

NO. 68957-6-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DJ NGUYEN,

Appellant.

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STATE OF WASHINGTON
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WESLEY SAINT CLAIR, JUDGE

BRIEF OF RESPONDENT

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A. ISSUE

1. Where a statute is clear on its face, a reviewing court will derive the statute's meaning from its plain language alone. A conviction for first-degree unlawful possession of a firearm requires proof that the possessor has previously been convicted of a "serious offense." "Serious offense" includes a felony attempt to commit "any crime of violence." Residential burglary is a "crime of violence." Nguyen, who had a pistol in his pocket when he was stopped, had a prior conviction for attempted residential burglary. Did the trial court properly find that Nguyen was guilty of first-degree unlawful possession of a firearm?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Juvenile respondent DJ Nguyen was charged by information with Unlawful Possession of a Firearm in the First Degree. The degree of the crime was based on Nguyen's prior conviction for Attempted Residential Burglary, a "serious offense." CP 1-3.

Following the denial of his motion to suppress evidence, the trial court found Nguyen guilty as charged. CP 25-28 (CrR 3.6 findings and conclusions), 20-24 (CrR 6.1(d) findings and

conclusions), 13 (Order on Fact Finding). The order of disposition required Nguyen to spend 30 days in detention, complete 100 hours of community restitution, and be under supervision for a period of 9 months. CP 16-19.

Prior to the court's finding of guilt, Nguyen raised a statutory challenge, arguing that attempted residential burglary was not a "serious offense," and thus could not support a conviction for first-degree unlawful possession of a firearm. 2RP¹ 132-38. The State disagreed. 2RP 140-46. The trial court rejected Nguyen's argument, and found him guilty as charged. 2RP 160-62.

2. SUBSTANTIVE FACTS.

On the morning of November 25, 2011, Billy Motshepe and his friend Mavius Nelson were on their way to basketball practice at Cleveland High School. 1RP 34-36; 2RP 10. As they were walking, someone put a gun to the back of Motshepe's head and demanded that he turn over his belongings. 1RP 36.

When the boys got to school, they told their coach what had happened, and the coach called the police. 1RP 37. The

¹ The verbatim report of proceedings consists of two volumes, which will be referred to in this brief as follow: 1RP (5/21/12); and 2RP (5/22/12, 6/5/12, 6/21/12).

description given to police was of an Asian male, about 20 years of age, wearing a black hooded sweatshirt. 1RP 125; 2RP 53.

Police stopped Nguyen, who was walking in the vicinity of the robbery and generally matched the description given by the victims. 2RP 55-57. While frisking Nguyen for weapons, police found a small-caliber pistol in his left rear pants pocket. 1RP 73-74; 2RP 63, 65-66, 77-78. Police arrested 15-year-old Nguyen for underage weapons possession. 1RP 97; 2RP 74-75.

Motshepe and Nelson were transported separately to the scene of the stop, and separate "show-up" identification procedures were conducted. 1RP 129-30; 2RP 97. Neither witness identified Nguyen as the person who had robbed them. 1RP 47; 2RP 74, 97-98.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY CONCLUDED THAT NGUYEN'S PRIOR CONVICTION FOR ATTEMPTED RESIDENTIAL BURGLARY WAS A "SERIOUS OFFENSE" SUCH THAT IT WAS A SUFFICIENT PREDICATE FOR UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

Nguyen contends that his prior conviction for attempted residential burglary is not properly classified as a "serious offense,"

and thus cannot support his conviction for first-degree unlawful possession of a firearm. This argument, which ignores the plain language of the relevant statute, must be rejected.

The appellate court reviews questions of statutory interpretation *de novo*. State v. Gonzalez, 168 Wn.2d 256, 263, 226 P.3d 131 (2010). The goal is to carry out the intent of the legislature. Id. “The first step in interpreting a statute is to examine its plain language.” Id. Where a statute is unambiguous after a review of the plain meaning, the inquiry is at an end. Id.

A person is guilty of the crime of unlawful possession of a firearm in the first degree when he has a firearm in his possession or control, and he has previously been convicted of “any serious offense as defined in this chapter.” RCW 9.41.040(1)(a). “Serious offense” is defined as “any of the following felonies *or a felony attempt to commit* any of the following felonies.” RCW 9.41.010(16) (italics added). Included among “any of the following felonies” is “[a]ny crime of violence.” RCW 9.41.010(16)(a). The category of “crime of violence” includes residential burglary. RCW 9.41.010(3)(a).

Nguyen’s argument relies specifically on the definition of “crime of violence” under RCW 9.41.010(3)(a). He points out that

“crime of violence” explicitly includes “an attempt to commit a class A felony,” but does *not* include attempted residential burglary.² Nguyen is looking to the wrong statute.

Unlawful possession of a firearm in the first degree, the crime of which Nguyen was convicted, requires a prior conviction for a “serious offense.” As a category, “serious offense” includes a “felony attempt” to commit a crime of violence. Because residential burglary is a class B felony, attempted residential burglary is a class C felony.³ Thus, attempted residential burglary, for which Nguyen has a prior conviction, is a felony attempt to commit a serious offense.

The fact that attempted residential burglary is not itself a crime of violence is of no moment here. Were a crime to contain as an element a prior conviction for a “crime of violence,” Nguyen’s argument would have merit. But *his* crime requires only a prior conviction for a “serious offense.” He was properly convicted here.

² Residential burglary is a class B felony. RCW 9A.52.025(2).

³ RCW 9A.28.020(3)(c).

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Nguyen's conviction for Unlawful Possession of a Firearm in the First Degree. Because there is no published decision on the statutory issue addressed in this brief, the State asks that this Court consider publishing its decision in this case.

DATED this 6th day of March, 2013.

Respectfully submitted,

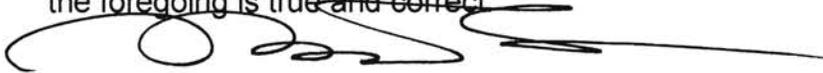
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. DJ NGUYEN**, Cause No. **68957-6-I**, in the Court of Appeals for the State of Washington, Division I.

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

 03-06-13

Name

Date

Done in Seattle, Washington