

NO. 46001-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

DAIVD SOHRAKOFF,

Appellant.

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

The Honorable Richard Brosey, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred by misadvising appellant regarding the scope of the restriction on his right to possess a firearm.

Issue Pertaining to Assignment of Error

Appellant pled guilty to four felony charges and was advised that, as a result, he could no longer possess a firearm. The sentencing court went further, however, and advised appellant that this meant he could not even be around a person with a gun. Was this advisement, which is inconsistent with Washington law, improper and unnecessarily restrictive of appellant's rights?

B. STATEMENT OF THE CASE

On March 7, 2013, appellant David Sohrakoff pled guilty to two counts of delivery of methamphetamine, one count of possession of methamphetamine, and one count of third-degree assault. CP 28. Following the prosecutor's recommendation, the court imposed concurrent standard range sentences totaling 40 months. CP 24, 34. The judgment and sentence states:

You may not own, use or possess any firearm, and under federal law any firearm or ammunition, unless your right to do so is restored by the court in which you are convicted or the superior court in Washington State where you live, and by a federal court if required. You must immediately surrender any concealed pistol license.

CP 39. At sentencing, the court advised Sohrakoff he no longer had the right to possess a firearm. 1RP¹ 28. The court explained that to do so would be a class B felony. 1RP 28. The court then told Sohrakoff, “So don’t have any guns in your house, car or apartment. Don’t be around anybody with a gun.” 2RP 28. Notice of appeal was timely filed after the court denied Sohrakoff’s motion to withdraw his guilty plea. CP 82-83, 84.

C. ARGUMENT

THE COURT MISADVISED SOHRAKOFF REGARDING THE CONSEQUENCES OF BEING IN THE VICINITY OF A PERSON WITH A FIREARM, AND SUCH ADVISEMENT IS IN DEROGATION OF HIS OTHER CONSTITUTIONAL RIGHTS.

The sentencing court told Sohrakoff he could not be around a person with a firearm, and failure to follow this admonishment would subject him to another felony prosecution. 1RP 28. This was an incorrect statement of the law because it announces an overly broad definition of constructive possession. State v. Lee, 158 Wn. App. 513, 515, 243 P.3d 929 (2010). Sohrakoff requests this Court remand with instructions to strike the oral advisement, as it did in Lee.

a. The Sentencing Court’s Oral Advisement Misstated the Law of Constructive Possession.

In any prosecution for unlawful possession of a firearm, the state must prove knowing possession of the firearm in question. State v.

¹ There are two volumes of Verbatim Report of Proceedings referenced as follows: 1RP – Mar. 7, 2013; 2RP – Mar. 5, 2014.

Anderson, 141 Wn.2d 357, 359, 5 P.3d 1247 (2000). Possession may be actual or constructive. State v. Callahan, 77 Wn.2d 27, 29-30, 459 P.2d 400 (1969); State v. George, 146 Wn. App. 906, 920, 193 P.3d 693 (2008). Constructive possession can be established by showing the accused had dominion and control over the contraband or over the premises where the contraband was found. Callahan, 77 Wn.2d at 29-30; George, 146 Wn. App. at 920. Dominion and control over the premises may raise a rebuttable inference of dominion and control over contraband on the premises, but it does not establish such dominion and control conclusively. State v. Cantabrana, 83 Wn. App. 204, 208, 921 P.2d 572 (1996).

In Lee, the sentencing court orally advised the defendant that he could not be “anywhere near a firearm” or “in the same house or the same car with a firearm.” 158 Wn. App. at 515. Because the trial judge’s remarks misstated the law on constructive possession, this Court struck the oral advisement in favor of the written statutory advisement. Id. at 515, 517.

The court explained, “a defendant with prior felony convictions may not be in violation of the law by simply being near a firearm if he or she has not exercised dominion or control over the weapon or premises where the weapon is found.” Id. at 517. Thus the judge’s global warning that being near a gun amounted to possession was incorrect under Washington law. Id.

Here, the court advised Sohrakoff possession of a firearm would be a class B felony and then told him, “Don’t be around anybody with a gun.” 1RP 28. This advisement is comparable to the erroneous advisement in Lee and may be raised for the first time on appeal. Lee, 158 Wn. App. at 516 n.3 (citing State v. Armstrong, 91 Wn. App. 635, 638 39, 959 P.2d 1128 (1998) (no waiver of right to review legality of sentencing condition by failing to object below)).

Contrary to the court’s advisement, mere proximity to an item (or another person possessing the item) is not sufficient to establish constructive possession. George, 146 Wn. App. at 920-21; State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990); United States v. Soto, 779 F.2d 558, 560-61 (9th Cir. 1986) (“The mere proximity of a weapon to a passenger in a car goes only to its accessibility, not to the dominion or control which must be proved to establish possession.”).

A person with a prior qualifying conviction does not violate the law simply by being near a person with a firearm unless he or she actually exercises dominion or control over the weapon or premises where the weapon is found. Lee, 158 Wn. App. at 517. Because the judge affirmatively misrepresented the law to Sohrakoff, this Court should strike the improper advisement. Id.

b. Review Is Warranted Either As A Matter Of Right Or Through Discretionary Review.

