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Court of Appeals
Division III
State of Washington

No. 94544-6

34018-0-III

IN THE COURT OF APPEALS IN THE STATE OF WASHINGTON
DIVISION THREE

IN RE THE PERSONAL RESTRAINT OF
EDDIE ARNOLD,
Petitioner.

BRIEF OF PETITIONER

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1. STATUS OF MR. ARNOLD

Mr. Arnold is currently held in custody at the Stafford Creek Corrections Center, having pleaded guilty on March 18, 2015, in the Superior Court of Spokane County, Washington, cause number 13-1-03641-1 to failing to register as a sex offender and having been sentenced on June 4, 2015, to 51 months confinement and 36 months of community custody. Mr. Arnold has not taken any appeals from this judgment and sentence. On July 22, 2015, Mr. Arnold prepared a motion to withdraw his plea of guilty in Spokane County Superior Court. On January 19, 2016, the Spokane County Superior Court transferred Mr. Arnold's motion to this court as a personal restraint petition.

2. GROUNDS FOR RELIEF

- i. The facts upon which the claim of unlawful restraint of Mr. Arnold is based.

On May 3, 1988, Mr. Arnold was charged with statutory rape in the second degree in violation of RCW 9A.44.080(1) for allegedly engaging in sexual intercourse with an 11 to 14-year-old child between October 31, 1987 and December 31, 1987.¹

On June 27, 1988, Mr. Arnold pleaded guilty to statutory rape in the second degree.²

In 2011, Division I of the Court of Appeals issued its decision in *State v. Taylor*, 162 Wn.App. 791, 259 P.3d 289 (2011). The *Taylor* court held that the definition of "sex offense" used in former RCW 9A.44.130(10) referred to the definition of "sex offense" found in the Sentencing Reform Act of 1981 (SRA), ch. 9.94A RCW and that the SRA's definition of "sex offense" included "a felony that 'is' a violation of the SRA."³ The

¹ Brief of Respondent, Attachment A-1.

² Brief of Respondent, Attachment A-2-A-5.

³ *Taylor*, 162 Wn.App. at 794-795, 259 P.3d 289

State charged Taylor with failing to register as a sex offender based on his conviction of third degree statutory rape in 1988 under former RCW 9A.44.090.⁴ The *Taylor* court found that because RCW 9A.44.090 was repealed in 1988⁵, and because “there is no provision...for offenses listed in chapter 9A.44 that existed after 1976 but were subsequently repealed”,⁶

The language of the SRA's definition resulted in a gap. Filling this gap would require us to read words into the statute to make it applicable to any felony that is “or was at the time of the offense” a violation of chapter 9A.44 RCW. It is highly likely this gap was inadvertent rather than intentional. Regardless, we may not fill such a gap without legislative authority.⁷

Ultimately, the *Taylor* court held that “the plain language of the statute does not define Taylor's conviction as a sex offense”⁸ and “Taylor's crime of conviction is no longer listed in the provision of the SRA defining ‘sex offense.’”⁹ The *Taylor* court found that it was “not empowered to add words to the statute to fix that gap” and reversed Taylor’s conviction.¹⁰

On October 11, 2013, the State charged Mr. Arnold with failing to register as a sex offender.¹¹

On March 18, 2015, Mr. Arnold pleaded guilty to failure to register as a sex offender in violation of RCW 9A.44.130.¹² The elements of that crime as set forth on the statement of defendant on plea of guilty were:

That on June 27, 1988, the defendant was convicted of a felony sex

⁴ *Taylor*, 162 Wn.App. at 794, 259 P.3d 289.

⁵ *Taylor*, 162 Wn.App. at 795-796, 259 P.3d 289.

⁶ *Taylor*, 162 Wn.App. at 799, 259 P.3d 289.

⁷ *Taylor*, 162 Wn.App. at 799, 259 P.3d 289.

⁸ *Taylor*, 162 Wn.App. at 800, 259 P.3d 289.

⁹ *Taylor*, 162 Wn.App. at 801, 259 P.3d 289.

¹⁰ *Taylor*, 162 Wn.App. at 801, 259 P.3d 289.

