

FILED
March 8, 2015
Court of Appeals
Division I
State of Washington

NO. 73491-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARVELL M. MILLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

DENNIS J. McCURDY
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

	Page
A. <u>ISSUES PRESENTED</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. PROCEDURAL FACTS	1
2. SUBSTANTIVE FACTS	2
C. <u>ARGUMENT</u>	8
1. THE FELONY FIREARM OFFENDER REGISTRATION STATUTE IS NOT SUBJECT TO DUE PROCESS VAGUENESS CHALLENGE	8
a. The Statute	8
b. Only Certain Laws Are Subject To Due Process Vagueness Challenge	10
2. RCW 9.41.330 IS NOT VAGUE	16
3. RCW 9.41.330 IS NOT VAGUE AS APPLIED TO THE DEFENDANT'S CONDUCT, AND THE COURT DID NOT ABUSE ITS DISCRETION	21
4. THE PROSECUTOR'S PRESENTATION OF FACTS AND LAW DID NOT VIOLATE THE PLEA AGREEMENT	26
D. <u>CONCLUSION</u>	31

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Johnson v. United States, ___ U.S. ___,
135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015)..... 14

Lockett v. Ohio, 438 U.S. 586,
98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978)..... 13

Miller v. Alabama, ___ U.S. ___,
132 S. Ct. 2455, 183 L. Ed. 2d 407 (2012)..... 23

North Carolina v. Alford, 400 U.S. 25,
91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)..... 28

Santobello v. New York, 404 U.S. 257,
92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)..... 26

Washington State:

City of Spokane v. Douglass, 115 Wn.2d 171,
795 P.2d 693 (1990)..... 17, 21

In re Cashaw, 123 Wn.2d 138,
866 P.2d 8 (1994)..... 10, 13

In re Treatment of Mays, 116 Wn. App. 864,
68 P.3d 1114 (2003)..... 14, 15, 16

In re Woods, 154 Wn.2d 400,
114 P.3d 607 (2005)..... 10

Matter of Estate of Burmeister, 124 Wn.2d 282,
877 P.2d 195 (1994)..... 20

O.S.T. ex rel. G.T. v. BlueShield, 181 Wn.2d 691,
335 P.3d 416 (2014)..... 20

<u>Sofie v. Fibreboard Corp.</u> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	25
<u>State v. Alvarez</u> , 128 Wn.2d 1, 904 P.2d 754 (1995).....	19
<u>State v. Bahl</u> , 164 Wn.2d 739, 193 P.3d 678 (2008).....	14, 15
<u>State v. Baldwin</u> , 150 Wn.2d 448, 78 P.3d 1005 (2003).....	10, 11, 12, 13
<u>State v. Dennison</u> , 115 Wn.2d 609, 801 P.2d 193 (1990).....	25
<u>State v. Eckblad</u> , 152 Wn.2d 515, 98 P.3d 1184 (2004).....	11
<u>State v. Halstien</u> , 122 Wn.2d 109, 857 P.2d 270 (1990).....	16
<u>State v. Harris</u> , 91 Wn.2d 145, 588 P.2d 720 (1978).....	20
<u>State v. Hopson</u> , 113 Wn.2d 273, 778 P.2d 1014 (1989).....	25
<u>State v. Jerde</u> , 93 Wn. App. 774, 970 P.2d 781, <u>rev. denied</u> , 138 Wn.2d 1002 (1999).....	27
<u>State v. Rhodes</u> , 92 Wn.2d 755, 600 P.2d 1264 (1979).....	12, 13
<u>State v. Rupe</u> , 101 Wn.2d 664, 683 P.2d 571 (1984).....	24
<u>State v. Sledge</u> , 133 Wn.2d 828, 947 P.2d 1199 (1997).....	26
<u>State v. Talley</u> , 134 Wn.2d 176, 949 P.2d 358 (1998).....	26, 27, 28, 29, 30

<u>State v. Talley</u> , 83 Wn. App. 750, 923 P.2d 721 (1999).....	29
<u>State v. Watson</u> , 160 Wn.2d 1, 154 P.3d 909 (2007).....	16

Constitutional Provisions

Federal:

U.S. CONST. amend. XIV, § 1	10
-----------------------------------	----

Washington State:

CONST. art. I, §. 3.....	10
--------------------------	----

Statutes

Washington State:

Former RCW 9.94A.120.....	11
Former RCW 9.94A.390.....	11
Former RCW 9.94A.700.....	15
Former RCW 11.12.050	20
LAWS OF 1994, ch. 221, § 72	20
RCW 9.41.010.....	1, 2, 8
RCW 9.41.040.....	2
RCW 9.41.330.....	1, 8, 9, 10, 13, 14, 16, 17, 19, 20, 21, 30
RCW 9.41.333.....	9
RCW 9.94A.530	5, 19

