

**NO. 43110-6-II**

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

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STATE OF WASHINGTON,

Respondent,

v.

**RODNEY S. MITUNIEWICZ,**

Appellant.

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

The Honorable Scott Collier, Judge  
The Honorable Barbara Johnson, Judge  
The Honorable Daniel Stahnke, Judge

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**APPELLANT'S BRIEF**

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**A. ASSIGNMENTS OF ERROR**

1. The evidence did not prove that a pistol in a locked metal security box was easily accessible and readily available to Mr. Mituniewicz for offensive or defensive use.

2. The evidence did not prove that Mr. Mituniewicz was in close proximity to the pistol in the locked metal security box.

3. The imposition of a firearm enhancement infringed Mr. Mituniewicz's Fourteen Amendment right to due process because the evidence was insufficient to prove that he was "armed" with a firearm.

**B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

A firearm enhancement may not be imposed unless the state presents sufficient evidence that the offender was armed with a firearm. Here the evidence was insufficient to prove that the pistol found in a locked metal security box was easily accessible and readily available for an offensive or defensive purpose, and that Mr. Mituniewicz was in close proximity to the pistol. Did the imposition of a firearm enhancement violate Mr. Mituniewicz's Fourteenth Amendment right to due process?

## **C. STATEMENT OF THE CASE AND PRIOR PROCEEDINGS**

### **1. Pre-trial motions**

Mr. Mituniewicz was charged with possession of heroin with intent to deliver<sup>1</sup> and unlawful possession of a firearm in the second degree.<sup>2</sup> The State also added enhancements to the charges for possessing a gun and committing the possession with intent charge within 1,000 feet of a school bus stop. CP 3-4.

At the first readiness hearing on November 10, 2011, over Mr. Mituniewicz's objection, defense counsel asked for a continuance of the trial date. Judge Johnson heard the motion. RP1 at 9-11. Defense counsel provided the court with a written motion and supplemented the motion with oral argument. Supplemental Designation of Clerk's Papers, Motion to Continue (sub. nom. 11).

Defense counsel wanted more time to conduct discovery and investigate potential pre-trial motions. Her discovery efforts were frustrated by the assigned prosecutor having been in trial for several weeks. She felt she could not effectively represent Mr. Mituniewicz. RP1 at 8-9.

In addition to being in custody on the current charges, Mr. Mituniewicz had also served a 60-day probation violation sentence which

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<sup>1</sup> RCW 69.50.401(1), (2)(a)

<sup>2</sup> RCW 9.41.040(2)(a)

was actually reduced to 40 days because of good time credit. RP1 at 10-13. He started serving the probation violation sentence on September 22, 2011. He was arraigned on the current charges September 29, 2011. RP1 at 1.

The court continued the trial date. The trial was originally scheduled to start on November 14, 2011. RP1 at 6. Judge Johnson moved it to January 9, 2012. RP1 at 14. The court entered a written order which excluded 60 days from the time for trial based on the 60-day probation violation sentence. Supplemental Designation of Clerk's Papers, Assignment of Trial Date (sub. nom. 12). In its oral ruling, the court also relied on defense counsel's need for additional time to prepare. RP1 at 12-14.

On January 5, defense counsel again asked to have the trial date continued. RP1 at 52-55. This time, additional time was needed to accommodate a suppression motion. The court granted the request and reset the trial to January 23. RP1 at 60-61.

In addition to moving the trial date to January 23, the court also heard Mr. Mituniewicz himself argue that his right to a speedy trial was violated when Judge Johnson granted defense counsel's motion to continue the first trial date. RP1 at 23-49. The court, Judge Stahnke,

refused to upset Judge Johnson's earlier ruling allowing the continuance of the trial date. RP1 at 49.

The court heard and denied a suppression motion on January 9. RP2 at 8-199; Supplemental Designation of Clerk's Papers, Motion to Suppress (sub. nom. 17). At the motion hearing, Mr. Mituniewicz argued Department of Corrections (DOC) Community Corrections (CCO) Officer Jennifer Thomas illegally relied on the reduced "reasonable suspicion" applicable to probationers to search a locked metal box Mr. Mituniewicz had had in his possession. He argued Thomas was acting as an agent of the police and the locked box could only lawfully be opened if authorized by the standard applicable to the police: a search warrant issued upon a judicial finding of probable cause. RP2 at 8-199. The court denied the motion. RP2 at 199-203.

Mr. Mituniewicz's trial began on January 23. RP3B at 228.

