

NO. 74779-7-I

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

STATE OF WASHINGTON,

Appellant,

v.

JOAQUIN GARCIA,

Respondent,

FILED
Sep 02, 2016
Court of Appeals
Division I
State of Washington

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

The Honorable Timothy Bradshaw, Judge

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>RESTATEMENT OF ISSUE ON APPEAL</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	6
1. THE TRIAL COURT CORRECTLY DISMISSED GARCIA’S FIRST DEGREE UPFA CHARGE.	6
a. <u>Introduction to applicable law</u>	7
b. <u>Because there are no disputed material facts, the court correctly ruled, as a matter of law, that Garcia had successfully asserted a defense to charge of first degree UPFA</u>	9
c. <u>The superior court correctly ruled that, despite later notice, violation of RCW 9.41.047(1)(a) as to the predicate offense requires dismissal.</u>	12
2. IN THE EVENT THAT THE STATE PREVAILS ON APPEAL, THIS COURT SHOULD NOT AWARD THE COSTS OF THE APPEAL.	18
D. <u>CONCLUSION</u>	19

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Cakowski v. Oleson

1 Wn. App. 780, 463 P.2d 673 (1970)..... 7, 12

State v. Breitung

155 Wn. App. 606, 230 P.3d 614 (2010)
aff'd in part, 173 Wn.2d 393, 267 P.3d 1012 (2011)..... 5, 6, 8-17

State v. Carter

127 Wn. App. 713, 112 P.3d 561 (2005)..... 5

State v. Fisher

___ Wn.2d ___, 374 P.3d 1185 (2016)..... 11

State v. Freigang

115 Wn. App. 496, 61 P.3d 343 (2002)..... 7

State v. Horton

___ Wn. App. ___, ___ P.3d ___, 2016 WL 4001433 (July 26, 2016)... 7

State v. Leavitt

107 Wn. App. 361, 27 P.3d 622 (2001)..... 15

State v. Minor

162 Wn.2d 796, 174 P.3d 1162 (2008)..... 8, 11, 13, 14, 16

State v. Mitchell

190 Wn. App. 919, 361 P.3d 205 (2015)
review denied, 185 Wn.2d 1024 (2016) 4, 5, 10, 11

State v. Sinclair

192 Wn. App. 380, 367 P.3d 612 (2016)
review denied, ___ Wn.2d ___ (June 29, 2016)..... 18

State v. Vasquez

109 Wn. App. 310, 34 P.3d 1255 (2001)
aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002)..... 12

TABLE OF AUTHORITIES (CONT'D)

	Page
<u>RULES, STATUTES AND OTHER AUTHORITIES</u>	
CrR 8.3	7
Former RCW 9.41.040 (2014).....	8
Laws of 1994, 1st Spec. Sess. ch. 7, § 404	2
RAP 14.2	18
RAP 14.3	18
RAP 2.2.....	6
RCW 9.41.010	8
RCW 9.41.040	3, 9
RCW 9.41.047	1, 2, 4, 5, 8, 9, 10, 12, 13, 14, 16
RCW 9A.44.073	1, 8
RCW 10.73.160.....	18, 19

A. RESTATEMENT OF ISSUE ON APPEAL

Under RCW 9A.04.047(1)(a) “[a]t the time a person is convicted . . . of an offense making the person ineligible to possess a firearm . . . the [convicting court] shall notify the person, orally and in writing, that the person . . . may not possess a firearm unless his or her right to do so is restored by a court of record.”

The respondent was charged with first degree unlawful possession of a firearm (UPFA) based on a single predicate conviction, a 1994 juvenile adjudication when the respondent was 13 years old. The undisputed record shows the juvenile court failed to provide the respondent oral and written notice of the firearm prohibition. Similarly, the State points to no evidence that the respondent “otherwise” received notice at the time of the adjudication. In light of the foregoing, did the trial court correctly conclude that dismissal of the respondent’s first degree UPFA charge was required?

