COA NO. 30871-5-III

SUPREME COURT

OF THE STATE OF WASHINGTON

89381-1

STATE OF WASHINGTON

Respondent

V.

LARRY ALLEN POWELL,

Petitioner Pro Se



PETITION FOR DISCRETIONARY REVIEW



Larry Allen Powell
DOC # 245691
Washington State Pen.
1313 N. 13th Avenue
Walla Walla, WA 99362

TABLE OF AUTORITIES

WASHINGTON SUPREME COURT



COURT RULES, STATUTES & CONSTITUTIONAL PROVISIONS

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## A. IDENTITY OF PETITIONER

Petitioner Larry Allen Powell, defendant and appellant pro-se, asks this Court to accept review of the decision in this case issued August 30, 2013, by Division III Court of Appeals Court Commissioner, Monica Wasson.

## B. DECISION

For these purposes, The Court of Appeals placed Petitioner's Appeal on its Motion on the Merits docket. The Court Commissioner distinquished **State V. Green**, 94 Wn.2d 216, 616 P.2d 628 (1980) with **State V. Ortega**, 134 Wn.App. 617, 142 P.3d 175 (2006), finding Ortega's analysis more persuasive that the jury could properly consider a stipulation as evidence of the existence of prior convictions. See, **APPENDIX-A**, infra.

## C. ISSUES PRESENTED FOR REVIEW

To convict Petitioner of first degree unlawful firearm possession, the State Prosecutor had to prove that Petitioner had previously been convicted of a "Serious Offense." The parties so Stipulated. The jury was istructed, however, that it could "consider evidence that the defendant/petitioner has been convicted of a crime in deciding what weight or credibility to give to the defendant's testimony and for No other purpose."

A. Under the law of the case doctrine, did the instruction preclude consideration of

the stipulation as evidence of the "Serious-Offense" element necessary to convict Petitioner of first degree unlawful firearm possession?

b. Because the Jury Instruction precluded consideration of the prior conviction as to Petitioner's guilt, was the evidence insufficient to convict?

## D. STATEMENT OF THE CASE

The State charged Larry Allen Powell with residential burglary, attempted first degree arson, two counts of second degree assault while armed with a firearm, and first degree unlawful possession of a firearm. The charges were based on a burglary and its aftermath occurring on July 30, 2011.[1] CP-1-5.

Witnesses testified Petitioner and another man, Trevor Frantz broke into the home of Marcus Anzivino and took property. Anzivino's neighbor testified Petitioner threatened him with a gun when the neighbor attempted to prevent Frantz and the Petitioner from leaving Anzivino's residence. RP 152-58. Anzivino testified he was shot at when he tried to follow a minivan he believed was being driven by the burglars. RP 186, 190-99.

Trevor Frantz testified against Petitioner Powell pursuant to a plea agreement which, according to Frantz, would result in the dismissal of an attempted arson charge and a firearm enhancement. RP 275, 277-93. Finally, although police never

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1. The State also charged Petitioner with bail jumping occurring July 27, 2011. Petitioner eventually pled guilty to that charge. CP 1-2, 19-27; RP 17.

found the license plates the witnesses identified, police arrested Petitioner Powell in a white minivan matching the same description of the one involved in the burglary. RP 259-61, 459, 465-67.

Petitioner Powell questioned the reliability of the witness identifications, and maintained Trevor Frantz was implicating Petitoner to take advantage of a generous plea agreement, and asserted that another minivan was involved in the shooting. RP 136-41, 506-14.

For purposes of the firearm charge, Petitioner Powell stipulated he had previously been convicted of a "serious offense as defined under charpter RCW 9.94." [2] CP 28; RP 460. The Trial Court gave the following limiting instruction as to the stipulation: **"You may consider evidence that the defendant has been convicted of a crime in deciding what weight or credibility to give to the defendant's testimony AND FOR NO OTHER PURPOSE."** CP 92 (Instruction 9)(Emphasis Added). Neither party objected to the instruction. RP 480.

A jury convicted Petitioner of the remaining charges and enhancements. CP 113-18. The Court sentenced Petitioner Powell to Life Without The Possibility of Parole under the Persistent Offender Accountability Act [3] on each of the assault convictions

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2. The pertinent statute, RCW 9.41.040(1)(a), instead requires convictions of a serious offense under chapter 9.41 RCW.

3. Rcw 9.94A.570

and the high end of the standard range on the remaining convictions. [4] CP 124-36; RP 539-40.

## E. ARGUMENT

THE EVIDENCE IS INSUFFICIENT TO SUPPORT PETITIONER'S CONVICTION FOR FIRST DEGREE UNLAWFUL FIREARM POSSESSION.

Absent objections, jury instructions become the law of the case. State V. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998); State V. Hames, 74 Wn.2d 173, 182, 446 P.2d 344 (1968). Since neither the State nor Petitioner's Court Appointed Attorney objected to Instruction 9, it became the law of the case.

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. U.S. Const. Amend. 14; In re Winship, 397 U.S. 358, 364 (1970); State V. Hundley, 126 Wn.2d 418, 421, 895 P.2d 403 (1995). Evidence is sufficient to support a conviction only if, when viewed in the light most favorable to the State , a rational trier of fact could find each element of the crime beyond a reasonable doubt. State V. Smith, 155 Wn.2d 496, 502, 120 P.3d 559 (2005); State V. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

> Under RCW 9.41.040(1)(a),
>
> A person...is guilty of the crime of unlawful possession of a firearm in the first degree, if the person...has in his or her possession [or] control any firearm after having previously been convicted...of any serious offense as defined in this chapter. CP 104.

