

No. 95083-1

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November 22, 2016

Court of Appeals
Division I
State of Washington

NO. 75441-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

EDGAR DENNIS III,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JULIE SPECTOR

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

The petitioner, Edgar Dennis, has a criminal history involving robbery, assault and drugs. He was convicted of multiple felonies from 1991 through 1998. Each of these felonies resulted in the loss of his right to possess firearms. After these crimes, he went well over five years with no new convictions. However, in 2014 he was again back in court and was convicted of negligent driving in the first degree. In April 2016, Dennis petitioned to restore his firearms rights under RCW 9.41.040(4) arguing that his crime-free period prior to his 2014 conviction qualified him to possess firearms. The King County Superior Court denied the restoration. Did the Superior Court err in denying Dennis's request to reinstate his firearms rights?

B. STATEMENT OF THE CASE

On April 18, 2016, Edgar Dennis filed a petition to reinstate his firearms rights under RCW 9.41.040(4). See CP at 1. At the time of the petition, Dennis had the following criminal convictions that prohibited possession of firearms under RCW 9.41.040(4): assault in the third degree (1991), robbery in the second degree (1991), two violations of the uniform controlled substances act

(1991), and assault in the third degree (1998). CP at 21-22.

Dennis was also convicted of negligent driving in the first degree in 2014 but failed to disclose the recent conviction in his April 2016 petition to the King County Superior Court. CP 21-22.

On April 27, 2016, the State objected to Dennis's petition for restoration because Dennis had not remained crime-free for the five-year period immediately preceding his petition. CP 21-28. The State argued that the 2014 negligent driving conviction interrupted the five-year crime-free period prior to the petition and thus Dennis was not eligible to petition. CP 47-48. The Superior Court denied Dennis's petition. CP at 47-48. Dennis filed a Motion for Reconsideration which was denied. CP 49-96, 143-44.

C. ARGUMENT

1. DENNIS HAS NOT GONE THE FIVE-YEAR CRIME-FREE PERIOD REQUIRED BY RCW 9.41.040(4) AND IS THEREFORE NOT YET ELIGIBLE TO HAVE HIS FIREARMS RIGHTS RESTORED.

Once convicted of a felony, a person loses the right to possess firearms. RCW 9.41.040. However, if a defendant has not been convicted of a sex offense, a Class A felony, or any felony with a maximum sentence of 20 years or more, he or she may

petition a court to restore the right. RCW 9.41.040(4). The defendant may petition if he or she has gone five or more years without any new convictions and has no pending matters, and has no prior felonies that are counted as part of the offender score. RCW 9.41.040(4).

The issue before this court is one of statutory interpretation and is reviewed de novo. State v. Argueta, 107 Wn. App. 532, 536, 27 P.3d 242 (2001); Stuckey v. Dep't of Labor & Indus., 129 Wn.2d 289, 295, 916 P.2d 399 (1996). The fundamental objective of statutory construction is to ascertain and carry out the Legislature's intent. Rozner v. Bellevue, 116 Wn.2d 342, 347, 804 P.2d 24 (1991). If the statute is plain and unambiguous, its meaning must be derived from the statute's words alone. Rozner, at 347. "A statute is ambiguous if it can reasonably be interpreted in two or more ways, but it is not ambiguous simply because different interpretations are conceivable." Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001). The courts need not discern an ambiguity by imagining a variety of alternative interpretations. Id. at 105. The courts are not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." State v. Keller, 143 Wn.2d 267, 276, 276-77, 19 P.3d 1030 (2001) (quoting

Telepage, Inc. v. Tacoma Dep't of Financing, 140 Wn.2d 599, 607, 998 P.2d 884 (2000)).

The defendant must qualify to restore firearms rights under RCW 9.41.040(4) which provides in relevant part:

(4)(a) . . .

Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(ii)(A) 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).

The restoring court has no duty other than ensuring the basic pre-petition statutory requirements are met. State v. Swanson, 116 Wn. App. 67, 78, 65 P.3d 343 (2003). In plain language, RCW 9.41.040 clearly identifies those individuals who may never petition for restoration (those convicted of sex offenses,

Class A felonies, or felonies with a maximum sentence of twenty years). For everyone else, the statute then identifies at what point in time they can petition to restore firearms rights. For those individuals barred due to a felony offense, they may petition after five or more consecutive years in the community without being convicted or currently charged with any other crimes and the individual must have no prior felony convictions counted as part of the offender score. RCW 9.41.040(4).