B. STATEMENT OF THE CASE

In October 1994, when Joaquin Garcia was 13 years old, he pleaded guilty to first degree rape of a child based on digital contact with his younger sister. CP 24, 32; RCW 9A.44.073. CP 38. Records reveal that Garcia had himself been the victim of long-term sexual abuse by his biological father starting when he was just four years old. CP 169-70, 174-75.

RCW 9.41.047(1)(a),¹ which requires a convicting court to notify a person orally and in writing when a conviction makes that person ineligible to possess a firearm, had gone into effect a few months before the plea. Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective July 1, 1994). But the superior court record relating to the adjudication contains no record of oral or written notice to Garcia. See CP 140-64 (court documents related to adjudication, including “Statement of Juvenile Offender on Plea of Guilty and Dispositional Order,” attached as Appendix B to State’s Response to Defense Motion); see also RP 26-27 (acknowledgment by State that entire record related to 1994 adjudication had been provided to court); CP 81 (acknowledgement, in State’s Response, that audio recordings or other record of plea hearing, sentencing hearing, and SSODA revocation proceedings were unavailable).

Four years later, Garcia pleaded guilty to a second felony, second degree UPFA.² However, the plea was based on possession of a firearm when he was less than 18 years old. CP 229 (Statement of Defendant on Plea of Guilty, listing elements of charged crime as “knowingly and

¹ The pertinent statutory language has remained unchanged since 1994. See former RCW 9.41.047(1) (1994); Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective July 1, 1994).

² Although Garcia was 17, that plea was entered in adult court. CP 220.

unlawfully possess[ing] a firearm while under the age of 18”); former RCW 9.41.040(1)(b)(iii) (1997).³

Corresponding to that conviction, Garcia received written notice that he was ineligible to possess a firearm. He also received similar notice as to a number of subsequent convictions. E.g. CP 262-63. However, the only conviction qualifying him for first degree UPFA remains the 1994 juvenile adjudication. CP 226, 233.

In November of 2014, the State charged Garcia with first degree UPFA, with the 1994 conviction as the sole predicate offense (count 1). CP 1-2, 46 (original and amended charging documents). The State also charged Garcia with felony harassment – domestic violence, witness tampering, two counts of misdemeanor violation of a court order – domestic violence, and, based on his other prior convictions, second degree UPFA (count 6). CP 46-48.

³ Garcia’s statement “in his own words” states the following:

On July 16, 1998, in Pierce County, I was 17 years old [scratched out word] knowingly had a gun in my possession. I did not have a lawful reason to have the gun. I was also convicted of a felony in 1994.

CP 233. According to the State, this indicates it is unclear under which prong of second degree UPFA Garcia pleaded. BOA at 8 n. 5. But this argument ignores the charge as set forth at CP 229.

Garcia moved to dismiss the first degree UPFA charge on the ground that he never received the required notice under RCW 9.41.047(1)(a). CP 20-22. He also filed a declaration stating that his attorney at the time never alerted him to any firearm prohibition. CP 80.

The court agreed and dismissed the charge. RP 59-62 (court's oral ruling); CP 71-76 (ruling denying State's motion to reconsider ruling); CP 537 (order dismissing); CP 541-43 (written findings, attached to this brief as the Appendix).

The court's written findings state that, as to Garcia's 1994 conviction, he did not receive oral and written notice as mandated by statute. CP 541-42. The court based its findings on the juvenile case file, which the parties appeared to agree was the "entire universe of existing evidence" concerning the 1994 adjudication, including the notices the court provided to Garcia at that time. CP 542; see also RP 60 (court's oral ruling, observing that parties agreed regarding the existing record as to the 1994 conviction); see also RP 26-27 (State's acknowledgment that recordings of any related court hearing had been destroyed).

In reaching its decision, the court distinguished, on its facts, a recent decision from this Court, State v. Mitchell. There, Mitchell argued that his UPFA conviction should be reversed because, as a matter of law, he had shown a lack of *oral* notice as required under RCW 9.41.047(1)(a).

