No. 94457-1

COA No. 74779-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOAQUIN GARCIA,

Petitioner.

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

The Honorable Timothy Bradshaw, Judge

PETITION FOR REVIEW

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RULES, STATUTES AND OTHER AUTHORITIES

A. IDENTITY OF PETITIONER

Petitioner Joaquin Garcia asks this Court to review the decision of the Court of Appeals referred to in section B.

B. COURT OF APPEALS DECISION

The petitioner seeks review of the Court of Appeals' unpublished decision in State v. Joaquin David Garcia, filed April 3, 2017 ("Opinion" or "Op."), which is appended to this petition.

C. ISSUES PRESENTED FOR REVIEW

Under RCW 9.41.047(1)(a) "[a]t the time a person is convicted . . . of an offense making the person ineligible to possess a firearm . . . the [convicting court] shall notify the person, orally and in writing, that the person . . . may not possess a firearm unless his or her right to do so is restored by a court of record." This Court has held that where a convicting court has failed to give the notice directed in RCW 9.41.047(1), and there is no evidence that the person has otherwise acquired notice or knowledge of the firearm possession prohibition, the person may not be subsequently convicted of unlawful possession of a firearm (UPFA) based on that offense.[1]

[1] See State v. Breitung, 173 Wn.2d 393, 404, 267 P.3d 1012 (2011) (reversing firearm conviction where Breitung did not receive notice required by statute and "[t]he State did not establish that Breitung *otherwise* had knowledge of the law or notice of the firearm prohibition") (emphasis added); see also State v. Breitung, 155 Wn. App. 606, 624, 230 P.3d 614 (2010), aff'd, 173 Wn.2d 393, 267 P.3d

The petitioner was charged with first degree UPFA based on a single predicate conviction, a 1994 juvenile adjudication when he was 13 years old. There is no available evidence that the juvenile court provided the him oral or written notice of the firearm prohibition. Similarly, there is no available evidence that he "otherwise" received notice at, or around, the time of the adjudication. The trial court dismissed the charge, and the State appealed.

1. Because lack of notice in this context does not act as a true affirmative defense, where there were no disputed material facts, did the trial court correctly conclude that the first degree UPFA charge in this case should be dismissed pretrial?

2. Where a convicted person does not receive oral *or* written notice as required by statute at the time of conviction, must the "otherwise" notice received by the person be received at least roughly contemporaneously to the conviction? In other words, does notice received several years later suffice?

1012 (2011) ("[W]e hold that where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition . . . the defendant's subsequent conviction for unlawful possession of a firearm . . . must be reversed.") (quoted in Breitung, 173 Wn.2d at 402).

D. STATEMENT OF THE CASE

1. Predicate offense and subsequent offenses

In October 1994, when Garcia was 13 years old, he pleaded guilty to first degree rape of a child based on digital contact with his younger sister. CP 24, 32; RCW 9A.44.073. CP 38. Garcia was himself the victim of long-term sexual abuse by his biological father starting when he was just four years old. CP 169-70, 174-75.

RCW 9.41.047(1)(a),[2] which requires a convicting court to notify a person orally *and* in writing when a conviction makes that person ineligible to possess a firearm, had gone into effect only a few months before the plea. Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective July 1, 1994). But the superior court record relating to the adjudication contains no record of oral *or* written notice to Garcia. See CP 140-64 (court documents related to adjudication, including "Statement of Juvenile Offender on Plea of Guilty and Dispositional Order," attached as Appendix B to State's Response to Defense Motion); see also RP 26-27 (acknowledgment by State that entire record related to adjudication had been provided to trial court); CP 81 (acknowledgement, in State's

[2] The pertinent statutory language has remained unchanged since 1994. See former RCW 9.41.047(1) (1994); Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective July 1, 1994).

Response to Defense Motion, that audio recording or other record of plea hearing, sentencing hearing, and Special Sex Offender Disposition Alternative revocation proceedings were unavailable).

