No. 95083-1

No. 754416

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

EDGAR DENNIS III

V.

STATE OF WASHINGTON

BRIEF OF APPELLANT

Lawand Anderson
Attorney for Appellant
WSBA# 49012
L.A. Law & Associates
22030 7th Ave S, Suite #103
Des Moines, WA, 98198

Lauren McLane
Attorney for Appellant
WSBA# 40945
Padula & Associates
2320 130th Ave NE
Building E, Suite #250
Bellevue, WA, 98005

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2016 SEP -9 PM 3:45

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A. Assignment of Error

The Superior Court erred when it disregarded *Payseno v. Kitsap County*, 186 Wn. App. 465, 346 P.3d 784 (2015), and denied Mr. Dennis's petition to restore his firearm rights.

Issue Pertaining to Assignment of Error

Did the Superior Court err when it disregarded Division II's decision in *Payseno* and denied Mr. Dennis's petition to restore his firearm rights when he spent well over five years in the community from 1998 to 2014 without being convicted of any new crimes, he had no pending charges at the time of filing his petition, and since 1998 he has had no convictions that count as part of the offender score under RCW 9.94A.525?

B. Statement of the Case

On April 18, 2016, Edgar Dennis filed a petition to reinstate his firearm rights pursuant to RCW 9.41.040(4)(a). *See* CP at 1. It was uncontested that Mr. Dennis's criminal history at the time of the petition was as follows:

11/27/91	King County Superior Court	91-1-054297	Assault 3 9A.36.031
11/27/91	King County Superior Court	91-1-037155	Count (I) Robbery 9A.56.210 Count (II) Assault 4 9A.36.041
9/6/91	King County Superior Court	91-1-027036	VUCSA 69.50.401(D)
9/6/91	King County Superior Court	91-1-016522	VUCSA 69.50.401(A)(1)(I)
1/23/98	King County Superior Court	97-1-085825	Assault 3 9A.36.031
8/18/14	King County District Court	4Z0390192	Negligent Driving 1st Degree RCW 46.61.5249

See CP at 21-22. It was also undisputed that Mr. Dennis resided in the community without being charged or convicted of any criminal offense

from 1998 to 2014, which is over 16 years. *Id.* The State's basis for objecting to the petition was a 2014 conviction for Negligent Driving in the First Degree in King County District Court. *See* CP at 21-28. The conviction for this simple misdemeanor does not preclude the lawful possession of a firearm. *See generally* RCW 9.41.040. At the time of the petition, Mr. Dennis was not currently charged with any criminal offenses and this was undisputed by the State. *See generally* CP at 21-22.

On April 27, 2016, the State objected to Mr. Dennis's petition, asserting that Mr. Dennis should have remained crime free from 2014 to 2019 before filing his petition, i.e., that he should have remained crime free for the five years immediately preceding the filing of his petition. *See* CP at 21-28. On May 2, 2016, Mr. Dennis filed a Memorandum in Response to the State's objection, stating that the court should overrule the State's object and therefore follow current law on the issue. *See* CP at 49-56. On May 10, 2016, the Superior Court agreed with the State and denied Mr. Dennis's petition. *See* CP at 47-48. On May 20, 2016, Mr. Dennis filed Motion for Reconsideration, requesting the court to reconsider its position based upon Division II's holding. *See* CP at 49-96. Mr. Dennis attached supporting documents to his motion for reconsideration, including a copy of the published opinion of Division II in *Payseno* where the court held that a person's "crime free" period need

not be the period immediately preceding his or her petition to restore firearm rights. *See* CP at 88-95. This motion to reconsider was denied by the Superior Court on June 13, 2016. *See* CP at 143-144. Thereafter, Mr. Dennis filed a timely notice of appeal to this Court on June 29, 2016. *See* CP at 145.

C. Summary of Argument

The facts before this Court are undisputed and the relevant legal issue has been previously decided by Division II in *Payseno v. Kitsap County*, 186 Wn. App. 465, 346 P.3d 784 (2015); that decision is based on solid reasoning that should apply in Mr. Dennis's case. Significantly, Division II's statutory interpretation of RCW 9.41.040(4)(a) remains sound, especially in light of the fact that our Legislature has had this statute before it since *Payseno* and has not amended it to reflect a different meaning or application of the "five-year-crime-free period" language. In its objection to Mr. Dennis's petition, the State asserted that the *Payseno* case was "problematic" and relied upon its own interpretation of RCW 9.41.090(4)(a) that was rejected by the *Payseno* court. *See* CP at 21-28. The Superior Court apparently accepted the State's position and disregarded Division II, denying the petition and Mr. Dennis's motion for reconsideration.

