No. 83377-0

WIGGINS, J. (dissenting)—Petitioner Harry Carrier's judgment and sentence is not facially invalid because the trial court properly included his 1981 indecent liberties conviction in his criminal history under the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. The legislature has said that a pre-SRA determination of guilt by trial or guilty plea is considered a conviction unless it is vacated. Former RCW 9.94.030(13)(b) (2004). Carrier's suspended sentence remains a conviction because it has never been vacated. Moreover, it cannot be vacated under the SRA because it is a crime against persons. Former RCW 9.94A.640 (1987); former RCW 43.43.830(5) (2004). I would affirm Carrier's sentence of life imprisonment without the possibility of parole because Carrier committed two sex offenses that qualify him as a persistent offender under former RCW 9.94A.030(32)(b)(i)-(ii) (2004). Accordingly, I respectfully dissent.

ANALYSIS

I begin by noting my agreement with much of the majority's opinion. I agree that we should consider Carrier's 1985 dismissal order in determining whether Carrier's sentence is valid on its face. *See* majority at 6-7. Because Carrier's 1981 dismissed conviction "has a direct bearing on the trial court's

authority to impose a life sentence," *id.* at 7, I believe it is appropriate for us to consider the facial validity of Carrier's judgment and sentence despite the ordinary one-year time bar imposed by RCW 10.73.090. I also agree that a pre-SRA dismissal of a deferred sentence remains a "conviction" under the SRA at least for some purposes. *See id*. at 8-12. As the majority demonstrates, our cases, legislative history, and the text of former RCW 9.95.240 (2003) support the conclusion that Carrier's dismissed pre-SRA conviction remains a conviction under the SRA. *Id.* at 12.

I am in agreement with the majority's discussion of former RCW 9.95.240 that acknowledges the legislature's intent to require a person convicted before the SRA to move to vacate the conviction under former RCW 9.94A.640 in order to remove the dismissed conviction from the convict's criminal history. *See id.* at 17, 20. In addition, I agree that Carrier could not have obtained a vacation had he applied for one because his 1981 indecent liberties conviction qualifies as a "crime against persons" under former RCW 9.94A.640 and former RCW 43.43.830(5). *See id.* at 17-18. Finally, I agree with the majority that in order to determine Carrier's 2004 sentence for first degree child molestation, dealing in depictions of a minor engaged in sexually explicit conduct, and possession of depictions of a minor engaged in sexually explicit conduct, we look to the law in effect when he committed the offenses and that, as a general proposition, the law applies retroactively if the

precipitating event under RCW 9.95.240 occurred before the date of its enactment. *See id.* at 18-19.

I part company from the majority on the narrow question of what qualifies as the precipitating event under RCW 9.95.240. Because I believe that the precipitating event under the statute is Carrier's commission of a new offense, which occurred after the legislature amended RCW 9.95.240 in 2003, I would hold that RCW 9.95.240 applies prospectively. The prospective construction of RCW 9.95.240 compels the conclusion that the trial court properly included Carrier's 1981 indecent liberties conviction in Carrier's criminal history and offender score.

The legislature, not the court, determines crimes and punishments. *State v. Varga*, 151 Wn.2d 179, 193, 86 P.3d 139 (2004) ("'Determination of crimes and punishment has traditionally been a legislative prerogative, subject to only very limited review in the courts.'" (quoting *State v. Bryan*, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980))). Indeed, the legislature's power to establish what qualifies as crime and to fix the penalties and punishments for crime is "'plenary and subject only to constitutional provisions.'" *Id*. (quoting *State v. Thorne*, 129 Wn.2d 736, 767, 921 P.2d 514 (1996) (internal quotation marks omitted) (quoting *State v. Mulcare*, 189 Wash. 625, 628, 66 P.2d 360 (1937))).

To determine whether a statute applies prospectively or retrospectively, we look to the subject matter of the statute and the event that triggers its

application. *In re Estate of Burns*, 131 Wn.2d 104, 112, 928 P.2d 1094 (1997). "A statute operates prospectively when the precipitating event for operation of the statute occurs after enactment." *Id.* at 110. A statute is retroactive "if the 'triggering event' for its application happened before the effective date of the statute." *State v. Pillatos*, 159 Wn.2d 459, 471, 150 P.3d 1130 (2007) (quoting *State v. Belgarde*, 119 Wn.2d 711, 722, 837 P.2d 599 (1992)). We "presume that statutes operate prospectively unless contrary legislative intent is express or implied." *Burns*, 131 Wn.2d at 110. "A statute is not retroactive merely because it applies to conduct that predated its effective date," *Pillatos*, 159 Wn.2d at 471, or "'because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law.'" *Id.* (quoting *Landgraft v. USI Film Prods.,* 511 U.S. 244, 269-70, 114 S. Ct. 1483, 128 L. Ed. 2d 229 (1994)). Neither is a statute retroactive "'merely because it relates to prior facts or transactions where it does not change their legal effect. It is not retroactive because some of the requisites for its actions are drawn from a time antecedent to its passage or because it fixes the status of a person for the purposes of its operation.'" *Varga*, 151 Wn.2d at 195 (quoting *State v. Scheffel*, 82 Wn.2d 872, 879, 514 P.2d 1052 (1973)).