¹¹ Brief of Respondent, Attachment D-1-D-2.

¹² Brief of Respondent, Attachment D-1-D-10.

offense and that due to this conviction, the defendant was required to register in the State of Washington sex offender [sic] between May 24 and October 10, 2013 knowingly failed to comply with a requirement of sex offender registration.¹³

On June 17, 2015, the Spokane County Sheriff's office sent Mr. Arnold a letter informing him that due to "a recent Washington State Court of Appeals ruling," Mr. Arnold was no longer required to register as a sex offender.¹⁴ A Washington State Patrol document titled "Sex/Kidnapping Offender Registration Relieved of Duty to Register" accompanied the Spokane Sheriff's letter and informed Mr. Arnold that the name of the Court of Appeals case was *State v. Taylor*.¹⁵

On June 30, 2015, Division II of the Court of Appeals issued its decision in *In re Pers. Restraint of Wheeler*, 18 Wn.App. 613, 354 P.3d 950 (2015). Wheeler pleaded guilty to third degree statutory rape in 1985. The legislature repealed the statute under which Wheeler was convicted in 1988. In 1999, the State charged Wheeler with failing to register as a sex offender under RCW 9A.44.130 based on his 1985 third degree statutory rape conviction. In 2000, Wheeler pleaded guilty to failure to register as a sex offender, with his 1985 statutory rape conviction serving as the predicate offense.¹⁶

In 2013, Wheeler filed a CrR 7.8 motion in superior court, alleging that his 2000 conviction was unlawful under *Taylor*.¹⁷ The superior court transferred the motion to the Court of Appeals as a personal restraint petition.¹⁸ The *Wheeler* court agreed with the reasoning of the *Taylor* decision and held that,

Wheeler's 2000 judgment and sentence is invalid on its face because his

¹³ Brief of Respondent, Attachment D-3.

¹⁴ Brief of Respondent, Attachment F-1.

¹⁵ Brief of Respondent, attachment F-2.

¹⁶ *Wheeler*, 188 Wn. App. at 616, 354 P.3d 950.

¹⁷ *Wheeler*, 188 Wn. App. at 616, 354 P.3d 950.

¹⁸ *Wheeler*, 188 Wn. App. at 616, 354 P.3d 950.

conviction is not based on an offense defined as a sex offense at the time of the failure to register. This error constitutes a fundamental defect that entitles Wheeler to relief. Accordingly, we grant the petition and vacate Wheeler's 2000 conviction for failing to register as a sex offender.¹⁹

On August 6, 2015, Mr. Arnold filed a pro-se CrR 7.8 motion to withdraw his guilty plea to failure to register as a sex offender. Mr. Arnold argued that his 2015 conviction for failure to register as a sex offender was not valid because it was based on his 1988 conviction of second-degree statutory rape that the legislature had repealed as an offense in 1988. Mr. Taylor argued that he was unaware of *State v. Taylor* and therefore did not understand the effect of the guilty plea. The Superior Court transferred Mr. Arnold's motion to this court for consideration as a personal restraint petition (PRP).

The State has filed a response to Mr. Arnold's PRP arguing that his PRP should be denied because Mr. Arnold cannot demonstrate he is prejudiced and because *State v. Taylor* was wrongly decided.

ii. Mr. Arnold is unlawfully restrained because his conviction for failing to register as a sex offender was not based on an offense defined as a sex offense at the time of his alleged failure to register.

a. *Mr. Arnold is under restraint.*

To obtain relief by means of a personal restraint petition, a petitioner must demonstrate that he is under restraint and that the restraint is unlawful.²⁰ A petitioner is under restraint if he has limited freedom because of a court decision, is confined or subject to imminent confinement, or is under some other disability resulting from a judgment or sentence in a criminal case.²¹

Mr. Arnold is currently incarcerated at the Stafford Creek Corrections Center

¹⁹ *Wheeler*, 188 Wn. App. at 621, 354 P.3d 950.

²⁰ *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 363, 256 P.3d 277 (2011).

