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No. 96072-1

IN THE WASHINGTON STATE SUPREME COURT

Jerry L. Barr, Appellant

vs.

Snohomish County Sheriff, Respondent

Appellant's Supplemental Brief

Vitaliy Kertchen #45183
Attorney for Appellant
917 S 10th St
Tacoma, WA 98405
253-905-8415
vitaliy@kertchenlaw.com

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ARGUMENT

Ten judges¹ in four published opinions have already unanimously decided the issue presented in this case. The Sheriff now seeks to add nine more.

The weight of authority overwhelmingly supports Mr. Barr’s position that a sealed juvenile offense does not prohibit firearm possession under state or federal law.

A. *Nelson v. State*

In April 2000, Mr. Nelson received a superior court order “sealing and expunging his juvenile record, as is permitted by RCW 13.50.050(11).” *Nelson v. State*, 120 Wn. App 470, 473, 85 P.3d 912 (2003). In July 2002, Mr. Nelson filed a petition to restore his firearm rights under RCW 9.41.047,² which the trial court denied. *Id.* at 474. On appeal, the *Nelson* court phrased the issue as “whether, as a result of the expungement, RCW 9.41.040(1)(a) no longer prohibits Nelson from carrying firearms.” *Id.* at 476. The State argued that Mr. Nelson could not

¹ Three separate panels of the Court of Appeals, each consisting of three judges, plus one federal judge.

² Likely a misnomer. RCW 9.41.047 relates to restorations after an involuntary commitment for mental health treatment. RCW 9.41.040(4) relates to restorations after criminal convictions. It is unclear whether Mr. Nelson made the mistake when he filed the petition or if the *Nelson* court made the mistake.

have a firearm until his convictions were “nullified by pardon or ‘other equivalent procedure’” under RCW 9.41.040(3). *Id.* at 477. The court rejected that argument, noting that trying to determine whether Mr. Nelson’s convictions have been the subject of a pardon of other equivalent procedure is putting the cart before the horse. *Id.* at 478. Instead, the court focused on whether Mr. Nelson had a conviction in the first instance. *Id.*

The court ultimately found the language in then RCW 13.50.050(14) as dispositive of the issue. *Id.* at 479 (“[t]hereafter, the proceedings in the case shall be treated as if they never occurred . . .”). Relying on this language, it said: “If the proceedings never occurred, logically the end result—a conviction—never occurred either. The plain language of the expungement statute entitles Nelson to act and be treated as if he has not previously been convicted. If he has not previously been convicted, he may legally possess firearms.” *Id.* at 479-80. Additionally, even if the fact of his convictions was undisputed given he acknowledged them on his petition, “legally the court could not conclude he had been ‘convicted’ for purposes of the firearm statute, because the court was obligated to treat the juvenile proceedings as if they never occurred.” *Id.* at 480.

B. *Siperek v. United States*

Mr. Siperek had his juvenile record sealed under RCW 13.50.260 and was subsequently denied a firearm purchase by the FBI during a background check. *Siperek v. United States*, 270 F. Supp. 3d 1242, 1244-45 (W.D. Wash. 2017). He sued the FBI in the United States District Court for the Western District of Washington under 18 USC § 925A, alleging wrongful denial of a firearm. *Id.* Applying the presumption language in RCW 13.50.260(6)(a) and the holding of *Nelson*, the federal court stated: “[A]s noted by the Washington Court of Appeals in *Nelson*, if a juvenile record has been [sealed] pursuant to RCW 13.50.260 it is to be treated as if it never occurred, meaning that there is no disqualifying conviction” *Id.* at 1250. Furthermore, “the absence of a predicate conviction for the purposes of RCW 9.41.040(1) or (2) renders the petition procedure in RCW 9.41.040(4) unnecessary.” *Id.* (citing *Nelson*, 120 Wn. App. at 480, 85 P.3d 912). The court went on to hold that Mr. Siperek’s sealed juvenile offense did not prohibit firearm possession under state or federal law and entered judgment in his favor. *Id.* at 1251.

