

No. 63458-5-I

**COURT OF APPEALS,
DIVISION I,
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON, Appellant

v.

JASON D. SMITH, Respondent.

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STATE OF WASHINGTON
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BRIEF OF RESPONDENT

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Introduction

This court should affirm the decision of the court below vacating the defendant's 1989 felony conviction under RCW 9.94A.640 because when defendant obtained an order vacating his 1995 misdemeanor conviction, the order of vacation prohibited all adverse consequences flowing from the later conviction. After the 1995 conviction was vacated, it ceased to be an obstacle to vacating the 1989 conviction.

Statement of Issue

When a misdemeanor conviction is vacated and charges are dismissed under RCW 9.96.060, is the misdemeanor still a "conviction" that bars an otherwise qualified person from receiving an order under RCW 9.94A.640 vacating a felony conviction?

Statement of the Case

Defendant Jason D. Smith pleaded guilty on October 9, 1989, in Snohomish County Superior Court to a charge of Burglary 2nd Degree, a felony offense described in RCW 9A.52.030. CP 46. The Superior Court granted a Certificate and Order of Discharge on December 28, 1990, signifying the defendant's completion of all terms and conditions of the sentence, and the restoration of the defendant's civil rights. CP 45.

Five years after receiving the Certificate and Order of Discharge, the defendant pleaded guilty on December 6, 1995, in King County Superior Court to a charge of Possession of Stolen Property 3rd Degree, a gross misdemeanor described in RCW 9A.56.170. CP 15-17. The King County Superior Court issued an order on January 5, 2009, vacating the defendant's conviction under RCW 9.96.060. CP 19-21.

After obtaining the order vacating the misdemeanor conviction, the defendant returned to the Snohomish County Superior Court and petitioned under RCW 9.94A.640 for an order vacating the 1989 felony conviction. CP 41-44. The state opposed the motion, arguing that the 1995 misdemeanor conviction, although vacated by the King County court, rendered the defendant ineligible to vacate the 1989 felony. CP 22-25.

Following oral argument on April 30, 2009, the Snohomish County Superior Court granted defendant's motion and entered the order vacating the defendant's felony conviction. CP 6-7. The state timely filed its Notice of Appeal on May 5, 2009, and now appeals the Superior Court order vacating the felony conviction. CP 3-5.

Argument

1. The standard of review is de novo.

A felony offender may petition the sentencing court to vacate the conviction under RCW 9.94A.640. The statute sets forth the eligibility requirements. Among the requirements is this one: “An offender may not have the record of conviction cleared if . . . the offender has been convicted of a new crime in this state, another state, or federal court since the date of the offender’s discharge under RCW 9.94A.637.” RCW 9.94A.640(2)(d). This appeal requires the court to decide whether the defendant’s 1995 conviction, although vacated, shall still be considered a subsequent conviction that disqualifies him from obtaining an order vacating his 1989 conviction.

The appeal involves statutory construction, a question of law, and therefore review is de novo. *State v. Breazeale*, 144 Wn.2d 829, 837, 31 P.3d 1155 (2001). A court’s primary goal in construing the meaning of a statute is to determine and give effect to the Legislature’s intent and purpose. *State v. Sullivan*, 143 Wn.2d 162, 174-75, 19 P.3d 1012 (2001). The meaning of a clear and unambiguous statute is derived from its plain language alone. *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001), *cert. denied*, 534 U.S. 1130 (2002). Courts must assume the Legislature “ ‘means exactly what it says.’ ” *State v. Delgado*, 148 Wn.2d

723, 727, 63 P.3d 792 (2003) (quoting *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 964, 977 P.3d 554 (1999)). A statute is ambiguous if it can be reasonably interpreted in more than one way. *Keller*, 143 Wn.2d at 276.

2. The statutes are unambiguous: A vacated conviction carries no adverse consequences.

The statutory language at issue in this appeal appears in RCW 9.94A.640(2)(d). The issue is whether a misdemeanor offense which has been vacated, and the charging document dismissed, constitutes a disqualifying “convict[ion] of a new crime.” The state asserts that this issue is resolved simply by determining whether the King County misdemeanor prosecution produced a conviction. According to the state’s view, “once a conviction, always a conviction.” The result advocated by the state would render meaningless the King County order to vacate the 1995 misdemeanor. Accordingly, the issue in this case should be resolved by determining the effect of the order which vacated and dismissed the defendant’s 1995 misdemeanor.