This Court held that Mitchell had not presented undisputed facts demonstrating a lack of oral notice under the statute.⁴

Rather, the superior court found the present case was more similar to State v. Breitung.⁵ Like Garcia, Breitung had not received the notice required by statute. CP 542. The court also rejected the State's argument that Garcia's subsequent convictions were sufficient to establish Garcia had "otherwise"⁶ obtained knowledge of the firearm prohibition. The superior court observed that, consistent with Breitung, the notification requirement could not be satisfied by information obtained well after the time of the predicate conviction. CP 542.⁷

⁴ State v. Mitchell, 190 Wn. App. 919, 928-30, 361 P.3d 205 (2015), review denied, 185 Wn.2d 1024 (2016).

⁵ State v. Breitung, 173 Wn.2d 393, 401, 267 P.3d 1012 (2011).

⁶ See Breitung, 173 Wn.2d at 404 (reversing where "[t]he State did not establish that Breitung *otherwise* had knowledge of the law or notice of the firearm prohibition.") (emphasis added); see also State v. Breitung, 155 Wn. App. 606, 624, 230 P.3d 614 (2010), aff'd in part, 173 Wn.2d 393, 267 P.3d 1012 (2011) ("[W]e hold that where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition . . . the defendant's subsequent conviction for unlawful possession of a firearm . . . must be reversed.") (quoted in Breitung, 173 Wn.2d at 402).

⁷ The court also rejected the State's argument that the charge should not be dismissed based on State v. Carter, 127 Wn. App. 713, 719-21, 112 P.3d 561 (2005) (even where firearm prohibition notification was not provided, no relief available because Carter was not "affirmatively

The court dismissed count 1. CP 537, 541-43. The court ruled, however, that the dismissal order was appealable of right under RAP 2.2(b)(1) as a final judgment. The court stayed the case pending the State's appeal. Supp. CP ____ (sub no. 97, Order Staying Proceedings Pending State's Appeal). Garcia, who has not been tried on any of the charged crimes,⁸ remains incarcerated pending this appeal. Supp. CP ____ (sub no. 89, Order Denying Bail Reduction).

C. ARGUMENT

1. THE TRIAL COURT CORRECTLY DISMISSED GARCIA'S FIRST DEGREE UPFA CHARGE.

Washington courts have held knowledge that possessing a firearm is illegal is not an element of the crime of unlawful possession. The Supreme Court has, nonetheless, twice reversed unlawful possession convictions where the statutorily required oral and written notice was not provided. Thus, those cases present an exception to the general rule that ignorance of the law is not a defense.

misled" by sentencing court). The court correctly observed that the Carter Court's rationale was explicitly rejected in Breitung. CP 543.

⁸ Garcia has not been convicted of, nor has he pleaded guilty to, any of the charged crimes in this case. Thus, the "substantive facts" set forth at pages 3-5 of the Brief of Appellant reflect the unproven allegations in the charging documents.

The rule set forth in those cases applies in this case. The undisputed record of the 1994 adjudication establishes that the statutorily required oral and written notice was not provided to Garcia. Likewise, the State is unable to demonstrate that, contemporaneous to or even roughly contemporaneous to the predicate adjudication, Garcia “otherwise” received notice, or obtained knowledge of, the firearm prohibition. This Court should, accordingly, affirm the superior court’s dismissal order.

a. Introduction to applicable law

Before the start of trial, an accused person may “move to dismiss a criminal charge due to insufficient evidence establishing a prima facie case of the crime charged.” CrR 8.3(c). This process is essentially a summary judgment procedure “to avoid a ‘trial when all the material facts are not genuinely in issue and could not legally support a judgment of guilt.’” State v. Horton, ___ Wn. App. ___, ___ P.3d ___, 2016 WL 4001433, at *7 (July 26, 2016) (quoting State v. Freigang, 115 Wn. App. 496, 501, 61 P.3d 343 (2002)). When a defendant advances an affirmative defense as a matter of law, the question must be determined in light of the evidence most favorable to the plaintiff. Cakowski v. Oleson, 1 Wn. App. 780, 781, 463 P.2d 673 (1970).

