

66373-9

66373-9

NO. 66373-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALI D.  
(D.O.B. 7/19/92),

Appellant.

2011 JUN 21 PM 4:43  
CLERK OF COURT  
COURT OF APPEALS  
STATE OF WASHINGTON  
1000 4TH AVENUE  
SEATTLE, WA 98101  
1000 4TH AVENUE  
SEATTLE, WA 98101

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

APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 3

D. ARGUMENT ..... 4

THE COURT IMPERMISSIBLY DENIED ALI D. HIS RIGHT TO POSSESS A FIREARM BASED ON AN ALLEGATION THAT WAS NEVER CHARGED OR PROVEN AND THIS PROHIBITION VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BEAR ARMS ..... 4

1. The charging document must provide notice of the legal and factual elements of the charged offense ..... 4

2. The charging document contains no support for the domestic violence claim or the additional punishment it mandates..... 6

3. The Second Amendment and the more protective requirements of Article I, section 24 bar the State from denying Ali D. the right to possess a firearm for a misdemeanor..... 9

4. The court lacked authority to prohibit Ali D. from possessing a firearm ..... 16

E. CONCLUSION ..... 17

TABLE OF AUTHORITIES

**Washington Supreme Court Decisions**

Leonard v. Territory, 2 Wash.Terr. 381, 7 P. 872 (1885).....5

Madison v. State, 161 Wn.2d 85, 163 P.3d 757 (2007).....14

State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997).....16

State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) .....11, 14

State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991).....4

State v. Leach, 113 Wn.2d 679, 782 P.2d 552 (1989) .....5

State v. Quismundo, 164 Wn.2d 499, 192 P.3d 342 (2008).....6

State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) ...5, 7, 9,  
16

State v. Sieyes, 168 Wn.2d 276, 225 P.3d 995 (2010) .9, 10, 11, 14

**Washington Court of Appeals Decisions**

State v. Felix, 125 Wn.App. 575, 105 P.3d 427 (2005) .....8, 9

State v. Ibsen, 98 Wn.App. 214, 989 P.2d 1184 (1989).....6

State v. O.P., 103 Wn.App. 889, 13 P.3d 1111 (2000).....8

State v. R.P.H., 147 Wn.App. 177, 195 P.3d 556 (2008), rev.  
granted, 169 Wn.2d 1005 (2010).....11

**United States Supreme Court Decisions**

District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171  
L.Ed.2d 637 (2008). .....9, 12

<u>McDonald v Chicago</u> , _U.S. _, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).....	12
---	----

**Federal Decisions**

<u>United States v. Chester</u> , 628 F.3d 673 (3 <sup>rd</sup> Cir. 2010).....	12, 13
---	--------

**United States Constitution**

Fifth Amendment .....	4
Fourteenth Amendment.....	4, 6
Second Amendment.....	1, 2, 9, 11, 13, 14, 15
Sixth Amendment .....	4, 6

**Washington Constitution**

Article I, section 22 .....	4, 6
Article I, section 24 .....	1, 2, 9, 10, 11, 13, 15
Article VI, section 3.....	14

**Statutes**

RCW 9.41.040.....	6, 7, 16
RCW 9A.36.041 .....	3, 7

**Court Rules**

CrR 2.1 .....	4
---------------	---

**Other Authorities**

C. Kevin Marshall, "Why Can't Martha Stewart Have a Gun?" 32  
Harv. J.L.& Pub. Policy 695 (2009).....12

Laws of 1992 .....11

Laws of 1994 .....11

**A. ASSIGNMENTS OF ERROR.**

1. The charging document was insufficient to give the court authority to prohibit Ali D. from possessing a firearm as punishment for a misdemeanor offense involving “domestic violence” when the information did not cite any legal authority or the essential facts necessary for adding punishment for a domestic violence offense.

2. The court lacked authority to prohibit Ali D. from possessing a firearm as punishment for a misdemeanor offense of “domestic violence” when the conclusions of law do not establish the State proved the essential elements of domestic violence.

3. The Second Amendment and the more protective individual right to bear arms in defense of self or State as guaranteed by Article I, section 24 prohibit the court from barring an 18-year old from possessing a firearm as punishment for committing a misdemeanor assault against a family member.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.**

1. A court lacks authority to impose punishment for an enhancement based on a factual finding that is not included in the charging document. The prosecution charged Ali D. with “assault in the fourth degree – domestic violence,” but the charging document did not allege any factual predicate supporting a claim of

domestic violence and did not cite any legal authority for imposing any additional punishment based on domestic violence. Was the charging document insufficient to convict Ali D. of an assault of domestic violence?

