predator. Id. at 85. The superior court's denial of the "show cause" petition did not, however, finally determine whether Petersen was to be unconditionally released. Thus, the Supreme Court held that the denial of the order was interlocutory; it was not a "final order" pursuant to RAP 2.2(a)(13).

Likewise, in In re Dependency of Chubb, 112 Wn.2d 719, 773 P.2d 851 (1989), the Supreme Court held that there was no right to appeal from a dependency review hearing. Chubb argued that each dependency review was "a reestablishment of the original dependency disposition[.]" Chubb, 112 Wn.2d at 723. The Court rejected that argument, saying that the superior court was not making a dependency determination at each review hearing but, rather, "[the] function [of the hearing] is to determine whether court supervision should *continue*." Id. at 724. The Court concluded that

"[e]ssentially ... what the juvenile court has decided is to abide by the status quo: the determination of dependency."

The petition to relieve sex-offender registration is like the petitions in Petersen and Chubb; it seeks to have the court alter the status quo -- set by statute here, and by earlier court or jury ruling in the cited cases -- but, if denied, the matter is not ended. The matter simply returns to the status quo until a new petition, based on changed circumstances, is presented to the court. In other words, the superior court has continuing power to decide whether a sex offender should be relieved of his duty to register, so a denial of a petition to be relieved of that duty is an interlocutory order; not a final order.

Gossage claimed in his RCW 9A.44.140(3) petition that the court should lift the statutory duty to register. The superior court disagreed, however, essentially deciding to abide by the status quo. Thus, although Gossage remains under the statutory duty to register, he may later petition the court for relief. If, at that time, the court believes that the duty should be lifted, the court will grant the petition. Until that time, the statutory obligation continues but may be modified by the trial court, so the court's order denying the

petition is interlocutory, not final. Review is not appropriate under RAP 2.2(a)(13).

Additionally, appeal of right is not available because the order does not "affect a substantial right." RAP 2.2(a)(13). App. Br. at 6. The duty to register as a sex offender is regulatory, not punitive. State v. Ward, 123 Wn.2d 488, 500, 869 P.2d 1062 (1994). It "imposes no significant additional burdens on offenders...[and] the physical act of registration creates no affirmative disability or restraint.... Registration alone imposes burdens of little, if any significance." Ward, 123 Wn.2d at 500-01. Moreover, even though registrant information is subject to public disclosure, registration as a sex offender does not create an affirmative disability or restraint," id. at 507, because criminal justice agencies may release conviction data pursuant to RCW 10.97.050(1), and sex offender registration data is publicly disseminated only under limited circumstances "'rationally related to the furtherance' of the goals of public safety and the effective operation of government." Id. at 502-04 (quoting Laws of 1990, ch. 3, § 116).

Although he does not expressly define the right, Gossage presumably asserts that the court's order affects his right *not* to

register as a sex offender. But Gossage has no such right. That right was lost when he was convicted of two class B sex offenses. Moreover, as the Washington Supreme Court observed in Ward, the registration duty itself is not particularly burdensome. And, the fact that Gossage is a convicted sex offender is available as a public record, so lifting of the registration requirement will not change the fact that people may know his history.³

b. RAP 2.2(a)(3) Does Not Apply

RAP 2.2(a)(3) provides that a party may appeal "[a]ny written decision affecting a substantial right in a civil case that in effect determines the action and prevents a final judgment or discontinues the action." The parameters of this provision are not abundantly clear. See 2A Karl B. Teglund, Washington Practice: Rules Practice, RAP 2.2, at 86-89 (6th ed.2004). Moreover, its application to this special proceeding is, perhaps, even less clear. The civil rules classically apply to "all suits of a civil nature." CR 1. There is said to be "one form of action to be known as a "civil action." CR 2. Civil actions are commenced by summons and complaint. CR 3.

³ Law enforcement officials notify the public only regarding Level II and III sex offenders. Since Gossage is a Level I offender, the fact that he registers will not be posted in the community.

By this standard, petitions to relieve an offender of the registration duty appear to be outside the rule because they are not "civil actions."

On the other hand, RAP 2.2(a)(3) covers "a written decision in a civil case that in effect...discontinues the action." The Civil Rules govern all "civil proceedings" as long as the rules do not conflict with rules or statutes applicable to special proceedings. CR 81. There are no rules of special proceeding, under the state rules or the King County local rules, that govern sex offender registration petitions. Insofar as such petitions appear to be a petition to the superior court, and since it is clearly not a criminal action, it *could* be considered a "civil proceeding" and thus a "civil case" for purposes of RAP 2.2(a)(3).