A person commits first degree UPFA “if the person owns, has in his . . . possession, or has in his . . . control any firearm after having

previously been convicted in this state or elsewhere of any serious offense as defined in this chapter.” Former RCW 9.41.040 (1)(a) (2014). Garcia’s 1994 first degree child rape conviction arguably qualifies as a “[c]rime of violence,” which is included within the definition of a “serious offense” for purposes of first degree UPFA. RCW 9.41.010(3)(a), (b); RCW 9.41.010(21)(a); RCW 9A.44.073.

But RCW 9.41.047(1)(a) unambiguously requires a convicting court to give the convicted person notice of the ensuing prohibition on the right to possess firearms. The statute provides:

At the time a person is convicted . . . of an offense making the person ineligible to possess a firearm . . . the [convicting court] shall notify the person, orally and in writing, that the person . . . may not possess a firearm unless his . . . right to do so is restored by a court of record.

RCW 9.41.047(1)(a) (emphasis added).

Although RCW 9.41.047(1) does not expressly provide a remedy for a convicting court’s violation of its terms, the Supreme Court has fashioned a remedy for such a violation. Twice in the last 10 years, the Supreme Court has reversed convictions for UPFA based on courts’ failure to comply with the statute. State v. Breitung, 173 Wn.2d 393, 401, 267 P.3d 1012 (2011); State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008).

Lack of oral and written notice of the firearm prohibition is an affirmative defense to UPFA. Breitung, 173 Wn.2d at 403. To successfully assert the defense, an accused must show that, when he was convicted of the predicate offense, he did not receive both oral and written notice that it was illegal for them to own a firearm. Id.; RCW 9.41.047(1)(a) (requiring the convicting court to notify a person orally *and* in writing when a conviction makes him or her ineligible to possess a firearm). A person is “convicted” at the time “a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of . . . sentencing or disposition.” RCW 9.41.040(3).

- b. Because there are no disputed material facts, the court correctly ruled, as a matter of law, that Garcia had successfully asserted a defense to the charge of first degree UPFA.

Here, the superior court ruled as a matter of law that Garcia had established that, as to the only offense that could serve as a predicate to first degree UPFA, the juvenile court did not provide oral and written notice as required by statute. CP 541; see also CP 542. The superior court also correctly ruled that the State had pointed to no evidence that Garcia “otherwise” obtained notice at the time of the juvenile adjudication. CP 542. The superior court’s ruling was correct.

Relying on this Court's Mitchell opinion, the State argues on appeal that the superior court shifted the burden of disproving the affirmative defense to the State. Brief of Appellant (BOA) at 19-20. In Mitchell, this Court rejected a defendant's claim that no reasonable juror could have failed to find he proved the Breitung defense. State v. Mitchell, 190 Wn. App. 919, 928-30, 361 P.3d 205 (2015), review denied, 185 Wn.2d 1024 (2016).

But Mitchell is distinguishable on its facts. There, State was able to demonstrate that Mitchell had received written notice complying with RCW 9A.04.047(1). The evidence strongly suggested that he had received oral notice as well. Id. at 928-29.

Mitchell's statement on plea of guilty, which the trial court admitted into evidence, informed Mitchell that he would lose the right to own or possess firearms. Mitchell signed the document. Mitchell's statement on plea of guilty, in addition to providing notice that Mitchell was ineligible to possess firearms, contained a bracketed statement in capital letters: "[JUDGE MUST READ THE FOLLOWING TO OFFENDER]." Mitchell's disposition order was also admitted into evidence. This document also notified Mitchell that he could not own, use, or possess a firearm. It was signed by the judge, Mitchell, and Mitchell's attorney. Id. at 929.