C. *Barr v. Snohomish County Sheriff*

In the present *Barr* case, decided June 5, 2018, Division II of the Court of Appeals ruled in line with *Nelson* and *Siperek* that a sealed

juvenile offense did not prohibit firearm possession under state or federal law. *Barr v. Snohomish Cnty. Sheriff*, 4 Wn. App. 2d 85, 419 P.3d 867 (2018). Mr. Barr had the record of two class A juvenile offenses sealed, had his firearm rights restored under RCW 9.41.040(4) for his adult offenses, and then applied to the Snohomish County Sheriff for a concealed pistol license. *Id.* The Sheriff denied his application, citing specifically the existence of his two class A sealed juvenile offenses. *Id.* Mr. Barr filed a petition for a writ of mandamus in Thurston County Superior Court, seeking to compel the Sheriff to issue the license. *Id.* The trial court denied the writ. *Id.*

On appeal, the Court of Appeals ruled that the presumption language in RCW 13.50.260(6)(a) and its interpretation under *Nelson* were still valid law, despite a number of statutory amendments passed since the time *Nelson* was decided in 2003. *Id.* The court also methodically rejected each of the Sheriff's arguments to the contrary and remanded with instructions to grant the writ along with attorney fees and costs. *Id.*

D. *Woodward v. State*

Division I of the Court of Appeals decided *Woodward* on August 13, 2018. *Woodward v. State*, 4 Wn. App. 2d 789, 423 P.3d 890 (2018). Mr. Woodward had sealed the record of his class A juvenile offense, and

then petitioned the Snohomish County Superior Court for an order restoring his firearm rights under RCW 9.41.040(4) on the basis of his adult offenses. *Id.* The superior court denied the petition, reasoning that the sealed class A juvenile offense prohibited restoration on the adult offenses. *Id.* On appeal, Division I followed the holdings in *Nelson* and *Barr* that a sealed juvenile offense does not prohibit firearm possession under state or federal law and does not bar Mr. Woodward from seeking the restoration of his firearm rights for his adult offenses. *Id.* The *Woodward* court also methodically rejected all arguments to the contrary. *Id.* Although the Snohomish County Sheriff was also a party to that case, it did not seek review of the *Woodward* decision.

E. Legislative acquiescence

In 1979, the legislature passed RCW 13.50.050 as part of Engrossed Substitute Senate Bill No. 2768. Laws of 1979, ch. 155, § 9. Subsection eleven of that statute provided for the sealing of juvenile records. *Id.* In subsection thirteen, the legislature set out that “[t]hereafter, the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed.” *Id.* It conditioned the sealing, stating in subsection fifteen that “[a]ny adjudication of a juvenile offender or a

crime subsequent to sealing has the effect of nullifying the sealing order.”

Between 1979 and 2014, the legislature amended RCW 13.50.050 eighteen times. Laws of 1981, ch. 299, § 19; Laws of 1983, ch. 191, § 19; Laws of 1984, ch. 43, § 1; Laws of 1986, ch. 257, § 33; Laws of 1987, ch. 450, § 8; Laws of 1990, ch. 3, § 125; Laws of 1992, ch. 188, § 7; Laws of 1997, ch. 338, § 40; Laws of 1999, ch. 198, § 4; Laws of 2001, ch. 49, § 2; Laws of 2001, ch. 174, § 1; Laws of 2001, ch. 175, § 1; Laws of 2004, ch. 42, § 1; Laws of 2008, ch. 221, § 1; Laws of 2010, ch. 150, § 2; Laws of 2011, ch. 333, § 4; Laws of 2011, ch. 338, § 4; Laws of 2012, ch. 177, § 2.

