

No. 96072-1

No. 50623-8

IN THE WASHINGTON STATE DIVISION II

Jerry L. Barr, Appellant

vs.

Snohomish County Sheriff, Respondent

Appellant's Opening Brief

Vitaliy Kertchen #45183
Attorney for Appellant
711 Court A, Suite 104
Tacoma, WA 98402
253-905-8415
vitaliy@kertchenlaw.com

TABLE OF CONTENTS

| | |
|---|----|
| Assignments of Error | 1 |
| Issues Pertaining to Assignments of Error | 1 |
| Statement of the Case..... | 1 |
| Argument | 2 |
| Writ of Mandamus | 3 |
| Mr. Barr is not prohibited by state law from possessing a firearm because his class A felonies never happened..... | 4 |
| A. Legislative history | 4 |
| B. <i>Nelson v. State</i> | 6 |
| C. Legislative acquiescence | 8 |
| Mr. Barr is not prohibited by federal law from possessing a firearm because there is no conviction under federal law. | 12 |
| Mr. Barr is entitled to attorney’s fees and costs..... | 12 |
| Conclusion | 13 |

TABLE OF AUTHORITIES

Case Law

Nelson v. State, 120 Wn. App. 470, 85 P.3d 912 (2003) passim
State v. Ervin, 169 Wn.2d 815, 239 P.3d 354 (2010)9
State v. Roggenkamp, 153 Wn.2d 614, 106 P.3d 196 (2005)10
State v. R.P.H., 173 Wn.2d 199, 265 P.3d 890 (2011)10, 12

Statutes

RCW 9.41.040passim
RCW 13.50.050passim
RCW 13.50.260passim

Session Laws

Laws of 1979, ch. 155, § 94
Laws of 1981, ch. 299, § 195
Laws of 1983, ch. 191, § 195
Laws of 1984, ch. 43, § 15
Laws of 1986, ch. 257, § 335, 6
Laws of 1987, ch. 450, § 8.....5
Laws of 1990, ch. 3, § 1255
Laws of 1992, ch. 188, § 75

| | |
|-------------------------------------|--------|
| Laws of 1997, ch. 338, § 40 | 5, 6 |
| Laws of 1999, ch. 198, § 4 | 5 |
| Laws of 2001, ch. 49, § 2 | 5 |
| Laws of 2001, ch. 174, § 1 | 5 |
| Laws of 2001, ch. 175, § 1 | 5 |
| Laws of 2004, ch. 42, § 1 | 5, 11 |
| Laws of 2005, ch. 453, § 1 | 11 |
| Laws of 2008, ch. 221, § 1 | 5 |
| Laws of 2009, ch. 293, § 1 | 11 |
| Laws of 2010, ch. 150, § 2 | 5, 11 |
| Laws of 2011, ch. 193, § 1 | 11 |
| Laws of 2011, ch. 333, § 4 | 5 |
| Laws of 2011, ch. 338, § 4 | 5, 11 |
| Laws of 2012, ch. 177, § 2 | 5, 11 |
| Laws of 2014, ch. 111, § 1 | 11 |
| Laws of 2014, ch. 175, §§ 3-4 | 5 |
| Laws of 2015, ch. 261, §§ 8-9 | 11, 12 |
| Laws of 2016, ch. 136, § 7 | 11 |

ASSIGNMENTS OF ERROR

The trial court erred when it denied Mr. Barr's petition for a writ of mandamus under RCW 9.41.0975.

//

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Where an applicant for a concealed pistol license has a juvenile class A felony conviction that has been sealed under RCW 13.50.260, is the applicant prohibited by state or federal law from possessing a firearm?¹

//

STATEMENT OF THE CASE

On March 23, 1992, the King County Juvenile Court convicted Mr. Barr of a class A felony. CP (Clerk's Papers) at 4, ¶ 1. On October 22, 1992, that court convicted Mr. Barr of another class A felony.² *Id.* In September 2016, Mr. Barr received orders from the King County Juvenile Court sealing records of both class A offenses under RCW 13.50.260. CP

¹ A similar issue is pending review in *Barr v. State*, No. 76932-4 in Division I.