Still, the question remains whether an order denying a petition for relief from registration "discontinues the action," in light of the fact that the superior court's denial simply continues the status quo established by the prior conviction -- and by the operation RCW 9A.44.130 -- and in light of the fact that the offender's duty to register may be revisited upon changed circumstances. RCW 9A.44.140(3). In these ways, as argued

above, the order appears interlocutory -- like the proceedings in Petersen and Chubb -- rather than final.

In short, it appears that an order is "final" or "determines an action" under the rules of appellate procedure when it has two qualities: 1) it has the "ring of finality," and 2) it alters the status quo. Appellate decisions seem to track these two themes. In the family law arena, for example, orders that are arguably temporary are appealable when they alter the status quo by requiring a change in child support or maintenance. 2A Karl B. Teglund, Washington Practice: Rules Practice, RAP 2.2, at 86-87 (citing cases). On the other hand, in In re Marriage of Greenlaw, 67 Wn. App. 755, 840 P.2d 223 (1992), rev'd on other grounds, 123 Wn.2d 593, 869 P.2d 1024 (1994), an order denying a motion to modify a commissioner's ruling on temporary custody was not appealable under RAP 2.2(a)(3), because the court retained jurisdiction to consider further proceedings, and because the denial of the motion to modify continued the status quo.⁴

Thus, the general policy reasons for limiting review of essentially interlocutory petitions should apply here. Appeal should

⁴ Discretionary review was granted in Marriage of Greenlaw.

be granted only when the order of the superior court fixes rights in a way that is not subject to alteration by the superior court. Under such circumstances, immediate review is appropriate because otherwise the litigant is without recourse. Discretionary review is more appropriate, however, if the petitioner still has avenues of relief in the trial court, as does Gossage.

Moreover, repeated, and potentially frivolous appeals would be encouraged if denials of petitions like Gossage's are appealable. Either the petitioner should be limited in the trial court to a single motion, which may be appealed, or the petitioner should be given the right to re-apply to the superior court on changed circumstances. Unless the spigot can be turned off at some point, litigants could flood *both* the trial and appellate courts with repeated petitions, and appeals from those petitions.

Finally, as the Supreme Court pointed out, discretionary review provides a sufficient avenue for appellate relief of essentially interlocutory orders. In re Petersen, 138 wn.2d 89.

For these reasons, this Court should hold that the denial of Gossage's petition to be relieved of his sex offender registration duty is not appealable.

c. Gossage Did Not Meet His Burden To Show
By Clear And Convincing Evidence That
Registration Was Meaningless.

If this court determines that the order of the superior court is not appealable, Gossage's notice of appeal may be considered a motion for discretionary review. RAP 5.1(c). Discretionary review is not warranted, however, under these facts. For the same reasons, even if this court decides that Gossage *does* have a right to appeal, the appeal should be rejected because the superior court did not abuse its discretion in rejecting his two-page petition. The reasons for rejecting discretionary review and/or affirming the trial court's order are set forth below.

As noted above, Gossage had the burden of convincing the superior court that, based on his past crime and his current circumstances, the purposes of registration have not been met. RCW 9A.44.140(3). Given the nature of this question, the superior court's decision will hardly be formulaic; in fact, the decision involves a high degree of discretion by the superior court, as it weighs the particulars of Gossage's past crime, the success or failure of his efforts to obtain treatment, his assertions about his current situation, and any evidence presented on these topics by the State. Thus, on appeal, Gossage must show that the superior

court abused its discretion -- or probably abused his discretion if the question is being evaluated under RAP 2.3 -- when it considered his petition. He cannot meet that standard because his petition was perfunctory and did not establish by clear and convincing evidence that registration would be meaningless.

In fact, the facts of his case suggest that Gossage is the type of offender whom the public wants registered. He had sexual intercourse with his adopted daughter over the course of many, many years, beginning when she was about twelve years old. Supp. CP ____ (Sub No. 10 (Statement of Defendant on Plea of Guilty and Certification of Determination of Probable Cause)). In his presentence report, Gossage acknowledged those facts. Supp. CP ____ (Sub. No. 13). Yet, now he claims that his risk of reoffense is low because "[h]e offended against only one victim, and that victim was not a stranger." App. Opening Br. at 13. Of course, he victimized that one victim multiple times over the course of many years. And, the fact that he victimized his daughter instead of a stranger says nothing about the likelihood of reoffense against another non-stranger, let alone against a stranger.

At his original sentencing, Gossage asked for a Special Sexual Offender Sentencing Alternative Sentence (SSOSA). Such

a sentence is ordinarily supported by a report from a sex offender treatment specialist. Although the report was never filed with the superior court clerk's office, and is not part of the record in this proceeding, such a report was prepared in this case and submitted to the sentencing court. See App. Br. at 14 (citing Sub No. 14). The sentencing court obviously rejected the SSOSA alternative but the record constructed for this particular action does not reveal the court's reasons. Such reasons might be relevant to this petition.

