

In The Court of Appeals OF The
STATE OF WASHINGTON, Division One

STATE OF WASHINGTON
Respondent,
v

Benjamin Batson
Appellant,

Statement of Additional Grounds

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STATE OF WASHINGTON
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V. **RCW 9A.44.132 violates the Equal Protection Clause by arbitrarily imposing disparate punishments on similarly situated individuals.**

Equal protection under the law does not require that individuals be similarly situated in all respects, but merely similarly situated with respect to the legitimate purpose of the law in question. Herriott v. Seattle, 81 Wn.2d 48, 500 P.2d 101 (1972). A distinction that is immaterial to the purpose of the law is not a basis for disparate treatment. Harmon v. McNutt, 91 Wn.2d 126, 587 P.2d 537 (1978).

In prescribing punishments for violation of RCW 9A.44.130, the legislature distinguishes between those of who have committed more serious predicate offenses (felonies) and those who have committed less serious sex offenses (sex offenses other than a felony) and apportions punishment correlating with the seriousness of the predicate offense; failing to register for a felony such offense is felonious, and failing to register for a non-felony is a gross misdemeanor. However, according to the State's reading of RCW 9A.44.132, the punishment for Mr. Batson's failure to register should be a felony even though his predicate conduct would not even be criminal under Washington law.

Because Mr. Batson's conduct is not criminal under the laws of Washington, logic and reason dictate that he must be more similarly situated with sex offenders whose sex offenses are "other than a felony" (under Washington law) than with offenders who have committed a sex offense under Washington law. Thus, Mr. Batson, should he be required to register in the first place, is similarly situated to individuals in Washington who commit the least serious level sex offenses, such as communicating with a minor for immoral purposes, attempted assault in the third degree with sexual motivation, or sexual misconduct with a minor in the second degree (RCW 9A.44.096), all gross misdemeanor offenses.

The State will attempt to justify the removal of the comparability requirement from RCW 9A.44.128(10)(h) as rational related to community safety and the need to close the Werneth loophole. No such coherent rational exists for punishing Mr. Batson as a felony sex offender. The purpose of RCW 9A.44.132 is the enforcement of the registration requirements of RCW 9A.44.130 through punishment of those who fail to comply with penalties commensurate with the underlying offense. Relying on the offense classifications of other states, regardless of actual conduct, does not bear a rational relationship to monitoring sex offenders nor is it consistent with the intent of RCW 9A.44.132 to punish offenders proportionally based on their underlying offenses.

More generally, RCW 9A.44.128(10)(h) creates a broader class of individuals convicted of out-of-state offenses for which they have are required to register as a sex offender in the State of conviction. Among this class of similarly situated individuals, two offenders committing the same conduct in separate states could receive disparate punishment pursuant to RCW 9A.44.132 based solely on the classification of their punishment in the state of conviction. For example, offenders convicted in states in which sexual conduct with a person 16 years of age is a misdemeanor or other “nonfelony” will be punished as gross misdemeanants for their failure to register in Washington. On the other hand, offenders convicted in states in which sexual conduct with a person 16 years of age is a felony will be punished as Class C felons for identical conduct. The failure of RCW 9A.44.132 to incorporate some mechanism by which out-of-state offenders are punished for failing to register consistently with in-state offenders violates the Equal Protection Clause.

VI. Defendant’s Arizona conviction is not a “felony” within the meaning of RCW 9A.44.132.

The question of whether a prior conviction qualifies as a predicate offense is “a threshold question of law for the court to decide.” State v. Chambers, 157 Wn.App. 465, 237 P.3d 352, 359, (2010). Only prior offenses that meet the statutory definition are admissible. Id. at 359. The State contends that because Arizona classifies its offense of Sexual Misconduct with a Minor as a felony offense, Mr. Batson’s conviction qualifies as a “felony sex offense” within the purview of RCW 9A.44.132(1). However, RCW 9A.44 does not define the term “felony” and RCW 9A.44.128 merely defines the term “sex offense.”