2. Following a juvenile adjudication, the court must enter conclusions of law setting forth the essential elements proved beyond a reasonable doubt. The court's conclusions of law did not include any determination that Ali D. committed a crime against a household or family member. Are the conclusions of law insufficient to punish Ali D. for committing a crime of domestic violence?

3. The right to possess a firearm is a fundamental individual right guaranteed by both the Second Amendment and the more protective reach of Article I, section 24. Ali D. lost his fundamental right to possess a firearm based on the court's finding that he committed a misdemeanor crime of "domestic violence," even though the factual and legal predicate for the domestic violence claim was not included in the charging document. At the time of the framing of our Constitution, the right to possess a firearm could not be denied based on a misdemeanor offense. Does it violate the Second Amendment and Article I, section 24 to prohibit Ali D.

from possessing a firearm as punishment for his assault conviction?

C. STATEMENT OF THE CASE.

Seventeen-year old Ali D.'s stepfather Eraj Divsar entered Ali D.'s bedroom to confront him after he heard curse words coming from the bedroom. RP 21, 23. Ali D. extended his arm to push his stepfather out of the bedroom. RP 24. Divsar claimed that Ali D. both pushed and punched him one time. Divsar called the police and they arrested Ali D. RP 24.

The charging document filed against Ali D. accused him of:

**Assault in the Fourth Degree – Domestic Violence,**  
committed as follows

That the respondent, ALI . . . in King County Washington on or about March 22, 2010, did intentionally assault Eraj Divsar, Contrary to RCW 9A.36.041, and against the peace and dignity of the State of Washington.

CP 1.

After bench trial before in juvenile court judge, Ali D. was convicted of fourth degree assault – domestic violence. CP 18. Ali D. was 18 years old at the time of disposition, and as an adult would have the clear right to possess a firearm, but the court entered an order prohibiting him from possessing a firearm based on the “domestic violence” classification of the misdemeanor

offense. RP 112; CP 18; Supp. CP \_\_, sub. no. 40. Ali D. timely appeals. CP 24.

D. ARGUMENT.

THE COURT IMPERMISSIBLY DENIED ALI D. HIS RIGHT TO POSSESS A FIREARM BASED ON AN ALLEGATION THAT WAS NEVER CHARGED OR PROVEN AND THIS PROHIBITION VIOLATES THE STATE AND FEDERAL CONSTITUTIONAL RIGHT TO BEAR ARMS

1. The charging document must provide notice of the legal and factual elements of the charged offense. Due process of law requires the State to properly inform an accused person of the charges against him. U.S. Const. amends. 5, 6, 14. Wash. Const. art. I, § 22. A charging document must contain “[a]ll essential elements of a crime.” State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); see CrR 2.1(a)(1) (charging document “shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged.”).

The information must contain the statutory and non-statutory elements of the crime. Kjorsvik, 117 Wn.2d at 1001. The “essential elements” required in the charging document are not only the elements of the crime but also “the conduct of the defendant which is alleged to have constituted that crime.” Id.; see also

Leonard v. Territory, 2 Wash.Terr. 381, 392, 7 P. 872 (1885)

(“Under our laws an indictment must be direct and certain, both as regards the crime charged and as regards the particular circumstances thereof, when they are necessary to constitute a complete crime.”); State v. Leach, 113 Wn.2d 679, 689, 782 P.2d 552 (1989) (“essential elements” rule requires that a charging document *allege facts supporting every element of the offense*, in addition to adequately identifying the crime charged.” (emphasis in original)).

The essential-elements rule requires the State to allege in the information every fact necessary to impose enhanced punishment, not only the predicate offense. State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008) (Recuenco III). Thus, where a weapon enhancement is alleged, the information must specify the type of weapon enhancement and allege the facts necessary to establish it. Id. at 436. Recuenco III concluded the rule was violated where the information alleged only that the defendant was armed with a “deadly weapon” as opposed to a “firearm” but the trial court nonetheless imposed the longer firearm enhancement. Due to the increase in confinement which results from the firearm as opposed to deadly weapon verdict, the State

was required to allege the specific fact that supported that increase. Recuenco III, 163 Wn.2d at 436.