In *Payseno*, Division II found that the requirement of the "five-year-crime-free period" under RCW 9.41.090(4)(a) can be satisfied at any time prior to filing of the petition. *Payseno*, 186 Wn. App. at 469. Division II found that the statute was ambiguous and applied the rule of lenity after attempting to discern the Legislature's intent behind the statute. Significantly, the Legislature has not since amended RCW 9.41.090(4)(a) in its sessions; specifically, it considered this statute in 2016 after the *Payseno* decision and had every opportunity to clarify the ambiguity. It did not and *Payseno* is good law today, providing this Court with reasoning and statutory interpretation that remains relevant and upon which it can rely in Mr. Dennis's case.

D. Argument

i. The Superior Court erred when it denied Mr. Dennis's petition to restore his firearm rights when he spent 16 years in the community from 1998 to 2004 without any convictions, he had no pending charges, and he had no convictions that counted as part of the offender score under RCW 9.94A.525 at the time of his petition.

a. Standard of review.

The issue before this Court, like the issue before Division II in *Payseno*, is one of statutory construction; thus, the applicable standard of review is de novo. "Statutory construction is an issue of law that we

review de novo." *Payseno*, 186 Wn. App. at 469, citing *Anderson v. Dussault*, 181 Wn.2d 360, 368, 333 P.3d 395 (2014).

b. The *Payseno* court's statutory interpretation of RCW 9.41.040(4)(a) is sound and the Legislature has not since amended the statute; therefore, the rule of lenity dictates that Mr. Dennis's petition should have been granted.

In its denial of Mr. Dennis's petition to restore his firearm rights, the Superior Court was interpreting a statute that remains ambiguous, but that our Legislature has had ample opportunity to clarify since the *Payseno* decision. Today, *Payseno* remains good law and the Legislature has not amended RCW 9.41.040(4)(a) in response to Division II's decision. Because Mr. Dennis remained crime free for a period of five years or more, i.e., 1998 to 2014 (for 16 years), he was eligible at the time of filing his petition for restoration of his firearm rights under this statute.

RCW 9.41.040(4)(a)(ii)(A) permits an individual to restore his firearm rights when the following applies:

> If the conviction or finding of not guilty by reason of insanity was for a felony offense, **after five or more consecutive years in the community without being convicted** or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525.

RCW 9.41.040(4)(a)(ii)(A) (emphasis added).

Accordingly, the individual seeking to restore his firearm rights must meet three requirements in order to successfully petition for restoration from the Superior Court. First, he must have been in the community for five or more years without being convicted of any crime. Second, he may not be facing current criminal charges of any kind. Third, he cannot have any other felony offenses that count as part of the offender score under RCW 9.94A.525.

Mr. Dennis satisfies all three requirements. First, he lived in the community for five or more years (actually 16 years) from 1998 (the date of his last felony conviction) to 2014 (the date of his Negligent Driving in the First Degree conviction) with no convictions. *See generally* CP at 21-22. Second, he is not facing any current criminal charges of any kind. *See generally* CP at 21-22. Finally, all of his prior felony convictions (his class B Robbery conviction and his class C convictions) "wash" under RCW 9.94A.525—such convictions were in 1991 and then in 1998. Mr. Dennis meets the criteria outlined in the statute; therefore, his petition for restoration should have been granted. It is only the first requirement of the statute that the State took issue with and that the Superior Court ultimately misinterpreted.

In rejecting Mr. Dennis's petition, the Superior Court apparently adopted the State's objection and reasoning with regard to whether or not Mr. Dennis remained in the community for "five or more consecutive years...without being convicted." The State asserted that the statutory language on this point should be interpreted to mean that at the time of the petition Mr. Dennis must have remained crime free for five or more years immediately preceding the filing of the petition. It argued that because Mr. Dennis was convicted of the simple misdemeanor of Negligent Driving in the First Degree, he had not satisfied the statute; in other words, the State believed that the statute required Mr. Dennis to remain without conviction from 2014 to 2019. This argument was soundly rejected in *Payseno* and the Legislature has not responded via amendment to the statute since.

The facts in *Payseno* are essentially the same as the facts before this Court. Mr. Payseno was convicted of a felony charge (VUCSA) in March 2000 and a simple misdemeanor of Negligent Driving in the First Degree in June 2000. *Payseno,* 186 Wn. App. at 467-68. After serving his sentences, Mr. Payseno then remained in the community for over five years without any conviction. Much like Mr. Dennis, Mr. Payseno was then convicted following this seven-year timeframe of crime free behavior. Specifically, in February 2007 and May 2010, Mr. Payseno was

convicted of two misdemeanors—DUI and Negligent Driving in the First Degree. *Id.* at 468. Thus, Mr. Payseno did not remain crime free for five years immediately preceding his petition. Notably, these misdemeanor convictions did not disqualify him from possessing a firearm. Mr. Dennis is similarly situated in the instant case where he was convicted of Negligent Driving in the First Degree in 2014, but after having already spent 16 years crime free in the community (from 1998 to 2014).