In Lee, this Court determined the sentencing court's oral advisement was not a final judgment appealable as a matter of right under RAP 2.2(a)(1) but relief could be granted via discretionary review. Lee, 158 Wn. App. at 516. Sohrakoff disagrees that the court's oral advisement is not appealable as a matter of right. A sentencing court's oral remarks, even if not reduced to final judgment, may still be appealable as a matter of right.

In State v. Faagata, the defendant appealed as a matter of right from a trial court's oral remarks that conditionally vacated a lesser offense conviction that was not reduced to judgment and sentence. State v. Faagata, 147 Wn. App. 236, 242, 193 P.3d 1132 (2008), rev'd sub nom., State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). The Court of Appeals held there was no double jeopardy violation, accepting the State's argument that the oral ruling was irrelevant because the judgment and sentence was silent regarding the lesser conviction. Faagata, 147 Wn. App. at 245-48. But the Supreme Court reversed, holding a sentencing court's oral remarks conditionally vacating a lesser conviction, even though not reduced to judgment and sentence, violated double jeopardy. State v. Turner, 169 Wn. 2d 448, 453, 465, 238 P.3d 461 (2010). In so doing, the Supreme Court

implicitly and necessarily rejected the notion that a sentencing court's oral remarks cannot in and of themselves constitute an appealable legal error.

Furthermore, appellate courts routinely look to a trial court's oral remarks to clarify ambiguity in a written order, in effect importing the oral remarks into the written order. See, e.g., State v. Iniguez, 143 Wn. App. 845, 859-60, 180 P.3d 855 (2008) (ambiguity in sentence clarified by court's oral ruling), rev'd on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009); State v. Smith, 82 Wn. App. 153, 159, 916 P.2d 960 (1996) (court's written decision may be clarified by resort to the court's oral opinion); State v. Parada, 75 Wn. App. 224, 234-35, 877 P.2d 231 (1994) ("when the trial court's interlineations and its oral opinion are considered in conjunction with the written findings of fact and conclusions of law, the court's findings support its conclusions.").

The court's oral remarks here regarding firearm possession may be treated in the same manner. The court was attempting to clarify what it meant to "possess" a firearm as per the written notice of ineligibility. The court's oral remarks and the written notice go hand in hand. A defendant faced with both the oral and written advisement is unlikely to draw any meaningful distinction between the two, especially where, as here, the sentencing court's oral remarks on the matter constitutes an interpretation of the written notice.

If the matter is not appealable as of right, appeal from the court's oral advisement may be treated as a motion for discretionary review in the interest of judicial economy. See Warner v. Design & Build Homes, Inc., 128 Wn. App. 34, 38 n.2, 114 P.3d 664 (2005) (matter was not appealable as of right, but notice of appeal treated as motion for discretionary review in the interests of judicial economy); Glass v. Stahl Specialty Co., 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982) (matter below was not final and not appealable as of right, but appellate court could consider the matter as one for discretionary review); RAP 1.2(c) ("The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice").

RAP 2.3(b)(2) permits discretionary review when "[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act." Although brought as a direct appeal as of right, this Court in Lee granted discretionary review of the trial court's remarks on firearm possession because they involved probable error implicating constitutional freedoms. Lee, 158 Wn. App. at 516.

This Court should do the same here. In light of Lee, the sentencing court here committed not just probable error but definite error. And Sohrakoff, like Lee, has the constitutional right to travel and associate with others. U.S. Const. Amend. I; U.S. Const. Amend. XIV; Aptheker v. Sec'y

of State, 378 U.S. 500, 505, 507, 517, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (right of travel is a fundamental one protected by due process clause and “freedom of association is itself guaranteed in the First Amendment”); Dawson v. Delaware, 503 U.S. 159, 163, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) (“We have held that the First Amendment protects an individual’s right to join groups and associate with others holding similar beliefs.”).

The court’s misadvisement of what constitutes possession of a firearm curtails those freedoms. The issue thus involves probable error by the sentencing court that substantially alters the status quo by limiting Sohrakoff’s constitutional freedoms to associate with others and to travel.

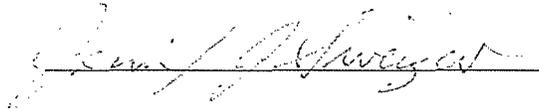
D. CONCLUSION

Sohrakoff requests this Court remand to strike the incorrect advisement about the scope of the restriction on his right to bear arms.

DATED this 21st day of July, 2014.

Respectfully submitted,

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DIVISION TWO

STATE OF WASHINGTON/DSHS)	
)	
Respondent,)	
)	
v.)	COA NO. 46001-7-1
)	
DAVID SOHRAKOFF,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 21ST DAY OF JULY, 2014, I CAUSED A TRUE AND CORRECT COPY OF THE BRIEF OF APPELLANT TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DAVID SOHRAKOFF
DOC NO. 364622
LARCH CORRECTIONS CENTER
15314 NE DOLE VALLEY ROAD
YACOLT, WA 98675

SIGNED IN SEATTLE WASHINGTON, THIS 21ST DAY OF JULY, 2014.

x Patrick Mayovsky

NIELSEN, BROMAN & KOCH, PLLC

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