Ali D. was charged with and convicted of “assault in the fourth degree – domestic violence.” CP 1, CP 18. The allegation of “domestic violence” subjected Ali D. to enhanced punishment that would not be authorized absent that allegation and finding. The “domestic violence” allegation, if proven, mandated that Ali D. he lose his right to possess a firearm pursuant to RCW 9.41.040. But the charging document was devoid of any legal or factual support for this allegation, and therefore provided insufficient notice as dictated by Article I, section 22 of the Washington Constitution, and the Sixth and Fourteenth Amendments. State v. Quismundo, 164 Wn.2d 499, 503, 192 P.3d 342 (2008).

2. The charging document contains no support for the domestic violence claim or the additional punishment it mandates. When challenged for the first time on appeal, a charging document is construed liberally. State v. Ibsen, 98 Wn.App. 214, 216, 989 P.2d 1184 (1989). This liberal construction requires the court to first determine whether the necessary facts appear in any form in the charging document. Id. at 216. Only after the court finds the necessary information could be inferred from the face of the

charging document will the court require the defendant to show he or she had been actually prejudiced from the inartful language. Id.

The information filed against Ali D. accused him of:

**Assault in the Fourth Degree – Domestic Violence,**  
committed as follows

That the respondent, ALI . . . in King County  
Washington on or about March 22, 2010, did  
intentionally assault Eraj Divsar,  
Contrary to RCW 9A.36.041, and against the peace  
and dignity of the State of Washington.

CP 1.

The information did not allege a family or household relationship with the complainant Divsar. CP 1. It did not cite to the firearms prohibition statute, RCW 9.41.040, or other authority for prohibiting Ali D. from possessing a firearm if convicted of having a family or household relationship with the person assaulted. It did not mention that if proven, the mandatory penalty would be that Ali D. would necessarily lose his firearm rights and this loss would be permanent unless he succeeded in restoring them after the passage of several years. RCW 9.41.040(4).

In Recuenco III, the court ruled that the facts necessary to support the increased punishment stemming from the possession of a firearm are subject to the essential-elements rule and must be alleged in the information with specificity. 163 Wn.2d at 434. The

allegation of firearm possession increases the maximum sentence beyond that authorized by statute. Id. It therefore acts as an element and “Washington law requires the State to allege in the information the crime which it seeks to establish.”

Some cases have held that a domestic violence allegation is not an “element” of a crime that must be alleged in the Information where its purpose is simply to signal the importance of the offense and it does not affect the punishment imposed. See State v. O.P., 103 Wn.App. 889, 892, 13 P.3d 1111 (2000). In State v. Felix, 125 Wn.App. 575, 579-80, 105 P.3d 427 (2005), the court rejected a claim that a domestic violence allegation must be proven to the jury beyond a reasonable doubt because it had no substantive punishment attached. It did not authorize additional punishment, but rather “specifies only additional enforcement measures for no-contact orders that may already be issued as a sentencing condition.” Id. at 580. It also treated the firearm prohibition as regulatory, but as discussed below, this rationalization does not survive current law explaining the fundamental nature of the right to possess a firearm. Id.

Ali D. was punished based on an allegation that was not charged in the information by supporting legal citation or a factual

basis. The lack of notice prohibited him from receiving a mandatory penalty depriving him of a fundamental right. Recuenco III, 163 Wn.2d at 436.

3. The Second Amendment and the more protective requirements of Article I, section 24 bar the State from denying Ali D. the right to possess a firearm for a misdemeanor. In Felix, the court dismissed the notion that the firearms prohibition that follows a misdemeanor conviction for a domestic violence offense is punishment, instead classifying it as “regulatory.” 125 Wn.App. at 581. But recent caselaw contradicts the notion that revoking a person’s right to possess a firearm is merely a non-punitive regulation.

The Second Amendment right to bear arms is a fundamental right accorded to an individual. District of Columbia v. Heller, 554 U.S. 570, 594, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Restrictions on the right to bear arms may not be justified under a rational basis review. Id. at 628 n.27. The right to bear arms is a right “necessary to an Anglo-American regime of ordered liberty and fundamental to the American scheme of justice. It is deeply rooted in this Nation’s history and tradition.” State v. Sieyes, 168 Wn.2d 276, 287, 225 P.3d 995 (2010).