The only evidence supporting Mitchell’s claim he was not given oral notice came from Mitchell himself. He testified that he did not *remember* receiving oral notice. And the State then cross-examined him about the gaps in his memory regarding the statement on plea of guilty. Id. This Court observed that, on those facts, the jury was free to make its own judgment as to whether Mitchell’s statements were credible. The jury could have disbelieved Mitchell. Id.

Not surprisingly, this Court rejected Mitchell’s claim that the affirmative defense applied as a matter of law. Id. at 930.

This case is not like Mitchell. There is nothing in the record—“the entire universe of existing evidence”—indicating that Garcia was given written notice at the time of the adjudication or disposition. There is nothing in the record to suggest he was given oral notice. So Garcia did not receive oral and written notice. Garcia need not testify to establish the affirmative defense. Unlike in Mitchell, there are—as the superior court correctly found—no disputed facts in this respect. CP 541-42.

The State argues that lack of evidence is not evidence. See, e.g., State v. Fisher, ___ Wn.2d ___, 374 P.3d 1185, 1193 (2016) (self-defense case cited in State’s Statement of Additional Authorities). But in Breitung, the seminal case on this subject, the situation was identical: There was no evidence of written notice. The record was also silent on the

question of oral notice. Under the circumstances, the Supreme Court found Breitung had established the defense. Breitung, 173 Wn.2d at 403.

Breitung controls in this respect: Lack of evidence of written notification plus silent record as to oral notification establishes the affirmative defense. This Court should, therefore, reject the State's contention that the superior court shifted the burden. Because there are no disputed facts, the court correctly ruled that Garcia had established the affirmative defense as a matter of law. Cakowski, 1 Wn. App. at 781.⁹

- c. The superior court correctly ruled that, despite later notice, the violation of RCW 9.41.047(1)(a) as to the predicate offense requires dismissal.

The State also argues that the 1994 court's failure to provide the notice required under RCW 9.41.047(1)(a) is irrelevant given that, based on later convictions, Garcia later received notice he could not possess

⁹ The State has assigned error to the court's statement that the parties agreed that this matter is a question of law, not fact. See BOA at 1 (assignment of error number three, asserting that court erred in stating that parties agreed that whether Garcia had established the Breitung defense was question of law, not fact); BOA at 8-9 (recounting superior court's inquiry as to whether State agreed); see also BOA at 12-13 (argument that, based on the principle that a convicted person can "otherwise" obtain notice, the State should be entitled to show that Garcia otherwise obtained notice).

As argued below, however, any facts in dispute are irrelevant to the questions before this Court. Moreover, whether such facts would be relevant is a legal question, which this Court reviews de novo. State v. Vasquez, 109 Wn. App. 310, 318, 34 P.3d 1255 (2001), aff'd, 148 Wn.2d 303, 59 P.3d 648 (2002).

firearms. BOA at 12, 17-19. As a careful reading of Minor and Breitung makes clear, the “otherwise” knowledge or notice must be contemporaneous to the predicate conviction or adjudication. And, contrary to the State’s assertions, a narrow reading of the “otherwise” exception does not lead to perilous consequences.

In Minor, the defendant was charged with first degree UPFA. The predicate offense court had failed to give oral and written notice to Minor, who was then just 15, that his firearm rights had been rescinded. Minor, 162 Wn.2d at 797. Indeed, the dispositional order included the required language, but the box next to that language was left unchecked, suggesting that the firearm prohibition did not apply. Id. at 797-98. The Supreme Court held “[t]he only remedy appropriate for the statutory violation is to reverse the current conviction.” Id. at 804.