² Those records have since been sealed and Mr. Barr respectfully requests this Court not mention the offenses by name in its opinion.

Mr. Barr has other disqualifying criminal history, but it is not relevant to this appeal.

at 4, ¶ 3. He also received an order stating that so long as those offenses remained sealed, Mr. Barr was not prohibited from possessing a firearm under RCW 9.41.040. *Id.*

In April 2017, Mr. Barr applied to the Snohomish County Sheriff for a concealed pistol license (CPL). CP at 4, ¶ 5. The Sheriff denied Mr. Barr's application due to the sealed class A felony offenses. CP at 4, ¶ 6.

In May 2017, Mr. Barr filed a petition for a writ of mandamus under RCW 9.41.0975 in the Thurston County Superior Court. CP at 3-19. Following oral argument on July 7, 2017, the trial court denied the petition, reasoning that Mr. Barr's class A offenses barred him from possessing a firearm under RCW 9.41.040 even if sealed. CP at 80-81. Mr. Barr filed this timely appeal. CP at 82-85.

//

ARGUMENT

In *Nelson v. State*, Division I of this Court has already ruled that a sealed juvenile offense is not a "conviction" for the purposes of RCW 9.41.040 because the sealing statute treats a sealed case as if though it never occurred. 120 Wn. App. 470, 85 P.3d 912 (2003). Despite this, the Sheriff argues that *Nelson* is no longer good law due to statutory amendments, and the trial court agreed.

The Sheriff's argument is meritless. The legislative amendments of the sealing statute did not overrule, abrogate, or nullify *Nelson*. *Nelson* controls and is dispositive here. Mr. Barr's sealed class A felony never happened and thus, he is not prohibited by RCW 9.41.040 from possessing a firearm. Additionally, federal law looks to the law of the state where the offense occurred in determining whether a conviction exists under federal law. 18 U.S.C. 921(a)(20). Since no state conviction exists, no federal conviction exists.³ Thus, Mr. Barr is not prohibited by state or federal law from possessing a firearm, the Sheriff erroneously denied his CPL application, and the trial court erred by denying the mandamus petition. This Court should reverse and remand with instructions to issue the writ of mandamus and award attorney's fees and costs.

//

Writ of Mandamus

RCW 9.41.0975(2) allows an individual wrongfully denied a concealed pistol license to apply to a court of "competent jurisdiction" for a writ of mandamus. "The application for the writ may be made in the county in which the application for a concealed pistol license or alien

³ Although the Sheriff devoted half its briefing to the federal issue, federal law didn't really play any role in the trial court's decision, nor did the parties spend a lot of time on it in oral argument.

firearm license or to purchase a pistol was made, or in Thurston county, at the discretion of the petitioner.” *Id.* That statute is silent on the specifics, but RCW 7.16.150-280 controls writs of mandamus. A writ of mandamus may be issued “by any court, except a district or municipal court, to any inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office.” RCW 7.16.160.

RCW 9.41.070 places an affirmative duty on the local sheriff to issue a concealed pistol license to every applicant unless the applicant is “is ineligible to possess a firearm under the provisions of RCW 9.41.040 or 9.41.045, or is prohibited from possessing a firearm under federal law.” Here, the sheriff breached its duty by denying Mr. Barr’s concealed pistol license application because Mr. Barr is not prohibited by state or federal law from possessing a firearm.

//

Mr. Barr is not prohibited by state law from possessing a firearm because his class A felonies never happened.

A. Legislative history

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.

