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No. 36799-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

CHRISTOPHER SIEYES

BRIEF OF APPELLANT

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4. Is RCW 9.41.040(2)(a)(iii) unconstitutional because it violates Mr. Sieyes' fundamental right to bear arms and is not narrowly tailored to serve a compelling state interest?

5. Did the trial court err by not requiring the State to prove the absence of the defenses set out in RCW 9.41.042?

B. Statement of Facts

Christopher Sieyes was charged with unlawful possession of a firearm in the second degree in Kitsap County Juvenile Court. CP, 1. Mr. Sieyes has a date of birth of December 23, 1989 and was 17 years old at all times relevant to this case. RP, 20. The case proceeded to trial in August of 2007 and the Juvenile Court found him guilty. CP, 4. In finding him guilty, the Court concluded that Mr. Sieyes had constructive possession of the firearm. CP, 12. In neither the court's oral decision or in the written findings of fact and conclusions of law did the Court conclude that the possession was "knowing."

Deputy Van Gesen conducted a traffic stop on April 26, 2007 in Kitsap County. RP, 26. The vehicle, a Suzuki Swift, was traveling in excess of the speed limit. RP, 26. As he was making the stop, Deputy Van Gesen observed three occupants in the car. RP, 27. While making the stop, he observed the front passenger, Christopher Sieyes, reach to the

handgun was loaded with six rounds in the magazine. RP, 36. Later, Deputy Van Gesen located a spent .380 casing at the feet of the back seat passenger. RP, 39. No latent fingerprints were found on the handgun. RP, 57.

Deputy Brian Petersen assisted with the search of vehicle. RP, 60. He discovered a Nike jacket in the rear, passenger side. RP, 60. The jacket had a Nike emblem on it. RP, 62. Inside the jacket was a .380 bullet, tobacco, and a small amount of amphetamine. RP, 54, 60. The police did not know who the Nike jacket belonged to. RP, 62. Mr. Sieyes' brother, Timothy Binkley, testified he had never seen Mr. Sieyes with a handgun. RP, 72. He was familiar with the Nike jacket and knew it belonged to Mr. Lawing. RP, 73. Mr. Binkley had seen Mr. Lawing with multiple firearms in the past, including a .380. RP, 75-76. Witness David Cross also testified he had seen Mr. Lawing shooting a .380 in the past. RP, 24 (August 29).

Janay Schnabel, Mr. Lawing's girlfriend, was the back seat passenger on the passenger side. RP, 9 (August 29). She described the car as "trashed," with lots of clothes and random items. RP, 10 (August 29). She never saw a firearm in the vehicle that night. RP, 12 (August 29). There was no conversation about a firearm. RP, 16 (August 29).

of law are reviewed de novo. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002). Mr. Sieyes objects to Finding of Fact III, which reads:

That during a safety search of the vehicle for weapons, Deputy Vangesen found a hand gun underneath the seat where Respondent had been sitting. The gun was found leaning against a ledge just under the front portion of the front passenger seat, and, was located in an area that Deputy Vangesen saw Respondent reaching. The gun was found more towards the front of the seat and was not easily accessible from the rear seat.

The testimony at trial about the firearm's accessibility from the front seat was confusing. Deputy Van Gesen described the passenger seat as having "some framework at the front of the seat" and the handgun was leaning against the framework. RP, 32. Although the firearm was assessable from the front seat, (RP, 58), access would have been difficult. Deputy Van Gesen described the effort to access the firearm, saying one would "have to go over this ridge and then push it another foot and a half into the backseat." RP, 33.

Deputy Van Gesen also testified that the firearm could not be seen from the passenger seat and when he first inspected the area, including running his hand underneath the seat, he did not see the firearm. RP, 30, 46. Finding of Fact III is not supported by substantial evidence.

2. The evidence is insufficient to convict Mr. Sieyes of unlawful possession of a firearm.

3. The trial court erred by not concluding that Mr. Sieyes' possession was "knowing."

Knowledge that the defendant is in possession of a firearm is a requisite element of the offenses of unlawful possession of a firearm. State v. Anderson, 141 Wn.2d 357, 361, 5 P.3d 1247 (2000); State v. Williams, 158 Wn.2d 904, 148 P.3d 993 (2006). The trial court in its oral decision relied on an antiquated version of the WPIC 133.52 and did not consider "knowledge" to be an element of the offense. RP, 35 (August 29). This was error and violated Mr. Warren's Sixth Amendment right to have the Court determine all the essential elements beyond a reasonable doubt.