Four years after the first plea, Garcia pleaded guilty to a second felony, second degree UPFA.[3] However, the plea was based on possession of a firearm when Garcia was less than 18 years old. CP 229 (Statement of Defendant on Plea of Guilty, listing elements of charged crime as "knowingly and unlawfully possess[ing] a firearm while under the age of 18"); former RCW 9.41.040(1)(b)(iii) (1997).[4]

Corresponding to that conviction, Garcia received written notice that he was ineligible to possess a firearm. He also received similar notice as to several subsequent convictions. E.g. CP 262-63. However, the only conviction qualifying him for first degree UPFA was the 1994 juvenile adjudication. CP 226, 233.

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[3] Although Garcia was 17, that plea was entered in adult court. CP 220.

[4] Garcia's statement "in his own words" states the following:

> On July 16, 1998, in Pierce County, I was 17 years old [scratched out word] knowingly had a gun in my possession. I did not have a lawful reason to have the gun. I was also convicted of a felony in 1994.

CP 233. The State argued in the Court of Appeals that this statement indicates it is unclear under which prong of second degree UPFA Garcia pleaded guilty. BOA at 8 n. 5. But this argument ignores the charge as set forth at CP 229.

2. Current charges

In November of 2014, the State charged Garcia with first degree UPFA, with the 1994 conviction as the sole predicate offense (count 1). CP 1-2, 46 (original and amended charging documents). The State also charged Garcia with felony harassment – domestic violence, witness tampering, two counts of misdemeanor violation of a court order – domestic violence, and, based on Garcia's other prior convictions, second degree UPFA (count 6). CP 46-48.

3. Trial court's dismissal of first degree firearm charge

Garcia moved to dismiss the first degree UPFA charge on the ground that he never received the required notice under RCW 9.41.047(1)(a) as to that charge. CP 20-22. He also filed a declaration stating that his attorney at the time never alerted him to any firearm prohibition. CP 80.

The trial court agreed and dismissed the charge. RP 59-62 (court's oral ruling); CP 71-76 (ruling denying State's motion to reconsider ruling); CP 537 (order dismissing); CP 541-43 (written findings, attached to Brief of Respondent).

The trial court's written findings stated that, as to Garcia's 1994 conviction, he did not receive oral or written notice as mandated by statute. CP 541. The court based its findings on the juvenile case file,

which the parties appeared to agree was the "entire universe of existing evidence" concerning the 1994 adjudication, including the notices the court provided to Garcia at that time. CP 542; see also RP 60 (court's oral ruling, observing that parties agreed regarding the existing record as to the 1994 conviction); see also RP 26-27 (State's acknowledgment that recordings of any related court hearing had been destroyed).

In reaching its decision, the trial court distinguished, on its facts, a decision from Division One of the Court of Appeals, State v. Mitchell. There, Mitchell argued that his UPFA conviction should be reversed because, as a matter of law, he had shown a lack of *oral* notice as required under RCW 9.41.047(1)(a).[5] Division One held the defendant had not presented undisputed facts demonstrating a lack of oral notice under the statute. Id.

Rather, the trial court found Garcia's case was more like this Court's decision in State v. Breitung. Like Garcia, Breitung had not received the notice required by statute. CP 542. The court rejected the State's argument that Garcia subsequent convictions were sufficient to establish Garcia had "otherwise"[6] obtained knowledge of the firearm prohibition. The superior court observed that, consistent with Breitung,

[5] State v. Mitchell, 190 Wn. App. 919, 361 P.3d 205 (2015), review denied, 185 Wn.2d 1024 (2016).

[6] Breitung, 173 Wn.2d at 402, 404.

the notification requirement could not be satisfied by information obtained well after the time of the predicate conviction. CP 542.

The trial court dismissed count 1. CP 537, 541-43. The court ruled, however, that the dismissal order was appealable of right under RAP 2.2(b)(1) as a final judgment. But the court stayed the case pending the State's appeal. CP 549-50. Garcia, who has not been tried, remains incarcerated. CP 548.

4. State's appeal of dismissal and Court of Appeals decision reversing trial court

The State appealed. The Court of Appeals reversed the trial court, holding that the trial court was not permitted to decide the affirmative defense on a pretrial motion. Op. at 5. Moreover, the trial court should not have precluded the State from presenting "other evidence of [Garcia's] actual knowledge of the law or the firearm prohibition." Op. at 8-9.