RCW 9A.36.045	8
RCW 9A.56.300	8
RCW 9A.56.310	8
RCW 10.95.070.....	20
RCW 10.99.080.....	18
RCW 26.09.080.....	20
RCW 26.26.130.....	20
RCW 26.50.060.....	18

Rules and Regulations

Washington State:

ER 402	19
ER 403	19

A. ISSUES PRESENTED

The defendant pled guilty to four felony charges, two of which are “felony firearm offenses” per RCW 9.41.010(8). Per RCW 9.41.330, the sentencing judge exercised her discretion and imposed the requirement that the defendant register with the county sheriff in which he resides as a “felony firearm offender.”

1. Can the defendant challenge RCW 9.41.330 on due process vagueness grounds?
2. Can the defendant show that RCW 9.41.330 is unconstitutionally vague as applied to him?
3. Can the defendant show that the sentencing judge abused her discretion in imposing a felony firearm offender registration requirement?
4. Can the defendant show that the State violated the plea agreement by directing the sentencing judge to the statutory firearm registration provisions and indicating where the information was that the judge was required to consider?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant pled guilty to two counts of Residential Burglary and two counts of Unlawful Possession of a Firearm in the

First Degree. CP 13-40. The defendant received a standard range sentence of 36 months confinement. CP 41-49. The sentencing judge also required that the defendant register with the county sheriff in which he resides as a felony firearm offender. CP 43.

2. SUBSTANTIVE FACTS

Prior to having committed the offenses that are the subject of this appeal, the defendant had a criminal history that included the following:

Assault in the Third Degree – a 2011 juvenile court felony
Burglary in the Second Degree – a 2009 juvenile court felony
Criminal Trespass – a 2011 juvenile court misdemeanor
Harassment – a 2011 juvenile court misdemeanor

CP 39. Due to his burglary in the second degree conviction, a “serious offense,” the defendant cannot legally possess a firearm.¹

On January 6, 2015, the Wheeler family home was burglarized. CP 31. Someone smashed in their kitchen window and looted their house, stealing jewelry, liquor, a debit card, a knife, a backpack and other items. CP 31.

¹ A person is guilty of unlawful possession of a firearm in the first degree if the person “has in his or her possession, or has in his or her control, any firearm after having previously been convicted...of any serious offense as defined in this chapter.” RCW 9.41.040(1)(a). “Serious offense” includes “any crime of violence.” RCW 9.41.010(21)(a). Burglary in the second degree is defined as a “crime of violence.” RCW 9.41.010(3)(a).

Later that same day, the Rodriguez family came home to find that someone had smashed out a window of their home and looted their house. CP 29. Among other things, the burglar took an iPhone, jewelry, money and a pair of Air Jordan basketball shoes. CP 29.

Using the tracking device on the stolen iPhone, officers were able to locate the defendant a couple blocks away. CP 30-31. The defendant had with him two backpacks that contained the families' stolen possessions. CP 30-31. He also had a fully loaded Sig Sauer P229 semiautomatic handgun tucked into his waistband. CP 30. The handgun had been stolen in a residential burglary in December of 2014. CP 30-31. When stopped, the defendant gave officers a false name. His true identity had to be confirmed via fingerprints. CP 30.

Post Miranda warnings, the defendant confessed to burglarizing the Rodriguez home and the Wheeler home. CP 31. He admitted that he carried the firearm with him during both burglaries in case he ran into the homeowners. CP 31. He also confessed that his getaway car, a blue Hyundai, was parked at a nearby apartment complex. CP 31. Inside the car officers found the following weapons:

An Armalite AR-15 rifle that had been stolen during a burglary of the Dahl family home in August of 2014. CP 32.

An ATI GSG-522 .22 caliber rifle that had been stolen during a burglary of the Uhm family home in December of 2014. CP 32.

A Sig Sauer M400 AR-15 rifle that also had been stolen from the Uhm home. CP 32.

A KSG 12-gauge shotgun that was confirmed as having been stolen. CP 32.

A Springfield 1911 .45 caliber pistol that had been stolen from the Uhm family home. CP 32.

The three rifles are all common tactical assault style

weapons. In a search of a storage unit associated with the defendant, police discovered multiple items that were identified as having been stolen in other area burglaries. CP 32.

