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COURT OF APPEALS
CLATSOP COUNTY

06 FEB 10 PM 2:43

STATE OF WASHINGTON

BY Chris
DEPUTY

NO 33178-1-II.
Cowlitz County No 03-1-01706-7.

STATE OF WASHINGTON,

Appellant,

vs.

NATHAN DANIEL COUGHLIN

Respondent.

BRIEF OF RESPONDENT

ANNE CRUSER/WSBA #27944
Attorney for Respondent

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

PM 2/8/06

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A. ASSIGNMENT OF ERROR

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DISMISSED THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT UNDER THE FACTS OF THIS CASE, A CONVICTION WOULD VIOLATE MR. COUGHLIN'S RIGHT TO DUE PROCESS OF LAW.

C. STATEMENT OF THE CASE

The Respondent accepts the State's recitation of the Statement of the Case, but wishes to add the following salient facts: The Statement of Respondent on Plea of Guilty provided that Mr. Coughlin's standard range sentence was five to ten days' detention. CP 9. It further provided, in paragraph 11, that the court had the option of sentencing him up to a maximum sentence of thirty days' detention. CP 9. In paragraph 12, the Statement provided that the maximum punishment for the offense (meaning the maximum punishment assuming a manifest injustice disposition, not the relevant statutory maximum as defined by *Blakely*) was commitment for five years or until Mr. Coughlin was 21 years old. CP 9.

The Order of Disposition from Mr. Coughlin's adjudication of guilty to Unlawful Imprisonment provided that Mr. Coughlin was to be

under probationary supervision for a period of six months. CP 12. As a condition of this six month probation, Mr. Coughlin was prohibited from possessing weapons of any type. CP 12.

When Mr. Coughlin applied for the purchase of a firearm from Bob's Merchandise in May of 2000, he filled out an application on a form from the Department of the Treasury, for the Bureau of Alcohol, Tobacco, and Firearms, in which he was asked a number of questions. CP 14. One of the questions he was asked was whether he had been convicted in any court of a crime for which the judge could have imprisoned him for more than one year, even if the judge actually gave him a shorter sentence. CP 14. Mr. Coughlin answered "no" to this question. CP 14. Nowhere on this application is the applicant asked whether he was convicted of a felony. CP 14. Paragraph 12 (c) states "The response initially provided by NICS or the appropriate State Agency was as follows: Proceed." CP 15.

D. ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT FOUND THAT UNDER THE FACTS OF THIS CASE, A CONVICTION WOULD VIOLATE MR. COUGHLIN'S RIGHT TO DUE PROCESS OF LAW.

The standard of review, on an appeal of a trial court's decision to dismiss a prosecution based on an earlier sentencing court's failure to warn a defendant of his ineligibility to possess firearms, is abuse of discretion. *State v. Moore*, 121 Wn.App. 889, 91 P.3d 136 (2004). In 1994, the Washington Legislature added a notification requirement regarding possession of firearms. RCW 9.41.047 (1) provided:

At the time a person is convicted of an offense making the person ineligible to possess a firearm...the convicting or committing court shall notify the person, 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.

In *State v. Leavitt*, 107 Wn.App. 631, 27 P.2d 622 (2001) Division II considered the consequences of a sentencing court's failure to comply with the statutory mandate of RCW 9.41.047 (1). The defendant in *Leavitt* pled guilty in 1998 to violation of a protection order. The court imposed a one-year suspended sentence, with conditions including no possession of firearms. These conditions were to terminate after one-year. *Leavitt* at 363. The court did not instruct Leavitt that RCW 9.41.047's prohibition against possession of firearms applied and extended beyond his one-year probationary period. The Conditions, Requirements and Instructions that DOC provided to Leavitt left the box next to the paragraph explaining the firearm prohibition under RCW 9.41.047 blank. Leavitt turned his

firearms over to his brother for a one year period. At the end of one-year, Leavitt received a letter stating his probation had ended. Believing he once again could legally possess firearms, Leavitt then retrieved his firearms from his brother. *Leavitt* at 363-64.