In the current case, the King County Superior Court had only to look at whether Dennis was eligible to petition for restoration. The determination of eligibility came solely from a review of criminal history. Although Dennis had spent several crime-free years in the community (longer than five) he never petitioned to restore during this time. Dennis was convicted of negligent driving in the first degree, a misdemeanor, in 2014, and two years later he moved to restore. He was not eligible to petition at this time. Interestingly, Dennis did not disclose to the King County Superior Court his 2014 conviction at the time of his petition. The State located the conviction and notified the court. The court denied the request without prejudice.

2. ALLOWING RESTORATION AFTER ANY FIVE-YEAR CRIME-FREE PERIOD WOULD PRODUCE ABSURD RESULTS.

Dennis urges this Court to interpret RCW 9.41.040(4) as instead allowing a person to petition for restoration after *any* five-year crime-free period. Dennis argues that this five-year crime-free period does not need to occur immediately prior to the petition. However, a reading of RCW 9.41.040(4) that allows any five-year crime-free period would lead to strained, if not absurd results. A reading of a statute that produces absurd results should be avoided and the court is to assume the Legislature does not intend them. State v. Vela, 100 Wn.2d 636, 641, 673 P.2d 185 (1983); State v. Larson, 184 Wn.2d 843, 851, 365 P.3d 740, 744 (2015). Courts should, where possible, interpret ambiguous language to avoid absurdity. Vela, at 641.

For example, suppose a defendant commits a Class C felony in 2000, goes five crime-free years and files a petition in 2015. He also has a pending misdemeanor charge. Under an interpretation that allows restoration at any point in time after a five-year period, the defendant is not eligible to have his rights restored because of the pending misdemeanor charge. However, the day after he gets his misdemeanor case resolved, either by acquittal or

conviction, he is eligible for reinstatement. It seems absurd and highly unlikely that the Legislature sought to prevent someone in this person's situation from possessing a firearm while the misdemeanor charge was pending, but that the same person could obtain a firearm upon conviction of the same misdemeanor charge. In other words, a person "accused" of a misdemeanor does not have the right to possess a firearm, but a person actually "convicted" of the same misdemeanor does have the right to possess a firearm.

One might argue that prohibiting a petition while a crime is pending serves to make sure that a person does not have their right restored only to immediately lose it upon a new conviction. However, the statute does not limit pending charges to only those convictions that would result in the loss of firearms rights. RCW 9.41.040(4) disallows a person to petition when *any* crime is pending. As a result, the most logical reading assumes that this is because the Legislature did not want individuals to rush into court and restore their firearms rights while the new charge was pending and thus evading the five-year crime-free period.

Moreover, under Dennis's interpretation, a defendant could have hundreds of misdemeanor convictions (including assaults,

dui's, harassment) since his five-year crime-free period ended and, so long as he has no "pending" charge at the time of the petition, he must be given the right to possess a firearm. These absurd results were clearly not intended by the Legislature. RCW 9.41.040 was amended in 1995 as part of the Hard Time for Armed Crime Act. Hard Time for Armed Crime Act, ch. 129, § 1, 1995 Wash. Laws 443, 444. The Act intended to deter criminals from possessing and using firearms during commission of crimes. State v. Thomas, 113 Wn. App. 755, 760, 54 P.3d 719 (2002); State v. Berrier, 110 Wn. App. 639, 649-50, 41 P.3d 1198 (2002). Specifically, the Legislature found that "[c]urrent law does not sufficiently stigmatize the carrying and use of deadly weapons by criminals." Laws of 1995, ch. 129, § 1(1)(c). Although the above language does not directly address the section at issue in this case, it does clearly show that the Legislature intended to keep guns away from those committing crimes.

3. ALLOWING RESTORATION AFTER ANY FIVE-YEAR CRIME-FREE PERIOD RENDERS LANGUAGE IN RCW 9.41.040 SUPERFLUOUS.

Dennis's argument that any period of five crime-free years should qualify him to restore, ignores a primary rule of statutory

construction. Courts must interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous. Rivard v. State, 168 Wn.2d 775, 783, 231 P.3d 186 (2010).

Statutes must be interpreted and construed so that all the language used is given effect. Citizens All. for Prop. Rights Legal Fund v. San Juan Cty., 184 Wn.2d 428, 440, 359 P.3d 753, 760 (2015). It is presumed that the Legislature does not engage in unnecessary or meaningless acts. State v. Wanrow, 88 Wn.2d 221, 228, 559 P.2d 548, 552 (1977).

Allowing a petition after any crime-free period, despite recent convictions, renders all the language about pending cases meaningless and should be avoided. A broader review of the statute suggests that RCW 9.41.040(4) identifies at what point in time an individual may petition for restoration of firearms rights. The statutory provisions must be read together as a whole. First, RCW 9.41.040(a) identifies those individuals who may never petition to restore. Second, section 9.41.040(4)(ii)(A) then goes on to identify at what point in time a person may petition to restore. RCW 9.41.040(ii)(A) must be read as a whole and in a manner so as to give effect to all the language. When the court reads section (ii)(A) as a clause, there is no ambiguity. An individual may petition

the court 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: Additionally, the language "or more consecutive years" supports this interpretation. If the Legislature had simply intended a list of qualifying factors, it would have simply required a "five year period" and omitted the "or more consecutive years."