The failure to enter findings of fact and conclusions of law is subject to a harmless error analysis. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998). In State v. Banks, 149 Wn.2d 38, 65 P.3d 1198 (2003), the Supreme Court reviewed the same scenario as presented by Mr. Sieyes' case. In Banks, the defendant was charged with unlawful possession of a firearm, but his bench trial was held prior to the Anderson decision being published. After the Supreme Court decided Anderson, he appealed arguing that the trial court erred by not deciding that the firearm possession was knowing.

The Banks Court first concluded that the trial court had erred by not deciding that the firearm was possessed knowingly. The Court then

a. The right of the individual to bear arms is a fundamental constitutional right.

Both the United States and Washington Constitutions recognize the right to bear arms. Both constitutional provisions grant the right of the individual citizen to bear arms. The Second Amendment reads, “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.” Under the Second Amendment, therefore, it is the right “of the people to bear arms.” Article 1, section 24 is more explicit insofar as it grants the right to “the individual:” “The right of the individual to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”

Washington has a long tradition of protecting the right of the individual to own and possess firearms. Commenting that constitutionally protected behavior cannot be the basis of criminal punishment, the Supreme Court reversed a death sentence after the prosecutor inferred that the defendant’s gun ownership aggravated his crime. State v. Rupe, 101 Wn.2d 664, 703-08, 683 P.2d 571 (1984). In Rupe, the Court said that any state action that “unnecessarily chill[s] or penalize[s]” the right to bear arms is unconstitutional.

While it is possible the United States Supreme Court will disagree with Judge Silberman, the weight of authority is that the right to bear arms is a fundamental individual right and supported by both the United States and Washington Constitutions.

b. RCW 9.41.040(2)(a)(iii) is not narrowly tailored to serve a compelling state interest.

State interference with a fundamental right is subject to strict scrutiny. In re Parentage of C.A.M.A., 154 Wn.2d 52, 57, P 10, 109 P.3d 405 (2005). Strict scrutiny requires that the infringement be narrowly tailored to serve a compelling state interest. Amunrud v. Board of Appeals, 158 Wn.2d 208; 143 P.3d 571 (2006).

The Washington Court of Appeals recently struck down as unconstitutional another provision of RCW 9.41.040 as not narrowly tailored. State v. Spiers, 119 Wn.App. 85, 79 P.3d 30 (2003). At issue in Spiers was the constitutionality of RCW 9.41.040(2)(a)(iv). (The case talks about RCW 9.41.040(1)(b)(iv), but the statute has been renumbered. The current numbering is used.) RCW 9.41.040(2)(a)(iv) makes it illegal to own or possess a firearm if the person is free on bond or personal recognizance pending trial for a serious offense. The Court found this provision to be an undue burden on the gun owner.

exception is subsection (2)(a)(iii). Assuming arguendo that the former provisions are narrowly tailored to serve a compelling state interest, there is reason to distinguish minors from felons.

The argument that the State has not narrowly tailored its statute is best demonstrated by the nine exceptions carved out by RCW 9A.16.042. While some of the exceptions are narrowly written, such as possessing a firearm during a firearm safety course, several of the exceptions are very broad. For instance, a minor who is at least 14 years old, has been issued a hunter safety certificate, and not trespassing on property may lawfully possess a firearm under subsection (5).

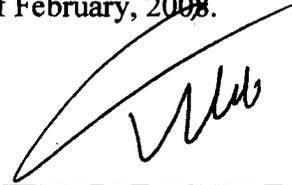
The most broad exception is subsection (8), which reads, "At his or her residence and who, with the permission of his or her parent or legal guardian, possesses a firearm for the purpose of exercising the rights specified in RCW 9A.16.020(3)." RCW 9A.16.020(3), often called the self-defense statute, gives a person the right to use lawful force to avoid injury. In other words, a minor is allowed to possess a firearm in his home to prevent a home invasion robbery, but is not allowed to possess a firearm in his car to avoid a car jacking. RCW 9A.16.040(2)(a)(iii) is unconstitutionally broad as written.

right to possess firearms. As such, any restrictions on this constitutional right must be narrowly tailored. The State should bear the burden to prove absence of the exceptions listed in RCW 9.41.042.

D. Conclusion

Mr. Sieyes' conviction for unlawful possession of a firearm should be dismissed.

DATED this 7th day of February, 2008.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

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Attorney for Defendant

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On February 7, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

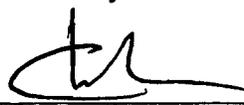
On February 7, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to Mr. Christopher Sieyes, 3664 S.E. Kowalski Lane, Port Orchard, WA 98367.

Dated this 7th day February, 2008.


Thomas E. Weaver
WSBA #22488
Attorney for Defendant

SUBSCRIBED AND SWORN to before me this 7th day of February, 2008.




Christy A. McAdoo
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 07/31/2010