Garcia now asks this Court to accept review, reverse the Court of Appeals, and reinstate the order of dismissal.

E. REASONS REVIEW SHOULD BE ACCEPTED

THIS COURT SHOULD ACCEPT REVIEW UNDER RAP 13.4(b)(1) AND (4) BECAUSE THE CASE PRESENTS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST AND THE COURT OF APPEALS' OPINION CONFLICTS WITH AUTHORITY FROM THIS COURT.

This Court should accept review under RAP 13.4(b)(1) and (4) because the case deals with the right to bear arms and conflicts with this Court's decision in Breitung.

First, based on this Court's Breitung decision, pretrial dismissal of a UPFA charge is an appropriate remedy where there is no dispute that the State has failed to notify a person orally *and* in writing of a firearm prohibition, and there is no dispute regarding the evidence, or lack of evidence, that could support "otherwise" knowledge of the firearm prohibition.

Second, suggesting that the State was precluded from presenting facts that were favorable to its position, the Court of Appeals' opinion mistakenly points to evidence that Garcia received notice of a firearm prohibition many years after his sole predicate conviction. But the question of what is the pertinent time period is a legal question, which the Court of Appeals evaded. Yet this question is the crux of the matter. This Court should grant review and reverse the Court of Appeals.

1. Introduction to applicable law

Before the start of trial, an accused person may "move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged." CrR 8.3(c). This process is essentially a summary judgment procedure "to avoid a 'trial when all the material facts are not genuinely in issue and could not legally support a judgment of guilt.'" State v. Horton, 195 Wn. App. 202, 217-18, 380 P.3d 608 (2016) (quoting State v. Freigang, 115 Wn. App. 496, 501, 61 P.3d 343 (2002)).

A person commits first degree UPFA "if the person owns, has in his . . . possession, or has in his . . . control any firearm after having previously been convicted in this state or elsewhere of any serious offense as defined in this chapter." Former RCW 9.41.040 (1)(a) (2014). A first degree child rape conviction arguably qualifies as a "[c]rime of violence," which is included within the definition of a "serious offense" for purposes of first degree UPFA. RCW 9.41.010(3)(a), (b); RCW 9.41.010(21)(a); RCW 9A.44.073.

But RCW 9.41.047(1)(a) unambiguously requires a convicting court to give the convicted person notice of the ensuing prohibition on the right to possess firearms. The statute provides that

> *[a]t the time a person is convicted . . . of an offense making the person ineligible to possess a firearm . . .* the [convicting court] shall notify the person, *orally and in*

> *writing*, that the person . . . may not possess a firearm unless his . . . right to do so is restored by a court of record.

RCW 9.41.047(1)(a) (emphasis added).

Although RCW 9.41.047(1) does not expressly provide a remedy for a convicting court's violation of its terms, this Court has fashioned a remedy for such a violation. Twice in the last 10 years, this Court has reversed convictions for UPFA based on courts' failure to comply with the statute. Breitung, 173 Wn.2d at 401; State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008). As this Court stated, "ignorance of the law is generally not a defense, and a convicted felon's knowledge that his right to firearm ownership is prohibited is not an element of the crime of unlawful possession of a firearm." Breitung, 173 Wn.2d at 402. But, "failure to provide a remedy for what is a clear statutory violation of RCW 9.41.047(1) ignores the statute's mandate and deprives the statute of any real bite." Breitung, 173 Wn.2d at 402. Thus, a defendant cannot be convicted of UPFA unless the State can show he was provided notice of the firearm prohibition.

2. Based on this Court's *Breitung* decision, pretrial dismissal may be an appropriate remedy where there are no disputed facts.

The Breitung "affirmative defense," while referred to as such, is not a true "affirmative defense." And based on this Court's decision in

that case, pretrial dismissal of a UPFA charge is an appropriate remedy where there is no dispute that the State has failed to notify a person orally *and* in writing, and there is no dispute that evidence that could support "otherwise" knowledge of the firearm prohibition is absent as well.