The Supreme Court highlighted the legislature’s concern over interfering with the right to possess and use firearms. “[I]n enacting [RCW 9.41.047(1)], the legislature balanced the concern with escalating violence, which some commentators blamed on the ‘ready availability of firearms,’ with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms.” Minor, 162 Wn.2d at 803 (quoting Final B. Rep. on Engrossed Second Substitute H.B. 2319, at 2, 53d Leg., Reg. Sess. (Wash. 1994)). The Court

emphasized that RCW 9.41.047(1) nonetheless “require[d] the convicting court to provide oral *and* written notice. *The statute is unequivocal in its mandate.*” Minor, 162 Wn.2d at 803 (emphasis added).

Despite the fact that RCW 9.41.047(1) did not specify a remedy for a violation, “[t]he presence of a notice requirement shows the legislature regarded such notice of deprivation of firearms rights as substantial. Relief consistent with the purpose of the statutory requirement *must* be available where the statute has been violated.” Minor, 162 Wn.2d at 803-04 (emphasis added).

Three years later, the Supreme Court expanded its Minor ruling in Breitung. Breitung answered questions left open by the Minor Court, and in the process reemphasized the Supreme Court’s strict adherence to the language of RCW 9.41.047(1)(a).

Breitung was convicted in 1997 of domestic violence assault, rendering him ineligible to possess firearms. Breitung, 173 Wn.2d at 402. The convicting court, however, failed to notify him in writing that his right to bear arms had been rescinded. The Supreme Court acknowledged, however, that the judgment and sentence was not actively misleading. Id.; cf. Minor, 162 Wn.2d at 802-03 (finding that Minor was misled when dispositional order failed to indicate firearm prohibition paragraph applied to Minor).

Prior cases had held that, although ignorance of the law is generally not a defense, a narrow exception to that proposition is warranted only where the State provided affirmative, misleading information regarding the firearm prohibition. *E.g.*, State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001).

The Breitung Court nonetheless found that, based on the Court's "robust and long-standing protection of the individual right to bear arms," the lack of statutorily required notification required reversal of Breitung's UPFA conviction, *even where he had not been affirmatively misled*. Breitung, 173 Wn.2d at 402-03.

The Court noted, however, that the affirmative defense could be defeated if the State could establish that a defendant "otherwise had knowledge of the law or notice of the firearm prohibition." *Id.* at 404.

Breitung does not explicitly state that such knowledge or notice must be specific to the predicate conviction, nor does it state *when* such knowledge must have been obtained. But, taken in the context of the Breitung decision as a whole, and based on the language of the statute itself, it is clear that the "otherwise" knowledge or notice must be contemporaneous to, or at least roughly contemporaneous to, the predicate conviction.

First, grounded in the constitutional right to bear arms, Breitung takes the statutory notification requirement so seriously that it requires a remedy for a violation of RCW 9.41.047(1)(a), even though the statute does not explicitly provide for such a remedy. Breitung, 173 Wn.2d at 403 (“Relief consistent with the purpose of the statutory requirement *must be available* where the statute has been violated.”) (quoting Minor, 162 Wn.2d at 803-04).

Even more significantly, Breitung removed the requirement that the accused must have been affirmatively misled into believing that he or she was permitted to possess firearms. In other words, after Breitung, the primary question is whether a statutory violation has occurred, and not whether the accused was misled or subjectively believed that he or she could legally possess firearms.

Finally, the language of the pertinent statute itself suggests that, to defeat the affirmative defense, the “otherwise” notice must have been obtained at the time of the conviction. RCW 9.41.047(1)(a) states that notice must be provided “[a]t the time a person is convicted.”

In light of statutory language requiring contemporaneous notification, and the primacy of the statutory requirement itself over the prior “affirmatively misled” analysis, the “otherwise” exception is

properly interpreted narrowly. The superior court did not err in this respect.

As a final matter, the State argues that the “otherwise” language cannot mean notice “at the time” of the conviction. BOA at 19. Besides oral or written notice from the court, the State argues, there is no other method of “otherwise” gaining knowledge at the time. Thus, the State argues, the notice or knowledge need not be contemporaneous. BOA at 19-20.