²¹ RAP 16.4(b).

while serving his sentence for failing to register as a sex offender. Mr. Arnold is clearly under restraint.

b. *Mr. Arnold's restraint is unlawful because the judgment and sentence is invalid on its face.*

To show that his restraint is unlawful, a petitioner must demonstrate either constitutional error that resulted in actual and substantial prejudice or a fundamental defect of a nonconstitutional nature that resulted in a complete miscarriage of justice.²² The imposition of an unlawful sentence is a fundamental defect.²³

Where a defendant is convicted of a nonexistent crime, the judgment and sentence is invalid on its face.²⁴ This is true whether or not the petitioner pleaded guilty.²⁵ An agreement to plead guilty to a nonexistent crime does not foreclose collateral relief because a plea agreement cannot exceed the statutory authority granted to the courts.²⁶

RCW 10.01.040 provides, in pertinent part, “Whenever any criminal or penal statute shall be amended...all offenses committed...while it was in force shall be punished...as if it were in force, notwithstanding such amendment...unless a contrary intention is expressly declared in the amendatory or repealing act.”

“RCW 10.01.040 generally requires that crimes be prosecuted under the law in effect at the time they were committed.”²⁷

RCW 10.01.040 prevents the amendment or repeal of a criminal statute from affecting all committed offenses and resulting penalties “unless a contrary intention is expressly declared in the amendatory or repealing act.” This savings clause requires trial courts to give effect to dispositions according to the statutes in effect on the date of the committed crime

²² *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 810–13, 792 P.2d 506 (1990).

²³ *In re Pers. Restraint of Carrier*, 173 Wn.2d 791, 818, 272 P.3d 209 (2012).

²⁴ *In re Pers. Restraint of Hinton*, 152 Wn.2d 853, 860, 100 P.3d 801 (2004).

²⁵ *Hinton*, 152 Wn.2d at 860, 100 P.3d 801.

²⁶ *In re Pers. Restraint of Thompson*, 141 Wn.2d 712, 723, 10 P.3d 380 (2000).

²⁷ *State v. Hylton*, 154 Wn. App. 945, 953, 226 P.3d 246, *review denied*, 169 Wn.2d 1025 (2010).

unless the repealing act expresses contrary intent. *See Rivard v. State*, 168 Wn.2d 775, 781, 231 P.3d 186 (2010) (refusing to consider a prior vehicular homicide conviction, a class B felony at the time of the offense, as a class A felony when the legislature did not include retroactive application intent language in the amendatory process when elevating the felony status of the crime).²⁸

“The savings statute, RCW 10.01.040, requires that defendants are prosecuted under the law in effect at the time the crime was committed. But the savings statute applies only to substantive changes in the law.”²⁹ “Substantive amendments change either the *elements of the offense*, the severity of the punishment, or what evidence can be used to prove the offense.”³⁰

1. Taylor, Wheeler, and former RCW 9A.44.130.

Both Taylor and Wheeler had pleaded guilty to third-degree statutory rape under former RCW 9A.44.090.³¹ Both Taylor and Wheeler were charged with failure to register as a sex offender under former RCW 9A.44.130.³² At the time Wheeler and Taylor failed to register as sex offenders, former RCW 9A.44.130

required any adult who had been convicted of a sex offense to register with the county sheriff. Former RCW 9A.44.130(1)(a); *Taylor*, 162 Wn.App. at 794, 259 P.3d 289. The registration statute defined a sex offense, in part, as any offense so defined by RCW 9.94A.030. Former RCW 9A.44.130(10)(a)(i). The *Taylor* court held that the relevant part of the sex offense definition was that defining a sex offense as a felony that “is” a violation of chapter 9A.44 RCW. 162 Wn.App. at 795, 259 P.3d 289.³³

Because RCW 9A.44.090 had been repealed and was not part of chapter 9A.44

²⁸ *State v. Lamb*, 163 Wn. App. 614, 633, 262 P.3d 89, 99 (2011) *aff'd in part, rev'd in part*, 175 Wn.2d 121, 285 P.3d 27 (2012).

