IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Personal Restraint of: EDDIE DEAN ARNOLD, Respondent.	No. 94544-6 Court of Appeals No. 34018-0-III CORRECTED RULING GRANTING REVIEW

On June 27, 1988, Eddie Arnold pleaded guilty to second degree statutory rape. Former RCW 9A.44.080(1) (1979). Mr. Arnold has been convicted on five previous occasions of failing to register as a sex offender, with his sex offender status arising out of the statutory rape conviction. In March 2015 Mr. Arnold pleaded guilty to failing to register as a sex offender (for a sixth time) and second degree trafficking in stolen property. Pursuant to a negotiated agreement, the trial court sentenced Mr. Arnold to 51 months of incarceration. Two weeks later Mr. Arnold received a letter from the Spokane County Sheriff's Office relieving him of his duty to register as a sex offender pursuant to *State v. Taylor*, 162 Wn. App. 791, 259 P.3d 289 (2011). In *Taylor*, which was not reviewed in this court, Division One of the Court of Appeals held that the statutory rape statute had been repealed and thus offenders convicted under the repealed statute were not sex offenders. *Id.* at 801. Division Two of the Court of Appeals issued a similar ruling in *In re Personal Restraint of Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015). The State did not seek review of the *Wheeler* decision in this court.

Mr. Arnold timely moved in superior court to withdraw his guilty plea after receiving the sheriff's letter. The court transferred the motion to Division Three of the Court of Appeals for treatment as a personal restraint petition. CrR 7.8(c)(2); *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 638-39, 362 P.3d 758 (2015). The State filed a response, urging that *Taylor* and *Wheeler* were incorrectly decided. In a published opinion, a panel of judges granted the personal restraint petition. *In re Pers. Restraint of Arnold*, 198 Wn. App. 842, 850, 396 P.3d 375 (2017). Although they were split on the result, all of the judges agreed the court should apply the principle of "horizontal stare decisis" by following the decisions of Divisions One and Two in *Taylor* and *Wheeler* unless the State could show that those decisions were both incorrect and harmful. *Id.* at 847 (lead opinion of Pennell, J.); 855-56 (dissenting opinion of Lawrence-Berrey, A.C.J.).

In dissent Judge Lawrence-Berrey explained in detail where he believed *Taylor* and *Wheeler* had run aground: the legislature had originally passed the statutory rape laws in 1975 and merely recodified them in 1979, and thus the sex offender registration laws applied under a statute that made registration applicable to any prior sex offense comparable to a current sex offense to Mr. Arnold's conviction that existed before July 1, 1976. 198 Wn. App. at 856-57, 861. The majority agreed that this argument had "much force." *Id.* at 846. But the majority found that it would be harmful to not follow *Taylor* and *Wheeler* because doing so would render the law "impermissibly vague," leaving the public and sex offenders in doubt about which division's decision applied. *Id.* at 848. The dissent would have found *Taylor* and *Wheeler* both incorrect and harmful. *Id.* at 862.

Judge Lawrence-Berrey invited this court to consider both whether *Taylor* and *Wheeler* were correctly decided and how the Court of Appeals should apply stare decisis in circumstances where a division of the Court of Appeals disagrees with a previous decision from another division. *Id.* at 862-63. The State moves for discretionary review

for the same reasons. RAP 16.14(c). To obtain this court's review, the State must show that the Court of Appeals decision conflicts with a decision of this court or with a published Court of Appeals decision, or that it is raising a significant constitutional question or an issue of substantial public interest. RAP 13.4(b); RAP 13.5A(a)(1), (b). As discussed below, both of these issues merit review.

First, the State and the dissent make a strong showing that *Taylor* and *Wheeler* were incorrectly decided. The statutory rape laws went into effect on September 8, 1975. LAWS OF 1975, 1st Ex. Sess., ch. 14, §§ 7-9, 10(2), at 175-76; *see also id.* at pg. ii (listing effective date of laws). The laws were recodified in 1979, but were unchanged except as to the class of each felony. LAWS OF 1979, 1st Ex. Sess., ch. 244, §§ 4-6, at 1988-89. In 1988, the legislature "repealed" and "renamed" the crimes of statutory rape as rape of a child, but the former law was in effect when Mr. Arnold committed his crime. LAWS OF 1988, ch. 145, §§ 2-4, 24 at 562, 584; H.B. REP. ON H.B. 1333, 50th Leg., Reg. Sess. (Wash. 1988). Under the amended sex offender registration statute, a "sex offense" includes any felony offense in effect before July 1, 1976, that is comparable to a current felony classified as a sex offense. LAWS OF 1999, ch. 352, § 8(33)(b). Since the legislature merely renamed and changed the sentencing severity of the statutory rape offenses over time from a statute originally in effect before July 1, 1976, statutory rape is plainly comparable to the modern sex offense of rape of a child. The courts in *Taylor* and *Wheeler* went astray by incorrectly assuming that the statutory rape law was created in 1979, but in that year it had merely been recodified. Because the likely incorrect holdings of *Taylor*, *Wheeler*, and now *Arnold*, affect public safety by removing an entire class of sex offenders from the registration requirements, review is appropriate under RAP 13.4(b)(4).

