No: 90645-9

SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MARK FRANCIS OWENS,

Petitioner.

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

The Honorable Craddock Verser, Superior Court Judge

PETITIONER'S REPLY IN MOTION FOR DISCRETIONARY REVIEW
RAP 13.3

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TABLE OF CONTENTS

RESTATEMENT OF THE CASE 1-3

ARGUMENT SUPPORTING ACCEPTANCE OF REVIEW 3-7

I. RCW 9.41.270(3)(a) Excludes Private Areas from RCW 9.41.270 Because it is Intended to Protect Members of the Public. 4

II. This Court has not Previously Ruled that the Relevant Language of RCW 9.41.270 is Constitutional 6

CONCLUSION 7-8

CERTIFICATE OF SERVICE 21

APPENDIX (Decision of Court of Appeals) 21

TABLE OF AUTHORITIES

FEDERAL CASES

District of Columbia v. Heller, 554 U.S. 570, 596, 128 S.Ct. 2783, 171 L.Ed 2d 637 (2008) 18

WASHINGTON CASES

Cregan v. Fourth Memorial Church, 175 Wn.2d 279, 284, fn. 2 285 P.3d 860 (2012) 5

State v. Haley, 35 Wn.App. 96, 665 P.2d 1375 7

State v. Maciolek, 101 Wn.2d 259, 676 P.2d 996 (1984) 5-7

State v. Smith, 118 Wn.App. 480, 93 P.3d 877 (2003) 7

Thompson v. Katzer, 86 Wn.App. 280, 284-85, 936 P.2d 421 (1997) 5-6

RULES, STATUTES, AND OTHER AUTHORITIES

RCW 9.41.270 ..... *passim*

RESTATEMENT OF THE CASE

The State's Response to Mr. Owens' petition makes subtle but significant misstatements of the facts. The Response claims the following:

> On the recording, Mr. Owens is heard to say "You call the cops? Are the coming here? Well Good. I'll get the gun." VRP 203 *Moments later* he was observed by Deputy Tamura carrying the 30-30 rifle he was convicted of unlawfully displaying. VRP 144.

(State's Response, p. 2) (emphasis added).

The truth of the sequence of events is quite different than implied by the State. The State's "moments later" language creates a distorted sense of temporal urgency. Mr. Owens was at his home, which was situated in rural Jefferson County. (VRP 100). Mr. Owens' five-acre property was completely surrounded by forest; and the family had past encounters with wild animals such as bears, cougars, and coyotes on the property. (VRP 70, 84, 155, 192). The property at issue was situated one-quarter of a mile from a locked gate which was, itself, an additional one-eighth of a mile from the county road. (VRP 101-02).

The incident took place behind Mr. Owens' home between his back door and detached garage some time after the 911 call. (VRP 103 "we were walking up the driveway. We came around the back corner of the house where the other door is ..."; VRP 106 "We were right at the

corner of the house when [Mark Owens] emerged out his back door. ... He came from the house towards the garage ..."; VRP 69 "Q: About how far away is [the garage] from the house? A: 20, 30 feet.").

Considering these facts, the State's claim that the deputies arrived "moments" after the 911 is patently wrong. After being dispatched following the 911 call, the deputies had to drive to the isolated rural location, stop at the locked gate which blocked vehicular access along Mr. Owens' driveway, exit their vehicles to circumvent the gate by going through the woods, and then walk up the quarter-mile long driveway to reach the residence. The record of proceedings quite simply does not support the State's claim that Mr. Owens was confronted by deputies moments after the 911 call in which he was allegedly heard talking about getting a gun.

The State's Response further misstates the record at the trial court level when it claimed that "[t]he court rejected the defense counsel version and selected WPIC 133.40 because there was no evidence that the offense occurred in the Defendant's place of abode. VRP 229-30."

The pages of the Verbatim Report of Proceedings to which the State's Response refers do not support what it purports to be a "fact." The prosecutor makes a short argument that "[Mr. Owens] wasn't in his

house ... there's no testimony saying it happened while it was in his house. It was all outside." VRP 232.

The trial court denied Mr. Owens' proposed instruction because "the WPIC 133.41 says what it says." VRP 234. The trial court noted that Mr. Owens presented "a good argument" that piqued the trial court's interest; but the trial court decided not "to add [the statutory defense] in as a jury instruction." VRP 234.

The State's factual claim that the trial court denied Mr. Owens' instruction due to an insufficient showing is not supported by the record. The prosecutor's statement is the *only* reference regarding any purported inadequacy in Mr. Owens' factual showing in support of the requested instruction. The trial court did not adopt the prosecutor's reasoning and made no mention whatsoever that the factual showing was insufficient to warrant an instruction on the defense of RCW 9.41.270(3)(a).

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

The State's Response essentially raises two objections to Mr. Owens' petition. It objects that Mr. Owens' argument about the purpose of RCW 9.41.270 is unavailing because the statute is intended to protect members of the public regardless of whether the display takes place in public. (State's Response, p. 5). It further argues that this Court has

already determined that RCW 9.41.270 is constitutional. Both assertions are flawed.

I. RCW 9.41.270(3)(a) Excludes Private Areas from RCW 9.41.270 Because it is Intended to Protect Members of the Public

Mr. Owens urges the Court to consider this petition in light of the fact that RCW 9.41.270(3)(a) exempts the "place of abode" from its provisions along with the very broad concept of "fixed place of business."

