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STATE OF WASHINGTON

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Supreme Court No. 83244-7
Court of Appeals No. 60474-1-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JAMES L. ERVIN,

Petitioner.

ON REVIEW FROM THE COURT OF APPEALS, DIVISION ONE

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUMMARY OF APPEAL

James Ervin spent five consecutive years following his release from confinement for a felony conviction, without committing any crime. That is all that the Sentencing Reform Act (SRA) required in order for Mr. Ervin's two prior class C felony convictions to "wash out" and be excluded from his offender score at sentencing for his current felony offense. Although Mr. Ervin spent 17 days in jail during that five-year period, for violating a condition of probation for a misdemeanor conviction, the time spent in jail did not interrupt the wash-out period. The purpose of the wash-out provisions of the SRA is to reward offenders for remaining crime-free, not to punish them for spending time in jail regardless of the reason for the confinement. The Legislature did not intend that confinement in jail for reasons unrelated to a felony trigger a new wash-out period. Because Mr. Ervin was not confined pursuant to a felony conviction, his two prior class C felonies washed out and should not have been included in his offender score.

B. ISSUE PRESENTED

Whether confinement in jail for a misdemeanor probation violation interrupts the five-year "wash-out" period for prior class C felony convictions.

C. STATEMENT OF THE CASE

A jury convicted James Ervin of one count of felony violation of a no-contact order stemming from an incident that occurred in June 2006. CP 1, 35 (RCW 26.50.110(1), (5)). Mr. Ervin had two prior class C felony convictions: second degree possession of stolen property, committed on January 27, 1991, and first degree rendering criminal assistance, committed on March 31, 1994. CP 41, 65-75; 7/24/07RP 1-2, 9-10. Mr. Ervin spent five consecutive years following his release from confinement for those felonies without committing any crime that resulted in conviction.

7/24/07RP 3-6, 11-12.

In 1999, Mr. Ervin was charged and convicted of a misdemeanor domestic violence offense and, as a condition of probation, ordered to attend anger management classes. CP 58, 60. Ervin violated that condition of probation and, as a result, spent 17 days in jail, from January 25 to February 11, 2002. CP 63-64. Upon his release, the misdemeanor case was closed. CP 64.

At sentencing for the current offense, defense counsel argued the two prior class C felonies "washed out" of the offender score because Mr. Ervin spent five consecutive years following his release from confinement for those offenses without committing any

crime. 7/24/07RP 3-6, 11-12; see RCW 9.94A.525(2)(c). The trial court disagreed, concluding the several days Mr. Ervin spent in jail in 2002 for the misdemeanor probation violation interrupted the wash-out period. 7/24/07RP 10-11. The Court of Appeals affirmed. State v. Ervin, 149 Wn. App. 561, 205 P.3d 170 (2009). This Court granted review.

D. ARGUMENT

MR. ERVIN'S TWO PRIOR CLASS C FELONIES WASHED OUT AND SHOULD NOT HAVE BEEN INCLUDED IN HIS OFFENDER SCORE, BECAUSE HE SPENT FIVE CONSECUTIVE YEARS IN THE COMMUNITY FOLLOWING HIS RELEASE FROM CONFINEMENT PURSUANT TO THOSE FELONIES, WITHOUT COMMITTING ANY CRIME

The SRA's wash-out provision for prior class C felony convictions states:

[C]lass C prior felony convictions other than sex offenses shall not be included in the offender score if, since the last date of release from confinement (including full-time residential treatment) pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in a conviction.

RCW 9.94A.525(2)(c). The issue in this case is whether the five-year wash-out period is interrupted by time an offender spends in jail for a misdemeanor probation violation.

It is well-established that the meaning of this statutory provision must be discerned from the ordinary meaning of the language at issue, the context of the statute in which the provision is found, related provisions, and the statutory scheme as a whole. See Christensen v. Ellsworth, 162 Wn.2d 365, 372-73, 173 P.3d 228 (2007) (citing Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002)). If the statutory language is susceptible to more than one reasonable interpretation, then this Court may resort to statutory construction, legislative history, and relevant case law for assistance. Christensen, 162 Wn.2d at 372-73 (citing Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 808, 16 P.3d 583 (2001)). The Court's ultimate objective is to give effect to the Legislature's intent. Christensen, 162 Wn.2d at 372-73 (citing Campbell & Gwinn, 146 Wn.2d at 9).