In 2014, the legislature took out the sealing portions of RCW 13.50.050 and recodified them as RCW 13.50.260. Laws of 2014, ch. 175, §§ 3-4. Despite being amended over eighteen times in the last thirty-eight years, the language “[t]hereafter, the proceedings in the case shall be treated as if they never occurred, and the subject of the records may reply accordingly to any inquiry about the events, records of which are sealed” has not changed in any way. The language exists now exactly how it was enacted in 1979. RCW 13.50.260(6)(a). The conditional nature of the sealing has also remained largely the same since 1979. RCW 13.50.260(8)(a) now reads “[a]ny adjudication of a juvenile offense or a crime subsequent to sealing has the effect of nullifying a sealing order,” but it also adds that “[a]ny charging of an adult felony subsequent to the

sealing has the effect of nullifying the sealing order.” RCW 13.50.260(8)(b). This latter language was first added in 1986, Laws of 1986, ch. 257, § 33, and was last amended in 1997 (other than being recodified in 2014). Laws of 1997, ch. 338, § 40.

Courts presume that the legislature is familiar with judicial interpretations of statutes and that amendments are presumed to be consistent with previous decisions unless there is an indication that the legislature intends to overrule a particular interpretation. *State v. Ervin*, 169 Wn.2d 815, 825, 239 P.3d 354 (2010); *see also State v. Roggenkamp*, 153 Wn.2d 614, 629, 106 P.3d 196 (2005) (“When amending a statute, the legislature is presumed to know how the courts have construed and applied the statute.”). This is referred to as legislative acquiescence. *Ervin*, 169 Wn.2d at 825, 239 P.3d 354.

In *Ervin*, this Court had to decide whether time spent in jail pursuant to a violation of probation for a misdemeanor interrupts an offender’s felony washout period under RCW 9.94A.525. *Id.* at 820. In support of its holding that time spent in jail for a misdemeanor probation violation does not interrupt the washout period, it cited to a 2004 court of appeals case. *Id.* at 825 (citing *In re Nichols*, 120 Wn. App. 425, 85 P.3d 955 (2004)). In *Nichols*, the court of appeals case held that incarceration for a misdemeanor did not preclude a person from being “in the

community” for the purposes of the washout provisions. *Id.* at 826. This Court noted: “From the time that *Nichols* was decided, the Legislature has amended RCW 9.94A.525 six times, . . . but has in no way altered the ‘in the community’ language interpreted by *Nichols*. This legislative acquiescence in the *Nichols* interpretation of the term strongly favors Ervin's interpretation of the statute.” *Id.* (internal citations omitted).

In *Roggenkamp*, this Court had to decide what definition of “in a reckless manner” to apply to the vehicular homicide and vehicular assault statutes in light of some legislative amendments. 152 Wn.2d 614, 106 P.3d 196. In support of its holding that the same definition given by the Court to the phrase “in a reckless manner” continued to apply after the amendments, the Court pointed out:

The vehicular homicide and vehicular assault statutes have been recodified or amended numerous times since they were enacted. . . . Despite these many statutory changes, the legislature has never availed itself of the opportunity to redefine the term “in a reckless manner” as used in the vehicular assault or vehicular homicide statutes. Because the legislature has acquiesced in this court's definition of “in a reckless manner,” we will not alter our interpretation of that term until the legislature provides a different definition.

Id. at 629-30 (internal citations omitted).

Compare *Ervin* and *Roggenkamp* to *State v. R.P.H.*, 173 Wn.2d 199, 265 P.3d 890 (2011). In *R.P.H.*, this Court ruled that termination of a juvenile offender’s duty to register as a sex offender is equivalent to a

certificate of rehabilitation for the purposes of possessing a firearm. At the first opportunity it had to amend the relief from registration statute since *R.P.H.*, the legislature added a provision to RCW 9A.44.142 and .143 that explicitly states that relief from sex offender registration does not constitute a certificate of rehabilitation for the purposes of possessing a firearm, directly and expressly overruling *R.P.H.* Laws of 2015, ch. 261, §§ 8-9.

Here, the legislature has amended former RCW 13.50.050 over eighteen times since its inception in 1979. Since the *Nelson* case was published on March 5, 2004,³ the legislature has amended former RCW 13.50.050 and current RCW 13.50.260 a combined total of eight times. Although it has changed various aspects of sealing since 2004, it has *never* changed the legal presumption that a sealed juvenile case is to be treated as though it never occurred. Laws of 2004, ch. 42, § 1 (changing the length of time to wait before sealing); Laws of 2010, ch. 150, § 2 (tweaking requirements for sealing); Laws of 2011, ch. 338, § 4 (prohibiting sealing for juveniles convicted of rape 1, rape 2, or indecent liberties actually committed by forcible compulsion); Laws of 2012, ch. 177, § 2 (adding provision about sealing deferred dispositions); Laws of

³ Decided on December 29, 2003, but not published until March 5, 2004.

