

NO. 63497-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL T. LEE,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE SUSAN J. CRAIGHEAD

**BRIEF OF RESPONDENT**

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**A. ISSUE**

1. When a defendant is convicted of an offense that renders him or her ineligible to possess a firearm, the trial court is statutorily required to provide notice of this prohibition, orally and in writing. The notice must also inform the defendant that any concealed pistol license must be surrendered and that the prohibition remains in effect unless a court of record restores the defendant's right to possess a firearm. Here, the court correctly told Lee that he was no longer allowed to possess a firearm and that being "anywhere near a firearm," such as in the same house or car, could result in Lee being charged with a new criminal offense. These remarks were not incorporated into the judgment and sentence or Lee's written notice of his ineligibility to possess a firearm. Has Lee failed to establish that the court misadvised him regarding the firearm prohibition and that he has been prejudiced as a result?

**B. STATEMENT OF FACTS**

Michael T. Lee pled guilty to three domestic violence charges: Assault in the Third Degree, Unlawful Imprisonment, and

Cyber Stalking.<sup>1</sup> CP8-50; 1RP 2-14.<sup>2</sup> The court imposed a first time offender waiver on the two felony counts and a 12-month suspended sentence on the misdemeanor Cyber Stalking count; all counts were to be served concurrently. CP52-54, 56-63; 2RP 5-7. At the time of Lee's plea, the prosecutor conducted a colloquy with him, including asking Lee if he understood that, as a consequence of pleading guilty, he would lose his right to possess a firearm.

1RP 7. Lee replied that he did. 1RP 7.

Several weeks later, after the court imposed the sentence and confirmed that defense counsel would inform Lee of his rights on appeal, the court stated to Lee:

This is your notice of ineligibility to possess a firearm and loss of your right to vote. When we say 'possess a firearm,' we don't just mean own a firearm, we mean be anywhere near a firearm. So you cannot be in the same house or the same car with a firearm. This lasts forever, unless a judge signs an order that changes it. So don't let anyone tell you it's expired.

2RP 7; CP 85. Lee responded that he had never owned a firearm.

2RP 7.

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<sup>1</sup> Lee's plea as to the assault charge was entered pursuant to North Carolina v. Alford, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970) and In re Barr, 102 Wn.2d 265, 684 P.2d 712 (1984).

<sup>2</sup> The Verbatim Report of Proceedings consists of two volumes: 1RP (03/26/09) and 2RP (04/17/09).

The court continued:

I tell everybody that, because you can get charged with a whole other felony if you violate that order.

2RP 8. The court also signed a written Notice of Ineligibility to Possess a Firearm and Loss of Right to Vote form, notifying Lee of these restrictions. The notice stated, in pertinent part:

Pursuant to RCW 9.41.047, **you are not permitted to possess a firearm** until your right to do so is restored by a court of record. You are further notified that you must immediately surrender any concealed pistol license....

CP 85 (emphasis in original).

**C. ARGUMENT**

**1. THE COURT'S ADVISEMENT TO LEE REGARDING THE POTENTIAL CONSEQUENCES OF POSSESSING A FIREARM IN VIOLATION OF THE STATUTE WAS PROPER AND NOT PART OF THE JUDGMENT AND SENTENCE.**

Lee asserts, for the first time on appeal, that the sentencing court affirmatively misadvised him by telling him that he could not "be anywhere near a firearm" because it was an incorrect statement of the law. Lee further asserts that he was prejudiced by the alleged misinformation because it imposed an unnecessary curtailment of his freedom of association. This argument should be rejected for several reasons. First, the court's oral advisory

comments regarding Lee's ineligibility to possess a firearm are not alone, nor a part of, a final judgment from which Lee may appeal. Second, Lee did not preserve his claim of error because he failed to object at the time that the alleged error occurred. Third, the claimed error does not affect a constitutional right. Fourth, even assuming, arguendo, that the alleged error affected a constitutional right, Lee cannot show actual prejudice and therefore, the claimed error is not manifest. Finally, the court's advisement was a correct statement of the law as to the potential criminal consequences if Lee were found knowingly in proximity to a firearm.