²⁹ *State v. Calhoun*, 163 Wn. App. 153, 162, 257 P.3d 693, 697-98 (2011), *review denied* 173 Wn.2d 1018 (2012) (internal citations omitted).

³⁰ *State v. Calhoun*, 163 Wn. App. 153, 164, 257 P.3d 693 (2011), *review denied* 173 Wn.2d 1018 (2012) (emphasis added).

³¹ *Wheeler*, 188 Wn.App. at 618-619, 354 P.3d 950.

³² *Wheeler*, 188 Wn.App. at 618-619, 354 P.3d 950.

³³ *Wheeler*, 188 Wn.App. at 618, 354 P.3d 950.

RCW at the time of Taylor's or Wheeler's failure to register, the *Taylor* and *Wheeler* courts found that neither Taylor nor Wheeler had been convicted of a crime that required them to register as sex offenders under former RCW 9A.44.130 and vacated their convictions for failing to register as a sex offender.

2. Mr. Arnold's case is virtually identical to *Taylor* and *Wheeler*.

Like Taylor and Wheeler, Mr. Arnold pleaded guilty to statutory rape under former RCW 9A.44.080, a statute that was repealed in 1988.

In 2013, the time Mr. Arnold allegedly failed to register as a sex offender, RCW 9A.44.128(10)(1)(a) defined "sex offense," in pertinent part as "[a]ny offense defined as a sex offense by RCW 9.94A.030."³⁴

The then-applicable version of RCW 9.94A.030(46) defined "sex offense" as, in pertinent part, "A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132."

In other, words, Mr. Arnold was charged with violating the same statutes as were Taylor and Wheeler.

Both the *Taylor* and *Wheeler* courts vacated the convictions in those cases because, due to the statutory definition of "sex offense" applicable to the crime of failing to register as a sex offender at the time the defendants failed to register, the defendants had pleaded guilty to nonexistent crimes. This analysis applies to Mr. Arnold's conviction for failing to register as a sex offender.

Like Taylor and Wheeler, at the time Mr. Arnold is alleged to have failed to

³⁴ Laws 2010 Chapter 267 (S.S.B. 6414) amended RCW 9A.44.130 in part by removing the definition of "sex offense" from that statute and placing it in a newly created section, RCW 9A.44.128. The relevant language of the definition did not change.

register as a sex offender, he had not been convicted of any crime that met the definition of a “sex offense” under RCW 9A.44.130 or RCW 9A.44.128. Mr. Arnold was convicted of second-degree statutory rape under RCW 9A.44.080(1), a statute that was repealed in 1988 and is not included in the definition of “sex offense” applicable to the 2013 version of RCW 9A.44.130 or RCW 9A.44.128.

Like Taylor and Wheeler, when Mr. Arnold pleaded guilty to failing to register as a sex offender, he pleaded guilty to a non-existent crime since he had not been convicted of any crime that required him to register as a sex offender. Because Mr. Arnold pleaded guilty to a non-existent crime, his judgment and sentence for that crime is invalid on its face and his restraint is unlawful. Mr. Arnold should be permitted to withdraw his guilty plea.

iii. Reply to State’s Response

The State argues that Mr. Arnold’s petition should be denied because the *Taylor* and *Wheeler* decisions “were predicated upon a misinterpretation of the law, and were incorrectly decided.”³⁵ Specifically, the State argues that the *Taylor* and *Wheeler* courts incorrectly interpreted the meaning of the word “is” in RCW 9A.44.030(46)’s definition of “sex offense” as “A felony that is a violation of chapter 9A.44 RCW other than RCW 9A.44.132.” The State argues that the Legislature intended “is” to be interpreted broadly and that the Legislature intended any crime committed at any time that met the definition of a sex offense that was a violation of 9A.44 RCW to trigger the requirement to register as a sex offender. The State’s argument fails.

a. *It is unnecessary to resort to statutory interpretation in this case.*

Courts attempt to determine legislative intent by examining the statute's plain

language.³⁶ Only if the plain language is ambiguous do courts consider other sources of statutory interpretation, such as legislative history.³⁷