Thus, the meaning of any particular word or phrase in the statute is not gleaned from that word or phrase alone, as this Court's purpose is to ascertain the legislative intent of the statute as a whole. Davis v. Dep't of Licensing, 137 Wn.2d 957, 970-71, 977 P.2d 554 (1999) (citing Whatcom County v. City of Bellingham, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (quoting State v. Krall, 125 Wn.2d 146, 148, 881 P.2d 1040 (1994)). Moreover, "the rule of

statutory construction that trumps every other rule," is that the Court should not adopt an interpretation that results in absurd or strained consequences. Davis, 137 Wn.2d at 971.

Finally, as a penal statute, the SRA must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co. v. Ward, 124 Wash. 204, 207, 213 P. 929 (1923). If the statute is ambiguous, under the rule of lenity, this Court must adopt the interpretation that favors the defendant. State v. Jacobs, 154 Wn.2d 596, 601, 115 P.3d 281 (2005). A statute is ambiguous if it is susceptible to two or more reasonable interpretations. Campbell & Gwinn, 146 Wn.2d at 12.

Applying these rules of statutory interpretation, it is apparent that the Legislature did not intend the five-year wash-out period for class C felonies be interrupted by time an offender spends in jail for only a misdemeanor probation violation. As discussed below, the language of the wash-out provision and the statutory scheme as a whole indicate the Legislature intended that the wash-out period begin when a person is released from confinement pursuant to a felony conviction, or on the date of judgment and sentence, and be interrupted only if the person commits a crime. An offender is "in

the community," and the wash-out period is not interrupted, as long as the offender is not confined pursuant to a felony conviction. The intent of the wash-out provisions is to reward offenders for remaining crime-free, not to punish them for spending time in jail regardless of the reason for the confinement.

Because Mr. Ervin was jailed for only a misdemeanor probation violation, and not pursuant to a felony conviction, and because he remained crime-free for five consecutive years, his two prior class C felony convictions washed out.

1. The Legislature intended the wash-out period begin when the offender is released from confinement pursuant to a felony conviction, or on the date of the judgment and sentence, and be interrupted only if the offender commits a crime. The statute provides that prior class C felony convictions "wash out" and are not included in the offender score

if, since the last date of release from confinement . . . pursuant to a felony conviction, if any, or entry of judgment and sentence, the offender had spent five consecutive years in the community without committing any crime that subsequently results in conviction.

RCW 9.94A.525(2)(c). According to the plain meaning of the statute, the five-year wash-out period begins on the date the

offender is released from confinement pursuant to a felony conviction, or on the date of judgment and sentence if the person is not sentenced to confinement. The wash-out period is interrupted only if the offender "commit[s] any crime that subsequently results in conviction." Id.

Professor David Boerner explained, there are two prerequisites for washout. David Boerner, Sentencing in Washington § 5.6(d), at 5-10 (1985). First, the starting date of the "decay" period is determined by the date of release from confinement pursuant to a prior felony conviction, or the date of judgment and sentence, whichever came later. Id. (citing former RCW 9.94A.360(12) (1984)). Although the Legislature has amended the statute since Boerner's treatise, the starting date of the "decay" period is the same as it has always been: the date of release from confinement pursuant to a felony conviction, or the date of judgment and sentence, whichever came later. RCW 9.94A.525(2)(c). The other prerequisite to washout is that the decay period is not interrupted. Boerner, Sentencing in Washington, supra, § 5.6(d), at 5-10. At the time of Boerner's treatise, the decay period was interrupted if the defendant was "'convicted of any felonies since' the date of release or of the

judgment and sentence." Id. (quoting former RCW 9.94A.360(12) (1984)). Now, the wash-out period is interrupted by the "commi[ssion of] any crime that subsequently results in conviction," and not by conviction of a felony. RCW 9.94A.525(2)(c).