2015, ch. 265, § 3 (adding that restitution need not be paid if owed to an insurance company). Nor has the legislature changed RCW 9.41.040 since *Nelson* in any meaningful manner. Laws of 2005, ch. 453, § 1; Laws of 2009, ch. 293, § 1; Laws of 2011, ch. 193, § 1; Laws of 2014, ch. 111, § 1; Laws of 2016, ch. 136, § 7.

This is the very definition of legislative acquiescence. The legislature knows how to disagree with the courts' interpretations of statutes. *See R.P.H.*, 173 Wn.2d 199, 265 P.3d 890; Laws of 2015, ch. 261, §§ 8-9. The legislature has had plenty of opportunity to change the statutory presumption for sealed juvenile records or the firearms statute and hasn't changed either. It has acquiesced in the *Nelson* court's interpretation of that language as it pertains to RCW 9.41.040.

Affirming the Court of Appeals means adhering to long-standing principles of predictability, reliability, and finality.

Washington state courts recognize the need for predictability, reliability, and finality in court rulings. *See generally Durland v. San Juan Cnty.*, 182 Wn. 2d 55, 340 P.3d 191 (2014) (dismissing judicial review of building permit due to violation of Land Use Petition Act); *Clark Cnty. v. W. Wash. Growth Mgmt. Hearings Bd.*, 177 Wn. 2d 136, 298 P.3d 704 (2013) (reversing Court of Appeals's *sua sponte* consideration of issues

not raised by the parties); *Stanley v. Cole*, 157 Wn. App. 873, 239 P.3d 611 (2010) (declining to vacate a judgment on the merits); *Lodis v. Corbis Holdings, Inc.*, 192 Wn. App. 30, 366 P.3d 1246 (2015) (discussing the importance of the law of the case, stare decisis, collateral estoppel, and res judicata doctrines for the promotion of predictability, uniformity, consistency, finality, and efficiency).

The issue before the Court is of significant interest not just to Mr. Barr and other individuals with sealed juvenile records, but also to public entities such as local police departments, sheriffs, and even the FBI. RCW 9.41.113 imposes a universal background check requirement for sales and transfers of most firearms. RCW 9.41.090(2)(a) imposes a duty on local chiefs of police and sheriffs to conduct a background check on firearm sales and transfers to determine if the purchaser or transferee is ineligible to possess a firearm under state or federal law. Likewise, 18 USC § 922(t) requires dealers to conduct a background check through the National Instant Criminal Background Check System (NICS), which is run by the FBI. 28 CFR § 25.3.

Local, state, and federal law enforcement agencies rely on court rulings in making important decisions during background checks on who is and who is not eligible to possess a firearm. Overruling fifteen years of unanimous precedent would unnecessarily disrupt this process where the

Sheriff has not and cannot proffer any valid reason for why it is right and everyone else is wrong. The Sheriff's principal argument is that while RCW 13.50.260(6)(a) confers a legal presumption that the offense never occurred in some contexts, such as employment or housing, it does not confer the same legal presumption in other contexts, such as firearm possession. The lower courts have repeatedly dismissed this argument for good reason: it is not supported by reason, logic, or law. Affirming the Court of Appeals advances predictability, reliability, and finality on an issue of significant public importance for individuals and government agencies.

Affirming the Court of Appeals allows the Court to avoid difficult constitutional questions in the future.

The current question before the Court is "Does a juvenile offense that has been sealed under RCW 13.50.260 prohibit possession of a firearm under state or federal law?" To date, all courts answering this question have said "no." If this Court chooses to say "yes," that would mean that individuals with a class A or sex-related juvenile offense have

suffered a lifetime prohibition on the possession of a firearm for a childhood mistake.⁴

The United States Supreme Court has held that the right to possess a firearm in the home for self-defense is a constitutional right guaranteed by the Second Amendment. *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008). The Court did state, in dicta, that its opinion should not be taken “to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-67.

