

FILED
COURT OFFICIALS

JUL 17 AM 9:28

STATE OF WASHINGTON

BY 

No. 33855-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEVEN A. HAGGARD,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Lisa Worswick, Judge

KATHRYN RUSSELL SELK
WSBA No. 23879
Counsel for Appellant

RUSSELL SELK LAW OFFICE
1037 Northeast 65th, Box 135
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF THE CASE 2

 1. Procedural Facts 2

 2. Facts relevant to issues on appeal 3

D. ARGUMENT 5

 1. APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE FIREARM ENHANCEMENT 5

 a. There was insufficient evidence appellant was “armed” as that term is legally defined 6

 b. The enhancement must be stricken and a different standard range employed on remand 8

 2. APPELLANT’S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF APPOINTED COUNSEL WERE VIOLATED 9

 3. THE SENTENCING COURT ERRED IN IMPOSING A SENTENCE FOR THE DRUG POSSESSION WHICH WAS GREATER THAN THE STATUTORY MAXIMUM FOR THAT OFFENSE 12

E. CONCLUSION 15

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000) 10

State v. Bowerman, 115 Wn.2d 794, 802 P.2d 116 (1990) 9

State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005) 6, 7

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996) 9

State v. Myers, 133 Wn.2d 26, 941 P.2d 1102 (1997) 6

State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983), overruled in part and on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989) 5

State v. Santiago, 149 Wn.2d 402, 68 P. 3d 1065 (2003) 13

State v. Schelin, 147 Wn.2d 562, 55 P.3d 632 (2002) 6

State v. Studd, 137 Wn.2d 533, 973 P.2d 1049 (1999) 9

State v. Thomas, 150 Wn.2d 666, 80 P.3d 168 (2003) 13, 14

State v. Tongate, 93 Wn.2d 751, 613 P.2d 121 (1980) 5

State v. Valdobinos, 122 Wn.2d 270, 858 P.2d 199 (1993) 6, 7

State v. Willis, 153 Wn.2d 366, 103 P.3d 1213 (2005) 7

WASHINGTON COURT OF APPEALS

State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005) 10, 11

State v. Johnson, 94 Wn. App. 882, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000) 7

State v. May, 100 Wn. App. 478, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000) 11

State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003) 10

State v. Zavala-Reynoso, 127 Wn. App. 119, 110 P.3d 827 (2005) 13,14

FEDERAL AND OTHER CASELAW

Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984) 9

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

14th Amend. 5
6th Amend. 5, 9
RCW 69.50.401(1)(2)(b). 2
RCW 69.50.4013 13
RCW 9.41.040(1)(a) 2, 10
RCW 9.94A.505(5) 13, 14
RCW 9.94A.510 2
RCW 9.94A.517 6, 8, 9, 14
RCW 9.94A.518 8, 9, 14
RCW 9.94A.533(3) 1, 6
RCW 9.94A.599 12-14
RCW 9A.20.021 13
RCW 9A.76.175 2
Wa. Const., Art. I, § 22 6, 9

A. ASSIGNMENTS OF ERROR

1. Appellant's state and federal due process rights were violated when a firearm enhancement was imposed and his standard range increased on a drug possession offense where there was insufficient evidence to support that enhancement.

2. Appellant's state and federal constitutional rights to effective assistance of appointed counsel were violated when counsel failed to propose an instruction which was necessary and crucial for the defense.

3. The sentencing court erred in ordering appellant to serve a sentence on the drug possession offense which exceeded the statutory maximum.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Appellant was convicted of the lesser included offense of possession of methamphetamine with a firearm enhancement. To prove a defendant was "armed" under RCW 9.94A.533(3), the prosecution was required to show a link between not only the defendant and the gun but also the gun and the crime.