Article I, section 24 “guarantees an individual right to bear arms.” Sieyes, 168 Wn.2d at 287. Sieyes involved a challenge to the statute that prohibits a juvenile from possessing a firearm. The court recognized the fundamental nature of this right under the state and federal constitution but refused to settle what level of scrutiny it would apply to firearms restrictions. Id. at 295 n.20. It noted that the Court’s “occasional rhetoric” treating such restrictions as “reasonable regulation” did not define how prohibitions on firearms possession should be treated. Id.

Due to inadequate briefing, the Sieyes Court declined to address whether the state constitutional protection for an individual right to bear arms is more protective than the federal counterpart. Id. at 293-94. However, the dissenting opinion in Sieyes provided detailed evidence of the historical right of firearm possession for all individuals in Washington that was absent from the parties’ briefing and strongly favors strict scrutiny of any prohibitions on an individual’s right to bear arms in Washington. Id. at 298-306 (Johnson. J., dissenting).

The Washington Supreme Court is presently considering the constitutionality of the statute that revokes the right to possess a firearm as a consequence of a juvenile sex offense conviction.

State v. R.P.H., 147 Wn.App. 177, 195 P.3d 556 (2008), rev. granted, 169 Wn.2d 1005 (2010). The briefing filed in R.P.H. expands upon the Gunwall<sup>1</sup> analysis proffered in the Sieyes dissent, in an effort to show that restrictions on the right to possess a firearm deny a fundamental individual right under the Second Amendment as well as Article I, section 24.<sup>2</sup>

There is no historical record supporting the prohibition on firearms possession as a consequence of a misdemeanor assault, either of as the result of a juvenile disposition or as a consequence of a domestic violence conviction. The law revoking the right to possess a firearm for an offense committed by a juvenile was not enacted until 1992, over 100 years after the adoption of Article I, section 24. Laws of 1992, ch. 205, § 118. The domestic violence prohibition was not enacted until 1994. Laws of 1994, 1st Sp.Sess., ch. 7, § 402.

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<sup>1</sup> The six factors used in assessing the differences in state and federal constitutional protections are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and state constitutions; and (6) matters of particular state interest or local concern. State v. Gunwall, 106 Wn.2d 54, 61-62, 720 P.2d 808 (1986).

<sup>2</sup> The briefing is available on the Supreme Court's website, [http://www.courts.wa.gov/appellate\\_trial\\_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=R](http://www.courts.wa.gov/appellate_trial_courts/coaBriefs/index.cfm?fa=coabriefs.briefsByTitle&courtId=A08&firstLetter=R).

At the time of the framing of our constitution, not even adult felons were banned from possession firearms. See C. Kevin Marshall, “Why Can’t Martha Stewart Have a Gun?,” 32 Harv. J.L.& Pub. Policy 695, 707 (2009) (“bans on convicts possessing firearms were unknown before World War I”); United States v. Chester, 628 F.3d 673, 681 (3<sup>rd</sup> Cir. 2010) (federal law barring firearm possession for “domestic-violence misdemeanants is of recent vintage, having been enacted in 1996,” as opposed to federal felon disarmament laws that were written in 1930s).

Ali D. was adjudicated for a misdemeanor offense. Heller and a subsequent case applying the reasoning of Heller to the states, McDonald v Chicago, U.S. , 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), left open the question of what type of regulatory measures states may impose such as “prohibitions on the possession of firearms by felons and the mentally ill.” McDonald, 130 S.Ct. at 3047; Heller, 554 U.S. at 626-27. Ali D. was not convicted of a felony nor found to be mentally ill.

While Heller and McDonald do not specify the precise scrutiny with which courts should analyze a firearm prohibition, they suggest that a restriction on firearm possession is subject to heightened scrutiny if it substantially burdens the right to keep and

to bear arms for self-defense. See Chester, 628 F.3d at 683 (under Heller and McDonald, finding inadequate justification for firearms restriction as punishment for misdemeanor domestic violence conviction).

The statute that denies Ali his right to possess a firearm for any reason by virtue of his juvenile disposition is not a historically recognized limitation on the fundamental right to bear arms. It substantially burdens his right to possess a firearm, even in self-defense, based on an allegation that was not charged in the information, and its broad prohibition of any firearms possession based on a misdemeanor offense is contrary to both the Second Amendment and Article I, section 24.