This Court should intervene to address the appropriateness of applying longstanding legal principles pertaining to privacy of the abode which deserve protection: the structure of the home itself and the curtilage. The Legislature certainly knew of the privacy jurisprudence related to the home, and the relationship of its curtilage to those protections, so it is no significant stretch to apply the place of abode exception from RCW 9.41.270(3)(a) to private areas of the home's curtilage. It makes little sense to narrowly construe the concept of abode solely because of the Legislature's use of the preposition "in," especially when considered in the context of its juxtaposition with the broader, more amorphous, term "fixed place of business" in RCW 9.41.270(3)(a).

A person does not lose the privacy protections of the home simply by stepping out of his door, but the State convinced the Court of Appeals to treat Mr. Owens' back door as the threshold which arbitrarily separates

the right to keep and bear arms for protection of the home and the public sphere where that right to keep and bear arms is subject to the whim of the public's sense of safety.

As the State points out in its Response, the purpose of RCW 9.41.270 is to prevent someone from displaying dangerous weapons so as to intimidate members of the public. (State's Response, p. 5) (citing *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 996 (1984)). The place of abode exception from RCW 9.41.270(3)(a) does not account for the possibility that a member of the public could be a "public invitee" or a "licensee" inside the home, so the State's argument about protecting the public without regard for the private nature of the area where the display occurs is flawed.

A member of the public would not feel free to bypass a locked gate and trespass onto Mr. Owens' property in the hours of darkness. That person's status would be that of a trespasser, not a member of the public. In the context of common law, a landowner's duty of care to a person on his land depended upon that person's status as an invitee, licensee, or trespasser. *Cregan v. Fourth Memorial Church*, 175 Wn.2d 279, 284 fn. 2, 285 P.3d 860 (2012). No member of the public could claim public invitee status on Mr. Owens' property without actually being invited, because the land was clearly not held open for public use. *See Thompson v. Katzer*, 86

Wn.App. 280, 284-85, 936 P.2d 421 (1997) ("A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.").

When entering land which is otherwise restricted from public access to perform some public duty, it is unreasonable to consider a police officer a "member of the public" within the meaning of RCW 9.41.270. While not appropriately considered trespassers, police officers regularly enter private areas where property owners would normally not be required to account for unauthorized entry of the public. The statute should not be applied to protect the public in areas where the public is not entitled to be without the landowner's affirmative invitation or consent.

The decisions of the Court of Appeals on the parameters of the "place of abode" exception do not create a rational methodology for adjudicating the fundamental rights of a private citizen on his private property; and this Court's intervention is necessary to address the conflicting interpretations flowing from the Court of Appeals' approach to RCW 9.41.270.

II. This Court has not Ruled on the Constitutionality of RCW 9.41.270(3).

The State cites *State v. Maciolek*, 101 Wn.2d 259, 676 P.2d 966 (1984) for the proposition that this Court has ruled that RCW 9.41.270, as

a whole, is not unconstitutionally vague. (State's Brief, p. 6). The problem with this citation is that this Court's *Maciolek* addressed alleged vagueness in different statutory language:

> Appellants argue that the definition of weapons in RCW 9.41.270 ("other cutting or stabbing instrument", "any other weapon apparently capable of producing bodily harm") and the definition of weapons use ("in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or warrants alarm for the safety of others") make both enactments unconstitutionally vague.

Maciolek, at 265. This Court did not address, directly or indirectly, the defense of RCW 9.41.270(3)(a). As such, there is no binding precedent holding that it passes constitutional muster. Mr. Owens asks the Court to independently evaluate the vagueness of the statute that resulted in disparate holdings among the three divisions of the Washington Court of Appeals. *See e.g. State v. Haley*, 35 Wn.App. 96, 665 P.2d 1375 (1983); *see e.g. State v. Smith*, 111 Wn.2d 1, 759 P.2d 372 (1998).

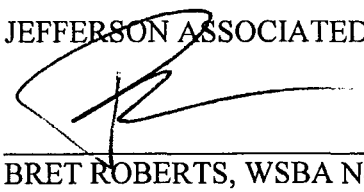
CONCLUSION

Mr. Owens asks this Court to accept review because he has shown that the analytical framework employed by the Court of Appeals in addressing the scope of RCW 9.41.270(3)(a)'s "place of abode" exception has resulted in disparate and incongruous case law. He asks the Court to

accept review because he has shown how RCW 9.41.270(3)(a) infringes on his constitutional right to privacy and to keep and bear arms without meeting the requisite constitutional tests which must balance the significance of the state interest involved with degree to which the regulation is tailored to achieve that purpose. The Court should accept review to clarify the interrelationship of these important individual rights and RCW 9.41.270.

Respectfully Submitted this 5 day of September, 2014.

JEFFERSON ASSOCIATED COUNSEL



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PROOF OF SERVICE

I, Bret Roberts, certify that, on September 4, 2014:

I filed Mark Owens' Reply in his Petition for Discretionary Review electronically with the Washington State Supreme Court through the Court's email filing system.

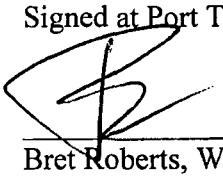
I delivered an electronic version of the same by email to:

Thomas Brotherton
Jefferson County Prosecutor's Office
tbrotherton@co.jefferson.wa.us

I also hand-delivered a hard copy of Petitioner's Reply to the Jefferson County Prosecutor's Inbox in the Jefferson County Superior Clerk's Office, Port Townsend, Washington.

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

Signed at Port Townsend, Washington, on September 5, 2014.



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State of Washington v. Mark F. Owens

No. 90645-9

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