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NO. 63332-5-I

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

REC'D
OCT 22 2009
King County Superior
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER SNETKOV,

Appellant.

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

The Honorable Harry J. McCarthy, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred by misadvising appellant regarding the breadth of the restriction on his right to possess a firearm.

Issue Pertaining to Assignment of Error

During sentencing, appellant was advised that as a result of his felony convictions he could no longer possess a firearm. The sentencing court went further, however, and advised appellant that this meant he could not be in the vicinity of anyone who possesses a firearm. Was this advisement, which is inconsistent with Washington law, improper and unnecessarily restrictive of appellant's rights?

B. STATEMENT OF THE CASE

Appellant Alexander Snetkov was convicted in King County Superior Court of possession of a stolen vehicle and attempting to elude a pursuing police vehicle. CP 37, 59; 8RP¹ 65-68. Snetkov was sentenced to serve 57 months of incarceration. CP 61-68; 9RP 19-20.

Snetkov also received and signed a notice regarding his ineligibility to possess a firearm or to vote. Supp. CP __ (Sub. No. 77,

¹ There are nine volumes of verbatim report of proceedings referenced as follows: 1RP – 1/9/09; 2RP – 2/5/09; 3RP - 2/9/09; 4RP - 3/2/09; 5RP - 3/3/09; 6RP - 3/4/09 (a.m.); 7RP - 3/4/09 (p.m.); 8RP - 3/5/09; and 9RP - 4/2/09.

Notice of Ineligibility to Possess Firearm and Loss of Right to Vote, 4/02/09). In this regard, the court advised Snetkov:

[Y]ou have signed the Notice of Ineligibility to Possess Firearms, and Loss of Right to Vote. As a result of this conviction, you may not possess any type of firearm at all, or be around people that possess firearms.

Do you understand? You have to say "yes" or "no."

MR SNETKOV: Yes.

9RP 22.

Snetkov appeals his judgment and sentence. CP 205-213.

C. ARGUMENT

THE COURT MISADVISED SNETKOV REGARDING THE CONSEQUENCES OF BEING AROUND OTHER PEOPLE POSSESSING FIREARMS, AND SUCH ADVISEMENT IS IN DEROGATION OF HIS OTHER RIGHTS.

The sentencing court told Snetkov he could not be "around people that possess firearms." 9RP 22. This was an incorrect statement of the law because it announces an overly broad definition of constructive possession by implying that if Snetkov is so much as near a person possessing a firearm, he can be punished for unlawful possession of a firearm. Snetkov is prejudiced by the error because the prevalence of firearms in this country means Snetkov must always be on guard to avoid being in the vicinity of any person possessing a firearm, knowingly or not, in order to follow the court's admonishment. As such, Snetkov's

constitutional freedoms of association and movement are unnecessarily impaired and he faces undue hardship as a result of the court's misadvisement.

1. The Court's Advisement was in Clear Derogation of Washington Law.

In any prosecution for unlawful possession of a firearm, the state must prove knowing possession of the firearm in question. State v. Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000). Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969); State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Here, the judge's comments imply an incorrect statement of the law of constructive possession.

Constructive possession can be established by showing the accused had dominion and control over the contraband or over the premises where the contraband was found. Callahan, 77 Wn.2d at 29-30; George, 146 Wn. App. at 920. Dominion and control over the premises may raise a rebuttable inference of dominion and control over contraband on the premises, but it does not establish such dominion and control conclusively. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

“An automobile may be considered a ‘premises.’” George, 146 Wn. App. at 920-21. But a passenger, for example, does not generally

exercise dominion and control over a car just because he is inside it. See, e.g., George, 146 Wn. App. at 920 (constructive possession of a glass pipe in a car could not be imputed by the mere fact of being a passenger in the car); State v. Cote, 123 Wn. App. 546, 550, 96 P.3d 410 (2004) (evidence insufficient to establish dominion and control of precursor chemicals in the back of a truck by passenger therein, even though passenger's fingerprints were found on a glass jar containing one chemical). See also United States v. Soto, 779 F.2d 558, 560-61 (9th Cir.1986) (mere presence as a passenger in a car does not prove possession of weapons found therein), cert. denied, 484 U.S. 833 (1987). Moreover, the case that established that "possession" of a gun for purposes of an unlawful possession of a firearm charge must be knowing involved a car's driver, who denied knowledge of the gun and claimed the car was his cousin's. Anderson, 141 Wn.2d at 359-360.