//

B. *Nelson v. State*

Jeffrey Nelson pleaded guilty to “certain felonies” in December 1992. 120 Wn. App at 472, 85 P.3d 912. In April 2000, he received a superior court order “sealing and expunging his juvenile record, as is permitted by RCW 13.50.050(11).” *Id.* at 473. In July 2002, Nelson filed a petition to restore his firearm rights under RCW 9.41.047.⁴ *Id.* at 474. Following a convoluted and inapposite exchange between Nelson, the

⁴ 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 Nelson made the mistake when he filed the petition or if the *Nelson* court made the mistake.

State, and the court regarding the application of ex post facto laws, the superior court denied the petition.⁵ 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.

On appeal, the State argued that Nelson could not have a firearm until his convictions were “nullified by pardon or ‘other equivalent procedure’” under RCW 9.41.040(3)⁶. *Id.* at 477. The court rejected that argument, noting that trying to determine whether Nelson’s convictions have been the subject of a pardon or other equivalent procedure is putting the cart before the horse. *Id.* at 478. Instead, the court focused on whether 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

⁵ Although the *Nelson* court did not mention what Nelson’s offenses were specifically, it did mention that they constituted a serious offense as defined by RCW 9.41.010. *Id.* at 473. Furthermore, one can only conclude that Nelson’s offenses were class As, otherwise Nelson would have been entitled to restoration under RCW 9.41.040(4) without the need for protracted argument.

⁶ Again suggesting that Nelson’s felonies were likely class As.

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.

The ultimate holding of *Nelson* is that a sealed juvenile conviction never happened for the purposes of the firearms statute, RCW 9.41.040, and whatever restrictions imposed by RCW 9.41.040 for those convictions do not apply. Admittedly, the *Nelson* opinion has some technical flaws and is not a model of judicial clarity. However, those flaws are not fatal to its holding. The holding of the case, based on the plain language of the presumption in former RCW 13.50.050(14), now RCW 13.50.260(6)(a), is legally sound.

//

C. Legislative acquiescence

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*, our supreme 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. The supreme 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*, our supreme 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 supreme 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.*, our supreme 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, 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 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.

//

Mr. Barr is not prohibited by federal law from possessing a firearm because there is no conviction under federal law.

Federal law looks to the state of conviction to determine whether an offense is a “conviction” for purposes of federal law. 18 USC 921(a)(20) (“What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held.”). Mr. Barr's sealed juvenile offenses are not convictions under state law. *Nelson*, 120 Wn. App. 470, 83 P.3d 912. Thus, those sealed juvenile offenses are also not convictions under federal law and Mr. Barr is therefore not prohibited from possessing a firearm under federal law.

//

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.”

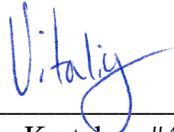
Mr. Barr asks this Court to award him his attorney’s fees and costs.

//

CONCLUSION

This Court should reverse and remand with instructions to issue the writ of mandamus and award attorney’s fees and costs.

Respectfully submitted,



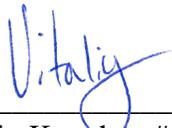
Vitaliy Kertchen #45183
Date: 9/3/17

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 9/3/17, I served this document on the Snohomish County Prosecutor 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: 9/3/17

Place: Tacoma, WA

KERTCHEN LAW, PLLC

September 03, 2017 - 8:31 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50623-8
Appellate Court Case Title: Jerry L. Barr, Appellant v. Snohomish County Sheriff, Respondent
Superior Court Case Number: 17-2-02519-1

The following documents have been uploaded:

- 7-506238_Briefs_20170903082953D2144478_5860.pdf
This File Contains:
Briefs - Appellants
The Original File Name was opening brief.pdf

A copy of the uploaded files will be sent to:

- ldowns@snoco.org

Comments:

Sender Name: Vitaliy Kertchen - Email: vitaliy@kertchenlaw.com
Address:
711 COURT A STE 104
TACOMA, WA, 98402
Phone: 253-905-8415

Note: The Filing Id is 20170903082953D2144478