Although the Court of Appeals found pretrial dismissal was not an appropriate remedy, this Court's decision Breitung itself suggests that it is. Regarding the procedural posture of that case, this Court stated that

> In his . . . motion to dismiss the unlawful possession of firearms charge, Breitung affirmatively established that the municipal court failed to notify him of his firearm prohibition as required by RCW 9.41.047(1). Importantly, the statute requires both written and oral notice. The State did not argue or establish that Breitung received oral notice from the court, and no evidence of oral notification appears in the record. "[B]ecause the record is silent on oral notification, the assumption is no such notice was given." Minor, 162 Wn.2d at 800. Nor did Breitung receive written notice in the 1997 court order. The judgment and sentence notified Breitung he must "[h]ave law abiding behavior," [and] "[h]ave no similar incidents," . . . . It did not, in any way, mention firearms or firearm prohibition.

Breitung, 173 Wn.2d at 403-04. In addition, the State did not establish that Breitung "otherwise had knowledge of the law or notice of the firearm prohibition." Id. at 404. Under the circumstances, this Court reversed the trial court's denial of a motion to dismiss. Id.

This Court referred to the defense as an "affirmative defense." Generally, a defendant bears the burden of proving an affirmative defense

by a preponderance of the evidence. State v. Deer, 175 Wn.2d 725, 734, 287 P.3d 539 (2012). But Breitung represents a break from the maxim that ignorance of the law is no excuse. Plainly stated, to honor the strict notice requirement of RCW 9.41.047(1)(a), ignorance of the law *is* the excuse. Indeed, following Breitung, a defendant cannot be convicted of UPFA unless *the State* can prove he was provided notice. Lack of notice cannot be treated as a garden variety affirmative defense. As Garcia argued below, Breitung supplies the authority for a pretrial motion to dismiss.

The Court of Appeals disagreed. The Court of Appeals noted that here, the trial court *granted* the motion to dismiss, whereas in Breitung, it was denied, and then later reversed. Op. at 5 n. 2. But this is a distinction without a difference. Where there is no genuine issue of fact, denying the remedy of pretrial dismissal makes little sense.

In summary, the Breitung defense does not operate as a garden variety affirmative defense. Because there were no disputed facts, the court correctly ruled that, under Breitung, dismissal was the appropriate remedy. Horton, 195 Wn. App. at 217-18.

3. Assuming pretrial dismissal was an available remedy, dismissal was appropriate in this case because the there was no dispute as to the facts during the pertinent time period.

If pretrial dismissal is, consistent with Breitung, an available remedy, this leads to the second question: Were there disputed material facts in this case that the court's ruling prevented the State from presenting?

In determining that there were facts supporting "otherwise" knowledge, the Court of Appeals' opinion points to evidence suggesting Garcia knew about a prohibition several years after the sole predicate conviction. Op. at 9. But, as Garcia argued below, that was too late. And whether it was too late is a legal question, which the Court of Appeals failed to address. See State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001) (whether certain facts are relevant to a legal determination is itself a legal question, which this Court reviews de novo), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002).

As Garcia argued in the Court of Appeals, Minor and Breitung suggest that the "otherwise" knowledge or notice must be contemporaneous to the predicate conviction or adjudication. Here, the State never advanced evidence suggesting that contemporaneous to, or

even roughly contemporaneous to, his adjudication, Garcia "otherwise" obtained notice of or knowledge of the firearm prohibition.

In Minor, the defendant was charged with first degree UPFA. The predicate offense court had failed to give oral and written notice to Minor, who was then just 15, that his firearm rights had been rescinded. Minor, 162 Wn.2d at 797. Indeed, the dispositional order included the required language, but the box next to that language was left unchecked, suggesting that the firearm prohibition did not apply. Id. at 797-98. This Court held "[t]he only remedy appropriate for the statutory violation is to reverse the current conviction." Id. at 804.

This Court highlighted the legislature's concern over interfering with the right to possess and use firearms. "[I]n enacting [RCW 9.41.047 (1)], the legislature balanced the concern with escalating violence, which some commentators blamed on the 'ready availability of firearms,' with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms." Minor, 162 Wn.2d at 803 (quoting Final B. Rep. on Engrossed Second Substitute H.B. 2319, at 2, 53d Leg., Reg. Sess. (Wash. 1994)). RCW 9.41.047(1) nonetheless "require[d] the convicting court to provide oral *and* written notice. *The statute is unequivocal in its mandate.*" Minor, 162 Wn.2d at 803 (emphasis added).