However, the Supreme Court has also issued a number of decisions holding that juveniles are inherently different from adults. *See, e.g., Roper v. Simmons*, 543 U.S. 551 (2005) (imposing the death penalty for a crime committed by a juvenile is unconstitutional); *Graham v. Florida*, 560 U.S. 48 (2010) (imposing life imprisonment without possibility of parole for a non-homicide crime committed by a juvenile is unconstitutional); *Miller v. Alabama*, 567 U.S. 460 (2012) (mitigating factors must be taken into account before a juvenile can be sentenced to life without possibility of

⁴ RCW 9.41.040(4) prohibits the restoration of firearm rights after a conviction for a class A felony or sex offense.

parole for homicide); *J.D.B. v. North Carolina*, 564 U.S. 261 (2011) (age is a factor when determining whether someone is “in custody” for the purposes of interrogation and the *Miranda* warnings).

This Court, too, has issued a number of similar decisions, adhering to *Miller*’s principle that “children are different.” *See, e.g., State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749 (2015) (sealing juvenile records does not violate the state constitution); *State v. Bassett*, No. 94556-0 (Oct. 18, 2018) (imposing life without possibility of parole for a crime committed as a juvenile violates the state constitution); *State v. Houston-Sconiers*, 188 Wn.2d 1, 391 P.3d 409 (2017) (sentencing courts must have absolute discretion to depart as far as they want below applicable ranges and enhancements when sentencing juveniles in adult court).

If Mr. Barr’s sealed juvenile record for a class A offense continues to prohibit him from possessing a firearm, then the next logical question Mr. Barr will be asking is “In light of the fact that ‘children are different,’ can the United States Constitution or the state constitution tolerate the permanent loss of a guaranteed right on the basis of an offense committed by a juvenile?” The Court can avoid this difficult constitutional question by affirming the Court of Appeals. *Cnty. Telecable of Seattle, Inc. v. City of Seattle*, 164 Wn.2d 35, 41, 186 P.3d 1032 (2008) (“We will avoid

deciding constitutional questions where a case may be fairly resolved on other grounds.”).

Affirming the Court of Appeals protects privacy rights.

Petitions to restore firearm rights under RCW 9.41.040(4) are typically handled as civil matters. *See Maloney v. State*, 198 Wn. App. 805, 395 P.3d 1077 (2017). Court records are presumptively public. *See Seattle Times Co. v. Ishikawa*, 97 Wn.2d 30, 640 P.2d 716 (1982). If a sealed juvenile record continues to prohibit possession of a firearm, the subject of the record would have no choice but to file a new petition to restore firearm rights as a civil matter. This new public filing would be counterintuitive to the purpose and intent of the juvenile sealing statute and this Court’s holding in *State v. S.J.C.*, 183 Wn.2d 408, 352 P.3d 749.

The Court can avoid this absurd result and protect the privacy rights of juvenile records by affirming the Court of Appeals.

Mr. Barr is entitled to attorney’s fees and costs.

RCW 9.41.0975 states: “A person granted a writ of mandamus under this subsection (2) shall be awarded reasonable attorneys' fees and costs.” RAP 18.1(a) states: “If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the

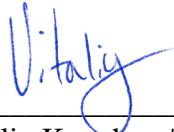
Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.”

Mr. Barr asks this Court to award him his attorney’s fees and costs.

CONCLUSION

For the foregoing reasons, this Court should affirm the Court of Appeals.

Respectfully submitted,



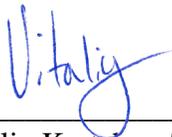
Vitaliy Kertchen #45183
Date: 11/21/18

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 11/21/18, I served this document on the Snohomish County Sheriff by uploading it using the Court's e-filing application and emailing a copy of the document using that process to ldowns@snoco.org.

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

Respectfully submitted,



Vitaliy Kertchen #45183

Date: 11/21/18

Place: Tacoma, WA

KERTCHEN LAW, PLLC

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