The 1995 order to vacate appears on the approved state form (Form CrRLJ 09.0200) available from the Administrative Office of the Courts. CP 19-21. The order accurately reflects the several distinct and separate remedies granted by RCW 9.96.060(3):

Once the court vacates a record of conviction under subsection (1) of this section, *the person shall be released from all penalties and disabilities resulting from the offense* and the fact that the person has been convicted of the offense shall not be included in the person's criminal history for purposes of determining a sentence in any subsequent conviction. For all purposes, including responding to questions on employment or housing applications, a person whose conviction has been vacated under subsection (1) of this section may state that he or she has never been convicted of that crime. Nothing in this section affects or prevents the use of an offender's prior conviction in a later criminal prosecution.

(Emphasis supplied.) The statute is in harmony with RCW 9.94A.030(14)(b), which provides: "A conviction may be removed from a defendant's criminal history only if it is vacated pursuant to RCW 9.96.060, 9.94A.640, 9.95.240, or a similar out-of-state statute, or if the conviction has been vacated pursuant to a governor's pardon."

RCW 9.96.060, RCW 9.94A.640, and RCW 9.95.240 provide, respectively, for the vacation of misdemeanors, felonies sentenced under the Sentencing Reform Act, and felonies for which indeterminate sentences were imposed.¹ An offender whose conviction is vacated under any one of the three statutes is "released from all penalties and disabilities

¹ An offender seeking vacation under RCW 9.95.240 (indeterminate sentencing) uses the procedure set forth in RCW 9.94A.640, and must meet the equivalent of the tests in RCW 9.94A.640(2).

resulting from the offense.” RCW 9.96.060(3), RCW 9.94A.640(3), and RCW 9.95.240(1).

The Supreme Court discussed the effect of vacating a felony conviction in *State v. Breazeale*, 144 Wn.2d 829, 31 P.3d 1155 (2001). The court was analyzing RCW 9.95.240 (relating to pre-SRA convictions) and RCW 9.94A.230 (now recodified as RCW 9.94A.640). A court’s acts in vacating a conviction under RCW 9.94A.640 are identical to a court’s acts in vacating a misdemeanor under RCW 9.96.060: the guilty plea is withdrawn and the court accepts a not-guilty plea (or the verdict is set aside), and the court dismisses the charging document. The *Breazeale* decision states: “The Legislature intended to prohibit all adverse consequences of a dismissed conviction, with the one exception of use in a subsequent criminal conviction, but with no additional implied exceptions.” *Breazeale*, 144 Wn.2d at 837-38. The *Breazeale* decision also favorably quoted Justice Hamilton’s concurring opinion in *Matsen v. Kaiser*, 74 Wn.2d 231, 237, 443 P.2d 843 (1968): “RCW 9.95.240 ‘is a legislative expression of public policy . . . [t]hat a deserving offender [is restored] to his [or her] preconviction status as a full-fledged citizen.’ ” *Breazeale*, 144 Wn.2d at 837. A person whose conviction has been vacated is entitled to state that he was not convicted. *Breazeale*, 144

Wn.2d at 837.² See also, *In re Discipline of Stroh*, 108 Wn.2d 410, 417-18, 739 P.2d 690 (1987) (applicant with vacated felony entitled to keep confidential the fact of his conviction when applying to Department of Licensing for real-estate license).

If a person whose conviction is vacated truly is restored to “pre-conviction status,” as the *Breazeale* court wrote, then the court below was exactly correct in its oral ruling regarding the vacated 1995 misdemeanor: “I treat that literally, it’s for naught. It didn’t happen. He wasn’t convicted. And it should not be an impediment from granting the relief that he now requests, and I will sign an order to that effect.” RP 10.

If the vacated 1995 misdemeanor conviction now bars the defendant from vacating the 1989 felony, that is indisputably an “adverse consequence” of the vacated and dismissed conviction under the *Breazeale* decision. The purpose of this appeal is to construe the statutes to determine the Legislature’s intent, and *Breazeale* has already mapped the route, because *Breazeale* holds that the Legislature intended to “prohibit all adverse consequences” of the conviction except one, and the

² “For all purposes, including responding to questions on employment applications, an offender whose conviction has been vacated may state that the offender has never been convicted of that crime.” RCW 9.94A.640(3) (regarding vacated felonies) . “For all purposes, including responding to questions on employment or housing applications, a person whose conviction has been vacated . . . may state that he or she has never been convicted of that crime.” RCW 9.969.060(3) (regarding vacated misdemeanors).

one exception is unrelated to the issue of vacating a prior felony conviction.

RCW 9.94A.640 is unambiguous. It provides that vacation is not permitted if the petitioner has been convicted of a crime since the date of his discharge in the case sought to be vacated. The state's analysis goes no further than the definition of "conviction" appearing in RCW 9.94A.030: "an adjudication of guilt pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." Brief of Appellant at 5. There is no dispute that the defendant pleaded guilty to the misdemeanor offense and was convicted. The state acknowledges that when the defendant was prosecuted in King County, the court's proceedings transformed the defendant from a non-convicted defendant to one who was convicted. But the state stops short of acknowledging that further proceedings of the same court once again transformed the defendant: from a convicted person into one who was not convicted. The defendant's conviction in King County is the starting point of the analysis, not the end point.