On April 13, 2015, the defendant entered a plea of guilty to two counts of Residential Burglary (for the Rodriguez and Wheeler homes) and two counts of Unlawful Possession of a Firearm in the First Degree (one count for the Sig Sauer P229 found on his person and one count for the other five weapons found in his car). CP 25, 27-28. As part of the plea, the State agreed not to file certain other charges. CP 17. The State agreed to make the following sentence recommendation:

22 months confinement on counts I & III concurrently with 36 months on counts II & IV; no contact with [victims and homes]; restitution TBD [to be determined] for losses and damages to 2412 NE 188th St in Shoreline and 18032 25th Ave NE in Lake Forest Park and items taken; court costs, \$500 VPA; \$100 DNA fee, recoupment. The State agrees not to add or file any further charges arising out of these burglaries KCSO # 15-5198 and LFPPD # 15-178.

CP 17.

The defendant was also informed that:

This offense, counts II & IV, is a felony firearm offense as defined by RCW 9.41.010, including any felony committed while armed with a firearm, and the judge may impose a requirement that I register with the sheriff in the County where I reside, for a period of four years from sentencing or from my release from confinement for this offense, whichever is later, in compliance with RCW 9.41.333.

CP 18.

In pleading guilty, the defendant agreed to "real facts," meaning that he was stipulating that the facts as contained in the certification for determination of probable cause and the prosecutor's summary, were real and material facts that could be considered by the trial judge in imposing sentence. CP 36; RCW 9.94A.530. Thus, all of the above facts, taken from the plea documents, were before the sentencing judge for her consideration.

The defendant entered the plea on the record before the Honorable Richard Bathum. 2RP² 1-16. During the plea colloquy, the defendant was asked, “[d]o you understand that counts 2 and 4 are felony firearm offenses and you may be ordered to comply with registration as a felony firearm offense.” 2RP 10. The defendant responded, “yes.” Id.

On May 1, 2015, the defendant appeared for sentencing before the Honorable Judge Palmer Robinson. 3RP. The prosecutor informed the court as follows:

Prosecutor: [B]ecause this is a firearm offense as appropriately defined, the court must consider whether to impose a firearm registration requirement under RCW 9.41.330. This is a fairly new statute so I can forward a copy to Your Honor.

Court: Thank you.

Prosecutor: The factors for the court to consider in determining the actual – the firearm offender registration is not a part of the plea agreement in this case but it is a required – required by the legislature that the court consider whether or not to impose it.

I would suggest for the court to look at the defendant’s criminal history as is required under (2)(a) and look at evidence of the defendant’s propensity for violence (inaudible) endanger persons under 2(c). With respect to that factor, I would ask the court to note in the certification that the defendant acknowledged that he carried the pistol that was

² The verbatim report of proceedings is cited as follows: 1RP—6/26/15; 2RP—4/13/15; 3RP—5/1/15.

found on his body with him during the burglaries to protect himself from possible harms that he may encounter.

3RP 4-5.

In imposing the requirement that he register as a firearm offender, the court stated the following:

[W]hether or not I require you to register with the county sheriff for the county of your residence when you get out of custody and that's – that's just register that you're there. I am going to do that and the reason that's I'm going to do that is my concern – I mean your criminal history is one thing. Certainly there's not any suggestion that you've been found guilty by – not guilty by reason of insanity but I am concerned just with the presence and number of weapons which were recovered. Not only the one on your person and according to the search there was a loaded magazine and the weapon, no round in the chamber but still a loaded handgun and then three rifles, a pistol, a shotgun and a Sig Sauer. I'm concerned about those.

3RP 11-12.

The Judgment and Sentence reflects the court's order and reads as follows:

This offense is a felony firearm offense (defined in RCW 9.41.010). Having considered relevant factors, including criminal history, propensity for violence endangering persons, and any prior NGI findings, the Court requires that the defendant register as a firearm offender, in compliance with 2013 Laws, Chapter 183, section 4. (RCW 9.41.333).

CP 43.

C. ARGUMENT

**1. THE FELONY FIREARM OFFENDER
REGISTRATION STATUTE IS NOT SUBJECT TO
DUE PROCESS VAGUENESS CHALLENGE**

The defendant argues that the felony firearm offender registration statute, RCW 9A.41.330, is unconstitutionally vague because the statute allows the sentencing judge to consider “all relevant factors” when deciding whether or not to impose a felony firearm offender registration requirement. However, the felony firearm offender registration statute is not subject to a due process vagueness challenge because (1) the statute does not deprive the defendant of a due process interest and (2) because the statute does not define conduct or allow for arbitrary arrest and criminal prosecution by the State.

a. The Statute

When a defendant has been convicted of a “felony firearm offense,”³ the sentencing court is required to consider whether or not to impose a firearm offender registration requirement per RCW 9A.41.330. It is discretionary with the sentencing judge whether to

³ “Felony firearm offense” means any felony offense that is a violation of chapter 9A.41 (firearms and dangerous weapons), a violation of RCW 9A.36.045 (drive-by shooting), a violation of RCW 9A.56.300 (theft of a firearm), a violation of RCW 9A.56.310 (possessing a stolen firearm), or any felony offense if the offender was armed with a firearm in the commission of the offense. RCW 9A.41.010(8).

actually impose such a requirement.⁴ Id. In considering whether to impose such a requirement, the court must consider the defendant's criminal history and any evidence of the defendant's propensity for violence that would likely endanger other persons.

