

No. 71097-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JOSHUA KRUEGER-KEITH,

Appellant.

COURT OF APPEALS DIV. 1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The sentencing court erred in stating on the judgment and sentence that domestic violence was pled and proved after the jury had acquitted Mr. Krueger-Keith of second-degree assault, domestic violence.

2. The sentencing court erred in prohibiting Mr. Krueger-Keith from possessing firearms, because Mr. Krueger-Keith was not convicted of a qualifying crime under the statute.

3. The prohibition on firearm possession violates the Second, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, sections 3, 21, 22, and 24 of the Washington Constitution.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The court instructed the jury that it was to use the “domestic violence” special verdict form only if it convicted Mr. Krueger-Keith of second-degree assault. The jury acquitted Mr. Krueger-Keith of second-degree assault, domestic violence, and convicted him only of the lesser offense of fourth-degree assault without a domestic violence finding. There is nevertheless a box checked on the judgment and sentence stating that domestic violence was “pled and proven.” Must this finding be stricken?

2. By statute, a person convicted of fourth degree assault – domestic violence is prohibited from possessing firearms, but a person

convicted of “regular” fourth-degree assault is not. Mr. Krueger-Keith was convicted of fourth-degree assault, but, consistent with the instructions the jury did not find that it was a crime of domestic violence. The sentencing court nevertheless prohibited Mr. Krueger-Keith from possessing firearms. Must this prohibition be stricken because it was imposed without statutory authority?

3. The Sixth Amendment and article I, sections 21 and 22 guarantee the right to a jury trial; the Fourteenth Amendment and article I, section 3 guarantee the right to due process; and the Second Amendment and article I, section 24 guarantee the right to bear arms for self-defense. Is the firearm prohibition imposed on Mr. Krueger-Keith unconstitutional, where the jury acquitted him of the alleged domestic violence crime which would have made him statutorily ineligible to possess firearms, and the judge simply prohibited firearm possession anyway with no explanation?

C. STATEMENT OF THE CASE

Joshua Krueger-Keith is a father who gained full custody of his infant son after the child’s mother could not care for him. RP (10/9/13) at 34. Mr. Krueger-Keith and his son, Liam, lived for several months with his sister, Ronda Keith, and her 13-year-old son, Braison C. RP (10/8/13) at 14-15. Ms. Keith’s boyfriend, Dayon Hennings, was a frequent visitor. RP (10/8/13) at 19, 107, 128.

One evening, Mr. Krueger-Keith was angry because he had heard from the neighbors that Braison was using drugs. RP (10/9/13) at 41-42. He came home and started yelling at Braison. RP (10/9/13) at 45-50. According to Ronda Keith, who was in another room, Mr. Krueger-Keith was yelling, "How could you?" and "why do you not listen?" RP (10/8/13) at 21. According to Mr. Krueger-Keith, Braison was indifferent and refused to listen to him because he was not Braison's parent. RP (10/9/13) at 45.

Ronda Keith went into the room and told Mr. Krueger-Keith it was none of his business what Braison did, and Mr. Krueger-Keith then disparaged Ms. Keith's parenting skills. RP (10/9/13) at 51-52. Dayon Hennings was a drug dealer and, according to the prosecutor in this case, Ronda Keith's house was a "drug house." RP (10/9/13) at 90. But Mr. Krueger-Keith was poor and had no place else to live, and he believed he had the authority and responsibility as Braison's uncle to order him not to use drugs. RP (10/9/13) at 37, 89-91.

The argument grew more heated. Braison went to his room, grabbed a bat, and approached Mr. Krueger-Keith, who was holding Liam. RP (10/8/13) at 118; RP (10/9/13) at 53-54. Mr. Hennings told Braison to put the bat away. RP (10/8/13) at 118; RP (10/9/13) at 53-54. Ms. Keith scratched Liam's face, after which Mr. Krueger-Keith hit Ms. Keith. RP

(10/8/13) at 119-20; RP (10/9/13) at 62. Mr. Krueger-Keith, Braison C., and Ronda Keith all called 911. RP (10/8/13) at 57. Dayon Hennings drove away before the police arrived. RP (10/8/13) at 118; RP (10/9/13) at 124-25.

Mr. Krueger-Keith wound up with scratches on his neck, while his son had scratches on his face. RP (10/8/13) at 29, 62; RP (10/29/13) RP at 68, 81. Ms. Keith had a bloody nose and a bruised eye. RP (10/8/13) at 62.

The State eventually charged Mr. Krueger-Keith with one count of second-degree assault, domestic violence, against Ronda Keith, and one count of fourth-degree assault against Braison C. CP 1-2. At trial, much of the testimony was contradictory and inconsistent with earlier statements to police. Ultimately, the jury found Mr. Krueger-Keith not guilty on count two, assault in the fourth degree against Braison C., and not guilty on count one, assault in the second degree, domestic violence, against Ronda Keith. CP 62. The jury convicted Mr. Krueger-Keith only of the lesser offense of assault in the fourth degree against Ronda Keith. CP 63. The jury did not find that it was a crime of domestic violence; indeed, the jury had been instructed that it was not to use the “domestic violence” special verdict form unless it found Mr. Krueger-Keith guilty of second-degree assault. CP 60-61, 66.