Division Three of the Court of Appeals similarly concluded there are two prerequisites for washout. In re Pers. Restraint of Nichols, 120 Wn. App. 425, 85 P.3d 955 (2004). Like Boerner, Division Three divided the statute into two clauses: a "trigger" clause and a "continuity/interruption" clause. Id. at 432. Addressing the former version of the statute, Nichols explained the wash-out period was "triggered" on the date the offender was released from confinement pursuant to a felony conviction. Id. Again, the "trigger" event is the same under the current version of the statute. RCW 9.94A.525(2)(c). Second, under the former version of the statute, the wash-out period was interrupted if the offender was convicted of a felony. Nichols, 120 Wn. App. at 432 (citing former RCW 9.94A.360(2) (1990)). Again, under the current version of the statute, the wash-out period is interrupted if the person commits a crime that subsequently results in conviction. RCW 9.94A.525(2)(c).

Nichols held that because a new wash-out period is not "triggered" unless the person is released from confinement pursuant to a felony, and is not "interrupted" unless the person is convicted of a felony, confinement for a misdemeanor conviction does not trigger a new wash-out period. Nichols, 120 Wn. App. at 432. "[A] person's freedom from the local jail or similar confinement unrelated to a felony is not a requisite to being 'in the community.'" Id. (quoting former RCW 9.94A.360(2) (1990)). The phrase "in the community" is not rendered superfluous, however, because it "refers to the defendant's status because of the trigger event. In other words, an offender is not 'in the community' if not released from felony confinement." Nichols, 120 Wn. App. at 432.

Although Nichols interpreted the former version of the statute, its analysis applies with equal force to the current version. Under the current version of the statute, a new wash-out period is not "triggered" unless the person is released from confinement pursuant to a felony conviction, and is not "interrupted" unless the person commits a crime. Therefore, confinement for a misdemeanor probation violation does not trigger a new wash-out period, because it is "confinement unrelated to a felony." Nichols,

120 Wn. App. at 432. The person is still "in the community" as long as he is not confined pursuant to a felony conviction.

The statutory amendments support the view that the Legislature intended the phrase "in the community" to mean not confined pursuant to a felony conviction. As enacted, the section read, "[c]lass C prior felony convictions . . . are not included if the offender has spent five years in the community and has not been convicted of any felonies." Laws 1983, ch. 115, § 7. The following year, the Legislature amended the statute to provide,

[c]lass C prior felony convictions . . . are not included if the offender has spent five years in the community and has not been convicted of any felonies since the last date of release from confinement pursuant to a felony conviction (including full-time residential treatment), if any, or entry of judgment and sentence.

Laws 1984, ch. 209, § 19.

The amendment added the language "since the last date of release from confinement pursuant to a felony conviction . . . if any, or entry of judgment and sentence." *Id.* The added language clarifies what the Legislature originally meant by the phrase "in the community." "In the community" means not confined "pursuant to a felony conviction." The amendment clarifies that, "[w]here the conviction resulted in a sentence which included total or partial

confinement, the [decay] period begins to run on the 'last date of release from confinement.'" Boerner, supra, § 5.6(d) at 5-10 (quoting former RCW 9.94A.360(12) (1984)).

The conclusion that the statutory phrase "in the community" means not confined "pursuant to a felony conviction" is consistent with the ordinary meaning of the word "community." "Community" means "neighborhood" or "vicinity," and is "synonymous with locality." Black's Law Dictionary 280 (6th ed. 1990). "Community" also means "a body of individuals organized into a unit or manifesting usu. with awareness some unifying trait," or "[t]he people living in a particular place or region and usu. linked by common interests; *broadly*: the region itself: any population cluster." Webster's Third New International Dictionary 460 (1993).

Applying these ordinary definitions of the word "community," it is apparent that "a person's freedom from the local jail or similar confinement unrelated to a felony is not a requisite to being 'in the community.'" Nichols, 120 Wn. App. at 432.

In this case, Division One of the Court of Appeals interpreted the phrase "in the community" to mean any time spent not in custody. Ervin, 149 Wn. App. at 565. But taking this interpretation to its logical extreme results in absurd or strained consequences.