With these principles in mind, I conclude that RCW 9.95.240 applies prospectively. When the legislature amended RCW 9.95.240 in 2003, it did so to place pre-SRA and post-SRA convicts on the same footing with regard to

vacating their convictions. *See* H.B. Rep. on Substitute H.B. 1346, at 4, 58th Leg., Reg. Sess. (Wash. 2003) (the "application for and granting of the vacation [for pre-SRA felons] are subject to the same conditions and restrictions as apply to SRA felony convictions"). This amendment expresses the legislative intent that any convicted person, whether sentenced before or after the enactment of the SRA, must apply for a vacation to exclude any prior conviction from his or her criminal history. If a court has not vacated a conviction, then the conviction remains in the criminal history to be considered in any subsequent sentencing. The subject matter of RCW 9.95.240, then, is the inclusion or exclusion of previous convictions in criminal history depending on whether the previous conviction has been vacated. Therefore, the precipitating event under the statute here is Carrier's commission of child molestation in 2004. If Carrier had not pleaded guilty to child molestation and lesser offenses in 2004, the court would not have needed to know his criminal history to calculate an offender score and RCW 9.95.240 would not have come into play. Because the precipitating event under RCW 9.95.240 is Carrier's commission of a new offense, RCW 9.95.240 can only be construed to operate prospectively: Carrier molested a child in 2004, *after* the legislature amended RCW 9.95.240 in 2003.

This prospective construction is compelled by our precedents. In *State v. Scheffel*, we considered whether chapter 46.65 RCW, the Washington

Habitual Traffic Offenders Act of 1971, applied prospectively or retroactively. 82 Wn.2d 872, 878, 514 P.2d 1052 (1973). The statute permitted automatic revocation of driver licenses where drivers received three or more serious traffic offenses within a five-year period. *Id.* at 874-75. When chapter 46.65 RCW went into effect, Scheffel had already committed two serious traffic offenses. *Id.* at 874. Shortly after the statute went into effect, Scheffel committed a third serious offense and the State sought to classify him as a habitual offender thereby revoking his driver license. *Id.* at 874-75. Scheffel argued that the statute applied to him retroactively because it imposed a new penalty and constituted an increase of a previously imposed punishment. *Id.* at 878. We disagreed, holding, "The act does not impose any new duty, and it does not attach any disability on [the defendant] in respect to transactions. [Scheffel] could have avoided the impact of the act by restraining [himself] from breaking the law of this state." *Id.* at 878-79. The fact that two of Scheffel's convictions occurred prior to the enactment of chapter 46.65 RCW had no bearing on our retroactivity analysis because the statute did not alter the consequences of Scheffel's traffic offenses before enactment but served only to increase the penalties for the traffic offense he committed after the new law went into effect.

Similarly, in *Varga*, we considered the legislature's 2002 amendments to the SRA that required the trial courts to include the defendants' previously

"washed out" convictions in their offender scores. 151 Wn.2d at 183-84, 191. Over Varga's arguments that the inclusion of washed out convictions constituted a retroactive application of the SRA amendments, we held that "[t]he 2002 SRA amendments serve only to enhance the penalty for Varga's crime that he committed after the amendments' effective date." *Id.* at 196. We noted that the precipitating event under the SRA amendments was the commission of a new offense. *Id.* at 197. We stressed that statutes are not deemed retroactive "'merely because [they] upset[] expectations based in prior law.'" *Id.* at 196-97 (quoting *Landgraf*, 511 U.S. at 269). Just as in *Scheffel*, 82 Wn.2d 872, we stated that "Varga could have avoided the effect of the 2002 SRA amendments by not committing a subsequent crime." *Varga*, 151 Wn.2d at 197.

The majority discusses *Varga* but curiously asserts that our analysis in *State v. T.K.*, 139 Wn.2d 320, 987 P.2d 63 (1999), is more apt. Majority at 21-22. In *T.K.*, we held that T.K. had a vested right in sealing his juvenile records because he met the statutory requirements for sealing the records before the legislature changed those requirements. 139 Wn.2d at 334-35. We indicated that the legislature's enactment of stricter conditions for sealing applied retroactively, depriving T.K. his right to have his records sealed. *Id.* The majority holds that, like T.K., "Carrier met all the conditions for vacating his conviction under the preamendment version of former RCW 9.95.240."

Majority at 22.