At sentencing, the judge nevertheless acted as if Mr. Krueger-Keith had been convicted as charged, saying that what Mr. Krueger-Keith did to Braison and Ms. Keith was “horrible” and that the jury’s verdict “didn’t really stack up with the evidence.” RP (10/18/13) at 8, 14. Despite the acquittals, the judge checked the box on the judgment and sentence stating that domestic violence had been “pled and proved,” and told Mr. Krueger-Keith that he was not permitted to possess firearms. CP 73; Supp. CP ___ (sub no. 52).

D. ARGUMENT

Because the jury acquitted Mr. Krueger-Keith of domestic violence under the law of the case, the domestic violence finding on the judgment must be stricken and the firearm prohibition vacated.

1. The jury acquitted Mr. Krueger-Keith of second-degree assault and, as instructed, did not use the domestic violence special verdict form after convicting Mr. Krueger-Keith of only fourth-degree assault.

The State charged Mr. Krueger Keith with second-degree assault, domestic violence, in count one. CP 1. The jury was instructed that if it was not unanimously satisfied beyond a reasonable doubt that Mr. Krueger-Keith was guilty of this offense, it could consider whether the State proved he was guilty of the lesser offense of fourth-degree assault. CP 58. The jury was further instructed as follows:

You must fill in the blank provided in the verdict form with the words “not guilty” or the word “guilty” according to the decision you reach as to each count.

You will also be furnished with a Special Verdict Form to be used only if you find the defendant guilty as to the crime of assault in the second degree as charged in Count I. If so, you must answer the question in the Special Verdict Form which inquires whether or not the State has met its burden of proving that Joshua Krueger-Keith and Ronda Keith were members of the same family or household at the time of commission of the crime. In order to answer the question “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you have a reasonable doubt as to the answer, you must answer “no”. You are instructed that the term “members of the same family or household” includes adult persons related by blood as well as adult persons who are presently residing together or who have resided together in the past.

CP 60-61 (emphasis added). Thus, as to count one, the jury was instructed that the domestic violence allegation applied only if Mr. Krueger-Keith was guilty of second-degree assault, and not if he was guilty of fourth-degree assault.

The jury found Mr. Krueger-Keith not guilty of second-degree assault, domestic violence, as charged in count one, and not guilty of fourth-degree assault as charged in count two. CP 62. The jury found Mr. Krueger-Keith guilty of the lesser offense of fourth-degree assault on count one. CP 63. Consistent with the instructions, the jury did not find that the crime of conviction was a crime of domestic violence. CP 66.

2. In light of the acquittal, the finding on the judgment and sentence that domestic violence was “pled and proven” must be vacated.

As explained above, the jury instructions permitted a finding of domestic violence only if Mr. Krueger-Keith was guilty of second-degree assault. CP 60-61. Consistent with these instructions, the jury did not find Mr. Krueger-Keith guilty of domestic violence assault, but only of “regular” fourth-degree assault. CP 62-66. This verdict reflects the law of the case. *See State v. Hickman*, 135 Wn.2d 97, 99, 954 P.2d 900 (1998) (if jury instructions create additional elements State must prove, they become law of the case); RP (10/9/13) at 159 (prosecutor in this case recognizes that failure of jury instructions to allow DV finding for fourth-degree assault is law of the case).

Notwithstanding the verdict, the trial judge stated on the judgment and sentence that domestic violence was pled and proved. CP 73. This finding must be stricken. A finding that domestic violence was pled and proved can have severe consequences, including the counting of the conviction in a defendant’s offender score. *See* RCW 9.94A.525(21); RCW 9.94A.030(41). Under the Sentencing Reform Act:

If the present conviction is for a felony domestic violence offense where domestic violence as defined in RCW 9.94A.030 was pled and proven, count priors as in subsections (7) through (20) of this section; however, count points as follows:

...

(c) Count one point for each adult prior conviction for a repetitive domestic violence offense as defined in RCW 9.94A.030, where domestic violence as defined in RCW 9.94A.030, was plead and proven after August 1, 2011.

RCW 9.94A.525(21). The definitional statute, in turn, provides:

(41) "Repetitive domestic violence offense" means any:

(a)(i) Domestic violence assault that is not a felony offense under RCW 9A.36.041;

...

RCW 9.94A.030(41). Thus, although normally only prior felonies count as points in a defendant's offender score, a prior misdemeanor assault conviction counts as a point *if and only if* domestic violence was pleaded and proved. Because, consistent with the law of the case, the jury did *not* find that domestic violence was pleaded and proved as to Mr. Krueger-Keith, the domestic violence finding on the judgment must be stricken. Otherwise, this conviction for regular fourth-degree assault may be improperly treated as a conviction for domestic violence assault in the future, and counted as a point his Mr. Krueger-Keith's offender score.