## **2. Trial testimony**

After the police searched her apartment, Jennifer Coleman decided to cut a deal with the police. In exchange for favorable treatment against future charges, she agreed to get her personal suppliers of heroin to come to the apartment so the police could arrest them. Clark County Sheriff's Detective Bill Sofianos asked Coleman to arrange for a \$1,000 heroin purchase. RP3A at 289, 295-300; RP4B at 645-46. Coleman made a



phone call. After a time, Rodney Mituniewicz drove into the apartment complex and walked up to Coleman's door. RP3A at 297-300, 312, 387.

When Detective Sofianos opened the door, Mr. Mituniewicz had a locked metal security box in his hand. RP3A at 303; RP3B at 397. The police arrested Mr. Mituniewicz and seized the metal box. RP3B at 397.

The police searched Mr. Mituniewicz. They found two golf ball sized chunks of suspected heroin in Mr. Mituniewicz's pants pocket. The chunks were wrapped in aluminum foil. RP3B at 395-96. Mr. Mituniewicz also had \$2,103 in cash. Most of the money was in a roll secured by a rubber band but there was also some money in Mr. Mituniewicz's wallet. RP3B at 396-98. Mr. Mituniewicz also had a bunch of keys. RP3A at 304; RP3B at 396.

CCO Jennifer Thomas was working with Detective Sofianos and other members of the Clark County Tactical Detective Unit (TDU) when Mr. Mituniewicz was arrested. She works in conjunction with TDU as TDU's activities often bring them in contact with probationers. RP3A at 352-56. Mr. Mituniewicz was on active probation. RP3A at 356. CCO Thomas used a key from the key ring found on Mr. Mituniewicz to open the locked metal box. RP3A at 357-59. Inside the box she found a magnifying glass, several syringes, baggies of what appeared to be heroin, a key, a lighter, a razor blade, a knife, spoons with brown residue, an

electric scale, and an unloaded pistol. RP3A at 363-65; RP3B at 409-13. She turned the box and its contents over to the TDU detectives. RP3B at 399.

Although the pistol had a magazine in it, it was not loaded. Mr. Mituniewicz had no ammunition on his person. There was no ammunition in Mr. Mituniewicz's SUV. RP3A at 326-27.

A police officer later test fired the gun and it was operable. RP 4A at 538-45.

The Washington State Patrol Crime Lab tested one of the two golf ball sized chunks. It tested positive for heroin. The lab did random testing on some of the other suspected heroin found in the metal box. Those items also tested positive for heroin. RP 4A at 468-511.

Detective Sofianos testified about the drug trade in Clark County. He offered that mid-level drug dealers made \$1,000 sales of heroin and that such dealers often carried a gun to prevent being robbed of their cash and product. RP4B at 650-53.

The apartment where Mr. Mituniewicz was arrested was well within 1,000 feet of three school bus stops. RP3A at 293-94; RP3B at 433-443; RP4A at 525-30.

To avoid having his criminal history heard at trial, and for purposes of proof on the unlawful possession of a firearm in the second

degree, Mr. Mituniewicz stipulated that he had a prior felony conviction. CP 27.

Mr. Mituniewicz did not testify and presented no defense other than an agreed stipulation that after his arrest he went through heroin withdrawal while in custody. RP5 at 730.

Although the jury considered a lesser included charge of simple possession of heroin, the jury convicted him as charged. CP 49-52.

### **3. Sentencing**

At sentencing, the court determined that Mr. Mituniewicz had an offender score of 17. The prosecutor proved the offender score through a combination of certified copies of judgment and sentences and an agreed stipulation as to criminal history included within one of those certified copies. RP5 at 832-48. The court imposed a 194 month sentence. CP 45.

## **D. ARGUMENT**

### **1. THE STATE FAILED TO PROVE THE UNLOADED PISTOL FOUND IN THE LOCKED CONTAINER WAS EASILY ACCESSIBLE AND READILY AVAILABLE FOR OFFENSIVE OR DEFENSIVE USE, OR THAT MR. MITUNIEWICZ WAS IN CLOSE PROXIMITY TO THE PISTOL.**

The due process clause of the Fourteen Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The same is true for sentencing enhancements. *State v. Recuenco*, 163 Wn.2d 428, 180 P.3d 1276 (2008). Constitutional questions are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011).