- a. The Court's Advisory Remarks Did Not Constitute A Final Judgment From Which Lee Can Appeal Under RAP 2.2.

RAP 2.2(a) lists several types of superior court proceedings from which a party may appeal, including a final judgment. A final judgment is one that settles all the issues in a case. In re Detention of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125 (2001). In a criminal proceeding, a final judgment ends the litigation, leaving nothing for the court to do but execute the judgment. In re Det. of Petersen, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999); see also State v. Siglea, 196 Wash. 283, 285, 82 P.2d

583 (1938) (“As a prerequisite to an appeal in a criminal case, there must be a final judgment terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination.”). Failure to mention a particular order or proceeding in RAP 2.2(a) indicates an intent that the matter be reviewable only under the guidelines for discretionary review. See Department of Social & Health Servs. v. Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989).

Here, the only final judgment was Lee’s judgment and sentence, of which the form providing notice to Lee of his ineligibility to possess a firearm was not a part. CP 52-63, 85. The written and oral notices were not orders and did not themselves trigger the firearm prohibition. Rather, the ineligibility of felons to possess firearms follows, as a matter of law, from their *status* as convicted felons, regardless of whether the statutorily required notice is provided at the time of conviction, as discussed below.<sup>3</sup> Moreover, the fact that the court chose to provide a second oral notice and the requisite written notice at the sentencing hearing

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<sup>3</sup> See RCW 9.41.047(1)

instead of at the time Lee's guilty plea was entered, did not convert the required notices into appendices to the judgment and sentence.

Lee's argument essentially characterizes the sentencing court's oral notice and advisory remarks to him as an order or final judgment from which he can appeal under RAP 2.2(a), when, in fact, Lee's firearm restriction took effect when he pled guilty as a consequence of his status as a convicted felon. RCW 9.41.047(1). And, because the court has taken no subsequent action based on Lee's behavior (i.e., unlawfully possessing a firearm), Lee is in effect asking this Court to render an advisory opinion as to the veracity of the sentencing court's remarks. See State v. Roberts, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995).

It is well established that Washington appellate courts do not render advisory opinions or decide purely theoretical controversies. State ex rel. O'Connell v. Kramer, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) (refusing to render an opinion on the constitutionality of a proposed initiative measure filed with the Secretary of State but not yet enacted by the people); see Nat'l Elec. Contractors Ass'n v. Seattle Sch. Dist. No. 1, 66 Wn.2d 14, 17-18, 400 P.2d 778 (1965). "The power to render such opinions should of course be exercised with great reluctance and only when there are urgent and

convincing reasons for doing so.” In re Elliott, 74 Wn.2d 600, 616, 446 P.2d 347 (1968); see also State v. Norby, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) (Washington courts give advisory opinions in very rare instances). In the instant case, there is no such urgent or compelling reason to render an advisory opinion.

Furthermore, because the court’s advice to Lee about his ineligibility to possess a firearm was not part of the written judgment and sentence or the written notification form as to the firearm prohibition, there is no alleged error in a final judgment from which he has a right to a direct appeal under RAP 2.2(a) and nothing to re-sentence Lee for.

b. Lee’s Claimed Error Is Not A Manifest Error Affecting A Constitutional Right And May Not be Raised For The First Time On Appeal.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). A claim of error may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). The exception under RAP 2.5(a)(3) is “a narrow one, affording review only of ‘certain

constitutional questions” State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). To obtain review, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights in the trial court. McFarland, 127 Wn.2d at 333. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences to his case. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688.

A trial court, at the time the time of conviction for an offense making the person ineligible to possess a firearm, has a statutory obligation to inform him or her, “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 a court of record.” RCW 9.41.047(1). This restriction follows from one’s status as a convicted person, as a matter of law, and, as discussed above, is not part of the judgment and sentence. The failure of a trial court to inform a defendant of his or her ineligibility to possess a firearm is not a question of constitutional magnitude because the notice requirement is

statutory and the prohibition against firearm possession is a collateral consequence of a conviction, not a direct consequence. In re Pers. Restraint of Ness, 70 Wn. App. 817, 822-24, 855 P.2d 1191 (1993), rev. denied, 123 Wn.2d 1009 (1994); see State v. Jamison, 105 Wn. App. 572, 591-92, 20 P.3d 1010, rev. denied, 144 Wn.2d 1018 (2001) (collateral consequences of a conviction are not constitutional in nature). Accordingly, any alleged error in a trial court's oral advisement to a defendant regarding his or her ineligibility to possess a firearm is not of constitutional magnitude and cannot be raised for the first time on appeal.