An offender "would be 'out of the community' and the wash-out period interrupted for any arrest and detention." Nichols, 120 Wn. App. at 433. In an earlier decision, Division One recognized the absurdity of such an interpretation of the statute:

Smith's concern that a misdemeanor sentence or time spent pretrial on a charge for which the defendant was eventually acquitted would interrupt the washout period is not well taken. Under the clear language of the statute the washout period is interrupted not for any reason, but only for time spent in confinement pursuant to a felony conviction.

State v. Smith, 65 Wn. App. 887, 893, 830 P.2d 379 (1992). The Legislature could not have intended that the wash-out period be interrupted if an offender spends time in jail but is not charged with a crime, for example, or if he spends time in jail on a charge that is ultimately dismissed.

As stated, Division Three held in Nichols that a person confined in jail for reasons unrelated to a felony is still "in the community" for purposes of the wash-out statute. 120 Wn. App. at 432. It is an accepted rule of statutory interpretation that reenactment of a statute following a judicial interpretation of it is a legislative approval and adoption of the court's holding. Ellis v. Dep't of Labor & Indus., 88 Wn.2d 844, 848, 567 P.2d 224 (1977) (citing Yakima Valley Bank & Trust Co. v. Yakima County, 149

Wash. 552, 271 P. 820 (1928)). "[W]hen our Legislature enacts a statute, it is presumed to be familiar with judicial interpretations of statutes, and absent an indication it intended to overrule a particular interpretation, amendments are presumed to be consistent with previous judicial decisions." State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000).

The Legislature amended the offender score statute several times after Nichols was issued in 2004, but the Legislature has not changed the statutory language interpreted in Nichols. See Laws 2008, ch. 231, § 3; Laws 2007, ch. 199, § 8; Laws 2007, ch. 116, § 1; Laws 2006, ch. 128, § 6; Laws 2006, ch. 73, § 7. The Legislature's failure to amend the language indicates its tacit agreement with Nichols that a person confined in jail for reasons unrelated to a felony is still "in the community" for purposes of the wash-out statute.

Finally, to the extent the statute is susceptible to more than one reasonable interpretation, under the rule of lenity, this Court must adopt the interpretation that favors Mr. Ervin. Jacobs, 154 Wn.2d at 601. As Nichols concluded, the most reasonable interpretation of the statute is that it requires the offender be confined pursuant to a felony conviction, and not a mere

misdemeanor probation violation, in order for a new five-year wash-out period to be triggered.

2. Misdemeanors are not relevant to the "trigger" date, because the statute's emphasis is on prior felony, not misdemeanor, convictions. As stated, the five-year wash-out period for prior class C felonies is triggered on the date the offender is released from confinement pursuant to a felony conviction, or on the date the felony judgment and sentence is entered. RCW 9.94A.525(2)(c). Nichols held that misdemeanors are not relevant to the "trigger" date because it is only felonies that are subject to wash out. Nichols, 120 Wn. App. at 432. That interpretation is consistent with the statute's emphasis on felony, not misdemeanor, convictions.

First, the SRA applies only to "the sentencing of felony offenders." RCW 9.94A.010. Second, with limited exceptions,¹ the offender score includes only prior convictions for felony offenses. RCW 9.94A.525; State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). The SRA allows use of only felony convictions in the

¹ Where the current conviction is for a felony traffic or watercraft offense, the SRA authorizes the court to include serious misdemeanor traffic or watercraft offenses in the offender score. See RCW 9.94A.525(11), (12).

offender score, because "the emphasis of the legislation [is] on felony offenses." Boerner, Sentencing in Washington, *supra*, §5.6(a), at 5-7 (citing former RCW 9.94A.360 (1984)).

The SRA's emphasis on felony convictions is reflected in the wash-out provision. A new wash-out period is triggered on the date the offender is released from confinement "pursuant to a felony conviction." RCW 9.94A.525(2)(c).