Was the evidence insufficient to prove that appellant was "armed" for the methamphetamine possession offense where the gun was not found with the drugs, the truck in which the gun was found did not belong to appellant but rather the passenger, the passenger had been alone and shown the gun as his own to appellant's mother earlier in the day, and the gun was inside the door panel far enough down that officers only saw it by shining a flashlight down inside to see what was in the hole?

2. The crucial issue regarding the unlawful possession of a firearm offense was whether appellant even knew the gun was stuffed inside the door of the friend's car he was driving. Was counsel prejudicially ineffective in failing to propose an "unwitting possession" instruction which would have held the prosecution to its burden of disproving that affirmative defense?

3. Did the sentencing court err in imposing a sentence of 42 months for the offense, 18 months for the sentence enhancement, and 9-12 months of community custody where the statutory maximum for the relevant offense was 60 months?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven A. Haggard was charged by amended information filed in Pierce County with first-degree unlawful possession of a firearm, unlawful possession of a controlled substance with intent to deliver, and making a false or misleading statement to a public servant. CP 9-12; RCW 9.41.040(1)(a); RCW 9.94A.510; RCW 9A.76.175; RCW 69.50.401(1)(2)(b). The possession offense was charged with a firearm enhancement. CP 9-12.

A jury trial was held before the Honorable Lisa Worswick on July 6-7, 11-12, 2005. RP 2, 25, 98, 216. The jury found Mr. Haggard not guilty of possessing the drugs with intent to deliver but guilty of the lesser included offense of simple possession of the drugs, of committing that possession while armed with a firearm, of possessing the firearm unlawfully, and of make a false or misleading statement. CP 102-106.

On September 23, 2005, Judge Worswick ordered Mr. Haggard to serve 60 months in custody for the drug possession offense, based upon 42 months for the underlying offense and 18 months for the firearm enhancement. CP 110-122; RP 257-58. The 42 months was to be served concurrently with the standard-range sentence for the firearm possession offense but the enhancement was to be served consecutively. CP 110-122. Also imposed on the drug possession offense was a 9-12 month term of community custody. CP 110-122; RP 257-58. A suspended sentence was ordered for the false statement offense. CP 123-124.

Mr. Haggard timely appealed, and this pleading follows. See CP 109.

2. Facts relevant to issues on appeal

Pierce County Sheriff's deputies Richard Scaniffe and Scott Mock were on patrol at about 10:30 p.m. on September 20, 2004, when they noticed a gray Mazda pickup truck with only one headlight illuminated. RP 27-30. After stopping the truck, they spoke to the two men inside, with Deputy Scaniffe speaking to the passenger, Brenton Metzger, and Deputy Mock speaking to the driver, later identified as Steven Haggard. RP 29-31.

Deputy Mock asked the driver for identification and the man said he did not have a license but that his name was "Brian Hempstead" and his date of birth was March 12, 1971. RP 80-82. Because the man was acting "nervous," the deputy did not believe him and told the driver he would be arrested if it turned out the name and birthdate were wrong. RP 80-82. When the deputy started to walk away, the driver then called him back and

identified himself as Steven Haggard, with a birthdate of March 22, 1971. RP 35, 80-82. Mr. Haggard explained that he had given the wrong information because he had a warrant out for his arrest. RP 35.

Both Mr. Metzger and Mr. Haggard were arrested, and the truck was searched. RP 36. Inside a partially open black bag on the seat between where Mr. Metzger and Mr. Haggard had sat was a mostly empty box of ammunition and, in the front pocket, some court paperwork and a vehicle registration for another vehicle, with Mr. Haggard's name on them. RP 41-42. Also in the bag was a plastic cylinder with two plastic bags in it, one inside the other. RP 56-57. Both had some white crystalline powder in them, and the only one tested showed positive for methamphetamine. RP 57-58, 89, 157-59. A digital scale found in a red bag behind a seat in the truck was not tested for drugs and the deputies did not remember it having any suspicious residue on it. RP 58, 96, 157-59.