When Leavitt was arrested at his home in 1999 on a new charge, he was asked if there were any firearms in the home. Leavitt replied there were none in the home, but volunteered that he had weapons in the car. He was subsequently charged with six counts of unlawful possession of a firearm. *Leavitt* at 364. On appeal, Division II reversed his convictions. The court ruled that both the actions and inactions of the State, both in failing to give him the required advisement under RCW 9A.047 and in leading him to believe that his prohibition against firearm possession lasted only one year, misled Mr. Leavitt to believe he could legally possess firearms. *Leavitt* at 372. Leavitt's reliance on these actions prejudiced him because he brought guns back into his possession, leading to his arrest and conviction for six counts of unlawful possession of a firearm. *Leavitt* at 366-67. The court agreed with Leavitt that "the failure to provide this notice must have some consequence to the [S]tate, or there is little or no motivation on the part of the judge or the prosecutor to insure that the statute is followed." *Leavitt* at 367.

In reversing Leavitt's conviction, the court held that the inaction of the State in failing to provide him with notice, under RCW 9.41.047, of his ineligibility to possess firearms, combined with the State having told him that he could not possess firearms for his one-year probationary period (thereby leading him to believe that he was free to possess firearms once his one-year probationary period expired), deprived him of due process of law. *Leavitt* at 367-68.

Like Leavitt, Mr. Coughlin, was not provided with the statutory notice requirement. And like Leavitt, Mr. Coughlin was told that as a condition of his six month probation (CP 12), he could not possess weapons of any type, thereby leading him to believe that he was entitled to possess weapons at the conclusion of his probationary period. The State argues in its brief not only that Mr. Coughlin is required to demonstrate prejudice, which *Leavitt* did not explicitly hold, but that Mr. Coughlin failed to demonstrate any prejudice. However, the prejudice to Mr. Coughlin is no different than the prejudice to Mr. Leavitt: He was led to believe that he could legally possess firearms, he possess a firearm pursuant to that belief, and he found himself charged with unlawful possession of a firearm as a result. Just as in *Leavitt*, there is virtually no incentive for courts and prosecutors to abide by the notice requirement of RCW 9.41.047 when there is no consequence for failing to do so. And the

State should not be able to experience a windfall as a result of its own negligence. As observed in *Leavitt*, “for the state to prosecute someone for innocently acting upon such mistaken advice is akin to throwing water on a man and arresting him because he’s wet.” *Leavitt* at 372, citing *Miller v. Commonwealth*, 25 Va.App. 727, 492 S.E.2d 482, 487 (1997).

In Mr. Coughlin’s case, the misrepresentations made to him went further than the court’s failure to give him the ineligibility warning and leading him to believe that any weapons prohibition placed on him lasted for only six months. In Mr. Coughlin’s case, he was also led to believe, based on an application he filled out to purchase a rifle, purportedly through the Bureau of Alcohol, Tobacco, and Firearms, that he was eligible to purchase a gun. CP 14-15. This document not only bore the header “Department of the Treasury, Bureau of Alcohol, Tobacco, and Firearms,” but it clearly advised him that his application had been reviewed by “NICS OR THE APPROPRIATE STATE AGENCY” and his purchase of the rifle had been approved. CP 14-15. In other words, Mr. Coughlin was told that his application had been reviewed by the State and he was approved to purchase a rifle.

The State complains in its brief that finding of fact number four (CP 21) states that this application had been reviewed “by a local police agency” rather than the State of Washington, as though this makes any

difference in the analysis of this case. What Mr. Coughlin, a lay person, was told was that the ATF application he filled out had been reviewed by the State of Washington and been approved. The State seeks to negate this clear affirmative misrepresentation made by Bob's Merchandise under both State and Federal authority to Mr. Coughlin by accusing Mr. Coughlin of having lied in his application.

The State points to the question where Mr. Coughlin was asked whether he had been convicted of a crime for which the judge could have imprisoned him for more than one year, even if the judge actually imposed a shorter sentence, and where Mr. Coughlin answered "no." CP 14. The State believes this to be an intentional lie on the part of Mr. Coughlin. A fair review of Mr. Coughlin's plea statement on the Unlawful Imprisonment, however, reveals that it is at best confusing and at worst, misleading. It states that the top end of his standard range (which, as we now know, is the maximum sentence) is ten days' confinement, but in the next paragraph it states that the judge has the option of sentencing him, because he is a middle offender, up to thirty days' confinement. Then, in the next paragraph, it states that the "maximum punishment" is confinement until he is 21 years old or up to five years.