Id. In total, the statute reads as follows:

Felony firearm offenders -- Determination of registration

(1) On or after July 28, 2013, whenever a defendant in this state is convicted of a felony firearm offense or found not guilty by reason of insanity of any felony firearm offense, the court must consider whether to impose a requirement that the person comply with the registration requirements of RCW 9.41.333 and may, in its discretion, impose such a requirement.

(2) In determining whether to require the person to register, the court shall consider all relevant factors including, but not limited to:

- (a) The person's criminal history;
- (b) Whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and
- (c) Evidence of the person's propensity for violence that would likely endanger persons.

RCW 9.41.330.

⁴ The registration requirements are relatively simple. For a period of four years, a felony firearm offender must personally register with the county sheriff for the county of the person's residence, and provide applicable identifying information. See RCW 9.41.333.

b. Only Certain Laws Are Subject To Due Process Vagueness Challenge

The Due Process Clause “protects against the deprivation of life, liberty, or property.” In re Woods, 154 Wn.2d 400, 411, 114 P.3d 607 (2005) (citing U.S. CONST. amend. XIV, § 1; Wash. CONST. art. I, §. 3). Therefore, “[t]he threshold question in any due process challenge is whether the challenger has been deprived of a protected interest in life, liberty or property.” In re Cashaw, 123 Wn.2d 138, 143, 866 P.2d 8 (1994). If not, the challenge fails. Id.

The defendant here fails to identify any life, liberty or property interest that RCW 9.41.330 deprived him of. RCW 9.41.330 does not revoke a person’s right to possess a firearm. RCW 9.41.330 does not impose incarceration. RCW 9.41.330 does not define a crime. In point of fact, RCW 9.41.330 does not deprive a defendant of any protected interest. This fact alone defeats the defendant’s due process challenge.

In addition to not having been deprived of a due process interest, the defendant’s argument also fails because the Supreme Court has specifically held that discretionary sentencing provisions are not subject to due process vagueness challenge. See State v. Baldwin, 150 Wn.2d 448, 457-61, 78 P.3d 1005 (2003).

A vagueness analysis encompasses two due process concerns. First, a criminal statute must be specific enough that citizens have fair notice of what conduct is proscribed. Second, laws must provide ascertainable standards of guilt to protect against arbitrary arrest and prosecution. Baldwin, 150 Wn.2d at 458; accord, State v. Eckblad, 152 Wn.2d 515, 518, 98 P.3d 1184 (2004). Both prongs of the vagueness doctrine focus on laws that prohibit or require conduct. Baldwin, at 458.

In Baldwin, the defendant was convicted of multiple counts of identity theft and forgery. The sentencing court imposed an exceptional sentence above the standard sentence range based on the finding that the crimes were “major economic offenses,” that the crimes involved a “high degree of sophistication,” that the “degree of sophistication was greater than that typical of theft of identity,” and that the “attempted monetary loss [was] substantially greater than typical for the theft of identity.” Baldwin, at 453-54. Baldwin argued that these exceptional sentence provisions (former RCW 9.94A.120 and RCW 9.94A.390) were unconstitutionally vague. The Supreme Court rejected the defendant’s argument, agreeing with the State and lower court that the vagueness doctrine has application only to laws that “proscribe or prescribe conduct” and

that it is “analytically unsound” to apply the doctrine to laws that merely provide directives that judges should consider when imposing sentence. Baldwin, at 458.

“[A]ggravating circumstances” the Court held, are not subject to vagueness challenges under the Due Process Clause because they “do not define conduct nor do they allow for arbitrary arrest and criminal prosecution by the State.” Baldwin, at 459. “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.” Id. at 459. “The guidelines are intended only to structure **discretionary decisions** affecting sentences; they do not specify that a particular sentence must be imposed. Since nothing in these guideline statutes requires a certain outcome, the statutes create no constitutionally protectable liberty interest.” Id. at 461 (emphasis added).

In reaching its decision, the Court in Baldwin specifically overruled State v. Rhodes.⁵ Baldwin, at 460-61. In Rhodes, the Court had held that the creation of juvenile offender standard disposition ranges created a liberty interest subject to due process

⁵ 92 Wn.2d 755, 600 P.2d 1264 (1979).

vagueness challenges, even though the statute did not prohibit any particular conduct. Baldwin, at 459. Citing to a United States Supreme Court case, Lockett v. Ohio,⁶ and its own prior case, In re Cashaw, supra, the Court recognized that Rhodes had been decided incorrectly. The Court held that a State law creates a liberty interest only when the statute contains “specific directives to the decision maker that if the regulations’ substantive predicates are present, a particular outcome *must* follow.” Baldwin, at 460 (citing Cashaw, at 144 (internal quotations omitted)) (emphasis added). Thus, the Court said, “laws that dictate particular decisions given particular facts can create liberty interests, but laws granting a significant degree of discretion cannot.” Id.