Thereafter, in 2013, Mr. Payseno petitioned the Superior Court to reinstate his right to possess a firearm; at that time, three years had passed since his last misdemeanor conviction and he had no charges pending. *Id.* The State objected to Mr. Payseno's petition, asserting what the State is now asserting in Mr. Dennis's case—that in order for his petition to be granted, Mr. Payseno's "five-year-crime-free period needed to immediately precede the filing of the petition." *Id.* The Superior Court rejected Mr. Payseno's petition and held that the statutory language that the petitioner not be "'currently charged with any felony, gross misdemeanor or misdemeanor crimes' as requiring the petitioner to be crime free for the five-year period preceding the petition even if the subsequent criminal offense was not a disqualifying crime that impacted his firearms right." *Id.*

Mr. Payseno then appealed to Division II, asserting that once he remained crime free for five years after his 2000 felony and misdemeanor convictions, then the statute does not grant the Superior Court discretion to deny his petition. *Id.* at 468-69; RCW 9.41.040(4)(a)(ii)(A). Division II agreed with Mr. Payseno that the five-year-crime-free period may be completed at any time before the petition is filed. *Id.* at 469.

The *Payseno* court engaged in statutory interpretation, applying a de novo standard of review. "Statutory construction is an issue of law that we review de novo." *Id.* citing *Anderson*, 81 Wn.2d at 368. It noted, first, that the primary objective in statutory construction is to ascertain the Legislature's intent. *Id.* citing *TracFone Wireless, Inc. v. Dep't of Revenue*, 170 Wn.2d 273, 281, 242 P.3d 810 (2010). The court went on to note that if a statute is not ambiguous or is plain on its face then the statute must be applied as written and it must be assumed that the Legislature meant exactly what it said. *Id.* citing *TracFone Wireless*, 170 Wn.2d at 281; *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). If the statute is ambiguous, i.e., susceptible to more than one interpretation after a plain meaning review is conducted, then courts "rely on statutory construction, legislative history, and relevant case law to determine legislative intent." *Id.* citing *State v. Rice*, 180 Wn. App. 308, 313, 320 P.3d 723 (2014).

Significantly, the *Payseno* court correctly stated, in interpreting a statute, courts "apply the rule of lenity, which provides that, if a criminal statute is ambiguous, we 'strictly construe' it in favor of the defendant." *Id.* 469-70 citing *State v. Evans*, 177 Wn.2d 186, 193, 298 P.3d 724 (2013) (quoting *State v. Hornaday*, 105 Wn.2d 120, 127, 713 P.2d 71 (1986)); *see also State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 984, 329 P.3d 78 (2014). "Washington courts apply the rule of lenity not only to criminal sanctions, but also to community custody, probation, and post-conviction context, and to procedural statutes affecting an offender's rights." *Id.* at 470 citing *State v. Slattum*, 173 Wn. App. 640, 658, 295 P.3d 788, *review denied*, 178 Wn.2d 1010, 308 P.3d 643 (2013).

In *Slattum*, this Court applied the rule of lenity in the post-conviction context. There, Mr. Slattum, after serving his indeterminate minimum sentence and while on community custody for life, moved for postconviction DNA testing in superior court under RCW 10.73.170—this statute allows offenders "currently. . .serving a term of imprisonment" to petition for DNA testing. *Slattum*, 173 Wn. App. at 643. The State opposed the motion, asserting that "imprisonment" meant the Legislature intended to narrow the scope of those eligible for postconviction DNA testing to only those offenders actually serving a sentence in jail or prison. *Id.* This Court found the word "imprisonment" in RCW 10.73.170 to be

ambiguous and applied the rule of lenity, which required that the statute be strictly construed against the State and in favor of Mr. Slattum. *Id.* In reaching its decision, this Court applied the same rules of statutory interpretation and construction that Division II did in the *Payseno* case. *See id.* at 649-50.

In *Slattum*, the State argued that the rule of lenity did not apply because RCW 10.73.170 was merely procedural and did not provide for any criminal sanctions. *Id.* at 658. This Court rejected that position.

> The State cites no Washington authority limiting the use of the rule of lenity to statutes that may result in criminal convictions. No Washington authority limits its application here.
>
> Washington courts have historically applied the rule when interpreting statutes that do not provide for criminal sanctions.

Id. This Court provided an example by referring to a state Supreme Court case that applied the rule of lenity when interpreting a statute that provided for exceptions to the one-year time bar for the filing of personal restraint provisions. *Id.* citing to *In re Pers. Restraint of Greening*, 141 Wn.2d 687, 698 9 P.3d 206 (2000). The *Slattum* court also referenced another Division I case where it applied the rule of lenity in the "community custody/probation/postconviction context." *Id.* at 658-59 citing *State v. Parent*, 164 Wn. App. 210, 267 P.3d 358 (2011).