While leaving for another day the debate about why juvenile plea forms are consistently the most confusing in our system of justice, when in

fact they should be the most clear, it is simply ridiculous to suggest that Mr. Coughlin knowingly lied when he answered “no” to the aforementioned question. It is worth noting that the maximum sentence in the State of Washington is that sentence which can be imposed based upon the verdict alone. *Blakely v. Washington*, 542 U.S. 296 (2004). In this case, that maximum sentence was thirty days’ confinement, not five years’ confinement. While it is unlikely that Mr. Coughlin, a lay person, appreciated these distinctions or had anyway of knowing about the longstanding debate among criminal law practitioners in this state (settled by *Blakely*) about what the “maximum sentence” is, it strains credulity to suggest that he knowingly lied when he answered this question.

Even if this court were to find the affirmative misrepresentation made to Mr. Coughlin on his application to purchase a rifle unpersuasive, the trial court in this case was still amply within its discretion to dismiss this charge based upon the failure to warn under RCW 9.41.047 and the sixth month probation condition alone. In *State v. Moore*, 121 Wn.App. 889, 91 P.3d 136 (2004), Division III upheld the trial court’s dismissal of a prosecution for unlawful possession of a firearm based solely upon the failure of two earlier sentencing courts to provide the RCW 9.41.047 warning and comments by the earlier sentencing courts that Mr. Moore could “put this all of this behind him” when he reached the age of 21.

Moore at 896-97. Specifically the earlier sentencing courts had made these comments: “I hope you can put this behind you now and start living a twelve year old life instead of being in detention,” and “ Start living a life like a fourteen year old ought to [live] like, instead of like a thirty year old criminal.” *Moore* at 893-94.

Division III held that these comments misled Mr. Moore to believe that he was free to possess firearms once he turned 21. In ruling that the trial court did not abuse its discretion in dismissing the prosecution, the court stated:

Here, Mr. Moore was not advised of the loss of his rights, and affirmatively he was told that he could put the ordeal behind him if he stayed out of trouble...The court concluded that this was enough to warrant dismissal of the possession of a firearm charge. That for us is a decision exercised on tenable grounds and for tenable reasons.

Moore at 896. The court further clarified that one is materially prejudiced in a situation such as this when he can demonstrate that he was misled.

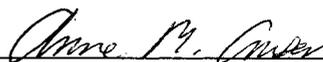
Moore at 895. The facts are substantially more egregious in Mr. Coughlin’s case than they were in *Moore*. Here, the earlier sentencing court went substantially beyond merely telling Mr. Coughlin that he could “put all of this behind him” at a later time in his life. Here, the earlier sentencing court led him to believe that any prohibition on his possession of a firearm would last only for the probationary period of six months.

And he was told, under the imprimatur of the government, that he was free, as of the year 2000, to purchase a rifle. The trial court did not abuse its discretion when it found that under the facts of this case, Mr. Coughlin's right to due process had been violated and dismissal of the prosecution was warranted.

E. CONCLUSION

This court should affirm the decision of the trial court dismissing the prosecution against Mr. Coughlin.

RESPECTFULLY SUBMITTED this 8th day of February, 2006.



ANNE M. CRUSER, WSBA #27944
Attorney for Mr. Coughlin

APPENDIX

1. 9.41.047. Restoration of possession rights

(1) At the time a person is convicted or found not guilty by reason of insanity of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.320, * 71.34.090, or chapter 10.77 RCW for mental health treatment, the convicting or committing court shall notify the person, 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. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity.

The convicting or committing court also shall forward a copy of the person's driver's license or identicard, or comparable information, to the department of licensing, along with the date of conviction or commitment.

(2) Upon receipt of the information provided for by subsection (1) of this section, the department of licensing shall determine if the convicted or committed person has a concealed pistol license. If the person does have a concealed pistol license, the department of licensing shall immediately notify the license-issuing authority which, upon receipt of such notification, shall immediately revoke the license.