As applicable here, RCW 9.41.330 affords a sentencing court with broad discretion in regards to whether or not to impose a registration requirement. Thus, RCW 9.41.330 does not create a liberty interest and the statute is not subject to due process vagueness challenges.

The defendant does not address the due process limitations as outlined above. Instead, the defendant cites to three cases that he asserts provide him a basis to apply a due process vagueness

⁶ 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978).

challenge. See Def. br. at 21 (citing Johnson v. United States,⁷ State v. Bahl,⁸ and In re Treatment of Mays⁹). These cases do not support his claim.

Johnson dealt with a provision of the federal Armed Career Criminal Act wherein a defendant convicted of being a felon in possession of a firearm faced a substantial increase in his punishment if the court found that he had three or more prior convictions for a “violent felony.” Without that finding, a defendant faced a maximum term of confinement of 10 years. With that finding, a defendant faced a minimum term of 15 years. Johnson, 135 S. Ct. at 2555. The Court heard a due process vagueness challenge to the definition of what constituted a “violent felony” because Johnson clearly had a liberty interest where the statute defined conduct that was punishable and if certain facts were found, he faced a minimum of an additional five years in prison. Id. at 2556-57. In contrast to the statute in Johnson, RCW 9.41.330 does not define a crime, nor does it impose punishment.

Bahl involved a due process vagueness challenge to various court imposed conditions of his community custody. Specifically,

⁷ ___ U.S. ___, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015).

⁸ 164 Wn.2d 739, 193 P.3d 678 (2008).

⁹ 116 Wn. App. 864, 68 P.3d 1114 (2003).

under former RCW 9.94A.700(5)(e) (since recodified), a sentencing court could impose conditions of community custody that were “crime related prohibitions.” Bahl was convicted of rape and burglary. Upon being sentenced, the court imposed conditions of his community custody that included prohibitions on possessing “pornographic materials,” frequenting “establishments whose primary business pertains to sexually explicit or erotic material,” and possessing “sexual stimulus material for your particular deviancy.” Bahl, 164 Wn. App. at 743.

The court in Bahl allowed a vagueness challenge. However, Bahl was not arguing that the sentencing statute was vague, he was arguing that the actual conditions of community custody were vague. Bahl, at 751-53. Those conditions described prohibited conduct that if violated subjected Bahl to imprisonment. Here, the defendant is not arguing that the requirement that he register is vague, rather, he argues that the statute that allowed the condition to be imposed is vague, the very type of claim not allowed under the cases cited above.

The Mays case simply involved a challenge to a statutory provision that allowed for involuntary commitment. Mays, 116 Wn. App. at 866. Clearly there is a liberty interest when being

involuntarily committed and a need to have clarity in what conditions must be present before a person can be so committed. Thus, Mays involves the classic situation where a statute prescribes conduct that if violated can result in confinement. RCW 9.41.330 does not do this.

In sum, for all the above reasons, the defendant is precluded from raising a due process vagueness challenge to RCW 9.41.330. In any event, even if RCW 9.41.330 were subject to a vagueness challenge, the claim would fail.

2. RCW 9.41.330 IS NOT VAGUE

A party challenging a statute under the “void for vagueness” doctrine bears the burden of overcoming a presumption of constitutionality, i.e., “a statute is presumed to be constitutional unless it appears unconstitutional beyond a reasonable doubt.” State v. Halstien, 122 Wn.2d 109, 118, 857 P.2d 270 (1990). A statute fails to provide the required notice if it forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application. State v. Watson, 160 Wn.2d 1, 7, 154 P.3d 909 (2007). However, a statute is not unconstitutionally vague merely because a person

cannot predict with complete certainty the exact point at which his actions would be classified as prohibited conduct. Id. at 7.

Because the defendant's challenge does not implicate the First Amendment, he must demonstrate that the firearm registration statute is unconstitutionally vague as applied to his conduct. City of Spokane v. Douglass, 115 Wn.2d 171, 182, 795 P.2d 693 (1990).

In other words, the challenged statute "is tested for unconstitutional vagueness by inspecting the actual conduct of the party who challenges the ordinance and not by examining hypothetical situations at the periphery of the ordinance's scope." Douglass, 115 Wn.2d at 182-83.