But review is also appropriate for another reason: by applying a "horizontal stare decisis" rule, the court in *Arnold* wholly reinvented the traditional duties of a Court of Appeals division. Whether or not such a change is appropriate, it is a watershed

departure from prior practice that affects the greater public interest. As the court noted, the Court of Appeals is a "unitary" court: the state constitution creates a "Court of Appeals," not a court with three distinct divisions. WASH. CONST. art. IV, § 30(1); *see Arnold*, 198 Wn. App. at 851 (Pennell, J., concurring). And it is well established that the Court of Appeals is bound to follow the precedent of this court. *Godefroy v. Reilly*, 146 Wash. 257, 259, 262 P. 639 (1928). Similarly, a superior court is bound by Court of Appeals precedent when this court has not reached an issue. *Am. Disc. Corp. v. Shepherd*, 129 Wn. App. 345, 355, 120 P.3d 96 (2005).

The question here is whether a geographical division of the Court of Appeals must follow a decision of another geographical division. In *State v. Schmitt*, 124 Wn. App. 662, 669 n.11, 102 P.3d 856 (2004), a Division Two panel answered in the negative, citing *McClarty v. Totem Elec.*, 119 Wn. App. 453, 469 n.8, 81 P.3d 901 (2003), *rev'd on other grounds*, 157 Wn.2d 214 (2006). In *McClarty*, another Division Two panel explained that although one geographic division is not *bound* by the decisions of another division, the preceding decision may be persuasive authority. *Id.* (citing *Eriksen v. Mobay Corp.*, 110 Wn. App. 332, 346, 41 P.3d 488 (2002)). In *Ericksen*, a Division Three panel held that it was not bound to follow the decisions of other geographic divisions, but that such decisions were persuasive authority. *Id.* at 345-46. Thus, the traditional rule followed by our courts, including a previous Division Three panel, is that the decision of another geographic division is not binding on any other division.

This traditional interpretation is also supported by statute and rule. The Court of Appeals was created by constitutional amendment with its authority and jurisdiction to be established by statute, and the legislature passed an enabling act in 1969. *See* WASH. CONST. art. IV, § 30(1), (2); RCW 2.06.010. The legislature established three geographic divisions, with each division having distinct geographic districts. RCW 2.06.020. Nothing in the enabling statute or the constitution suggests that one of

the geographic divisions of the court is bound to follow the decisions of other geographic divisions of the court. And RAP 13.4(b)(2) clearly contemplates that there will be conflicts of authority, since it establishes as one basis for this court's review the fact that a Court of Appeals decision conflicts with a published Court of Appeals decision.

By adopting a "horizontal stare decisis" rule, the Court of Appeals here has determined that a geographic division is bound by previous decisions from other geographic divisions of the court unless the previous decisions are both incorrect and harmful. It may be that this change will result in less confusion arising out of disagreements between the court's divisions. But this change itself conflicts with the traditional view of the role of the Court of Appeals divisions and directly conflicts with the holdings of *Schmitt*, *McClarty*, and *Eriksen*. Thus, review is appropriate under RAP 13.4(b)(2). Moreover, altering the way that the divisions treat other division decisions risks perpetuating incorrect decisions of law, insulating them from this court's review on the basis of divisional conflicts as contemplated by RAP 13.4(b)(2). Thus, the adoption of a horizontal stare decisis rule is an issue of substantial public interest that merits this court's review under RAP 13.4(b)(4).

The motion for discretionary review is granted. Any party may serve and file a supplemental brief within 30 days of the date of this ruling. *See* RAP 13.7(d).

COMMISSIONER

October 3, 2017