Article I, section 24 explicitly protects the right to bear arms in self-defense, and it further states that this right “shall not be impaired.”<sup>3</sup> This textual language and structure is different and broader than the Second Amendment,<sup>4</sup> which indicates that the express language of Article I, section 24 is more protective of the

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<sup>3</sup> Article I, section 24 provides:

The right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.

individual right (Gunwall factors one, two, and five). See Sieves, 168 Wn.2d at 293. As to constitutional and common law history, Gunwall factor three, the right to bear arms under our constitution does not include language restricting the right as a penalty for a conviction. This must be viewed in contrast to Article VI, section 3, which explicitly restricts voting rights due to a felony conviction and demonstrates the framers's understanding of how to expressly restrict a right as the result of the commission of criminal offenses. See Madison v. State, 161 Wn.2d 85, 91, 163 P.3d 757 (2007) (explaining constitutional disenfranchisement for people convicted of felony).

The constitutional history contains no support for absolute prohibitions on a person's right to possess a firearm due to a misdemeanor assault against a family member. See e.g., State v. Rupe, 101 Wn.2d 664, 706-07, 683 P.2d 571 (1984). Gunwall factor four, pre-existing state law, shows no similar rules. Until 1992, people convicted of crimes as juveniles were free to own firearms as adults without restrictions, and the domestic violence prohibition was not added until 1994. The right to possess a

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<sup>4</sup> The Second Amendment provides, "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

firearm is plainly a matter of state and local concern, Gunwall factor six. Some states have no constitutional provisions protecting the right to bear arms, while others explicitly reserve the right to restrict such possession by law or as needed for the police power. See State v. Schelin, 147 Wn.2d 562, 591-92, 55 P.3d 632 (2002) (Sanders, J. dissenting). Article I, section 24 has no such limitations, and these variations among the state constitutional texts demonstrates the lack of need for uniformity among states.

Not only under the Second Amendment as recently clarified by the United States Supreme Court, but by virtue of the broadly guaranteed and historically recognized individual right to possess a firearm guaranteed by Article I, section 24, Ali D. was punished by losing his fundamental right to possess a firearm due to his conviction for a misdemeanor assault of domestic violence. He may neither possess a firearm in his home nor in self-defense. The legal authority and factual predicate causing him to lose this fundamental right were not charged in the information. This restriction substantially burdens his right to bear arms and is not justified as a long-standing regulation authorized under Article I, section 24. The lack of notice prohibited him from receiving a

mandatory penalty depriving him of a fundamental right. Recuenco III, 163 Wn.2d at 436.

4. The court lacked authority to prohibit Ali D. from possessing a firearm. Ali D. was an adult at the time of his juvenile court disposition, and therefore, it does not matter whether his rights could be restricted lawfully when he was a juvenile. CP 18; RP 112. He is an adult who lost his fundamental right to possess a firearm without notice in the charging document, and without any conclusion of law demonstrating that the State proved the factual basis for this restriction. The court's conclusions of law do not state that the prosecution proved that the offense occurred against a family or household member, which is the mandatory factual predicate for losing the right to possess a firearm following an adjudication for fourth degree assault. RCW 9.41.040(2); CP 13-14. Findings of fact not expressly entered are presumed to have not been proven. State v. Armenta, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997).

The punishment imposed for the "domestic violence" label attached to Ali D.'s charge was not included in the information. It was not found to have been proven beyond a reasonable doubt by the juvenile court. It unconstitutionally impinges on his

fundamental right to bear arms. This unauthorized punishment should be stricken on remand.

E. CONCLUSION.

For the reasons stated above, Ali D. respectfully asks this Court to vacate the firearm prohibition imposed as punishment for his juvenile disposition.

DATED this 21<sup>st</sup> day of June 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 66373-9-I
v.	)	
	)	
ALI D.,	)	
	)	
Juvenile Appellant.	)	

FILED IN DIVISION  
COURT OF APPEALS WASHINGTON  
2011 JUN 21 PM 4:14

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21<sup>ST</sup> DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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| <input checked="" type="checkbox"/> ALI D.<br>10216 NE 20 <sup>TH</sup> PL<br>BELLEVUE, WA 98005  | (X)<br>( )<br>( ) | U.S. MAIL<br>HAND DELIVERY<br>_____ |

**SIGNED** IN SEATTLE, WASHINGTON THIS 21<sup>ST</sup> DAY OF JUNE, 2011.

X \_\_\_\_\_  


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