The Court of Appeals has concluded that confinement "pursuant to a felony conviction" includes confinement due to a felony probation violation. State v. Blair, 57 Wn. App. 512, 516, 789 P.2d 104 (1990); State v. Higgins, 120 Wn. App. 159, 163-64, 83 P.3d 1054 (2004) (following Blair). In other words, a new wash-out period is triggered if the offender spends time confined for a felony probation violation. That conclusion is consistent with the statute's emphasis on prior felony convictions. "In interpreting 'pursuant to a felony conviction' under [former] RCW 9.94A.360(2), there is no reason to disassociate the probation confinement from its underlying cause, the felony conviction." Blair, 57 Wn. App. at 515-16.

But there is no basis to conclude that release from confinement pursuant to a *misdemeanor* probation violation triggers

a new wash-out period. The offender score does not include prior convictions for misdemeanors. The wash-out statute does not provide that a new wash-out period is triggered on the date a person is released from confinement pursuant to a misdemeanor conviction. The SRA is not concerned with misdemeanor sentencing, or in imposing additional punishment for an offender's failure to comply with conditions of misdemeanor probation. The statute must be construed strictly and may not be extended by construction to situations not clearly intended by the Legislature. Blanchard Co., 124 Wash. at 207. Imposing additional punishment for a person's violation of a condition of misdemeanor probation is not consistent with the SRA's emphasis on prior *felony* convictions.

3. Confinement for a misdemeanor probation violation does not interrupt the wash-out period, because the purpose of the statute is to impose punishment proportionate to a person's history of prior convictions, not to punish a person for being confined. The purpose of the offender score provisions of the SRA is to impose punishment proportionate to the seriousness of a person's "criminal history." RCW 9.94A.010(1); RCW 9.94A.525. "'Criminal history' means the list of a defendant's prior convictions and juvenile adjudications" RCW 9.94A.030(11). "The Act makes it clear

that criminal history is limited to convictions." Boerner, Sentencing in Washington, *supra*, §5.4, at 5-6 (citing former RCW 9.94A.030(8) (1984)). "Criminal history" does *not* include misdemeanor probation violations.

In 1995, the Legislature amended the statute to provide that the wash-out period is interrupted any time a person commits a crime, whether felony or misdemeanor, that subsequently results in conviction. Laws 1995, ch. 306, § 1. Previously, the wash-out period was interrupted only if the person was "convicted of any felonies." Former RCW 9.94A.360(2) (1992). The 1995 amendments are consistent with the SRA's purpose to impose punishment proportionate to a person's criminal history. The amendments allow the wash-out period to be interrupted only if the person commits a *crime*, and only if the commission of the crime results in *conviction*. The amendments provide no basis to conclude the wash-out period is interrupted if the person is jailed for violating a condition of misdemeanor probation.

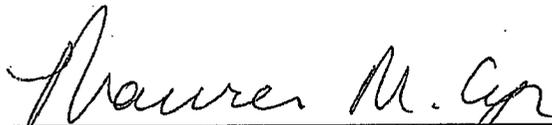
Here, Mr. Ervin committed no crime during the five-year wash-out period. Instead, he was jailed for 17 days for failing to attend anger management classes, which was a condition of his probation for a misdemeanor conviction. CP 58, 60, 63-64. The

purpose of the wash-out provisions is to reward offenders for being crime-free, not to punish them for spending time in jail for violating conditions of misdemeanor probation. Mr. Ervin spent five consecutive years without committing any crime, and without being confined pursuant to a felony conviction. His two prior class C felonies therefore washed out and should not have been included in his offender score for the current offense.

E. CONCLUSION

Because Mr. Ervin spent five consecutive years without committing any crime, and without being confined pursuant to a felony conviction, his two prior class C felonies washed out and should not have been included in his offender score. He is entitled to be resentenced.

Respectfully submitted this 15th day of January, 2010.



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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 83244-7
v.)	
)	
JAMES ERVIN,)	
)	
Petitioner.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 15TH DAY OF JANUARY, 2010, I CAUSED THE ORIGINAL **SUPPLEMENTAL BRIEF OF PETITIONER** TO BE FILED IN THE **WASHINGTON STATE SUPREME COURT** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 15TH DAY OF JANUARY, 2010.

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