The plain language of RCW 9A.44.130, RCW 9A.44.128, and RCW 9.94A.030(46) is unambiguous. It is unnecessary to resort to statutory interpretation to understand the meaning of the statutes. The legislature clearly did not include a conviction under the now-repealed RCW 9A.44.080 in the list of crimes that require an offender to register as a sex offender.

b. *Division II has already considered and rejected the State's argument regarding the intent of the Legislature.*

Should this court decide to reach the State's arguments regarding legislative intent, it should be aware that the State's argument has already been rejected by another division of the Court of Appeals. The State made the same argument regarding the Legislature's intent to Division II in *Wheeler*. The *Wheeler* court considered the argument and rejected it:

B. Legislative Intent

The State maintains that we should not follow *Taylor* because it rests on an improper interpretation of the word "is" in the sex offense definition. The State argues that it is far more reasonable to read the word "is" broadly and to conclude that the legislature intended that any crime which was at any time included in chapter 9A.44 RCW "is" a sex offense.

To support its interpretation of former RCW 9.94A.030(33), the State cites the policy statement underlying the sex offender registration statute. That policy notes the high risk of reoffense that sex offenders pose and the need to assist local law enforcement agencies in protecting their communities by requiring sex offenders to register with those agencies. Laws of 1990, ch. 3, § 401. The State argues that if monitoring the whereabouts of sex offenders is a priority, it is unlikely that the legislature meant to exempt offenders who were convicted before the 1990 legislation was enacted.

³⁵ State's Response, p. 6.

³⁶ *Erakovic v. Dep't of Labor & Indus.*, 132 Wn. App. 762, 768, 134 P.3d 234 (2006).

³⁷ *Erakovic*, 132 Wn. App. at 768, 134 P.3d 234.

We disagree.

The purpose of interpreting a statute is to determine and enforce the legislature's intent. *State v. Alvarado*, 164 Wn.2d 556, 561–62, 192 P.3d 345 (2008). Where the meaning of statutory language is plain on its face, courts must give effect to that plain meaning as an expression of legislative intent. *Id.* at 562, 192 P.3d 345. In discerning the plain meaning of a provision, courts consider the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *Id.*

Looking at the plain language of the sex offense definition, we observe, as did the *Taylor* court, that this definition was amended in 1999 to include “[a]ny conviction for a felony offense in effect at any time prior to July 1, 1976, that is comparable to a felony classified as a sex offense in (a) of this subsection.” Laws of 1999, ch. 352, § 8; 162 Wn.App. at 798, 259 P.3d 289. This action is consistent with the view that the previous language did not apply the duty to register to crimes not currently listed in chapter 9A.44 RCW. *Taylor*, 162 Wn.App. at 798, 259 P.3d 289. This action also shows the legislature's ability to tailor the definition to include offenses other than those currently classified as sex offenses under the SRA.

We observe further that despite the holding in *Taylor*, the legislature has not amended the sex offense definition to include comparable post–1976 felonies that were subsequently repealed. The legislature is presumed to be familiar with past judicial interpretations of statutes, including appellate court decisions. *State v. Stalker*, 152 Wn.App. 805, 812–13, 219 P.3d 722 (2009), *review denied*, 168 Wn.2d 1043, 234 P.3d 1173 (2010). “[L]egislative inaction following a judicial decision interpreting a statute often is deemed to indicate legislative acquiescence in or acceptance of the decision.” *Stalker*, 152 Wn.App. at 813, 219 P.3d 722. “[W]here statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Stalker*, 152 Wn.App. at 813, 219 P.3d 722 (quoting *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). Consequently, we agree with *Taylor* that the sex offense definition in effect when Wheeler failed to register supports a reading of “is” that permits only sex offenses contemporaneously included in chapter 9A.44 RCW to serve as the predicate for a failure to register conviction.

Wheeler's 2000 judgment and sentence is invalid on its face because his conviction is not based on an offense defined as a sex offense at the time of the failure to register. This error constitutes a fundamental defect that entitles Wheeler to relief.³⁸

³⁸ *Wheeler*, 188 Wn. App. 613, 619–21, 354 P.3d 950.