Lee relies on State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001) to support his argument that he was affirmatively misinformed about the law. Leavitt is distinguishable. In Leavitt, the defendant was convicted of violating a protection order, which disqualified him from possessing or owning any firearms. Id. at 363. The court imposed a one-year suspended sentence with conditions, including that Leavitt not possess any firearms. Id. The court failed to provide Leavitt with the statutorily required written notice that his firearm restrictions would last longer than one year, issued an order that seemed to imply that the ban would last only one year, and allowed the defendant to retain his concealed

weapons permit. Id. Upon receiving a letter that confirmed completion of his year of probation, Leavitt believed that he could legally possess firearms again, and retrieved his guns from his brother. Id. at 363-64. Leavitt was later convicted of unlawfully possessing multiple firearms after he openly admitted to having the guns in his car. Id. at 364. The court held that Leavitt's subsequent unlawful possession convictions violated due process because Leavitt had detrimentally relied on, and was therefore actually prejudiced by, the previous sentencing court's failure to inform Leavitt that he remained ineligible to possess firearms beyond the probationary term.<sup>4</sup> Id. 372-73.

Here, in accordance with the statutory requirement, and in contrast to Leavitt, the trial court informed Lee that he could no longer possess or own a firearm and that the restriction remained in effect until that right is restored by a judge. 2RP 7. The court told Lee that he could not be "anywhere near" a firearm and explained that this meant Lee could not be in "the same house or the same car" with a firearm because he could possibly be charged with new felony offenses for violating the order. 2RP 7-8. Also unlike

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<sup>4</sup> The Leavitt court specifically declined to address whether a failure to follow RCW 9.41.047, absent prejudice to the defendant, would warrant reversal. Id. at 373 n.19

Leavitt, Lee has not been subsequently charged with unlawfully possessing a firearm that he believed, based on a previous court's misinformation, that he could legally possess. Rather, the trial court's comments properly notified Lee of his ineligibility to possess a firearm and correctly informed Lee of the *potential* consequences if he were found in proximity to a firearm. Furthermore, the court's advisory remarks did not impose any greater restriction on Lee's freedom of association than is already inherent in the statutory prohibition.

Lee also relies on three surveys that he asserts establish the prevalence of guns in Washington State and the United States. App. Br. at 6.<sup>5</sup> Two of the surveys, the Washington State 2000 Behavioral Risk Factor Surveillance System,<sup>6</sup> and Philip J Cook and Jens Ludwig's Guns in America: National Survey on Private

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<sup>5</sup> Lee cites Philip J. Cook & Jens Ludwig, Guns in America: Results of a National Comprehensive Survey On Firearms Ownership and Use (1996) and notes that similar figures are available in a subsequent publication available on the Internet. For simplicity, the State has opted to cite only the latter.

<sup>6</sup> [http://www.doh.wa.gov/ehsphi/CHS/CHS-Data/brfss/brfss\\_keypoints.htm](http://www.doh.wa.gov/ehsphi/CHS/CHS-Data/brfss/brfss_keypoints.htm)

Gun Ownership and Use of Firearms,<sup>7</sup> limited the sample populations to households with adults that had a residential telephone line and that were fluent enough in either English or Spanish to conduct a telephonic interview. The data collected by the surveys was also inherently biased by the fact that the information came from self-reporting. Hence, the statistics quoted from the surveys about the percentage of households in the state and nationwide that contain firearms excluded a significant portion of the population and are of questionable reliability.