While RCW 9.41.047(1) did not specify a remedy for a violation, "[t]he presence of a notice requirement shows the legislature regarded such notice of deprivation of firearms rights as substantial. Relief consistent with the purpose of the statutory requirement *must* be available where the statute has been violated." Minor, 162 Wn.2d at 803-04 (emphasis added).

Three years later, this Court expanded its Minor ruling in Breitung, answering questions left open by the Minor Court, and in the process reemphasizing this Court's strict adherence to the language of RCW 9.41.047(1)(a).

Breitung was convicted in 1997 of domestic violence assault, rendering him ineligible to possess firearms. Breitung, 173 Wn.2d at 402. The convicting court, however, failed to notify him in writing that his right to bear arms had been rescinded. This Court acknowledged, however, that the judgment and sentence was not actively misleading. Id.; cf. Minor, 162 Wn.2d at 802-03 (finding Minor was misled when dispositional order failed to indicate firearm prohibition paragraph applied to Minor).

Prior cases had held that, although ignorance of the law is generally not a defense, a narrow exception to that proposition is warranted only where the State provided affirmative, misleading

information regarding the firearm prohibition. E.g. State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001).

This Court nonetheless found that, based on its "robust and long-standing protection of the individual right to bear arms," the lack of statutorily required notification required reversal of Breitung's firearm conviction, even where he had not been affirmatively misled. Breitung, 173 Wn.2d at 402-03.

This Court noted, however, that such a defense could be defeated if the State could establish that a defendant "otherwise had knowledge of the law or notice of the firearm prohibition." Id. at 404.

Breitung does not explicitly state that such knowledge or notice must be specific to the predicate conviction, nor does it state *when* such knowledge must have been obtained. But, considered in the context, and based on the language of the statute itself, the "otherwise" knowledge or notice must be contemporaneous to, or at least roughly contemporaneous to, the predicate conviction.

First, grounded in the constitutional right to bear arms, this Court takes the statutory notification requirement so seriously that it requires a remedy for a violation of RCW 9.41.047(1)(a), even though the statute does not explicitly provide for such a remedy. Breitung, 173 Wn.2d at 403 ("'Relief consistent with the purpose of the statutory requirement *must*

be available where the statute has been violated.'") (quoting Minor, 162 Wn.2d at 803-04).

Even more significantly, Breitung removed the requirement that the accused must have been affirmatively misled into believing that he or she was permitted to possess firearms. In other words, after Breitung, the primary question is whether a statutory violation has occurred, and not whether the accused was misled or subjectively believed that he or she could legally possess firearms.

Finally, the language of the pertinent statute itself suggests that, to defeat the affirmative defense, the "otherwise" notice must have been obtained at the time of the conviction. RCW 9.41.047(1)(a) states that notice must be provided "[a]t the time a person is convicted."

Considering the statutory language requiring contemporaneous notification, and the primacy of the statutory requirement itself over the prior "affirmatively misled" analysis, the "otherwise" exception is properly interpreted narrowly.

A narrow interpretation of the "otherwise" language makes sense. A showing that an accused received only oral *or* written notice would not strictly satisfy the statutory language. But it could satisfy the "otherwise" language. Moreover, it is conceivable that some entity other than the court, such as a prosecutor or defense attorney, could provide the required

notice orally or in writing. But here, as the State acknowledged, there was simply no such information available to the State to meet *the State's* burden to prove notice. CP 81 (State's Response); RP 26-27.

In summary, the record of Garcia's 1994 adjudication demonstrates he did not receive the statutorily required oral and written notice at the time of his juvenile adjudication. And the State never advanced evidence suggesting that contemporaneous to, or even roughly contemporaneous to, his adjudication, Garcia "otherwise" obtained knowledge or notice of the firearm prohibition. The trial court correctly ruled that, as a matter of law, Garcia established the Breitung defense to the first degree UPFA charge. This Court should grant review, reverse the Court of Appeals, and order the dismissal order reinstated.

