

No. 36799-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON

V.

CHRISTOPHER SIEYES

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

ORIGINAL

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A. Assignment of Errors

Assignment of Errors

1. 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."
4. Mr. Sieyes' conviction for violation of RCW 9.41.040(2)(a)(iii) should be dismissed because the statute is an unconstitutional infringement of his fundamental right to bear arms.
5. The trial court erred by not requiring the State to prove the absence of the defenses set out in RCW 9.41.042.

Issues Pertaining to Assignment of Errors

1. Is Finding of Fact III supported by substantial evidence?
2. Is the evidence sufficient to convict Mr. Sieyes of unlawful possession of a firearm?
3. Did the trial court err by not concluding that Mr. Sieyes' possession was "knowing?"

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

front floorboard as he twisted his body towards the floorboard. RP, 29. Although Mr. Sieyes reached down, his shoulders remained in sight at all times. RP, 29.

Deputy Van Gesen approached on the passenger side and ordered Mr. Sieyes out of the car. RP, 30. The deputy looked down at the floorboard but did not see anything of note. RP, 30. He also put his hand down under the front of the seat, but did not feel anything. RP, 46. He patted down Mr. Sieyes and did not locate anything. RP, 31. Deputy Van Gesen then ordered the driver, Jacob Lawing, out of the car. RP, 31. Mr. Lawing was later determined to be the owner of the vehicle. RP, 51. Mr. Lawing said that he had just purchased the car. RP, 51.

While on the driver's side of the car, Deputy Van Gesen looked closer under the passenger seat and saw a handgun. RP, 32. It would have been impossible to see the handgun from the passenger seat because it was located directly under the seat. RP, 32. The Suzuki Swift has "some framework at the front of the seat" and the handgun was leaning against the framework. RP, 32. Although the firearm was accessible 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. The handgun turned out to be a Bursa .380 handgun. RP, 35. 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).

Mr. Sieyes' father, Monte Trousdale, testified that he got rid of all of his guns the day his kids were born. RP, 21. The family does own a pellet gun that Mr. Trousdale keeps locked in his bedroom. RP, 21. Mr. Sieyes is permitted to shoot the pellet gun only in his backyard and only with proper safety equipment. RP, 21.

Mr. Sieyes called Mr. Lawing to testify at trial. RP, 3 (August 29). Mr. Lawing invoked his Fifth Amendment right to remain silent, however. RP, 4 (August 29). Defense counsel then sought to admit Mr. Lawing's criminal history for two purposes. First, he sought to impeach Mr. Lawing's hearsay statements. RP, 5 (August 29). He also sought to show that Mr. Lawing is a convicted felon for whom firearm possession is illegal. RP, 5 (August 29). The Court admitted the evidence. RP, 6 (August 29).

C. Argument

1. Finding of Fact III is not supported by substantial evidence.

When reviewing a finding of fact, this Court must determine whether substantial evidence supports the trial court's findings and whether those findings support its conclusions of law. This Court considers any fact that is not objected to a verity on appeal. Conclusions

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.

Possession may be actual or constructive. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Constructive possession is established by examining the totality of the circumstances and determining if there is substantial evidence from which a jury can reasonably infer the defendant had dominion and control over the item. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995). Proximity alone is insufficient to establish constructive possession, State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990), but it is one factor to consider. State v. Turner, 103 Wn. App. 515, 522-23, 13 P.3d 234 (2000).

In Echeverria, the Court of Appeals found insufficient evidence of constructive possession of a throwing star found under a vehicle seat. Of importance to the Court, there was no finding that the throwing star was visible, and the officer testified it was not.

Like the defendant in Echeverria, Mr. Sieyes was seated in a car that did not belong to him. There was no evidence proffered that he ever touched the firearm. The firearm could not be seen from the seat and, according to Deputy Van Gesen, could not be felt when running one's hands beneath the seat towards the front of the seat. Apparently, there was a ridge that would have made accessing the firearm difficult as well. Mr. Sieyes was not in constructive possession.

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

reviewed whether the error was harmless. Noting that the trial court had found that the defendant had picked up the firearm in its findings of facts, the Court concluded that the outcome would have been no different if the trial court had been asked to make a finding of knowledge. Reversal was, therefore, unnecessary.

In Mr. Sieyes' case, there was no evidence that Mr. Sieyes ever touched the firearm. The only evidence tying Mr. Sieyes to the firearm was his proximity to the firearm and the fact that the firearm would have been accessible, with difficulty, from his seat. Under these circumstances, the failure to find the possession was "knowing" was not harmless and reversal is required.

4. RCW 9.41.040(2)(a)(iii) is unconstitutional because it violates Mr. Sieyes' right to bear arms.

It does not appear that any Washington court has reviewed the constitutionality of RCW 9.41.040(2)(a)(iii). This statute makes it unlawful for any person under 18 years of age to possess a firearm, except as permitted by RCW 9.41.042. RCW 9.41.042 has a list of nine exceptions to the statute. This provision is an unwarranted interference with a fundamental right that is not narrowly tailored to the state's interest and is unconstitutional.