The jury acquitted Mr. Haggard of possessing the drugs with intent to deliver, but found him guilty of simple possession of the drugs. CP 102-106.

Also found in the truck, inside holes where the speakers would normally be found in the passenger and driver's side doors, the deputies found guns. RP 36-39. The door panels were still on the doors and the guns were behind the respective door covers in each door. RP 66. The gun found in the driver's side door had a magazine with rounds in it but was not "chambered" and thus, according to Deputy Scaniffe, was not ready to fire. RP 40. The gun was only found by Deputy Mock after he saw the speaker hole, got out a flashlight, and looked down inside the hole,

seeing the “butt” of the handgun sitting inside the door frame. RP 84, 94. Deputy Scaniffe admitted that, without a flashlight, the gun would not have been “visible to the naked eye.” RP 67. The deputy also could not recall where in the door the gun was but thought that only the “butt end” of the gun was visible when the officers looked. RP 71. For his part, Deputy Mock said he looked inside the holes in the door to see what was inside “because there’s nothing there” when he saw them. RP 84.

Earlier in the day, Mr. Metzger was at Mr. Haggard’s mother’s house looking for Mr. Haggard. RP 181-82, 184. Mr. Metzger had driven there in the gray Mazda pickup, which belonged to the Metzger family. RP 181-82, 184. Mrs. Haggard testified that Mr. Metzger had two guns with him at the house, and even accidentally fired one of them while Mrs. Haggard was in another room. RP 184, 187. Before Mr. Metzger left, Mrs. Haggard gave Mr. Metzger some court documents to give to Mr. Haggard when he saw him. RP 184.

D. ARGUMENT

1. APPELLANT’S DUE PROCESS RIGHTS WERE VIOLATED BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO PROVE THE FIREARM ENHANCEMENT

Both the state and federal constitutions require the prosecution to shoulder the burden of proving every essential element of an allegation of a firearm enhancement, beyond a reasonable doubt. State v. Pam, 98 Wn.2d 748, 752, 659 P.2d 454 (1983), overruled in part and on other grounds by State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989); State v. Tongate, 93 Wn.2d 751, 754, 613 P.2d 121 (1980); 6th Amend.; 14th

Amend.; Wa. Const., Art. I, § 22. An enhancement is therefore not constitutionally proper unless the prosecution meets the burden of proving, beyond a reasonable doubt, that the defendant or an accomplice was “armed” at the time of the offense. State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993); RCW 9.94A.533(3). In reviewing the sufficiency of the evidence to prove an enhancement, this Court determines whether, viewed in the light most favorable to the state, a rational trier of fact could have found the facts supporting it, beyond a reasonable doubt. See State v. Myers, 133 Wn.2d 26, 37, 941 P.2d 1102 (1997).

In this case, this Court should strike the firearm enhancement and should remand for resentencing, because there was insufficient evidence to support the enhancement and the imposition of that enhancement increased the standard range because of the special provisions for armed drug offenses contained in RCW 9.94A.517.

a. There was insufficient evidence appellant was “armed” as that term is legally defined

The legal definition of when someone is “armed” for the purposes of a firearm enhancement is very specific. See State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005). Under the law, a person is only “armed” with a firearm during the commission of a crime if the firearm is easily accessible and readily available for use for either offensive or defensive purposes. Valdobinos, 122 Wn.2d at 282. Further, there must be a “nexus” between the gun and the crime, and the gun and the person. State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002).