Even if the surveys are statistically significant, they are inapposite because Lee is ineligible to possess a firearm regardless of the number of guns in the country, state, city or neighborhood in which Lee lives, works, or passes through. The right to possess a firearm is not unfettered. On the contrary, the restriction of felons' ability to possess firearms is long-standing and has been upheld despite constitutional challenges. See State v. Krzeszowski, 106 Wn. App. 638, 641, 24 P.3d 485 (2001) (permanent restrictions on felons' rights to possess firearms constitute acceptable regulation of

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<sup>7</sup> Phillip J. Cook & Jens Ludwig, Guns in America: National Survey on Private Ownership and Use of Firearms, United States Department of Justice, National Institute of Justice Research in Brief, May 1997, available at <http://www.ncjrs.gov/pdffiles/165476.pdf>

the right to bear arms under both the federal and state constitutions); District of Columbia v. Heller, \_\_\_ U.S. \_\_\_, 128 S. Ct. 2783, 2816-17, 171 L. Ed. 2d 637 (2008); United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002).

Since Lee did not preserve the alleged error for appeal and cannot show actual prejudice by making a plausible showing that the claimed error had any practical and identifiable consequences in his sentencing, his claim is not manifest and he is not entitled to relief on appeal.

c. The Court's Oral Advisement Was A Correct Statement Of The Law

As discussed above, a trial court has an affirmative duty to notify defendants, orally and in writing, of their ineligibility to possess a firearm. RCW 9.41.047(1). Many courts, as here, fulfill this obligation by informing defendants of the potential risk for new criminal charges if found in possession of a firearm.

Under Washington law, a person is guilty of Unlawful Possession of a Firearm in the Second Degree if he or she owns, has in his or her possession, or has in his or her control a firearm

after having been convicted of a felony.<sup>8</sup> RCW 9.41.040.

Knowledge of the illegality of firearm possession is not an element of the crime, but the State must prove that the defendant knew that he possessed the firearm. State v. Semakula, 88 Wn. App. 719, 721, 726-27, 946 P.2d 795 (1997), rev. denied, 134 Wn.2d 1022 (1998).

Possession of a firearm can be actual or constructive.

Actual possession occurs when the firearm is in the actual physical custody of the defendant. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); WPIC<sup>9</sup> 133.52. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the firearm or the premises where the firearm is found. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Proximity alone or a fleeting possession is insufficient to establish constructive possession, but dominion and control need not be exclusive. Callahan, 77 Wn.2d at 29; State v. Hagen, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

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<sup>8</sup> A person is also guilty of second degree unlawful possession of a firearm if he or she has previously been involuntarily committed for mental health treatment, but that provision is not applicable here.

<sup>9</sup> Washington Pattern Jury Instruction—Criminal

Here, the court provided Lee with a written order notifying him of his ineligibility to possess a firearm, and told Lee that he could potentially be charged with a felony if he were found anywhere near a firearm, including inside the same house or car as a firearm. The court was trying to convey to Lee that to avoid even the *possibility* of being arrested and charged with a felony, regardless of whether a conviction would follow, Lee should not allow himself to be in the vicinity of a firearm. The court's remarks were sound advice that accurately informed Lee of the potential consequences of being in a situation where the State could conclude that he possessed a firearm in violation of the law. See State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995) (constructive possession when defendant knew a firearm was under the couch in his home); State v. Reid, 40 Wn. App. 319, 698 P.2d 588 (1985) (possession proved when defendant admitted having a firearm in front seat of automobile, but said he moved it to the back so it would not be seen by the police); State v. Howell, 119 Wn. App. 644, 649–50, 79 P.3d 451 (2003) (no requirement that the firearm be immediately accessible at the time of possession, distinguishing firearm possession offenses from firearm enhancements). Further, as discussed above, there is no remedy

available to Lee because there is no error in a final judgment from which relief can be granted.

**D. CONCLUSION**

For the foregoing reasons, the State respectfully requests that the Court affirm Lee's conviction and sentence.

DATED this 20<sup>th</sup> day of November, 2009.

Respectfully submitted,

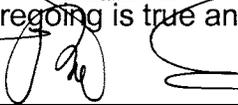
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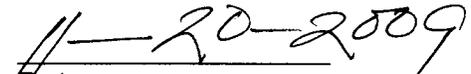
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Kira Franz, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MICHAEL LEE, Cause No. 63497-6-1, in the Court of Appeals, Division I, for the State of Washington.

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

  
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