

FILED
April 7, 2016
Court of Appeals
Division I
State of Washington

No. 73491-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

Marvell M. Miller,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

TABLE OF CONTENTS

A. ARGUMENT 1

 1. By not fairly considering all of the statutory factors on whether to require a person to register as a felony firearm offender on the record, the trial court abused its discretion. 1

 2. By advocating that the court require Mr. Miller to register as a firearm offender, the State violated the plea agreement. 3

 3. The statute used to decide which firearm offenders must register, RCW 9.41.330, is unconstitutionally vague in violation due process. 5

 4. Any costs should be denied..... 10

B. CONCLUSION 10

TABLE OF AUTHORITIES

United States Supreme Court Cases

Bolling v. Sharpe, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884 (1954)..... 7

Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)..... 5, 7, 8, 9

Santobello v. New York, 404 U.S. 257, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)..... 3

Washington State Supreme Court Cases

State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003) 7

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 1

State v. MacDonald, 183 Wn.2d 1, 346 P.3d 748 (2015)..... 3

State v. Sledge, 133 Wn.2d 828, 947 P.2d 1199 (1997)..... 3, 5

State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998)..... 3

Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 858 P.2d 1054 (1993)..... 2

Washington Court of Appeals Cases

In re Marriage of Mathews, 70 Wn. App. 116, 853 P.2d 462 (1993)..... 1, 2

State v. Schimelpfenig, 128 Wn. App. 224, 115 P.3d 338 (2005)..... 6

State v. Sinclair, 72102-0-I, 2016 WL 393719 (Wash. Ct. App. Jan. 27, 2016) 10

Other cases

Aponte v. Holder, 610 F.3d 1 (1st Cir. 2010)..... 2

United States v. Madrid, 805 F.3d 1204 (10th Cir. 2015) 8

United States v. Taylor, 803 F.3d 931 (8th Cir. 2015) 8

United States v. Wivell, 893 F.2d 156 (8th Cir. 1990) 7, 8

Statutes

RCW 9.41.330 6

RCW 9.41.330(2)..... 1

RCW 9.41.330(2)(c) 1

RCW 9.41.333 6

RCW 9.41.333(8)..... 6

RCW 9.41.335 6

A. ARGUMENT

1. **By not fairly considering all of the statutory factors on whether to require a person to register as a felony firearm offender on the record, the trial court abused its discretion.**

In deciding whether to require a felony firearm offender to register, the court must consider (1) “all relevant factors including but not limited to” (2) the person’s criminal history, (3) whether the person has been found not guilty by reason of insanity, and (4) the person’s propensity for violence. RCW 9.41.330(2).

Here, the trial court abused its discretion in imposing the registration requirement upon Mr. Miller because its decision “does not evidence a fair consideration” of the requisite statutory factors. In re Marriage of Mathews, 70 Wn. App. 116, 123, 853 P.2d 462 (1993).

The court’s oral ruling on the issue did not show any consideration regarding evidence of Mr. Miller’s “propensity for violence that would likely endanger persons.” RCW 9.41.330(2)(c). The boilerplate finding stating that the court did is inadequate under the reasoning of State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015). Consistent with the pertinent statute, that case required an individualized inquiry, on the record, into the defendant’s ability to pay. Blazina, 182 Wn.2d at 838. Thus, as in Blazina, the court’s signing of a judgment and sentence with a boilerplate finding stating that it engaged in the required inquiry is

inadequate. Id. Further, the court’s cursory inquiry does not “evidence a fair consideration” of all the factors. Mathews, 70 Wn. App. at 123 (trial court abused its discretion in not fairly considering statutory factors when awarding maintenance to one spouse).

The State’s brief is not responsive to these arguments. Br. of Resp’t at 22-25. The State does not attempt to distinguish Mathews, which involved a similarly structured statute. Neither does the State explain why an on-the-record inquiry is required before a trial court imposes legal financial obligations upon a defendant, but not when imposing a requirement to register as a firearm offender. The State simply argues that the “sentencing court was not required to make detailed findings or go through some elaborate test.” Br. of Resp’t at 25. In effect, the State is advocating for judicial abdication by Washington appellate courts on review. The abuse of discretion standard may be lenient, but it is not toothless. Aponte v. Holder, 610 F.3d 1, 4 (1st Cir. 2010); see Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (trial court necessarily abuses its discretion if its ruling is premised on an erroneous view of the law). It still demands judicial engagement. Engaging in the record and following precedent, this Court should hold that the trial court abused its discretion in requiring Mr. Miller to register as a firearm offender.

2. By advocating that the court require Mr. Miller to register as a firearm offender, the State violated the plea agreement.