In *Payseno*, Division II applied the same generally accepted rules of statutory interpretation to RCW 9.41.040(4)(a) that this Court applied to RCW 10.73.170 in the *Slattum* case. First, the *Payseno* court noted that it had previously held that the RCW 9.41.040 "'does not expressly grant the restoring court any discretion or state a burden of proof'; the superior court thus 'serves a ministerial function—i.e., granting the petition—once the petitioner has satisfied the enumerated requirements.'" *Id.* at 470-71 quoting *State v. Swanson*, 116 Wn. App. 67, 69, 65 P.3d 343 (2003). The *Payseno* court then went on to find that the superior court, to the extent it exercised its discretion, did so improperly. *Id.* at 471.

Next, the court found that the applicable statutory language was ambiguous. The court held that RCW 9.41.040(4)(a)(ii)(A)'s "after five or more consecutive years in the community without being convicted" provision can be reasonably interpreted in two ways. "The statute could be interpreted to require a five-year-crime-free period immediately preceding a petition. Alternatively, it could be interpreted to require a five-year-crime-free period at *any* time prior to a petition so long as the other statutory requirements are met (no current charges or disqualifying convictions)." *Id.*

To resolve the ambiguity, Division II considered the legislative history and intent. Following this analysis, the court concluded that "[t]he

legislature offered no statement illuminating whether the five-year-crime-free period was meant to immediately precede a petition for firearms restoration. Therefore, the legislative history does not assist us in resolving the ambiguity." *Id.* at 472.

Next, the court considered the applicable rules of statutory construction. The court found that there was no language in the relevant part of the statute "that expressly requires that the five-year-crime-free period immediately precede the petition. This provides some support for Payseno's position." *Id.* at 473. The court concluded that there were no rules of construction that could definitively resolve the ambiguity.

Finally, because the court could not discern the Legislature's intent, it found that RCW 9.41.040(4)(a)(ii)(A) was ambiguous as applied to the facts and, critically, that the rule of lenity required the statute to be strictly construed in favor of Mr. Payseno. *See id.* citing *Villanueva-Gonzalez*, 180 Wn.2d at 984; *Slattum*, 173 Wn. App. at 658. Division II then held that, in Mr. Payseno's case, the statute "requires only that Payseno was crime free during *any* five-year period before his petition to restore his gun rights." *Id.* (emphasis in original).

Our state Supreme Court has previously stated that when considering challenges to previous statutory interpretations, "[t]his court presumes that the legislature is aware of judicial interpretations of its

enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision." *City of Federal Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009). The Legislature has not made RCW 9.41.040(4)(a) any less ambiguous than it was when the *Payseno* court analyzed it; nor has it responded to *Payseno* in the form of amendments to the relevant statutory language.

While we recognize the State's consternation and objection to the *Payseno* court's interpretation of RCW 9.94.040(4)(a), we must note that the 2016 Legislature did consider amendments to RCW 9.41.040 in Engrossed Substitute House Bill 2906, Juvenile Offenders – Rehabilitation and Reintegration, chapter 136, Laws of 2016, signed by Governor Inslee and filed April 1, 2016.[1] House Bill 2906 has three substantive references to RCW 9.41.040 and while the Bill is titled Juvenile Offenders, clearly the Legislature is aware of its own enactment and has demonstrated that it may, when it seeks to, amend RCW 9.41.040 and, yet, did not amend the statute in question to reflect the State's position.

Mr. Dennis is in the same situation that Mr. Payseno was—he remained crime free for well over five years (from 1998 to 2014) and was

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[1] *See* House Bill 2906, State of Washington, 64th Legislature, 2016 Regular Session, http://app.leg.wa.gov/billinfo/summary.aspx?year=2015&bill=2906 (last visited August 31, 2016).

then convicted of a simple misdemeanor in 2014 (that did not impact his right to possess a firearm) prior to filing his petition in 2016. RCW 9.41.040(4)(a)(ii)(A) is ambiguous as applied to Mr. Dennis's case and the rule of lenity dictates that the statute be construed in his favor. This statute only requires that Mr. Dennis remain crime free during *any* five-year period before filing his petition; he did and so this petition should have been granted by the Superior Court.

E. Conclusion

This Court should reverse the Superior Court's denial of Mr. Dennis's petition and remand the matter with instructions to sign an order restoring Mr. Dennis's firearm rights.

Dated this 9th day of September, 2016.

Respectfully submitted,

Lawand Anderson
Attorney for Appellant
WSBA# 49012

Lauren McLane
Attorney for Appellant
WSBA# 40945