The *Wheeler* court’s analysis of the State’s argument regarding the intent of the Legislature is equally applicable to Mr. Arnold’s case. The plain language of RCW 9.94A.030(46) establishes that statutory rape in the second degree in violation of RCW 9A.44.080(1) was not a “sex offense” under RCW 9A.44.130 that would trigger a duty to register as a sex offender. Even if the court were to resort to statutory interpretation, the Legislature’s actions clearly indicate that it has chosen explicitly not to include RCW 9A.44.080 as a crime that requires an individual to register as a sex offender.

c. *State v. Horton and RCW 1.12.010 do not apply to this case or to an analysis of the correctness of Taylor and Wheeler.*

Citing *State v. Horton*, 59 Wn.App. 412, 798 P.2d 813 (1990) and chapter 1.12 RCW, the State argues that *Wheeler* and *Taylor* courts misinterpreted RCW 9.94A.030(46) because the *Taylor* and *Wheeler* courts should have interpreted “the various versions of RCW 9.94A.030 defining ‘sex offense’...as continuations of the previous versions of the same statutory provisions”, i.e. the statutory rape statutes.³⁹

But this court is not interpreting RCW 9.94A.030. This court is interpreting RCW 9A.44.130, the statute criminalizing failure of an individual to register as a sex offender. RCW 9A.44.130 was not a continuation of any prior statute- it was a newly enacted crime. The Legislature was free to include or not include whatever elements it wished when defining the crime of failing to register as a sex offender.

d. *The State’s arguments are actually a request for this court to violate the separation of powers and to create legislation.*

As recognized by the *Taylor* court, while it is “highly likely” that the “gap” in the sex offender registration requirement created by the language of the SRA’s definition of

³⁹ State’s Response, p. 17.

“sex offense” was inadvertent, the court “may not fill such a gap without legislative authority.”⁴⁰

The State’s arguments are nothing less than an argument that this court ignore the plain language of the statutes passed by the legislature and add crimes to the list of crimes enumerated by the Legislature as being the crimes for which registration is required. This is improper and beyond this court’s authority to do: “This court cannot read into a statute that which it may believe the legislature has omitted, be it an intentional or an inadvertent omission.”⁴¹

The State’s argument is an improper appeal to this court to exceed its authority and modify a statute without Legislative authority.

3. CITATIONS TO COURT DOCUMENTS

The Clerk of the Spokane County Superior Court has already transferred all relevant documents to this court and the State has attached pertinent documents to its Response Brief.

4. STATEMENT OF FINANCES

Mr. Arnold’s statement of finances, request for waiver of filing fee, and request for appointment of attorney have already been filed with this court.

5. REQUEST FOR RELIEF

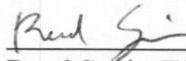
Mr. Arnold requests that this court grant his request that he be permitted to withdraw his guilty plea and that this case be remanded back to the trial court for dismissal of the charge of failing to register as a sex offender with prejudice.

⁴⁰ *Taylor*, 162 Wn. App. at 799, 259 P.3d 289.

⁴¹ *Jenkins v. Bellingham Mun. Court*, 95 Wn.2d 574, 579, 627 P.2d 1316, 1319 (1981).

6. OATH

I declare under penalty of perjury under the laws of the State of Washington that I am the attorney for the petitioner, that I have read the petition, know its contents, and I believe the petition is true.



Reed Speir, WSBA No. 36270

Signed this 26th day of July, 2016, at University Place, Washington

CERTIFICATE OF SERVICE

Reed Speir hereby certifies under penalty of perjury under the laws of the State of Washington that on the 26th day of July, 2016, I delivered via US Mail a true and correct copy of the Petitioner's Brief to the following:

Spokane County Prosecuting Attorney's Office,
County-City Public Safety Building
West 1100 Mallon
Spokane, WA 99260

and I delivered via U.S. mail a true and correct copy of the Petitioner's Brief to

Eddie Arnold, DOC No. 631420
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Signed at Tacoma, Washington this 26th day of July, 2016.



Reed Speir, WSBA No. 36270