The State may not undercut the terms of a plea agreement and must adhere to its recommendation at sentencing. State v. MacDonald, 183 Wn.2d 1, 8, 346 P.3d 748 (2015); Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Here, the plea agreement was silent on the issue of registration, implying that the prosecutor would remain neutral. CP 18. Rather than remain neutral, the prosecutor “suggest[ed]” that the court look at two of the enumerated factors and “ask[ed]” that the court “note” particular evidence that arguably tended to support imposing the registration requirement. 5/1/15RP 4-5. The prosecutor’s statements were not elicited by the court. They were plainly advocacy in support of requiring registration. Accordingly, the prosecutor breached the plea agreement. See Santobello, 404 U.S. at 262; State v. Sledge, 133 Wn.2d 828, 842-43, 947 P.2d 1199 (1997).

In resisting this analysis, the State relies heavily on our Supreme Court’s decision in State v. Talley, 134 Wn.2d 176, 949 P.2d 358 (1998). Br. of Resp’t at 28-29. Talley is dissimilar. There, the issue was “whether a prosecutor who enters into a plea agreement that requires the State to recommend a standard range sentence, upon the defendant’s plea of guilty, breaches that agreement by participating in a court ordered evidentiary

sentencing hearing.” Talley, 134 Wn.2d at 178. The prosecutor was not recommending an exceptional sentence, but the purpose of the hearing was whether to impose such a sentence. Id. at 183. The key takeaway from Talley is that when a trial court orders an evidentiary hearing, the prosecutor’s mere participation in that hearing does not violate a plea agreement. Id. at 178. In such circumstances, the prosecutor, as an officer of the court, has a duty to present relevant evidence to the court and respond to its inquiries. Id. at 186. However, a prosecutor may still “easily undercut” a plea agreement by placing emphasis on evidence that would support a harsher sentence than what it is recommending. Id.

Here, through its initial silence, the prosecutor informed Mr. Miller that it was not taking a position on the firearm offender registration issue. The prosecutor then reneged at the sentencing hearing by impliedly advocating for imposition of the registration requirement. Contrary to the State’s characterization, the prosecutor did more than merely inform the court about the firearm offender registration statute. Br. of Resp’t at 30. If the prosecutor had simply informed the court of the law and then answered any questions from the court, there likely would have been no breach. But by taking the initiative, directing the court to certain factors, and asking that the court examine particular facts in evaluating whether to require Mr. Miller to register, the prosecutor crossed the line into

advocacy. 5/1/15RP 4-5. This undercut the plea agreement, which by its silence, indicated neutrality. Accordingly, this Court should hold that the prosecutor breached the plea agreement and remand for a new sentencing hearing on the firearm offender registration issue before a different judge. See Sledge, 133 Wn.2d at 846.

3. The statute used to decide which firearm offenders must register, RCW 9.41.330, is unconstitutionally vague in violation due process.

The State violates constitutional due process guarantees “by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” Johnson v. United States, ___ U.S. ___, 135 S. Ct. 2551, 2556, 192 L. Ed. 2d 569 (2015) (emphasis added). As the Supreme Court’s decision in Johnson clarifies, the vague for voidness doctrine applies “to statutes fixing sentences.” Id. at 2557. Johnson involved the residual clause of the Armed Career Criminal Act (ACCA), which provides for increased sentences if the defendant has three or more convictions for a “violent felony.” Id. The statute defined a “violent felony” as a crime that “involves conduct that presents a serious potential risk of physical injury to another.” Id. The Supreme Court held that imposing an increased sentence under this provision violates the due process prohibition against vague laws. Id.

Hence, the void for vagueness doctrine applies to RCW 9.41.330, a statute fixing sentences for defendants convicted of felony firearm offenses. Under this statute, some people will be required to register as a firearm offender while others will not. RCW 9.41.330. Because the statute invites arbitrary application by sentencing judges, it is void for vagueness.

The State cursorily (yet seriously) contends no liberty interest is implicated when a sentencing court requires a person to register as a felony firearm offender. Br. of Resp't at 10. Requiring Mr. Miller to register as a felony firearm offender undeniably implicates his liberty. Upon release, Mr. Miller must personally register in a government database, must update this registration when moving, and must personally register again if moving to another county. RCW 9.41.333. This implicates Mr. Miller's liberty as it affects his right to travel within the state. State v. Schimelpfenig, 128 Wn. App. 224, 226, 115 P.3d 338 (2005). The duty to register continues for four years and if he knowingly fails to comply, he is guilty of a crime and may be incarcerated. RCW 9.41.333(8); 9.41.335. This further implicates Mr. Miller's liberty because he may be punished and confined due to imposition of the registration requirement. See Bolling v. Sharpe, 347 U.S. 497, 499-500,

74 S. Ct. 693, 98 L. Ed. 884 (1954) (“‘[L]iberty’ . . . is not confined to mere freedom from bodily restraint.”).¹

The State makes a more detailed argument that discretionary sentencing provisions are not subject to due process vagueness challenges. Br. of Resp’t at 10-16. The argument relies principally on State v. Baldwin, 150 Wn.2d 448, 78 P.3d 1005 (2003). There, the Washington Supreme Court held that sentencing guideline are not subject to a due process vagueness analysis:

The sentencing guideline statutes challenged in this case do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State. [United States v. Wivell, 893 F.2d 156, 160 (8th Cir. 1990)]. Sentencing guidelines do not inform the public of the penalties attached to a criminal conduct nor do they vary the statutory maximum and minimum penalties assigned to illegal conduct by the legislature. A citizen reading the guideline statutes will not be forced to guess at the potential consequences that might befall one who engages in prohibited conduct because the guidelines do not set penalties. Thus, the due process considerations that underlie the void-for-vagueness doctrine have no application in the context of sentencing guidelines.