I respectfully disagree. As an initial matter, the rights that we considered in *T.K.* involved the sealing of juvenile records and were not at all related to the inclusion of *T.K.*'s juvenile criminal history in sentencing for a subsequent offense. This ground alone distinguishes *T.K.* from our analysis here. Moreover, the legislative amendments at issue here do not "resemble" *T.K.* at all, *id*., but are nearly identically to the legislative amendments considered in *Varga*. Like Varga, Carrier could not rely on the exclusion of his previous conviction from his offender score until he reoffended *See Varga*, 151 Wn.2d at 197. When Carrier reoffended, the legislature had already addressed Carrier's situation and indicated that previous convictions would serve to augment penalties for future offenses. Therefore, as in *Varga*, Carrier "could not exercise his alleged 'right' to [exclude his conviction from his criminal history] until he committed a new offense." *Id.*

As we indicated in both *Varga*, 151 Wn.2d 179, and *Scheffel*, 82 Wn.2d 872, legislative amendments that alter the penalties for crimes committed after enactment are prospective in their application. The amendments at issue here did not alter the consequences of Carrier's previously dismissed conviction. Rather, they only determined how the previously dismissed conviction would be used in sentencing for any subsequent conviction. Accordingly, the 2003 SRA amendments here apply prospectively to Carrier and, contrary to the

majority's holding, require Carrier's 1981 indecent liberties conviction to be included in his criminal history for the calculation of his offender score.[1]

The majority criticizes my reliance on *Varga*, attempting unsuccessfully to distinguish this case from *Varga*: "The 2003 amendment changes the legal effect of convictions that were effectively vacated prior to its passage. This is quite different from the situation in *Varga*." Majority at 23 n.10. But a conviction dismissed under former RCW 9.95.240 was not "effectively vacated," as the majority asserts. A conviction is "effectively vacated" for purposes of Carrier's case only if it could no longer be used during a later prosecution. But former RCW 9.95.240 provided just the opposite: "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." Laws of 1957, ch. 227, § 7. Carrier's 2004 prosecution is clearly a "subsequent prosecution[ ] for any other offense . . . . *Id.* Under former RCW 9.95.240, the prior dismissal of Carrier's 1981 conviction has "the same effect as if probation had not been granted, or the information or indictment dismissed." Laws of 1957, ch. 227, § 7.

The majority acknowledges that we have previously explained that "'the

[1] Because I would resolve this case based solely on the statute's prospective application, I do not address the effect of a change to the SRA that might be considered retroactive.

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.'" Majority at 14 (quoting *State v. Breazeale*, 144 Wn.2d 829, 837-38, 31 P.3d 1155 (2001)). The majority then "take[s] this opportunity to clarify the holding in *Breazeale*," reaching the opposite conclusion that Carrier's 1981 conviction cannot be used in this subsequent prosecution. Majority at 15. I conclude that we correctly interpreted the statute in *Breazeale*, 144 Wn.2d 829, and that there was no need to "clarify" *Breazeale.*

The majority has actually blended the two former statutes, RCW 9.95.240 and 9.94A.640, into a hybrid to accomplish a result that could not have been achieved under either statute separately. Under former RCW 9.95.240, Carrier's 1981 conviction could have been used in a subsequent prosecution and could therefore have been used in this case. Under former RCW 9.95A.640(2), Carrier cannot vacate his 1981 conviction because "crimes against persons" cannot be vacated. But the majority combines the two statutes together to permit a result not allowed under either separately.

CONCLUSION

Our cases and the apparent legislative intent of the 2003 SRA amendments require us to conclude that RCW 9.95.240 applies prospectively to defendants in Carrier's position. Because RCW 9.95.240 applies

prospectively, we cannot consider Carrier's 1981 indecent liberties conviction vacated. Carrier's nonvacated conviction was therefore properly included in his criminal history at sentencing for his 2004 child molestation conviction. The sentencing court did not exceed its authority in imposing Carrier's life sentence under the Persistent Offender Accountability Act, former RCW 9.94A.030(32)(b)(i)-(ii), and therefore Carrier's judgment and sentence cannot be considered facially invalid. Carrier's petition must be denied.

I do not reach this conclusion lightly. Carrier's life sentence seems an unduly harsh punishment for the offenses to which he pleaded guilty: first degree child molestation, dealing in depictions of a minor engaged in sexually explicit conduct, and possession of such depictions would have carried a sentencing range of 51 to 68 months in 2004 if Carrier had had no criminal history and the sentences were imposed concurrently. *See* former RCW 9.94A.510 (2004). His sentence was elevated to life without the possibility of parole because of a conviction 23 years earlier for indecent liberties, for which he was given a suspended sentence and probation, and which was dismissed in 1985 after he successfully completed probation. But however harsh the sentence may seem to me, the legislature has established the sentencing scheme, and we are bound by the intent of the legislature as expressed in these statutes.

Accordingly, I dissent.

AUTHOR:
Justice Charles K. Wiggins

WE CONCUR:

Justice James M. Johnson