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.

In speaking about the right to bear arms, the Washington Supreme Court recently said,

Without doubt, this provision confers upon our fellow citizens the individual right to keep and bear arms. Although we have noted the right secured in our state constitution may be broader than that provided by the second amendment to the United States Constitution, we have yet to determine the outer limits of this provision. Yet there is no doubt each citizen enjoys equal privilege to the right guaranteed by this provision.

State v. Schelin, 147 Wn.2d 562, 588-89, 55 P.3d 632 (2002).

The right of the individual to possess a firearm under the Second Amendment is in a state of flux at this time. The D.C. Circuit Court of Appeals recently wrote a broad opinion recognizing the rights of individuals to possess firearms. Parker v. District of Columbia, 375 U.S. App. D.C. 140, 478 F.3d 370 (2007), rehearing en banc denied, cert. granted sub. nom. Heller v. District of Columbia, __ U.S. __ (07-290) (2007). A ruling from the United States Supreme Court is expected this spring. The Heller case represents the first case decided by the United States Supreme Court in over a century.

Writing for the majority in Parker, Judge Silberman concluded that the Second Amendment requires the State to recognize the right of the individual to possess a firearm, saying: "In sum, the phrase 'the right of the people,' when read intratextually and in light of Supreme Court precedent, leads us to conclude that the right in question is individual."

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.

Looking to the balancing test, this court balances the public benefit to prohibiting gun ownership by defendants who are free pending trial with the degree of frustration of the constitutional right. To avoid prosecution, Spiers not only had to sell his guns, but he had to arrange for the sale before he left custody. Thus, the degree of frustration is both immediate and complete. Though the frustration need only be temporary if the defendant is acquitted, the burden outweighs the benefits. The State's argument that a defendant who chooses to be out on bail necessarily submits to this divestiture demonstrates the significance of the rights at stake: one who is entitled to pretrial freedom must choose between incarceration and gun ownership even where his guns would be out of his possession.

The statute's prohibition against firearm ownership is not "reasonably necessary" to protect public safety, at least not as it applies to a person free on bond or personal recognizance pending trial for a serious offense. The prohibition against possession and control of a firearm is sufficient to protect public safety and welfare. The public does not derive much, if any, additional benefit by forbidding a person who is free on bond pending trial for a serious offense from owning firearms beyond that benefit secured by forbidding such persons from possessing or controlling firearms. That is, the public faces little danger from a defendant released on bond pending trial who owns, but may not possess, guns. Accordingly, the temporary removal of Spiers's gun ownership rights was not reasonably necessary to protect public safety. We hold the prohibition against ownership to be unconstitutional.

Spiers at 93-94.

The statute in this case is not narrowly tailored to serve a compelling state interest. All of the provisions of RCW 9.41.040 restrict the ability of felons, people free on bond for felony offenses, or people subject to court ordered involuntary mental health treatment. The

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 9.41.042. 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 9.41.040(2)(a)(iii) is unconstitutionally broad as written.

5. The trial court erred by not requiring the State to prove the absence of the defenses set out in RCW 9.41.042.

As noted above, there are nine defenses outlined in the statute that would make it legal for a minor to possess a firearm. There are no cases establishing who has the burden of proving the existence or non-existence of the statutory defenses. The trial court dismissed summarily the possibility that any of the defenses applied, saying, “[N]one of them would apply to the facts in this particular case.” RP, 35 (August 29).

Although the defenses of RCW 9.41.042 have never been addressed, the Court of Appeals has addressed a similar statute. RCW 66.44.270 makes it illegal for minors to possess or consume alcohol except for several enumerated exceptions. In State v. Lawson, 37 Wn. App. 539, 681 P.2d 867 (1984), the defendant argued that the burden should be on the State to prove the absence of the defenses. The Court of Appeals disagreed. Reasoning that placing the burden on the State would create an impossible burden, the Court of Appeals has held that the burden is on the defense to prove the existence of such a defense.

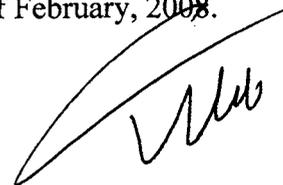
There is a significant difference between alcohol and firearms, however. No person has the right to possess alcohol. In fact, the State could make it illegal for anyone to possess alcohol if it chose. See United States Constitution, Amendment 21. On the other hand, the public has the

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.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,)	Case No.: 07-8-00353-7
)	Court of Appeals No.: 36799-8-II
Respondent,)	AFFIDAVIT OF SERVICE
)	
vs.)	
)	
CHRISTOPHER SIEYES,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On February 7, 2008, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

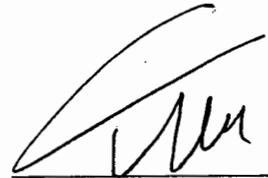
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On February 7, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-4683.

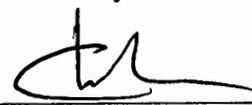
On February 7, 2008, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to Mr. Christopher Sieyes, 3664 S.E. Kowalski Lane, Port Orchard, WA 98367.

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