Thus, more than just the presence of a gun in a place where there is illegal activity is required, as is more than the mere constructive possession of a gun by someone engaged in illegal activity. State v. Johnson, 94 Wn. App. 882, 895-96, 974 P.2d 855 (1999), review denied, 139 Wn.2d 1028 (2000); Gurske, 155 Wn.2d at 138; Valdobinos, 122 Wn.2d at 282. Instead, as the Gurske Court noted, the “nexus requirement refines the analysis” and limits the application of an enhancement so that it is not imposed where the defendant simply has a weapon “unrelated to the crime.” 155 Wn.2d at 141, quoting, State v. Willis, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005). Thus, in Gurske, although the gun was in the same car as the drugs, there was insufficient evidence that gun was within the defendant’s reach, no evidence he made any movement towards it, and no evidence that he “had used or had easy access to use the weapon against another person at any other time” such as when he acquired or possessed the drugs, so that the firearm enhancement was improper. Gurske, 155 Wn.2d at 143.

Similarly, here, there is no question that the gun was in the same car as the drugs. But there was insufficient evidence that the gun was within the defendant’s reach. Neither of the officers ever testified that Mr. Haggard could have reached down inside the door frame and grabbed the gun from where he sat as the driver of the truck. RP 25-114.

Further, there was no evidence Mr. Haggard made any movement towards the gun, or that he had used or had easy access to use it at any time relevant to the possession of the drugs found in the bag. Indeed, there was no evidence that Mr. Haggard ever handled the gun - the only

evidence was that Mr. Metzger, not Mr. Haggard, had the guns when he was *by himself* earlier in the day. And it is undisputed that the truck belonged to Mr. Metzger's family, not Mr. Haggard.

Taken together, and in the light most favorable to the state, this evidence simply did not prove any link between the gun in the door and the possession of the drugs in the bag. This Court should so hold.

b. The enhancement must be stricken and a different standard range employed on remand

In many cases, where a firearm enhancement is invalid, it is sufficient to simply strike that enhancement. Here, however, more is required. Under the relatively new drug sentencing scheme, the Legislature has created three levels of drug offenses, set forth in RCW 9.94A.518. Simple possession of methamphetamine is considered to have a low seriousness and is designated a "level I." RCW 9.94A.518. In contrast, any felony violation of RCW Title 69.50 "with a deadly weapon special verdict" is considered the highest seriousness level, "level III." RCW 9.94A.518. RCW 9.94A.517, the "drug offense sentencing grid," establishes the standard range for a person with an offender score of 6 or above who commits a level I drug offense at 12-24 months. RCW 9.94A.517. For a level III drug offense, the standard range is greatly increased. RCW 9.94A.517.

In this case, Mr. Haggard was ordered to serve 18 months of flat time for an improper firearm enhancement. His standard range was also increased substantially (to 51-61 months) because of the finding of guilt

for that enhancement¹. Because the enhancement was not proper, this Court should not only strike the 18-month enhancement but also remand for resentencing within the correct standard range of 12-24 months.

2. APPELLANT'S STATE AND FEDERAL
CONSTITUTIONAL RIGHTS TO EFFECTIVE
ASSISTANCE OF APPOINTED COUNSEL WERE
VIOLATED

Both the state and federal constitutions guarantee the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). Although there is a "strong presumption" that counsel's representation was effective, that presumption is overcome where counsel's conduct fell below an objective standard of reasonableness and prejudiced the defendant. See State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

In this case, this Court should reverse the unlawful firearm possession conviction, because counsel was prejudicially ineffective in relation to that count.

To prove Mr. Haggard guilty of the firearm possession offense, the prosecution had to show more than just that he was next to the gun tucked down inside the truck's door. A person is only guilty of unlawful

¹The prosecutor erroneously indicated the standard range was 51-61 months, rather than the 100-120 months the statute seems to require. RP 251; see RCW 9.94A.517; RCW 9.94A.518. The effect of that error is discussed further, *infra*.

possession of a firearm if they have the prerequisite prior conviction and knowingly possess a firearm. RCW 9.41.040; State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000).