This argument is illogical. First, a showing that an accused received only oral *or* written notice would not strictly satisfy the statutory language. But it could satisfy the “otherwise” language. As a result, this Court should disregard the parade of horrors the State fabricates in its briefing. See BOA at 20.

Moreover, it is conceivable that some entity *other than the court*, such as a prosecutor or defense attorney, could provide the required notice orally or in writing. But here, as the State acknowledged, there was simply no such information available to it. CP 81 (State’s Response); RP 26-27.

In summary, the record of Garcia’s 1994 adjudication demonstrates he did not receive the statutorily required oral and written notice at the time of his juvenile adjudication. The State has advanced no

evidence suggesting that, contemporaneous to his adjudication, Garcia “otherwise” obtained knowledge or notice of the firearm prohibition. The superior court correctly ruled that, as a matter of law, Garcia established the Breitung defense to the first degree UPFA charge. This Court should affirm the superior court’s order.

2. IN THE EVENT THAT THE STATE PREVAILS ON APPEAL, THIS COURT SHOULD NOT AWARD THE COSTS OF THE APPEAL.¹⁰

RAP 14.2 provides certain appellate costs may be awarded to the “party that substantially prevails on appeal.” RAP 14.3(a) identifies the items recoverable as costs including “other such sums as provided by statute.” RAP 14.3(a)(8).

RCW 10.73.160, which governs “Court fees and costs,” provides that “[t]he court of appeals . . . may require an adult . . . *convicted of an offense* . . . to pay appellate costs.” RCW 10.73.160(1) (emphasis added). Under RCW 10.73.160(2), “[a]ppellate costs are limited to expenses specifically incurred by the state in prosecuting or defending an appeal or collateral attack *from a criminal conviction or sentence*” (Emphasis added). Moreover, “[e]xpenses incurred for producing a verbatim report of proceedings and clerk’s papers may be included in costs the court may

¹⁰ Garcia includes this argument in an abundance of caution based on State v. Sinclair, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016), review denied, ___ Wn.2d ___ (June 29, 2016).

require a *convicted defendant* . . . to pay.” RCW 10.73.160(2) (emphasis added)

Here, the State appealed from a pretrial dismissal order. Garcia has not been convicted of a crime and does not fall under RCW 10.73.160. Moreover, the superior court has found Garcia to be indigent, and he remains incarcerated pending his trial. See Supp. CP ___ (sub no. 94, Order of Indigency); see also Supp. CP ___ (sub no. 93, Declaration of Respondent). This Court should, accordingly, reject any request by the State for appellate costs, in the event that it is the prevailing party.

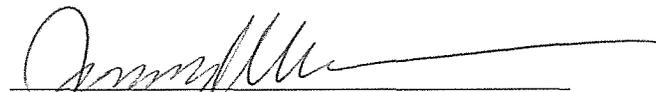
D. CONCLUSION

Because there was no remaining factual issue to be determined at trial, and because the remedy for a lack of statutorily required notice is dismissal, the trial court correctly dismissed the charge. This Court should affirm the order of dismissal and remand for trial on the remaining counts.

DATED this 2nd day of September, 2016.

Respectfully submitted,

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Attorney for Respondent

APPENDIX

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FILED
KING COUNTY, WASHINGTON

MAR 10 2016

SUPERIOR COURT CLERK
BY Victor Bigornia
DEPUTY

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

JOAQUIN GARCIA,

Defendant.

No. 14-1-05928-7 SEA

ORDER GRANTING DEFENSE MOTION
TO EXCLUDE PREDICATE OFFENSE AND
DISMISSING UPFA1 CHARGE

The Defense has filed a motion to prohibit the use of a 1994 conviction as a predicate offense to support the charge of Unlawful Possession of a Firearm in the First Degree. The Court considered all of the written pleadings and oral arguments offered, the evidence (Appendices) presented, and the pertinent case law and applicable statute(s). Based on the information before it the Court reaches the following conclusions.