(3)(a) A person who is prohibited from possessing a firearm, by reason of having been involuntarily committed for mental health treatment under RCW 71.05.320, *71.34.090, chapter 10.77 RCW, or equivalent statutes of another jurisdiction may, upon discharge, petition a court of record to have his or her right to possess a firearm restored. At the time of commitment, the court shall specifically state to the person that he or she is barred from possession of firearms.

(b) The secretary of social and health services shall develop appropriate rules to create an approval process under this subsection. The rules must provide for the restoration of the right to possess a firearm upon a showing in a court of competent jurisdiction that the person is no longer required to participate in an inpatient or outpatient treatment program, is no longer required to take medication to treat any condition related to the commitment, and does not present a substantial danger to himself or herself, others, or the public. Unlawful possession of a firearm under this subsection shall be punished as a class C felony under chapter 9A.20 RCW.

(c) A person petitioning the court under this subsection (3) shall bear the burden of proving by a preponderance of the evidence that the circumstances resulting in the commitment no longer exist and are not reasonably likely to recur. If a preponderance of the evidence in the record supports a finding that the person petitioning the court has engaged in violence and that it is more likely than not that the person will engage in violence after his or her right to possess a firearm is restored, the person shall bear the burden of proving by clear, cogent, and convincing evidence that he or she does not present a substantial danger to the safety of others.

(4) No person who has been found not guilty by reason of insanity may petition a court for restoration of the right to possess a firearm unless the person meets the requirements for the restoration of the right to possess a firearm under RCW 9.41.040(4).

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2
3 IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
4 DIVISION II

5 STATE OF WASHINGTON,)
6 Appellant,) Court of Appeals No. 33178-1-II
7 vs.) Cowlitz County No. 03-1-01706-7
8 NATHAN COUGHLIN,)
9 Respondent.) AFFIDAVIT OF MAILING
10

11 ANNE M. CRUSER, being sworn on oath, states that on the 8th day of February 2006
12 affiant placed a properly stamped envelope in the mails of the United States directed to:

13
14 Susan I. Baur
15 Cowlitz County Prosecuting Attorney
16 312 S.W. 1st Avenue
17 Kelso, WA 98626

18 and that said envelope contained the following

- 19 (1) BRIEF OF RESPONDENT
20 (2) VERBATIM REPORT OF PROCEEDINGS
21 (3) AFFIDAVIT OF MAILING

22 AND

23 David C. Ponzoha, Clerk
24 Court of Appeals, Division II
25 950 Broadway, Suite 300
Tacoma, WA 98402-4454

and that said envelope contained the following

AFFIDAVIT OF MAILING - 1 -

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DIVISION II
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STATE OF WASHINGTON
BY AMA
DEPUTY

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- (1) BRIEF OF RESPONDENT (2 COPIES)
- (2) AFFIDAVIT OF MAILING

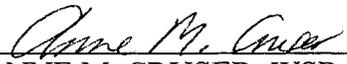
AND

Mr. Nathan Coughlin
 1828 Maple Street #107
 Longview, WA 98632

and that said envelope contained the following

- (1) BRIEF OF RESPONDENT
- (2) R.A.P. 10.10
- (3) AFFIDAVIT OF MAILING

Dated this 8th day of February 2006


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

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

Date and Place: February 8th, 2006, Kalama, Washington

Signature: Anne M. Cruser

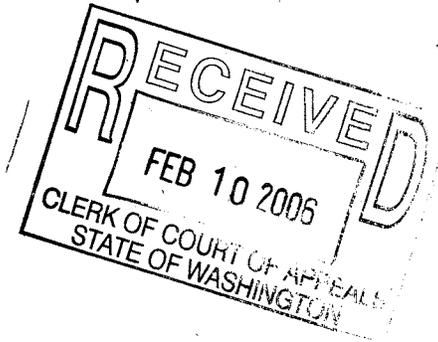
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February 8th, 2006

Mr. David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402



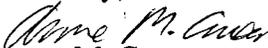
State of Washington, Appellant, v. Nathan Coughlin, Respondent
Cowlitz County No. 03-1-01706-7
Court of Appeals No. 33178-1-II

Dear Mr. Ponzoha:

Enclosed please find Respondent's brief, as well as the Affidavit of Mailing.

Please do not hesitate to contact me if I can be of further assistance.

Sincerely,


Anne M. Cruser
Attorney at Law