A firearm enhancement may only be imposed if the prosecution proves that the offender was “armed with a firearm” within the meaning of RCW 9.94A.533. The Supreme Court has expanded the definition of “armed” beyond the colloquial understanding of a person carrying a weapon; however, the “mere presence of a [firearm] at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). A person is armed with a firearm if it is “easily accessible and readily available for use for either offensive or defensive purposes;” in addition, “there by must be a nexus between the defendant, the crime, and the weapon.” *Id.*

To that end, and for purposes of the charged firearm enhancement, the court instructed the jury:

For purpose of a special verdict, as to Special Verdict Form B – Count 1, the State must prove beyond a reasonable doubt that the defendant was armed with a firearm at the time of the commission of the crime of Possession of a Controlled Substance with Intent to Deliver- Heroin, in Count 1.

A person is armed with a firearm, if, at the time of the commission of the crime, the firearm is easily accessible and readily available for offensive or defensive use. The State must prove beyond a reasonable doubt that there was a connection between the firearm and the defendant. The State must also prove beyond a reasonable doubt that there was a connection between the firearm and the crime. In determining whether these connections existed, you should consider, among other factors, the nature of the crime and the circumstances surrounding the commission of the crime, including the location of the weapon at the time of the crime, the type of weapon.

A firearm is a weapon or device from which a projectile may be fired by an explosive such as gunpowder.

CP 36 (Instruction 28).

Washington Courts have consistently held that a defendant is not “armed” within the meaning of the statute “even though he, presumably, could have obtained a weapon by taking a few steps.” *State v. Ague-Masters*, 138 Wn. App. 86, 104, 156 P.3d 265 (2007); see also *State v. Gurske*, 155 Wn.2d 134, 143, 118 P.3d 333 (2005). For example, a defendant arrested at his home (after offering to sell drugs to an undercover agent) is not “armed” with a firearm, even if a rifle is found under his bed. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993).

In this case, Mr. Mituniewicz came to Jennifer Coleman’s apartment door with \$1,000 worth of heroin wrapped in an aluminum foil. Coleman called Mr. Mituniewicz and asked him to bring that specific

amount of heroin to her. The heroin was in his pocket and easily accessible for a sale and transfer to Coleman. Mr. Mituniewicz needed nothing else to complete the transaction. Nothing in the record suggested that prior drug transactions between Coleman and Mr. Mituniewicz involved a gun.

When Mr. Mituniewicz arrived at Coleman's door, he carried with him a locked metal security box. The key to the box, as well as six other keys, were in his pocket. To open the locked box, he would have to get the keys out of his pocket, locate the right key, and open the locked box. He would then have to dig through the box to get the gun. As such, he was not in close proximity to the gun. Although there was a magazine in the gun, there were no bullets in the magazine. There were no bullets in the box, no bullets on Mr. Mituniewicz's person, and no bullets in Mr. Mituniewicz's SUV. RP3A at 326-27.

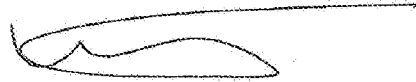
The pistol in the locked box was less accessible than the rifle found under the bed in *Valdobinos*. Further, Mr. Mituniewicz made no attempt to put his hands on the keys or open the locked box when the police greeted him at Coleman's door. All of these factors make Mr. Mituniewicz's case like *Valdobinos*, and distinguish it from cases in which the defendant was found to be armed. See e.g., *State v. Schelin*, 147 Wn.2d 562, 55 P.3d 632 (2002).

The evidence was insufficient to prove Mr. Mituniewicz was armed with a firearm. *Valdobinos, supra*. Because of this, the firearm enhancements must be vacated and the case remanded for correction of the Judgment and Sentence.

**E. CONCLUSION**

Mr. Mituniewicz's firearm enhancement should be stricken and his case remanded for resentencing.

Respectfully submitted this 19th day of December 2012.



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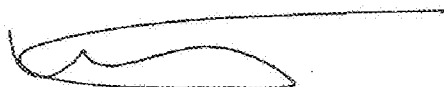
**CERTIFICATE OF SERVICE**

Lisa E. Tabbut declares as follows:

On today's date, I filed Appellant's Brief to: (1) Abigail Bartlett, Clark County Prosecutor's Office, at prosecutor@clark.wa.gov; (2) the Court of Appeals, Division II; and (3) I mailed it to Rodney S. Mituniewicz/DOC#912672, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed December 19, 2012, in Longview, Washington.



Lisa E. Tabbut, WSBA No. 21344  
Attorney for Rodney S. Mituniewicz



# COWLITZ COUNTY ASSIGNED COUNSEL

**December 19, 2012 - 4:33 PM**

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