Also, Gossage asserts that he completed sex offender treatment at Twin Rivers Correctional Center but he provided no documentation to support that claim, nor did he supply any basis on which to evaluate his performance in that program. Moreover, he completed that program at least ten years ago, before his release in 1995, and his petition contains no information about his behavior since that date, except the claim that he has not been convicted of new crimes.

The superior court likewise did not err in rejecting the two-page petition without a hearing. RCW 9A.44.140(b) establishes a presumption that sex offender registration is appropriate for fifteen years. Gossage must overcome that presumption by clear and convincing evidence if he wants to terminate the duty after only ten

years. His petition was wholly inadequate on its face. And, setting a hearing would only have led to the setting of an additional hearing because any evidence presented at the hearing which was not included in the petition would likely have triggered a continuance so the State could respond. The superior court should have the discretion to reject a petition that is inadequate on its face.

2. RESTITUTION AND CERTIFICATE OF DISCHARGE

As Gossage points out, a challenge to the denial of a request to terminate the restitution obligation is appealable because it challenge's the court's *authority* to continue collecting restitution.⁵ A court that collects restitution without statutory authority violates due process. It indeed appears that the superior court no longer has jurisdiction to collect restitution in this case because ten years have elapsed since Gossage was released from custody, and jurisdiction was not extended before the ten-year period ended. See RCW 9.94A.753(4).

The fact that the court cannot enforce the restitution order does not mean, however, that Gossage is entitled to a certificate of

⁵ In contrast, the challenge to a denial of a request to terminate sex offender registration is a challenge to the court's *exercise of discretion*; it does not claim the court lacks *authority* to enforce the registration duty.

discharge. Certificates of discharge are governed by RCW 9.94A.637, which provides in pertinent part:

When the department has provided the county clerk with notice that an offender has completed all the requirements of the sentence and the offender subsequently *satisfies all legal financial obligations under the sentence*, the county clerk shall notify the sentencing court, including the notice from the department, which shall discharge the offender and provide the offender with a certificate of discharge by issuing the certificate to the offender in person or by mailing the certificate to the offender's last known address.

RCW 9.94A.637(b)(ii). Gossage appears to have met the some conditions of sentence, except that he failed to "satisf[y] all legal financial obligations under the sentence." Thus, by the plain language of the statute, he is not entitled to a certificate of discharge.

This requirement that an offender pay legal financial obligations before obtaining a certificate of discharge is compatible with RCW 9.94A.753(4). The legislature has provided that an offender who wants his civil rights restored must *fully* comply with his sentence. RCW 9.94A.637(b)(ii). RCW 9.94A.753(4), on the other hand, simply requires an express extension of jurisdiction by the sentencing court before it attempts to enforce a restitution obligation, which can, of course, involve repeated court hearings

and the imposition of sanctions for failure to pay. See RCW 9.94A.634. See also: State v. Shultz, 138 Wn.2d 638, 980 P.2d 1265 (1999) (upholding constitutionality of statute as applied to restitution orders that predated the statute). These statutes strike a balance between, on the one hand, the desire to restore civil rights only to those felons who have truly fulfilled their debt to society and, on the other hand, the interest in conserving judicial resources that might otherwise be spent attempting to collect restitution from felons who show little inclination to pay. It is reasonable for the legislature to strike this balance.

As for restoration of civil rights, a certificate of discharge is a precondition. Thus, Gossage is not entitled to restoration of his civil rights until he pays restitution and obtains a discharge.

Finally, an order denying reinstatement of firearm rights is generally an appealable order. However, it is clear that in this case Gossage is not entitled to relief. A person who has been convicted of certain sex offenses can never have his or her firearm rights restored by a court. RCW 9.41.040(3), (4). Pursuant to RCW 9.41.010(12)(d), (h), incest in the first degree committed against a child under age fourteen, and rape in the third degree are "serious offenses" that disqualify Gossage from reinstatement of the right to

possess a firearm. See also: Graham v. State, 116 Wn. App. 185, 64 P.3d 684 (2003); Smith v. State, 118 Wn. App. 464, 76 P.3d 769 (2003). Thus, his rights to possess a firearm may not be restored.

Finally, because there currently is no statutory provisions for obtaining a certificate of rehabilitation, the superior court did not error in rejecting that request. State v. Masangkay, 121 Wn. App. 904, 91 P.3d 140 (2004).

D. CONCLUSION

For the foregoing reasons, this court should hold that the trial court's order is not appealable. If appealable or subject to discretionary review in some respects, the order is nonetheless proper, and should be affirmed.

DATED this 9th day of February, 2007.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Lila Silverstein, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. GOSSAGE, Cause No. 58231-3-I, in the Court of Appeals, Division I, for the State of Washington.

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

W Brame

Name Wynne Brame
Done in Seattle, Washington

2/12/07

Date ~~2/8/07~~

W Brame

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