3. In light of the acquittal, the firearm prohibition is improper under the statute and the state and federal constitutions.

The trial judge also told Mr. Krueger-Keith that he was prohibited from possessing firearms as a result of this conviction. Supp. CP ____ (sub no. 52); RP (10/18/13) at 17. This was improper, as the statute prohibits

firearm possession for those convicted of misdemeanor assault only if it is a conviction for a crime of domestic violence.

RCW 9.41.040 provides, in relevant part:

A person ... is guilty of the crime of unlawful possession of a firearm in the second degree, if the person ... owns, has in his or her possession, or has in his or her control any firearm: (i) After having previously been convicted [of] any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree,

RCW 9.41.040(2)(a)(i). As explained previously, Mr. Krueger-Keith was not convicted of assault in the fourth degree against a family or household member; the instructions dictated that he could not be convicted of a crime against a family or household member unless he was convicted of second-degree assault. Both the jury's verdict and the law of the case show that Mr. Krueger-Keith was convicted of assault in the fourth degree, but *not* assault in the fourth degree against a family or household member. Thus, the sentencing court was without statutory authority to impose the prohibition on firearm possession. RCW 9.41.040.

Furthermore, the prohibition violates Mr. Krueger-Keith's constitutional rights to a jury trial, to due process, and to bear arms. U.S. Const. amends. II, VI, XIV; Const. art. I, §§ 3, 21, 22, 24. The Sixth and Fourteenth Amendments and article I, sections 3, 21 and 22 guarantee the right to a jury finding beyond a reasonable doubt of every fact essential to

punishment. *Alleyne v. United States*, ___ U.S. ___, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013). A domestic violence finding is essential to imposition of a firearm prohibition for misdemeanors, but the jury in Mr. Krueger-Keith's case did not make such a finding. Although this Court has held that "[c]onviction of a domestic violence misdemeanor can be viewed as indicating unfitness to engage in the activity of carrying firearms," an *acquittal* certainly cannot be so viewed. *See State v. Felix*, 125 Wn. App. 575, 581, 105 P.3d 427 (2005).

Furthermore, the antiquated notion that firearm prohibition is not "punishment" must be rejected after *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) and *McDonald v. Chicago*, ___ U.S. ___, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). These cases held that the Second Amendment guarantees the fundamental right of individuals to keep and bear arms for self-defense. *McDonald*, 130 S.Ct. at 3026. Article I, section 24 of the Washington Constitution explicitly guarantees this right, stating, "The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired" Const. art. I, § 24; *see State v. Jorgenson*, 179 Wn.2d 145, 152, 312 P.3d 960 (2013) (article I, section 24 and Second Amendment have different text and history and therefore should be interpreted independently).

Not only do these cases support the proposition that a complete ban on firearm possession constitutes punishment triggering the constitutional rights to due process and a jury trial, they also support the proposition that Mr. Krueger-Keith's constitutional right to bear arms was violated when the judge prohibited him from possessing firearms based on a crime for which he was neither charged nor convicted. It remains an open question whether the Second Amendment permits such a broad infringement on the right to bear arms based only on a misdemeanor domestic violence conviction. See *United States v. Skoien*, 614 F.3d 638, 639 (7th Cir. 2010) (en banc) (upholding prohibition on firearm possession for those convicted of misdemeanor domestic violence, but acknowledging circuit split). But there can be little doubt that the Second Amendment and article I, section 24 are offended by a complete ban on firearm possession for a person who was never charged with nor convicted of such a crime – based only on the judge's own apparent finding that the person should nevertheless be treated as if he had been charged with and convicted of the qualifying crime. For this reason, too, the firearm prohibition should be vacated.

E. CONCLUSION

Mr. Krueger-Keith asks this Court reverse and remand with instructions to strike both the domestic violence finding and the firearm prohibition.

DATED this 18th day of August, 2014.

Respectfully submitted,



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

| | | |
|-----------------------|---|---------------|
| STATE OF WASHINGTON, |) | |
| |) | |
| Respondent, |) | |
| |) | NO. 71097-4-I |
| v. |) | |
| |) | |
| JOSHUA KRUEGER-KEITH, |) | |
| |) | |
| Appellant. |) | |

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 18TH DAY OF AUGUST, 2014, 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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| [X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104 | (X) () () | U.S. MAIL HAND DELIVERY _____ |
| [X] JOSHUA KRUEGER-KEITH 35414 16 TH AVE CT S ROY, WA 98589 | (X) () () | U.S. MAIL HAND DELIVERY _____ |

SIGNED IN SEATTLE, WASHINGTON THIS 18TH DAY OF AUGUST, 2014.

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