No. 46001-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DAVID WARREN SOHRAKOFF,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

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Respondent's Brief

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I. FACTS

The State accepts the Appellant's Statement of the Case with the following additions:

The written Judgment and Sentence, which included the firearms prohibition, was signed by the Superior Court and filed with the Superior Court Clerk on March 7, 2013. (CP 60). The Court's verbal warning against possessing or using firearms was also given when the Court signed the Judgment and Sentence on March 7, 2013. (CP 35). No Notice of Appeal was filed within 30 days from the date of that Judgment and Sentence, on any issue.

On June 18, 2013, over three months after the defendant's change of plea, and two months past the deadline for filing a notice of appeal, the defendant filed a Motion to Withdraw Guilty Plea. (CP 41). That motion was based solely on the defendant's multiple allegations that his defense attorney "totally deceived" him and "told him many lies." (CP 41). The trial court denied the Appellant's motion to withdraw his guilty plea. The Court's decision was reduced to a written order that was signed and filed on March 6, 2014. (CP 82). In that motion, and in that order, the Appellant did not raise, as an issue for consideration by the trial court, the judge's warning against future use or possession of firearms. No motion for

reconsideration was ever filed. Page one of the Appellant's opening brief is the first time the Appellant has raised this issue. No other issues are raised on this appeal.

II. ARGUMENT

A. THE DEFENDANT'S APPEAL IS TIME-BARRED.

For appeals as a matter of right, RAP 5.2 allows for the filing of a Notice of Appeal within 30 days after entry of the decision of the trial court that the Appellant wants reviewed. RAP 5.2(a) (Emphasis added). Likewise, Notices of Discretionary Review must be filed within 30 days after the act of the trial court that the Appellant wants reviewed. RAP 5.2(b).

In *State v. Lee*, the Division I Court of Appeals allowed discretionary review of the Court's oral firearms advisement. *State v. Lee*, 158 Wn.App 513, 516, 243 P.3d 929 (2010). The court specifically said that the Discretionary Review was under RAP 2.3(b)(2). *State v. Lee*, 158 Wn. App at 516. The Court in *Lee* stated that it agreed with the Appellant that discretionary review was appropriate. *State v. Lee*, 158 Wn. App at 516. While the published decision is silent as to the timeliness of the Appellant's Notice for Discretionary review, it is reasonable to infer that said notice was timely filed given the appellate courts' recognition of that

remedy. This is in stark contrast to Mr. Sohrakoff, who has never filed a Notice for Discretionary Review.

The Appellant is challenging the verbal firearm warning the trial court gave him when he entered his change of plea. He did not raise that "act of the trial court" until he filed his opening brief. In point of fact, Appellant, in his Notice of Appeal, actually crossed out the words "Judgment and Sentence", and hand wrote in the words, "Order Denying Motion to Withdraw Plea." (CP 84). That order of denial says nothing about the prohibition against the Appellant using or possessing firearms. The fact that the Appellant crossed out "Judgment and Sentence" shows a manifest intent that the court not consider the Judgment and Sentence, but only the order denying the motion to withdraw the guilty plea. The only issues the defendant may raise in this appeal have to do with the Court's denial of his motion to withdraw his guilty plea. He claims no error in that decision or written order.

B. THE COURT'S ADVISEMENT ON THE RECORD WAS A MERE WARNING AND NOT AN "ORDER".

The sole basis for the Appellant's appeal is the trial court's verbal warning, "Don't be around anybody with a gun." (Appellant's Brief, page 4). Appellant takes the phrase out of context.

In this case, the actual language in the transcript prohibiting firearms was in the first paragraph. (RP 28). The second paragraph of the transcript, where the phrase is located, was a simple warning to the Appellant that it will be a class B felony if he uses or possess a firearm. (RP 28). This is different than the warning in *Lee.* In *Lee,* the warning was against being anywhere near a firearm. *State v. Lee*, 158 Wn. App at 516. The appellate court held that this was an incorrect advisement of constructive possession. *State v. Lee*, 158 Wn. App at 516.

However, Judge Brosey's warning to the Appellant was different. When taken in context, this was a mere warning, not a directive. (RP 28). The entire two paragraphs from the transcript read:

> "With respect to the 634 the convictions here are for felonies. As an adult, because of these convictions any right that you had to possess a firearm or gun in the State of Washington is revoked. Do not under any circumstances possess any kind of firearm including a black powder rifle or pistol, unless or until your right to do so is restored by Superior Court. That doesn't happen automatically or by the mere passage of time. The only way it happens is for you to be crime free and law abiding for a minimum period of ten years after you are off all conditions of community custody or supervision from all sources. You then have to file a petition with the Superior Court in the county where you then live asking the court to restore your firearm rights. The judge has to agree to that and sign an order to that effect.

> Unless or until that happens, if you possess any kind of a gun including a black powder rifle or pistol it's at least a class B felony. This county among others prosecutes that particular crime. So don't have any guns in your house, car or apartment. Don't be around anybody with a gun. No hunting or target shooting with any kind of a gun, including a black powder rifle or pistol." (RP 28)

If you look at Judge Brosey's comments as a whole, and employ common sense instead of a hyper-technical analysis of the words used, his warning had nothing to do with constructive possession. Nor was he denying the Appellant his right to associate with other individuals. Rather, Judge Brosey was simply imparting to the Appellant the gravity of being in possession of a firearm as a felon. Quite frankly, the Court was doing the Appellant a favor.

III. CONCLUSION

The Appellant's appeal of the Judgment and Sentence is time-barred. Appellant has taken the Judge's verbal warning against possessing a firearm out of context. It was a mere warning, not an order. Moreover, Judge Brosey's warning to the Appellant had nothing to do with

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Constructive possession, as was the case in *State v. Lee*. For these reasons, the Appellant's appeal should be denied.

RESPECTFULLY submitted this 20 day of October, 2014.

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by: _____
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COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON, Respondent, vs. DAVID WARREN SOHRAKOFF, Appellant.	No. 46001-7-II DECLARATION OF SERVICE

Ms. Teri Bryant, paralegal for J. Bradley Meagher, Chief Criminal Deputy Prosecuting Attorney, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On October 20, 2014, the appellant was served with a copy of the **Respondent's Brief** by email via the COA electronic filing portal to Jennifer J. Sweigert at Nielsen Bromand & Koch, PLLC, attorney for appellant, at the following email addresses: sloanej@nwattorney.net and sweigertj@nwattorney.net.

DATED this 20th day of October, 2014, at Chehalis, Washington.

Teri Bryant

Teri Bryant, Paralegal
Lewis County Prosecuting Attorney Office

LEWIS COUNTY PROSECUTOR

October 20, 2014 - 2:02 PM

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