F. CONCLUSION

This Court should accept review under RAP 13.4(b)(1) and (4) and reverse the Court of Appeals.

DATED this 2nd day of May, 2017.

Respectfully submitted,

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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Appellant, v. JOAQUIN DAVID GARCIA, Respondent.	No. 74779-7-I DIVISION ONE PUBLISHED OPINION FILED: April 3, 2017

APPELWICK, J. — Garcia was charged with unlawful possession of a firearm in the first degree. He moved to exclude the prior conviction underlying this charge, because the predicate court did not notify him of the firearm prohibition. The trial court granted the motion and dismissed the charge. We reverse and remand.

FACTS

The State charged Joaquin Garcia with unlawful possession of a firearm in the first degree, among other offenses. To satisfy the prior conviction element of this crime, the charge was premised on Garcia's 1994 conviction for rape of a child in the first degree.

Garcia moved to exclude his 1994 conviction as a predicate offense. He argued that the State could not prove that the 1994 conviction was constitutionally valid. And, he argued that he had an affirmative defense to the first degree

unlawful possession of a firearm charge, because the predicate court failed to notify him of the firearm prohibition.

The parties submitted evidence concerning Garcia's 1994 conviction. After oral argument on the motion, the court concluded as a matter of law that Garcia did not receive the required notice of his ineligibility to possess firearms at the time of the 1994 conviction. As a result, the court excluded the 1994 conviction. Because that conviction was Garcia's only prior offense that could support the charge of unlawful possession of a firearm in the first degree, the court dismissed that charge.

The State appeals.

DISCUSSION

The State argues that the trial court erred by excluding Garcia's 1994 conviction and dismissing the first degree unlawful possession of a firearm charge. It contends that the trial court erred in deciding this issue in the context of a CrR 8.3(c) motion. And, it asserts that the trial court erroneously applied a per se rule instead of examining whether Garcia had actual knowledge of the firearm prohibition.

I. CrR 8.3(c) Motion

The State contends that the trial court erred in determining this issue as a matter of law. It contends that the trial court should have treated Garcia's challenge to the underlying conviction as an affirmative defense, a question for the jury.

Pretrial, a defendant may move to dismiss a criminal charge if there are no material disputed facts and the undisputed facts do not establish a prima facie case of the charged crime.[1] CrR 8.3(c); State v. Knapstad, 107 Wn.2d 346, 352-53, 729 P.2d 48 (1986). The defendant initiates such a motion by filing a sworn affidavit. Knapstad, 107 Wn.2d at 356. The State can defeat the motion by filing an affidavit that denies the defendant's alleged material facts. Id. If the State does not dispute the facts or allege other material facts, the court must determine whether the facts relied upon by the State establish a prima facie case of guilt as a matter of law. Id. at 356-57.

On appeal, this court reviews de novo the trial court's decision to dismiss on a Knapstad motion, viewing the facts and inferences in the light most favorable to the State. State v. Newcomb, 160 Wn. App. 184, 188-89, 246 P.3d 1286 (2011). We will affirm the trial court's dismissal of a charge based on a Knapstad motion if no rational finder of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. O'Meara, 143 Wn. App. 638, 641, 180 P.3d 196 (2008).

This case involves a charge of first degree unlawful possession of a firearm. The elements of this offense are: (1) the defendant knowingly owned a firearm or knowingly had a firearm in his or her possession or control, (2) the defendant was previously convicted, adjudicated guilty as a juvenile, or found not guilty by reason of insanity of a serious offense, and (3) the ownership or possession or control

[1] CrR 8.3(c) delineates the procedures first outlined in Knapstad. See State v. Horton, 195 Wn. App. 202, 217 n.12, 380 P.3d 608 (2016), review denied, 187 Wn.2d 1003, 386 P.2d 1083 (2017).

occurred in the state of Washington. RCW 9.41.040(1)(a); 11A WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 133.02 (4th ed. 2016).

Knowledge that possession of a firearm is illegal is not an element of the offense. State v. Sweeney, 125 Wn. App. 77, 83, 104 P.3d 46 (2005). But, the defendant may raise the lack of the required notice under RCW 9.41.047(1) as an affirmative defense. State v. Breitung, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011). RCW 9.41.047(1) requires that a convicting court "shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by the court."