The state relies on *State v. Partida*, 51 Wn. App. 760, 756 P.2d 743, *review denied*, 111 Wn.2d 1016 (1988) to support its assertion of "once a conviction, always a conviction." However, *Partida* involved the dismissal of a pre-SRA felony, which is a circumstance much different

from the dismissal of a misdemeanor. In *Partida*, the defendant argued that the court should not consider his 1973 felony conviction in evaluating his request for a first-time offender waiver in his sentencing for a 1986 felony. *Partida*, 51 Wn. App. at 761. The defendant had received a deferred sentence and probation for the 1973 felony, followed by dismissal in 1976.³ *Id.* The controlling statute for dismissal of pre-SRA felonies, RCW 9.95.240, allows dismissal following probation, with the following limitation: “PROVIDED, That in any subsequent prosecution, for any other offense, such prior conviction may be pleaded and proved, and shall have the same effect as if probation had not been granted, or the information or indictment dismissed.” This proviso makes a pre-SRA dismissal distinctly different from the misdemeanor dismissal at issue in this case. The misdemeanor vacation statute specifically provides: “Once the court vacates a record of conviction . . . the fact that the person has been convicted of the offense shall not be included in the person’s criminal history for purposes of determining a sentence in any subsequent conviction.” RCW 9.96.060(3). Identical language appears in the statute governing the vacation of SRA felonies. *See* RCW 9.94A.640(3). Thus, while a dismissed pre-SRA felony may be counted toward the offender

³ The *Partida* decision does not indicate the statutory basis for dismissal of the 1973 conviction. However, dismissals of pre-SRA offenses are governed by RCW 9.95.240. *State v. Moore*, 75 Wn. App. 166, 170, 876 P.2d 959 (1994).

score, a vacated misdemeanor (under RCW 9.96.060) or vacated SRA felony (under 9.94A.640) may not be counted. *Partida* is irrelevant to the discussion in this case.

3. The Legislature is presumed to understand that the statute governing vacations of misdemeanors differs from the statute governing vacations of felonies, with distinctly different effects.

The state points to one of the remarkable differences between RCW 9.96.060 and RCW 9.94A.640 to show that the Legislature could not have intended the result urged by the defendant in this case. Vacation of a misdemeanor is a once-in-a-lifetime proposition under RCW 9.96.060(2)(h), which provides that a person may not obtain an order to vacate if “[t]he applicant has ever had the record of another conviction vacated.” No such restriction appears in RCW 9.94A.640, the felony vacation statute. According to the state, if the court deems defendant’s vacated misdemeanor a “penalty” or “disability,” it will lead to the “absurd result” that an offender may vacate multiple felony convictions, but only one misdemeanor conviction. Brief of Appellant at 9-10.

This argument ignores the rule that the Legislature is presumed to have full knowledge of existing statutes affecting the matter upon which it is legislating. *State v. Conte*, 159 Wn.2d 797, 808, 154 P.3d 194, *cert. denied*, 128 S.Ct. 512, (2007). The Legislature enacted RCW 9.96.060 in

2001. Laws of 2001, Ch. 140, §1. Since then, the Legislature amended RCW 9.94A.640 in 2006, when it added restrictions to the felony vacation statute. Laws of 2006, Ch. 73, §8. When the Legislature enacted the 2006 amendments to RCW 9.94A.640, legislators presumably knew of the once-in-a-lifetime restriction appearing in RCW 9.96.060, yet they did not add such a restriction to the felony vacation statute.

Further, a court must give a “literal and strict” interpretation to a criminal statute. *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). A court may not add words or phrases to an unambiguous statute when the Legislature has chosen not to include the language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). As these rules make clear, the relief sought by the state must come from the Legislature, the body from which the judiciary draws its power to sentence and vacate convictions. *See State v. Alberts*, 51 Wn. App. 450, 454-55, 754 P.2d 128, *review denied*, 111 Wn.2d 1006 (1988) (in rejecting offender’s contention the court’s interpretation of a probation statute would lead to absurd results, court found that the argument should be addressed to the Legislature).

Even if this court finds the statutory provisions at issue to be ambiguous, the rule of lenity requires a construction that favors the

defendant. *In re Personal Restraint of Sietz*, 124 Wn.2d 645, 652, 880 P.2d 34 (1994).