4. DENNIS RELIES ON THE DIVISION TWO DECISION IN PAYSENO V. KITSAP COUNTY FOR SUPPORT THAT HIS FIREARMS RIGHTS SHOULD BE RESTORED. THE DECISION IN PAYSENO IS WRONG AND NOT CONTROLLING ON THIS COURT.

Although Payseno v. Kitsap County, 186 Wn. App. 465, 346 P.3d 784 (2015), is persuasive authority, it is not binding on this court. Eriksen v. Mobay Corp., 110 Wn. App. 332, 346-47, 41 P.3d 488 (2002). The interpretation of RCW 9.41.040(4) in Payseno is flawed for several reasons. This Court should undertake an independent review of the statute.

The State acknowledges that the facts of this case are similar to the facts in Payseno. However, the issue before this

court is one of statutory construction. The Court in Payseno found ambiguity in RCW 9.41.040(4) and although the statute is not a model of clarity, it does clearly identify who can petition to restore firearms rights and at what point in time the petition may be brought before the court. A restoring court need only look at whether the petition is properly before it and if those requirements are met the duty to restore is ministerial. State v. Swanson, 116 Wn. App. 67, 78, 65 P.3d 343 (2003).

The decision in Payseno v. Kitsap County, does not give effect to all of the language in RCW 9.41.040(4). The court in Payseno determined that the language in RCW 9.41.040(4)(a)(ii)(A) is ambiguous because the phrase "after five or more consecutive years in the community without being convicted" could be reasonably interpreted in two different ways. Payseno, 186 Wn. App. 465, 471. The court determined that the statute could either be interpreted to require a five-year crime-free period immediately preceding a petition or it could be interpreted to require a five-year crime-free period at any time prior to a petition. Id. The court held that the legislative history and interpretative aids did not definitively resolve the ambiguity and therefore, under the rule of lenity, the court construed the statute in Payseno's favor. Id. at 473-74.

The rule of lenity only applies if a statute is ambiguous and the defense-forwarded interpretation does not lead to strained or absurd results. State v. Radan, 143 Wn.2d 323, 330, 21 P.3d 255, 258 (2001). If a statute is unambiguous, however, the rule of lenity is inapplicable. Id. (citing State v. McGee, 122 Wn.2d 783, 787, 864 P.2d 912 (1993); Chapman v. United States, 500 U.S. 453, 463-64, 111 S. Ct. 1919, 114 L. Ed. 2d 524 (1991)). When interpreting a statute, the court's objective is to determine the Legislature's intent. State v. Ervin, 169 Wn.2d 815, 820, 239 P.3d 354, 356 (2010). The surest indication of legislative intent is the language enacted by the Legislature, so if the meaning of a statute is plain on its face, the court gives effect to that plain meaning. Id. In determining the plain meaning of a provision, the court looks to the text of the statutory provision in question, as well as "the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." Id. If, after this inquiry, the statute is susceptible to more than one reasonable interpretation, it is ambiguous and the court "may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent." Id.

The court in Payseno ignored the fact that the statute does not just say "five consecutive years..." The statute includes the words "or more." In the washout provisions of the SRA, the Legislature clearly said "five years" for a Class C to wash, and the Legislature set a start date for the five years. RCW 9.94A.525. Thus, if the Legislature had intended to limit the time period to just any five-year period, they certainly knew how to do that. By using the phrase "five or more consecutive years," the Legislature must have intended the time period to be that period immediately prior to the filing of the petition, otherwise, there really would be no use for the "or more" language.

Additionally, the court in Payseno focused on the five-year "crime-free period" but its focus solely on a crime-free "period" did not examine the full language of the statutory provision that also prohibits persons from petitioning while they have any pending crimes. This interpretation fails to give effect to all the language in the statute. Instead, under the analysis in Payseno, this language is made superfluous. This language relating to misdemeanors and gross misdemeanors is rendered superfluous because even if those crimes resulted in convictions they would not limit firearms rights.

D. CONCLUSION

This Court should uphold the denial of Mr. Dennis's firearms rights.

DATED this 22 day of November, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Lawland Anderson and Lauren McLane, containing a copy of the Brief of Respondent, in STATE V. EDGAR DENNIS III, Cause No. 754416-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.


Name
Done in Seattle, Washington

11-22-16
Date