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Court of Appeals
Division III
State of Washington
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No. 96643-5

NO. 351718

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

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW THOMAS SCHWARTZ,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 17-1-00015-1

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. Is RCW 9.94A.525(2)(c) ambiguous where the legislature's intent is clear through a plain language reading and the Appellant's interpretation would lead to absurd results?

2. Is this appeal without merit where even the Appellant's reading of the statute he would still not have satisfied the five year period for his criminal history to washout?

B. STATEMENT OF THE CASE

In January, 2017, Matthew Thomas Schwarts (herein Appellant) pleaded guilty to failure to register as a sex offender. RP 21; CEP 1-6. The Appellant's criminal history was presented at the sentencing hearing, including a VUCSA – Possession of Methamphetamine violation in 2014 and three other offenses dating back to 1997, 1998, and 2001. RP 21-22. The criminal history was not contested. RP 21-22. The calculation of the offender score was. RP 22.

At the hearing Appellant argued the offender score should not be calculated to include the 2001 and 1997 offenses because they had "washed out" pursuant to RCW 9.94A.525(2)(c). RP 22. Specifically, Appellant believed the five years he had spent in the community since the judgment and sentence for the 2001 failure to register washed out the earlier convictions, which resulted in his offender score being a 4. RP 22-23.

The State asserted, and the trial court held, the offender score was a 6 because the prior convictions did not wash out. RP 22-28. This finding was based on Appellant's subsequent incarcerations in 2014 and 2015 for

his failure to pay his legal financial obligations associated with his 2001 conviction. RP 22-23. The trial court disagreed with Appellant's contention that RCW 9.94A.525(2)(c) should be read to mean five years from the judgment and sentence. RP 28. With an offender score of 6 Appellant was sentenced to 17 months. RP 28. Appellant appealed. CP 76-91.

C. ARGUMENT

1. RCW 9.94A.525(2)(C) IS NOT AMBIGUOUS, TIME IS CALCULATED FROM THE DATE OF LAST RELEASE FROM CONFINEMENT PURSUANT TO A FELONY CONVICTION, OR IF NONE EXISTS, FROM THE DATE OF ENTRY OF JUDGEMENT AND SENTENCE.

Appellant contends that RCW 9.94A.525(2)(c) is ambiguous in that the statute can be read to allow the date of the judgment and sentence to trigger the five year period even when there are subsequent confinements. The statute is not ambiguous, the language is plain on its face and is further supported by the fact that if Appellant's interpretation were adopted, it would lead to absurd results.

In calculating the offender score RCW 9.94A.525(2)(c) provides "since the last date of release from confinement … pursuant to a felony conviction, if any, or entry of judgment and sentence." As made clear by a plain language reading, the legislature intended the date of last confinement to be the trigger, and for the judgment and sentence to be used only where no subsequent confinements occurred. The reference to the "if any, or"

language clearly evidences this intent. Appellant's contention that the language is ambiguous is not supported by the language itself.

Even if the Court accepts that the statute is ambiguous, the interpretation proffered by the Appellant would lead to absurd and dangerous results. Under Appellant's interpretation, a defendant could be sentenced to a 60 month sentence on a Class C felony and if he served that entire 60 months sentence, and based upon the finding it commenced upon entry of the judgement and sentence, the felony would wash the day he was released from prison. That is a patently absurd result.

In *State of Washington v. Sassan Mehrabian*, 175 Wn.App. 678, 308 P.3d 660 (Div 1 2013), *review denied*, 178 Wn.2d 1022 (2013) the court explicitly considered the argument that subsequent incarcerations do not revive convictions for scoring purposes and roundly rejected that contention. In *Mehrabian* the State cross-appealed the trial court's failure to include 1992 Theft 1 conviction in its score calculation. The exact issue decided was the "parties dispute [on] the meaning of 'the last date of release from confinement ... pursuant to a felony conviction.'" *Mehrabian*, 175 Wn.App. at 679. It was uncontested that more than 10 years had elapsed after the defendant's conviction of a Class B felony in *Mehrabian* but the court found the last date from release reset the washout dates for all the previous convictions. *Id.*

Still, Appellant argues that there are two "triggering periods" by way of citation to *State v. Ervin*, 169 Wn.2d 815, 821, 239 P.3d 354 (2010). *Ervin* does not support this proposition of multiple triggering periods but rather clearly states that RCW 9.94A.525(2)(c) is broken down into two clauses: a "trigger" clause, which identifies the beginning of the five-year period, and a "continuity/interruption" clause, which sets forth the substantive requirements an offender must satisfy during the five-year period. *Ervin*, 169 Wn.2d at 821. In *Ervin* the Supreme Court found the statutory reference to five consecutive years "spent in the community" to be ambiguous, not the trigger clause. *Ervin*, 169 Wn.2d at 821-22. Further, the Court in *Ervin* specifically found that an offense committed after the trigger period date that results in a conviction *resets the five-year clock. Ervin*, 169 Wn.2d at 821 (stating "[b]ecause Ervin was [later] convicted [of a separate crime] this crime implicated the continuity/interruption clause, effectively resetting the five-year clock").

The statute unambiguous and the courts have consistently ruled that the wash out period resets upon subsequent incarceration. Appellant's incarcerations in 2014 and 2015 reset the clock - the court correctly calculated Appellant's offender score.

2. THIS APPEAL IS WITHOUT MERIT – EVEN WITHOUT INCLUDING THE CONTESTED INCARCERATION DATES THE APPELLANT IS STILL NOT OUTSIDE THE 5 YEAR WASHOUT PERIOD BASED ON HIS 2014 CONVICTION.

Even if the Appellant's interpretation of the statute were applied, he would still be within the 5 year period pursuant RCW 9.94A.525(2)(c) which renders this appeal without merit. It was uncontested at the sentencing that Appellant had a 2014 felony conviction for a Class C possession of a controlled substance. This means the trigger period would be the entry of the judgement and sentence, or, the date of release from custody if he served any time, at the latest in 2014, less than the 5 years from the sentencing in the underlying cause in this action in 2017.

D. CONCLUSION

The trial court's calculations should be upheld. The correct triggering period for using the five year washout provision is clear from the language of the statute, it is the date of the last release from confinement pursuant to a felony conviction. Even with Appellant's reading of the statute, the appeal is still without merit based on the 2014 conviction.

Respectfully submitted this 2nd day of January, 2018.

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