In his motion below, Garcia argued that the State could not meet its burden to prove that his 1994 conviction was constitutionally valid. He argued that he pleaded guilty to rape of a child in the first degree without effective assistance of counsel and without understanding the nature of the crime or the consequences of the guilty plea. Garcia further contended that his guilty plea did not have an adequate factual basis. Alternatively, Garcia argued that he had an affirmative defense to the charge, because the predicate court did not notify him of the firearm prohibition.

The trial court denied the portion of Garcia's motion addressing the constitutional validity of the 1994 conviction. And, it determined that Garcia's affirmative defense could be decided as a matter of law. The court concluded that Garcia did not receive the required oral and written notice at the time of his

predicate conviction and sentencing, so the predicate offense must be excluded. Consequently, it dismissed the first degree unlawful possession of a firearm charge.

An affirmative defense generally does not negate an element of the offense. See State v. Frost, 160 Wn.2d 765, 773, 161 P.3d 361 (2007) (the affirmative defense of duress excuses the defendant's unlawful conduct rather than negating an element of the offense). Instead, an affirmative defense excuses the defendant's otherwise unlawful conduct. Id. at 773-74; State v. Votava, 149 Wn.2d 178, 187-88, 66 P.3d 1050 (2003). This particular affirmative defense is no different, since the case law has specifically recognized that knowledge is not an element of the offense. See State v. Minor, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). Thus, the lack of notice affirmative defense does not negate an element, rather it is an affirmative defense that attempts to excuse the defendant's unlawful possession.

We conclude that the trial court erred by deciding Garcia's affirmative defense on a CrR 8.3(c) motion.[2] CrR 8.3(c) permits the trial court to dismiss a charge where the State's facts, if true, would not establish a prima facie case of

[2] Garcia contends that Washington courts have previously decided a lack of notice affirmative defense on a motion to dismiss. He contends that Breitung involved a similar procedural posture. We disagree. While the defendant in Breitung moved to dismiss the unlawful possession of a firearm charge, his motion was denied. See State v. Breitung, 155 Wn. App. 606, 619, 612, 230 P.3d 614 (2010), aff'd, 173 Wn.2d 393. He was convicted of the charge. Breitung, 173 Wn.2d at 397. The Washington Supreme Court reversed the conviction and affirmed the Court of Appeals decision vacating and dismissing the charge with prejudice. Id. at 404; Breitung, 155 Wn. App. at 625. Breitung does not stand for the proposition that a CrR 8.3(c) motion may be used to decide a lack of notice affirmative defense.

guilt. But, Garcia's lack of notice affirmative defense admits the facts of the State's case—he does not argue that the elements of the offense were not satisfied.[3] Thus, whether Garcia proved lack of notice by a preponderance of the evidence should have been a question for the jury.

II. Dismissal of Unlawful Possession of a Firearm Charge

The State contends that the trial court erroneously interpreted Washington Supreme Court case law[4] regarding a lack of notice affirmative defense to unlawful possession of a firearm.

In Minor, the Washington Supreme Court addressed the proper remedy where the predicate court failed to provide notice of the firearm prohibition. 162 Wn.2d at 804. Minor was convicted of first degree unlawful possession of a firearm. Id. at 799. But, when Minor's prior conviction was adjudicated, the court failed to check the appropriate paragraph notifying him that he was prohibited from possessing firearms. Id. at 800. And, the record was silent as to whether Minor was orally notified of the prohibition. Id. Thus, the parties agreed that Minor did not receive oral or written notice of the firearm prohibition. Id.

In determining the proper remedy for the statutory violation, the court focused on whether the predicate court affirmatively misled Minor. Id. at 802-03. After assessing the legislative history behind RCW 9.41.047(1), the court noted that the statutory notice requirement "is unequivocal in its mandate." Id. at 803.

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[3] While Garcia argued below that his prior conviction was not constitutionally valid, the trial court rejected this argument.

[4] The State does not ask us to interpret RCW 9.41.047(1). Therefore, we limit our analysis to prior case law interpreting the statute.