“Unwitting possession” is an affirmative defense to the crime of unlawful possession of a firearm. See State v. Warfield, 119 Wn. App. 871, 80 P.3d 625 (2003). Further, because unlawful possession of a firearm is not a strict liability offense, it is required that the prosecutor bear the burden to disprove that defense, instead of the defendant having to prove it. State v. Carter, 127 Wn. App. 713, 717, 112 P.3d 561 (2005). As a result, it is ineffective assistance of counsel to act in a way relating to jury instructions which ensures that the jury is misinformed about the state’s burden for the defense. See Carter, 127 Wn. App. at 717-18 (reversing based on counsel’s ineffectiveness for proposing an unwitting possession instruction which placed the burden on the defendant to prove the defense).

In this case, the main issue for the unlawful firearm possession count was whether Mr. Haggard knowingly constructively possessed the gun or whether this was “all a big misunderstanding” and the guns belonged to his buddy. RP 212, 221. The prosecution’s argument was that it had met its burden of proof because it was not “reasonable” that Mr. Haggard did not know the gun was there. RP 229. Indeed, in rebuttal closing argument, the prosecutor faulted the defense for failing to “quite get to” the argument that Mr. Haggard had not known the gun was there. RP 236.

It is clear that unwitting possession was the defense for the gun

possession, just as it was for the drug possession offense. And counsel proposed an “unwitting possession” instruction for the drugs sitting on the seat between the two men. See RP 195; CP 59-60. Yet counsel failed to propose an “unwitting possession” instruction for the gun stuffed down inside the door of the car, even though his client’s defense on that count was far stronger than his defense for the drugs found closer, in a bag which was visible to the naked eye, and near identification papers of Mr. Haggard.

Under the facts of this case, a reasonable attorney would have proposed a proper unwitting possession instruction “placing the burden of proof on the State.” See Carter, 127 Wn.2d at 717. Indeed, had such an instruction been proposed, it would have been reversible error for the court to have refused it. See, e.g., State v. May, 100 Wn. App. 478, 997 P.2d 956, review denied, 142 Wn.2d 1004 (2000) (even under former law that knowledge was not an element of the crime, error to fail to instruct on unwitting possession when facts indicate a lack of awareness of presence of firearm). There could be no strategic reason to fail to instruct the jury on the prosecution’s burden of disproving the very defense upon which Mr. Haggard’s entire case against this count relied.

Further, counsel’s unprofessional failure prejudiced Mr. Haggard. The evidence on the unlawful firearm possession count was scanty at best. It is undisputed that it was Mr. Metzger, not Mr. Haggard, who was in actual possession of the guns earlier in the day, at a time when he was not even with Mr. Haggard. It is also undisputed that the truck was not Mr. Haggard’s but rather belonged to Mr. Metzger’s family and was being

driven by Mr. Metzger alone earlier in the day. And it is undisputed that Mr. Haggard would have had to look into the hole in the driver's side door with a flashlight to see even part of the gun.

Indeed, the only evidence indicating any possible link between Mr. Haggard and the gun in the driver's side door was that it was of the same caliber as the bullets found inside the bag where the drugs were found. But the ownership of that bag was in question at trial. In any event, .22 caliber ammunition was not shown to be so unusual or distinctive that its possession necessarily proved knowledge or ownership of a gun of that caliber, inside the truck's door.

Had the jury been properly instructed as to the state's true burden, it would have been able to properly and fairly evaluate the state's evidence, and likely would not have convicted. Counsel's failure to propose the very crucial instruction on his client's affirmative defense was ineffective assistance, and this Court should so hold and should reverse the unlawful firearm possession conviction.

3. THE SENTENCING COURT ERRED IN IMPOSING A SENTENCE FOR THE DRUG POSSESSION WHICH WAS GREATER THAN THE STATUTORY MAXIMUM FOR THAT OFFENSE

Even if this Court does not find that the scant evidence submitted below is insufficient to support the firearm enhancement in this case, reversal for resentencing is still required, because the sentencing court erroneously imposed a sentence greater than the statutory maximum for the drug possession offense.