Washington courts review questions of statutory interpretation with the goal of effectuating the legislature's intent. State v. Gonzalez, 68 Wn.2d 256, 263, 226 P.3d 131 (2010). The first step in interpreting a statute is to examine its plain language. Id. at 263. A statute's “[p]lain meaning ‘is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.’ ” Id. (quoting State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009)). If the statute is unambiguous upon reviewing its plain meaning, courts shall conduct no further inquiry. Id. “If a statute is subject to more than one reasonable interpretation, it is ambiguous; and the rule of lenity [requires] us to interpret an ambiguous criminal statute in the defendant's favor absent legislative intent to the contrary.” State v. Mandanas, 168 Wn.2d 84, 87–88, 228 P.3d 13 (2010). A statute is not ambiguous merely because different interpretations are conceivable. Gonzalez, 68 Wn.2d at 263.

As discussed above, the Senate Bill Report on the amendment to RCW 9A.44 cites concerns for efficiency and eliminating time-consuming analyses of whether out-of-state conduct offends Washington law. SSB 6414, 61st Leg. at 1, 4-5 (February 13, 2010). No such clear indications of legislative intent exist with respect to the comparability of felony versus nonfelony

convictions. A key distinction between the amendments to RCW.44.128(10) and .132, is that comparability for the purposes of determining sentences will have little effect on the administrative efficiency of law enforcement in determining whether individuals with out-of-state convictions have a duty to register. The sole administrative concern of law enforcement will be determining whether or not an individual has a duty to register, not the penalties arising if they fail to do so. Comparability for the purpose of punitive consequence would have no bearing on administering a sex offender registry or efficiently determining its populace.

When examined within the statutory scheme as a whole, the legislature clearly intended punishment for the failure to register to be commensurate, at least in broad categories, with the seriousness of the offense triggering the duty to register. The distinction between subsections (1) and (2) of current RCW 9A.44.132 clearly evince this intent; failure to register for a felony sex offense is a felony, and failure to register for a nonfelony sex offense is a gross misdemeanor. Furthermore, the use of the term “non-felony” rather than “misdemeanor and gross misdemeanor” as distinguished from “felony” implies recognition of the instant circumstance: an out-of-state conviction which would not be an offense at all under Washington law.

The State may argue that the inclusion of the term “nonfelony” denotes recognition that other jurisdictions may not use Washington’s felony/misdemeanor classification system and that the legislature intended for offenses in such jurisdictions to be nonfelonies for the purpose of RCW 9A.44.132. However, this would clearly run counter to the legislative intent that penalties for failing to register be related to the seriousness of the predicate offense. For example, a person engaging in conduct equivalent to the Washington crime of Rape of a Child in the First Degree in a foreign country without the term “felony” in its legal system would then be subject to gross misdemeanor penalties for failing to register, while a person engaging in conduct not

criminalized under Washington law, would be subject to felony penalties for failure to register – simply because of the name given an offense in another jurisdiction.

In the context of almost all other Washington criminal statutes governing the use of prior criminal history, comparability is legislatively required. Under RCW 9A.010(6), the legislature defined “felony” as “any felony offense under the laws of this state or any federal or out-of-state offense comparable to a felony offense under the laws of this state.” Washington appellate courts have held that the legislative purpose of the provision of RCW 9A.010 prohibiting possession of firearms by those previously convicted in Washington or elsewhere of any serious offense is to give out-of-state convictions the same effect as in-state convictions. State v. Stevens, 137 Wn.App. 460, 153 P.3d 903 (2007). Similarly, with respect to drug offenses, the legislature has declined to rely on the classifications of other states to determine whether an offense is a felony. See RCW 9A.030(22) (definition of “drug offense.”) The Sentencing Reform Act specifically requires that prior convictions be comparable to Washington offenses for scoring purposes. RCW 9A.010 requires that “felony traffic offenses” also be comparable to Washington statutes.

While the Washington legislature may have rejected comparability as too onerous for law enforcement administering the sex offender registry, such a consideration has no rational relation to a determination of punishment by Courts pursuant to a criminal case. Because the term “felony” is not defined specifically as it relates to Chapter 9A.010, it can be reasonably interpreted to encompass only offenses comparable to felonies under Washington law. Therefore, the rule of lenity requires that the Court construe this provision in favor of the defendant and classify his predicate Arizona conviction as a “nonfelony” sex offense.