Even more clear is that a person can be present in a residence without exercising dominion and control over any contraband therein. See State v. Spruell, 57 Wn. App. 383, 387-89, 788 P.2d 21 (1990) (defendant's presence in codefendant's kitchen where drugs were openly sitting on table, plus defendant's fingerprint on a plate on table containing drugs, held insufficient to prove dominion and control over contraband). Even temporary residence in a home might not establish dominion and

control over items therein, let alone a short stop in a house to visit a friend. See e.g., Callahan, 77 Wn.2d at 31 (evidence defendant stayed in the residence in question, a houseboat, for two or three days did not show dominion and control over the items therein). See also, Cantabrana, 83 Wn. App. at 206-08 (reversible error for jury to be instructed that defendant's dominion and control over his own house equated to dominion and control over contraband found therein).

Finally, mere proximity to an item is not sufficient to establish constructive possession. George, 146 Wn. App. at 920-21; Spruell, 57 Wn. App. at 388-89. Even handling an item may not establish possession: "possession entails actual control, not a passing control which is only a momentary handling." George, 146 Wn. App. at 920 (quoting Callahan, 77 Wn.2d at 29).

Here, the judge's advisement to Snetkov that merely being "around people that possess firearms" would violate the firearm restriction against him was incorrect under Washington law. Mere knowledge and/or proximity is insufficient to prove possession of a firearm. There must also be proof of dominion and control, whether actual or constructive.

2. Snetkov is Prejudiced by the Court's Erroneous Admonishment.

Mildly put, guns are popular in the United States. The Small Arms Survey published in the summer of 2007 estimated there are 270,000,000 firearms in the U.S., or approximately 90 firearms for every 100 people. Small Arms Survey 2007, GUNS AND THE CITY, p. 47 (2007). An earlier survey indicated that as many as 35 percent of all American households have at least one gun. Philip J. Cook & Jens Ludwig, GUNS IN AMERICA: RESULTS OF A NATIONAL COMPREHENSIVE SURVEY ON FIREARMS OWNERSHIP AND USE at 14, 32 (1996).² According to Washington State's 2000 Behavioral Risk Factor Surveillance System, firearms are present in approximately 711,000 (33.1%) of Washington households (from "Firearm Related Statistics," or "The Firearm Fact Sheet," published by King County Public Health, May, 2003).

However one feels about the popularity of guns, it is clear given the prevalence of guns in the United States and Washington, that if Snetkov cannot "be around people that possess firearms," his movement and associations are being significantly curtailed in derogation of his constitutional rights of association and of freedom of movement and

² Similar figures are found in Philip Cook & Jens Ludwig's "Guns in America: National Survey on Private Ownership and Use of Firearms," published by the National Institute of Justice Research in Brief, May 1997. This document is available at: <http://www.ncjrs.gov/pdffiles/165476.pdf>.

travel. See Const., Art. I, §1 (limiting unreasonable acts by the government infringing on individual rights), §3 (due process); §4 (right to assemble); U.S. Const., Amend I (protecting right to association/right to assemble), Amend. 14 (due process).

The judge's admonition to Snetkov that being "around people that possess firearms" equates to "possession" of the firearm is incorrect. This admonition may be well-intentioned, and meant only to warn Snetkov away from situations where he might end up being charged with unlawful possession of a fire arm. But however well-intentioned, it is also wrong.

It is not necessary for a judge to explain the full canon of constructive possession law when advising a defendant about a restriction on the right to possess a firearm. However, when a court takes it upon itself to provide unsolicited advice, it may not affirmatively misinform a defendant about the law, as occurred here. See State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2002) (in prosecution for unlawful possession of a firearm where prior sentencing court improperly warned defendant about his firearms prohibition, "the predicate sentencing court was the 'voice of the State'" and could not "actively mislead" the defendant to his detriment). The judge here affirmatively misrepresented the law to Snetkov, thereby imposing unnecessary confusion and hardship upon him. Because the judge affirmatively misrepresented the law to Snetkov, this

Court should remand for resentencing, at which the sentencing court accurately explains the law regarding the restriction on Snetkov's right to possess a firearm.

D. CONCLUSION

This Court should remand Snetkov's case for resentencing, at which the sentencing court can correct its advisement regarding the loss of Snetkov's firearms rights.

DATED this 21st day of October, 2009.

Respectfully Submitted,

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Respondent,)	
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v.)	COA NO. 63332-5-I
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ALEXANDER SNETKOV,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 22ND DAY OF OCTOBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] ALEXANDER SNETKOV
 DOC NO. 838263
 WASHINGTON STATE PENITENTIARY
 1313 N. 13TH AVENUE
 WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 22ND DAY OF OCTOBER, 2009.

x *Patrick Mayovsky*