The defendant claims that RCW 9.41.330 is unconstitutionally vague because it allows a sentencing judge to consider "*all relevant factors*," along with a defendant's propensity for violence, a defendant's criminal history and any prior not guilty by reason of insanity findings, in deciding whether a defendant convicted of a felony firearm offense should be required to register as a felony firearm offender. More specifically, the defendant asserts that the phrase "all relevant factors" makes the statute guideless and unconstitutionally vague. The defendant's argument fails for a variety of reasons.

First, the phrase “all relevant factors” does not define conduct. Rather, this language merely provides guidance as to what evidence a sentencing judge may consider in reaching a decision. This is similar to a plethora of other statutes. For example, when considering whether to impose a domestic violence penalty assessment, a sentencing judge is instructed as follows: “judges are encouraged to solicit input from the victim or representatives for the victim in assessing the ability of the convicted offender to pay the penalty, including information regarding current financial obligations, family circumstances, and ongoing restitution.” RCW 10.99.080(5).

On the other end of the spectrum, there are a plethora of statutes that provide absolutely no guidance or suggestions as to what evidence a court may consider in reaching a particular result. For example, the statute pertaining to motions to impose a no-contact order provides a list of actions the court can take (e.g., restraining the respondent from committing acts of domestic violence or excluding the respondent from certain locations), but the statute provides no guidance and places no limitations regarding the evidence the court may consider. See RCW 26.50.060. Similarly, in deciding what sentence to impose upon a

defendant in a criminal case, the sentencing judge is allowed to consider any evidence that is admitted, acknowledged or proven to the court. RCW 9.94A.530(2). Of course, in every case – unstated, or stated as it is in RCW 9.41.330 – the guiding principle is that the evidence must be “relevant.”

Words are given the meaning provided by the statute or, in the absence of a specific statutory definition, words used in a statute are given their ordinary meaning. See State v. Alvarez, 128 Wn.2d 1, 11, 904 P.2d 754 (1995). RCW 9.41.330 does not define the term “relevant.” A court rule does. “Relevant evidence” “means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 403. And as may be applicable, all relevant evidence “is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.” ER 402.

Statutes may provide an enumerated list of relevant factors a court may consider that is exhaustive. For example, in the area of probate law, in hearing certain Will contests, former RCW

11.12.050 dictated what evidence the court could consider and then specifically stated that “no other evidence to rebut the presumption of revocation shall be received.” See RCW 11.12.050 (repealed by LAWS OF 1994, ch. 221, § 72, p. 1179); Matter of Estate of Burmeister, 124 Wn.2d 282, 285, 877 P.2d 195 (1994). Other statutes (some using the exact language as RCW 9.41.330) provide an enumerated list of relevant factors a court may consider that is not exhaustive. For example, in deciding the disposition of property and liabilities in a marriage dissolution, RCW 26.09.080 dictates that the court shall consider “all relevant factors including, but not limited to...” followed by a list of four factors. Still other statutes provide no limitation besides relevance. For example, in determining the existence or nonexistence of a parent and child relationship, the court must consider “**all relevant factors.**” RCW 26.26.130(6).¹⁰

¹⁰ The phrase is also used in contract law, case law and in death penalty cases. See O.S.T. ex rel. G.T. v. BlueShield, 181 Wn.2d 691, 704-05, 335 P.3d 416 (2014) (for purposes of determining generally accepted standards of medical practice, the contract provided a list of enumerated factors to consider along with a provision to consider “**any other relevant factors.**”); State v. Harris, 91 Wn.2d 145, 150, 588 P.2d 720 (1978) (In determining whether police must disclose the identity of confidential informants, the Court created a balancing test that dictated trial courts “taking into consideration the crime charged, the possible defenses, the possible significance of the informer’s testimony, and **other relevant factors.**”); State v. Rupe, 101 Wn.2d 664, 701, 683 P.2d 571 (1984) (Supreme Court rejected a due process vagueness challenge to RCW 10.95.070, a statute

Just as with all the above statutes, the phrase “all relevant factors” simply informs a sentencing court -- and anybody reading the statute, that the list of factors the court can consider under RCW 9.41.330 is not exhaustive. The court is allowed to consider other factors as long as they are relevant to the issue being determined, in this case, whether or not to impose a firearm offender registration requirement. Still, regardless of the determination as to whether the phrase “all relevant factors” is vague, the defendant must prove that the statute is vague as applied to his conduct.

3. RCW 9.41.330 IS NOT VAGUE AS APPLIED TO THE DEFENDANT’S CONDUCT, AND THE COURT DID NOT ABUSE ITS DISCRETION

The defendant’s vagueness challenge does not implicate the First Amendment. Therefore, he must demonstrate that the firearm offender registration statute is unconstitutionally vague as applied to his conduct. Douglass, 115 Wn.2d at 182.