4. *Matsen v. Kaiser* is a weak precedent for the state's argument, and lends more support to the defendant than to the state.

The state relies on *Matsen v. Kaiser*, 74 Wn.2d 231, 443 P.2d 843 (1968), for the idea that even if vacation of a felony removes “all penalties and disabilities” of the conviction, it does not obliterate the fact that the conviction occurred. Brief of Appellant at 10-12. As a 2-4-3 plurality decision, *Matsen's* force as precedent is doubtful. *In re Isadore*, 151 Wn.2d 294, 302, 88 P.3d 390 (2004) (plurality opinion has limited precedential value and is not binding on the courts).

If anything, *Matsen* supports the defendant's argument in this matter, rather than the state's. The four-justice concurring opinion examined the language of RCW 9.95.240, the pre-SRA felony dismissal statute, which provides that following probation, (1) an offender may withdraw the offender's guilty plea, (2) enter a not-guilty plea, (3) after which the court will dismiss the information or indictment, (4) thereby releasing the offender from all penalties and disabilities. *Matsen*, 74 Wn.2d at 237. These provisions are identical to provisions appearing in the misdemeanor vacation statute, RCW 9.96.060, under which the

defendant here vacated the 1995 misdemeanor. In *Matsen*, the release from all penalties and disabilities rendered the defendant sheriff once again eligible to hold public office. Likewise, the release from all penalties and disabilities resulting from vacation of the defendant's 1995 misdemeanor conviction rendered the defendant eligible to apply under RCW 9.94A.640 for vacation of the 1989 felony conviction.

This result is consistent with the legislative intent of the statutes permitting vacation of criminal convictions. "This statute [RCW 9.95.240] is a legislative expression of public policy in the field of criminal law and rehabilitation. It undertakes, in unambiguous terms, to restore a deserving offender to his preconviction status as a full-fledged citizen." *Matsen*, 74 Wn.2d at 846-47.

5. Vacations of adult offenses are analogous to vacations under the juvenile statutes, providing that after dismissal, the proceedings 'shall be treated as if they never occurred.'

Nelson v. State, 120 Wn. App. 470, 85 P.3d 912 (2004) is an analogous case arising under the juvenile-justice counterpart to the adult conviction statutes. Nelson pleaded guilty to felony offenses as a juvenile. *Nelson*, 120 Wn. App. at 472. He then petitioned for and received an order under RCW 13.50.050(11) sealing and expunging his juvenile offender record. *Id.* at 473. The statute provides:

If the court grants the motion to seal made pursuant to subsection (11) of this section, it shall, subject to subsection (23) of this section, order sealed the official juvenile court file, the social file, and other records relating to the case as are named in the order. Thereafter, 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. Any agency shall reply to any inquiry concerning confidential or sealed records that records are confidential and no information can be given about the existence or nonexistence of records concerning an individual.

RCW 13.50.050(14) (emphasis supplied). Two years after receiving the order sealing the juvenile records, Nelson petitioned the court for an order restoring his right to possess firearms, and the trial court denied relief. *Id.* at 475.

On appeal, Nelson argued that the juvenile-court sealing order meant that he had not “previously been convicted” for the purposes of RCW 9.41.040, the firearm-possession statute. In its holding, this court noted that under RCW 13.50.050(14), after a sealing order “ ‘the proceedings in the case shall be treated as if they never occurred.’ ” *Id.* at 479. “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

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previously been convicted. If he has not previously been convicted, he may legally possess firearms.” *Id.* at 479-80.

There is no practical distinction between treating a vacated and sealed juvenile adjudication “as if it never occurred,” and releasing an adult misdemeanor or felony offender “from all penalties and disabilities resulting from the offense.” The result and effect is that which the *Breazeale* court pointed to: “The Legislature intended to prohibit all adverse consequences of a dismissed conviction, with the one exception of use in a subsequent criminal conviction but with no additional implied exceptions. *Breazeale*, 144 Wn.2d at 837-38.

Conclusion

A misdemeanor conviction vacated under RCW 9.96.060 is not a subsequent “conviction” under RCW 9.94A.640 because the court order vacating the misdemeanor has a profound effect. The court’s action in vacating a misdemeanor restores the offender to pre-conviction status and prohibits all adverse consequences resulting from the conviction. The defendant here is entitled to the full benefit of the order vacating the 1995 misdemeanor, and therefore this court should affirm the trial court’s order vacating defendant’s 1989 felony conviction.

Respectfully submitted: Oct. 26, 2009

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Certificate of Service

On October 26, 2009, I sent a copy of the Brief of Respondent to Appellant's counsel via U.S. Mail, first class, postage paid, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Signed at Bellevue, Washington, on the date written below.

10-26-2009

Date



David M. Newman