Baldwin, 150 Wn.2d at 459. The problem with this analysis, however, is that it is no longer good law under Johnson.

¹ Mr. Miller is not arguing that State cannot require people to register. He is arguing that the standards used to implement this program must comply with the due process prohibition against vague laws.

United States v. Wivell, the federal case relied on in Baldwin, is no longer good law in light of Johnson. The Eighth Circuit itself recently explained that the “reasoning in *Wivell* that the guidelines cannot be unconstitutionally vague because they do not proscribe conduct is doubtful after *Johnson*.” United States v. Taylor, 803 F.3d 931, 933 (8th Cir. 2015); see also United States v. Madrid, 805 F.3d 1204, 1211 (10th Cir. 2015) (summarizing conflict among federal appellate courts on the issue of whether discretionary sentencing statutes are subject to vagueness challenges, and noting that Sixth and Eighth Circuits have since retreated from the position that vagueness challenges are not allowed). Hence, contrary to Baldwin, discretionary sentencing laws are subject to due process vagueness challenges. The State’s contention that RCW 9.41.330 is not subject to the constitutional prohibition against vague laws should be rejected.

Continuing to ignore the shift in the law, the State maintains that Mr. Miller must prove that the statute is vague in all its applications because the First Amendment is not implicated. Br. of Resp’t at 17, 21. Johnson, however, did not apply this rule despite the case not involving the First Amendment and the dissent’s objection. See Johnson, 135 S. Ct. at 2582 (Alito, J., dissenting). Johnson recognized this rule to be no rule at all, but a tautology: “It seems to us that the dissent’s supposed

requirement of vagueness in all applications is not a requirement at all, but a tautology: If we hold a statute to be vague, it is vague in all its applications (and never mind the reality).” Johnson v. 135 S. Ct. at 2561. Hence, that there existed some clearly risky crimes did not save the residual clause at issue in the sentencing statute. Id.

In any event, Mr. Miller has established that the vague aspect of the law was used impermissibly to impose the firearm offender registration requirement. Br. of App. at 25. The State argues he has not because the facts the judge considered were the facts of the crimes for which Mr. Miller was being sentenced. Br. of Resp’t at 21. But the issue is not whether Mr. Miller received notice of what facts the court could consider at sentencing. The issue is whether the “relevant factors” language allowed the court to arbitrarily impose the registration requirement on Mr. Miller. As argued, the term “relevant factors” is vague because it is unclear what factors normatively weigh in favor of imposing a duty to register as a firearm offender. The legislature has created three such factors, which is its prerogative, but its mandate that courts must consider all other “relevant factors” generates confusion and unpredictability. See Johnson, 135 S. Ct. at 2561 (“The phrase ‘shades of red,’ standing alone, does not generate confusion or unpredictability; but the phrase ‘fire-engine red, light pink, maroon, *navy blue*, or colors that

otherwise involve shades of red’ assuredly does so.”) (citation and quotation omitted). It effectively delegates to judges who should and who should not be subject to registration based on their own personal predilections on what is “relevant.” This is what the vagueness doctrine prohibits.

The Court should hold that RCW 9.41.330 is unconstitutionally vague in violation of due process.

4. Any costs should be denied.

The State does not respond to Mr. Miller’s request that no costs be imposed if he does not substantially prevail in this appeal.

By not responding, the State has waived the issue. State v. Sinclair, 72102-0-I, 2016 WL 393719, at *6 (Wash. Ct. App. Jan. 27, 2016) (“The State has the opportunity in the brief of respondent to make counterarguments to preserve the opportunity to submit a cost bill.”). As argued, this Court should direct that no costs will be imposed. Br. of App. at 25-27; see also id. at *6-7 (rejecting cost bill).

B. CONCLUSION

The requirement that Mr. Miller register as a firearm offender should be reversed.

DATED this 7th day of April, 2016.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	NO. 73491-1-I
)	
MARVELL MILLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 7TH DAY OF APRIL, 2016, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<p>[X] DENNIS MCCURDY, DPA [paoappellateunitmail@kingcounty.gov] [dennis.mccurdy@kingcounty.gov] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104</p>	<p>() () (X)</p>	<p>U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL</p>
<p>[X] MARVELL MILLER 382506 OLYMPIC CORRECTIONS CENTER 11235 HOH MAINLINE FORKS, WA 98331</p>	<p>(X) () ()</p>	<p>U.S. MAIL HAND DELIVERY _____</p>

SIGNED IN SEATTLE, WASHINGTON THIS 7TH DAY OF APRIL, 2016.



X _____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, WA 98101
Phone (206) 587-2711
Fax (206) 587-2710