Here, the only facts that the defendant identifies that the sentencing judge considered that he claims did not fall under any of the three enumerated factors in RCW 9.41.330 were the actual facts of the crimes for which he was being sentenced. Specifically,

that dictated that a jury could consider “**any relevant factors**” in deciding whether to impose or spare a defendant from the death penalty).

the court considered the fact that the defendant had multiple stolen firearms in his actual and constructive possession (three assault style rifles, a shotgun and two semiautomatic handguns), the fact that he committed multiple burglaries while armed with a loaded semiautomatic handgun, and the fact that he admitted he possessed the weapon in case he was confronted by the homeowners of the houses he was burglarizing. But the defendant's argument fails for two reasons. First, any person being sentenced for a crime would have notice that the facts of the crime are before the sentencing court. Second, the defendant stipulated that the facts as contained in the certification of determination of probable cause were real facts that could be considered by the trial court. Thus, the defendant did not have to guess at the facts the court was allowed to consider.

In addition, the defendant's argument that the court abused its discretion in imposing the firearm offender registration requirement is without merit. The defendant's argument is simply a rehashing of the facts in a light he believes is more favorable to himself.

For example, the defendant asserts that he had minimal criminal history. Along with this being a completely subjective

conclusion, many would consider having been convicted of six felony offenses and two misdemeanor offenses in just four years to be far too many and a sign of continued criminal behavior. In addition, the defendant's prior crimes include a felony assault, a threat to cause harm, and two crimes of the same nature as the crimes currently before the court just four years later (burglaries and criminal trespass). In addition, the certification for determination of probable cause noted multiple other felony crimes for which the defendant could have been charged, including other burglaries, possession of stolen firearms and possession of stolen property.

The defendant also cites to cases stating that there are material differences between juveniles and adults in regards to criminal behavior. Def. br. at 14-15. It is true, the Supreme Court has noted that because children have a lack of maturity and an underdeveloped sense of responsibility, they may act recklessly or impulsively. See Miller v. Alabama, ___ U.S. ___, 132 S. Ct. 2455, 2464-65, 183 L. Ed. 2d 407 (2012). The Court also noted that juveniles generally have diminished culpability and a greater prospect for reform. Id. For these reasons, the Court has found

that before sentencing a minor to life, the sentencing court must take into consideration the defendant's age. Id.

The problem with citing to these cases is that the defendant is no longer a child. Moreover, he continued his criminal activities into adulthood, thus demonstrating that his criminal ways were not simply the result of a lack of maturity as a minor. Additionally, the defendant has demonstrated that unlike many juveniles, he has not reformed himself.

In regards to the multiple guns he possessed, the defendant cites to State v. Rupe,¹¹ and notes that many nonviolent individuals enjoy using guns in a variety of lawful ways. However, in Rupe, the issue was whether introduction of Rupe's gun collection was relevant to the jury's determination whether to impose the death penalty. The Court noted that the guns were legally owned and had no connection to the charged crime. Rupe, 101 Wn.2d at 708. Here, all of the guns were stolen and all were in the defendant's actual or constructive possession when he committed additional burglaries. Further, as a convicted felon, the defendant was not lawfully allowed to possess any gun.

¹¹ 101 Wn.2d 664, 683 P.2d 571 (1984).

In conjunction therewith, the defendant claims the fact that he had a semiautomatic handgun in his waistband during the commission of the burglaries was a nonfactor because he was only going to use it in self-defense. First, if the defendant were to shoot someone during the course of committing a burglary, he could not justify his actions under a claim of self-defense theory. See State v. Dennison, 115 Wn.2d 609, 616, 801 P.2d 193 (1990). Second, by arming himself, the defendant demonstrated that he was willing to effectuate his crimes with either the use or threatened use of a gun.

The sentencing court's determination is reviewed for abuse of discretion. An abuse of discretion is shown when the reviewing court is satisfied that "no reasonable judge would have reached the same conclusion." State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989) (citing Sofie v. Fibreboard Corp., 112 Wn.2d 636, 667, 771 P.2d 711 (1989)). The sentencing court was not required to make detailed findings or go through some elaborate test. The court indicated it looked at all the facts and made a determination, a determination that was not an abuse of discretion.

**4. THE PROSECUTOR'S PRESENTATION OF
FACTS AND LAW DID NOT VIOLATE THE PLEA
AGREEMENT**

The defendant contends that the prosecutor violated the plea agreement by advocating for imposition of the firearm offender registration requirement after "promis[ing] to remain neutral on the issue." Def. br. at 19. The defendant is mistaken on all accounts. The prosecutor did not advocate for imposition of firearm offender registration, the prosecutor did not promise to remain neutral on the issue, and the prosecutor did not violate the plea agreement.