RCW 9.41.047(1) is the controlling statute. This statute required the court sentencing Mr. Garcia in the predicate serious offense to "at the time" inform Mr. Garcia orally and, additionally, in writing that that conviction rendered him ineligible to possess a firearm. The Court "shall" so notify. "The statute is unequivocal in its mandate."¹ There is no evidence,

¹ St v. Minor, 162 Wn.2d 803.



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1 circumstantial or direct, that Mr. Garcia was at the time of the underlying conviction relevant to
2 count 1 informed of his prohibition concerning possessing a firearm, in any way.

3 The parties agree that the evidence submitted to the Court is the entire universe of
4 existing evidence concerning notice of a firearm prohibition discussed in Mr. Garcia's predicate
5 offense; no transcription or recording exists. Because no written or oral notice of his ineligibility
6 to possess firearms was given at the time of conviction or sentencing on the predicate offense,
7 both parties agreed in open court that this is a question of law, not of fact.

8 One may compare this to *St v. Mitchell*² in which there was at least some evidence of
9 written notice. Mitchell's statement on plea of guilty acknowledged the loss of right possess
10 firearms, and contained the following in capital letters: "Judge must read the following to
11 offender." Moreover, the disposition order document similarly notified Mitchell. This record
12 was viewed as sufficient for the question to go to the jury, particularly in light of the
13 defendant's burden of establishing an affirmative defense (by POE).³ At trial, Mitchell's claim
14 of lack of oral notice was subject to credibility determination. This may be considered alongside
15 the record in *St. Minor*, 162 Wn. 2d 796, where the relevant order did not indicate that the notice
16 "box" had been checked; the Supreme Court opined that Minor had therefore been
17 "affirmatively misled." Like *Breitung*, Garcia was not affirmatively misled; and like *Breitung*,
18 count 1 here nonetheless fails for lack of the statutory notice at the time of predicate offense.

19 The State argued that Garcia "otherwise" had knowledge of the firearm prohibition
20 since after all he was subsequently convicted and subsequently received notice. But neither the
21 majority opinion in *Minor* nor *Breitung* states that subsequent "otherwise" knowledge may be
22 retroactively attached to the predicate conviction actually charged (here count 1).

23 As a matter of law, at the time of the underlying conviction and sentencing in question
24 Mr. Garcia did not receive the statute's mandated written or oral notice of his ineligibility to
25 possess firearms as required by RCW 9.41.047(1). The proper remedy for this violation is

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27 ² Div. I 2015:

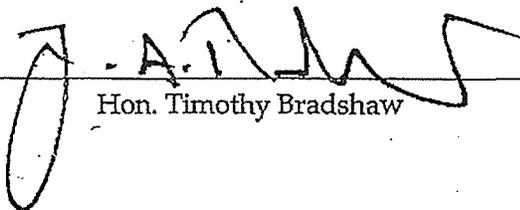
³ In *Breitung*, Court noted that the defendant had met his burden of proof via his motion to dismiss.

1 exclusion of that proposed predicate offense. *See State v. Breitung*, 173 Wn.2d 393 (2011) and
2 *State v. Minor*, 162 Wn.2d 796 (2011).

3 After the Court had issued its ruling regarding count 1, the State in a motion for
4 reconsideration relied on *State v. Carter*, 127 Wash. App. 173 (2005). *Carter* is a Div. Three case
5 that the Supreme Court was aware of, and cited to, in *Minor* and is contrary to its ruling in
6 *Breitung*.

7
8 The use of Mr. Garcia's 1994 conviction as a predicate offense for Unlawful Possession of
9 a Firearm in the First Degree is excluded. As this is the *only* prior conviction that could support
10 a conviction of Unlawful Possession of a Firearm in the First Degree, that charge is dismissed.

11
12 SO ORDERED this 10th day March, 2016

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Hon. Timothy Bradshaw

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ORDER GRANTING DEFENSE MOTION TO EXCLUDE
PREDICATE OFFENSE AND DISMISSING UPFA1 CHARGE

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