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4. The Court sentenced Petitioner to consecutive six-year firearm enhancement on the second degree assault convictions. CP 129; RCW 9.94A.533(3)(b)(d).

Under Instruction 9, the jury was precluded from considering any evidence that Petitioner had previously been convicted of a crime for any purpose other than determining his credibility. CP 92. Yet to prove Petitioner unlawfully possessed a firearm as charged in the information, the State had to prove beyond a reasonable doubt that Petitioner Powell had been convicted of a serious offense. CP 104.

Although juries are presumed to follow the Court's instructions, State V. Stein, 144 Wn.2d 236, 247, 27 P.3d 184 (2001), this presumption fails here. Had the jury properly followed Instruction 9, it would have necessarily reached a not guilty verdict. Unable to consider the evidence of Petitioner's prior conviction for anything other than credibility the jury could not lawfully conclude the State had proven each element of the firearm charge beyond a reasonable doubt.

This Court should, therefore, reverse the Commissioner's ruling and give this case full appellate review de novo, as required by State V. Rolax, 104 Wn.2d 129, 702 P.2d 1185 (1985), or reverse Petitioner's conviction and dismiss the charge. See, Hickman, 135 Wn.2d at 103-06 (applying Green sufficiency analysis in context of additional element); see, also, State V. Hardesty, 129 Wn.2d 303, 309, 915 P.2d 1080 (1996)(double jeopardy protects against a second prosecution for the same offense after acquittal conviction, or a reversal for insufficient evidence).

## D. CONCLUSION

Under the law of the case, the evidence was insuficient to convict Petitioner Larry Allen Powell of first degree unlawful firearm possession. His conviction must therefore be reversed and the charge dismissed.

DATED this 26th day of September, 2013.

Respectfully Submitted,

Petitioner Larry Allen Powell, Pro Se

# APPENDIX

*Renee S. Townsley*
*Clerk/Administrator*

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July 2, 2013

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CASE # 308715
State of Washington v. Larry A. Powell
SPOKANE COUNTY SUPERIOR COURT No. 111027474

Counsel:

Enclosed is your copy of the Commissioner's Ruling, which was filed by this Court today.

If objections to the ruling are to be considered (RAP 17.7), they must be made by way of a Motion to Modify filed in this Court within 30 days from the date of this ruling (**August 1, 2013**). Please file the original with one copy; serve a copy upon the opposing attorney and file proof of such service with this office.

If a motion to modify is not timely filed, appellate review is terminated.

Sincerely,

Renee S Townsley

Renee S. Townsley
Clerk/Administrator

RST:jcs
Encl.

**E-Mail**
c: Information Copy:
Honorable John O. Cooney (Judge Leveque's case)

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The Court of Appeals
of the
State of Washington
Division III



STATE OF WASHINGTON,
Respondent,
v.
LARRY A. POWELL,
Appellant.

No. 30871-5-III

COMMISSIONER'S RULING

Larry A. Powell appeals the Spokane County Superior Court's May 10, 2012 judgment and sentence, which the court entered on a jury verdict that found him guilty of various offenses. He contends the evidence was insufficient to convince a rational trier of fact beyond a reasonable doubt that he committed all the elements of one of these offenses – first degree unlawful possession of a firearm. *See State v. Green,* 94 Wn.2d 216, 616 P.2d 628 (1980).

The Court has placed the appeal on its motion on the merits docket.

To prove a defendant committed first degree unlawful possession of a firearm, the State must prove he has a prior serious conviction. *See* RCW 9.41.040(1)(a). Mr. Powell argues, as follows: Although he stipulated[1] he had a prior conviction for a crime that was a serious offense, that stipulation did not survive the jury instruction that restricted the jury's consideration of prior offenses to the issues of weight and/or credibility of the defendant's testimony.[2]

The State points out that *State v. Ortega*, 134 Wn. App. 617, 142 P.3d 175 (2006) rejected an analogous argument. There, the defendant faced charges of felony violation of a protection order. Such violations are felonies only if the State proves the defendant has two prior convictions for violating a protection order. Mr. Ortega stipulated he had two such prior convictions. On appeal, he argued that the court's instruction to the jury that it could consider Mr. Ortega's prior convictions for no other purpose than to evaluate his credibility, overrode his stipulation.

The court disagreed with Mr. Ortega. It reasoned at 134 Wn. App. 622 that "[t]o use the prior convictions for the purpose of evaluating Ortega's testimony, the jury would

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[1] The superior court read the stipulation to the jury and advised them "you are to accept that as fact." RP at 450.

[2] Mr. Powell did not testify. Hence, the superior court would more properly have worded the instruction to advise the jury that it should not consider the prior offense as proof that Mr. Powell committed the other offenses for which he was on trial, including residential burglary and assault. Neither side objected to the wording of the instruction.

first have to find that those prior convictions existed. The jury could properly consider the stipulation as evidence of the existence of the two prior convictions."

*Ortega's* analysis is persuasive. The instruction here did not prohibit the jury from considering Mr. Powell's stipulation. It only prohibited it from considering the prior conviction to evaluate the weight/credibility of Mr. Powell's testimony. Accordingly,

IT IS ORDERED, the Court's motion on the merits is granted, and Mr. Powell's conviction is affirmed.

July 2, 2013

Monica Wasson
Commissioner