A plea agreement is a contract between the State and a defendant. State v. Sledge, 133 Wn.2d 828, 838-39, 947 P.2d 1199 (1997). When acceptance of a plea "rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." Santobello v. New York, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971). Accordingly, a plea agreement obligates the State to recommend to the court the sentence contained in the plea agreement. State v. Talley, 134 Wn.2d 176, 183, 949 P.2d 358 (1998). The State must not undercut the terms of the agreement, either explicitly or implicitly, through conduct

indicating an intent to circumvent the agreement. Talley, 134 Wn.2d at 183.

At the same time, a prosecutor has a duty as an officer of the court to present evidence that will assist the sentencing court in making discretionary decisions. Talley, 134 Wn.2d at 186-87. Thus, merely presenting evidence to a sentencing court that will help the judge make an informed decision does not undercut a plea agreement so long as the prosecutor, by words and conduct, does not contradict the State's promised sentence recommendation. Id.

In determining whether the State breached a plea agreement, a reviewing court will apply an objective standard. State v. Jerde, 93 Wn. App. 774, 780, 970 P.2d 781, rev. denied, 138 Wn.2d 1002 (1999). The test is whether the prosecutor contradicts, by word or conduct, the State's promised recommendation. Jerde, 93 Wn. App. at 780 (citing Talley, 134 Wn.2d at 187).

To begin, the defendant fails to show that anything about the potential of the sentencing court imposing a firearm offender registration requirement comprised a promise by the prosecutor that was an inducement or consideration that led to the defendant's

plea. In any event, what occurred at sentencing was not a violation of the plea.

The facts of Talley are illustrative as to what a prosecutor is allowed, or even required, to do at a sentencing hearing. Charged with second-degree rape, Talley and the State entered into a plea agreement whereby Talley would enter an Alford plea of guilty¹² to a reduced charge of third-degree rape, and the State, for its part, would recommend a 12-month standard range sentence. Talley entered the plea and the State made the sentence recommendation as promised. However, the sentencing judge indicated that he was going to impose an exceptional sentence above the standard range. Thus, he set an evidentiary hearing to allow for the establishment of facts that could support the exceptional sentence. The court later struck the evidentiary hearing but still imposed an exceptional sentence based on facts contained in the certification for determination of probable cause. Talley appealed.

The Court of Appeals reversed Talley's sentence because the sentencing judge had relied on contested facts. In ordering a new sentencing hearing, the court rejected Talley's argument that

¹² Referring to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) whereby a defendant may plead guilty while disputing the facts alleged by the State.

upon remand, the prosecutor would be in breach of the plea agreement by participating in an evidentiary hearing. Talley, 134 Wn.2d at 181-82 (citing State v. Talley, 83 Wn. App. 750, 923 P.2d 721 (1999)). The Supreme Court agreed with the Court of Appeals, reversing Talley's sentence and agreeing that a prosecutor has a duty to provide evidence to a sentencing court and that participation by a prosecutor in an evidentiary hearing, a hearing being held to establish facts in support of an exceptional sentence, does not by itself constitute a breach of a plea agreement. Talley, at 186-87.

Here, the defendant was fully informed at the time he entered his guilty plea that two of his offenses were felony firearm offenses and that as a result, the judge could impose a felony firearm offender registration requirement. CP 18; 2RP 36. In entering the plea, the defendant specifically stipulated that the sentencing judge could consider all of the facts as contained in the certification for determination of probable cause and the prosecutor's summary in imposing sentence. CP 36. Contrary to the defendant's assertion on appeal, nowhere in the record or the plea documents did the prosecutor "promise to remain neutral," in regards to the court imposing a registration requirement.

At sentencing, the prosecutor correctly instructed the sentencing judge on the law. See 3RP 4-5. Recognizing that RCW 9.41.330 was a relatively new statute that the court might not be aware of, the prosecutor provided the court with a copy of the statute. 3RP 4-5. She then correctly informed the court that the statute *required* the court to determine whether or not to impose a felony firearm offender registration requirement. Id. She informed the court what factors the statute required the court to consider, and consistent with the defendant's stipulation to real facts, she directed the court to the certification for determination of probable cause. The prosecutor never asked or argued that the court should impose a registration requirement. Akin to Talley, the prosecutor did nothing more than outline the law (accurately), identify the factors the court was required to consider by statute, and identify where the court could permissibly look for evidence in determining whether to impose a felony firearm offender registration requirement.

D. CONCLUSION

For the reasons cited above, this Court should affirm the sentencing court's imposition of the felony firearm offender registration requirement.

DATED this 8 day of March, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 

DENNIS J. McCURDY, WSBA #21975
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Richard Lechich at Washington Appellate Project, containing a copy of the Brief of Respondent, in STATE V. MILLER, Cause No. 73491-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

03-08-16
Date