The court held that the predicate court violated RCW 9.41.047(1) by failing to notify Minor of the firearm prohibition, and that it affirmatively misled Minor by representing to him that this prohibition did not apply to him. Id. at 804. The only available remedy for this violation was to reverse Minor's conviction. Id. Because of the evidence that Minor was affirmatively misled, the court did not address whether failure to comply with the statute alone would warrant reversal. Id. at 804 n.7.

In Breitung, the court addressed the question left open by Minor. 173 Wn.2d at 397, 402. Breitung was convicted of second degree unlawful possession of a firearm. Id. at 397. Breitung established that the predicate court did not notify him of the firearm prohibition: the record contained no evidence of oral notification, and the judgment and sentence did not mention firearms at all. Id. at 403-04. The court concluded,

> The State did not establish that Breitung otherwise had knowledge of the law or notice of the firearm prohibition. On the contrary, the record evidences a lack of actual knowledge on Breitung's part. Based on this record, we conclude Breitung was not notified of his firearm prohibition as required under RCW 9.41.047(1) and did not otherwise have notice of the prohibition against possession of firearms. Absent that notice, he is entitled to reversal of the unlawful possession of firearms conviction.

Id. at 404.

Here, the parties generally agree as to the facts surrounding Garcia's predicate offense. On October 27, 1994, Garcia pleaded guilty to first degree rape of a child. While the disposition order notified Garcia of the sex offender registration requirements, it contained no mention of the firearm prohibition or

firearms at all. Nor did Garcia's statement on plea of guilty mention the firearm prohibition. No record is available of Garcia's guilty plea hearing, sentencing hearing, or subsequent revocation of the special sex offender disposition alternative. Thus, there is no evidence that Garcia received oral notification of the firearm prohibition from the predicate court.

The State argues that Breitung's "otherwise have notice" language creates the possibility that actual knowledge can satisfy RCW 9.41.047(1). It contends that by treating a lack of oral and written notice at the time of the predicate conviction as conclusively establishing Garcia's affirmative defense, the trial court converted Breitung into a per se rule.

The Breitung court took careful steps to avoid crafting a bright line rule. Rather than concluding the analysis after determining that Breitung did not receive oral or written notice of the firearm prohibition, the court continued. See Breitung, 173 Wn.2d at 403-04. It reasoned that because the State did not otherwise prove that Breitung had actual knowledge of the law or the firearm prohibition, the conviction must be reversed. Id. at 404. This language demonstrates that the court specifically considered the lack of evidence of actual knowledge. In other words, the fact that Breitung showed that he did not receive oral or written notice alone was not necessarily enough. It was the fact that the State did not demonstrate actual knowledge of the firearm prohibition that warranted reversal of the conviction.

We conclude that Breitung did not create a bright line rule, but instead suggested that the State may overcome the lack of notice affirmative defense by

presenting other evidence of actual knowledge of the law or the firearm prohibition. Here, the State provided records from Garcia's convictions subsequent to the 1994 conviction, which informed him of his ineligibility to possess a firearm. It also pointed to the underlying facts of the current case. Garcia's girlfriend told the police that Garcia made her purchase firearms in her name, because he was aware that he could not buy them himself. And, police officers reported that Garcia repeatedly told them that he was a convicted felon who could not possess a gun. This evidence could support a determination that Garcia otherwise had actual knowledge of the firearm prohibition.

Even if the trial court could decide an affirmative defense as a matter of law pretrial, it erred in doing so here. We conclude that the trial court erred in dismissing the first degree unlawful possession of a firearm charge. And, we conclude that the issue of appellate costs is not ripe for review.

We reverse and remand for proceedings consistent with this opinion.

Appelwick, J.

WE CONCUR:

Becker, J.

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State v. Joaquin Garcia
74779-7-I

On 5-2-17 I E filed & E Served through the Court of Appeals Portal a Petition for Review in State v. Joaquin Garcia (appellant 74779-7-I) in the Court of Appeals, Division I, for the State of Washington to the King County Prosecuting Attorney:

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

Jamila Baker
Done in Seattle, WA

5/2/2017
Date