RCW 9.94A.599 places limitations on sentences which may be

imposed. State v. Santiago, 149 Wn.2d 402, 68 P. 3d 1065 (2003). Under that statute, unless a defendant is a persistent offender, the total sentence which may be imposed is “presumptively limited by the statutory maximum for the underlying offense.” Id. Further, where a standard range sentence and a firearm enhancement are imposed, the statute mandates that the firearm enhancement must not be reduced even if its addition “increases the sentence so that it would exceed the statutory maximum for the offense.” RCW 9.94A.599. If the addition of the firearm enhancement increases the sentence beyond the statutory maximum, then the court must reduce “the base sentence to accommodate the firearm enhancement.” State v. Thomas, 150 Wn.2d 666, 671, 80 P.3d 168 (2003).

A similar doctrine is contained in RCW 9.94A.505(5). Under that statute, except in circumstances not applicable here,

a court may not impose a sentence providing for a term of confinement or community supervision, community placement, or community custody which exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.

Thus, a court crafting a sentence must not only be aware of the limits of the statutory maximum when imposing time in custody such as a base sentence and enhancement, but also when imposing community custody. See State v. Zavala-Reynoso, 127 Wn. App. 119, 124, 110 P.3d 827 (2005).

In this case, the statutory maximum for the possession of methamphetamine offense was five years. RCW 69.50.4013 (possession is a class C felony); RCW 9A.20.021 (statutory maximum for class C

felony is 5 years); see Thomas, 150 Wn.2d at 671. The standard range was indicated by the prosecutor as 51-61 months. RP 251.

As a preliminary matter, it appears this calculation may have been in error. Mr. Haggard's offender score of above 9 and the possession offense with a deadly weapon special verdict as a level III drug offense seems to lead to a standard range of 100-120 months. RCW 9.94A.517; RCW 9.94A.518.

This possible error, however, is immaterial, because of the statutory maximum for the offense. Regardless whether the standard range was for 51-61 months or for 100-120 months, the maximum base sentence Mr. Haggard could receive and still receive the full 18-month term of the enhancement was 42 months, under RCW 9.94A.599. The prosecutor properly recognized that fact, and the court properly imposed a 42-month base sentence, along with the 18-month enhancement. RP 251, 257-59.

After doing so, however, the court then erroneously ordered Mr. Haggard to serve 9-12 months of community custody. CP 110-22; RP 257-59. Taken together, the 42-month sentence, the 18-month enhancement, and the 9-12 month term of community custody amounts to a total of 69-72 months, 9-12 months greater than the statutory maximum of five years or 60 months. Thus, the sentence imposed was in violation of RCW 9.94A.505(5); see Zavala-Reynoso, 127 Wn. App. at 124.

It is Mr. Haggard's position that, because the firearm enhancement was erroneously imposed, he is entitled to resentencing based upon the correct, lower standard range for the offense, as well as having the enhancement stricken, as argued *infra*. Should this Court uphold the

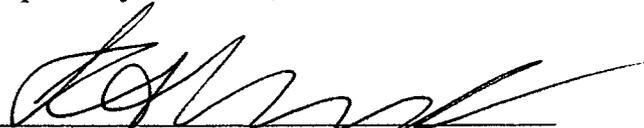
enhancement, however, reversal is nevertheless required to correct the sentencing court's error in imposing a sentence above the statutory maximum in this case.

E. CONCLUSION

There was insufficient evidence that Mr. Haggard was armed with the firearm as that term is defined under the law. Counsel was ineffective on the crucial issue of his client's affirmative defense for the unlawful firearm possession count. And the trial court erred in imposing a combined sentence and term of community custody which exceeded the statutory maximum for the drug count. For these reasons, this Court should reverse.

DATED this 13th day of January, 2006.

Respectfully submitted,


KATHRYN RUSSELL SELK, No. 23879
Counsel for Appellant
RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street, Box 135
Seattle, Washington 98115
(206) 782-3353

