

FILED
Court of Appeals
Division II
State of Washington
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NO. 50035-3-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

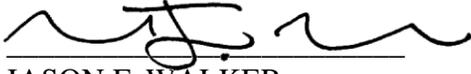
ARTURO GOMEZ RIOS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE STEVEN E. BROWN, JUDGE

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- 1. It was not an abuse of discretion to order Felony Firearm Registration because the evidence was that the Defendant used a firearm, and there is no requirement of a special verdict for a collateral consequence of a conviction.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

The State is satisfied by the Appellant's recitation of the case.

ARGUMENT

The Defendant asserts that it was error to require the Defendant to register as a felony firearm offender. The Defendant further avers that the standard of review is an abuse of discretion.

If abuse of discretion is the proper standard, then this order was clearly not an abuse of discretion because, the uncontroverted evidence was that the Defendant threatened Jorge Topate with a pistol.

The Defendant argues that a special jury finding was required to find that the Defendant used a firearm, although the statutory scheme does not require the filing of a special allegation or a jury finding. The Defendant appears to imply that *Apprendi v. New Jersey* and *Blakely v. Washington* require such a finding. However, registration schemes, such as sex offender registration (and felony firearm registration) are

considered collateral consequences to a conviction and not punishment, and therefore do not require a special jury finding.

Felony Firearm Registration.

The felony firearm registration requirement is similar to the sex and kidnapping offender registration requirement, in that it requires such an offender to register with local law enforcement and imposes a penalty for failing to register.¹

There appear to be two categories of felony firearm offenses; *per se* offenses, enumerated in RCW 9.41.010(9)(a) – (d),² and felony firearm offenses in fact. In fact offenses are defined in 9.41.010(9)(e) as, “[a]ny felony offense if the offender was armed with a firearm in the commission of the offense.”

This is a case where the Defendant was convicted of an “in fact” crime, Assault in the Second Degree, RCW 9A.36.021(c), which can be committed with any deadly weapon, including a firearm.³ The Defendant argues that the court abuses discretion when imposing this requirement without a special jury verdict.

¹ Failure to register as a felony firearm offender is always a misdemeanor, however, while failure to register as a sex offender can be either a felony or misdemeanor, depending on the predicate offense. *Compare* RCW 9.41.335 and RCW 9A.44.032.

² These offenses are, any felony violation of RCW Chapter 9.41 (such as Unlawful Possession of a Firearm,) Drive-By Shooting, Theft of a Firearm and Possessing a Stolen Firearm.

³ “Firearms” are a subset of deadly weapons. RCW 9A.04.110(6).

The decision as to whether to require an offender to register as a felony firearm offender was placed within the discretion of the court by the legislature. *See* RCW 9.41.330(1). The statute makes no mention of a special verdict or finding by a jury, and does not require the prosecutor to file a special allegation, as is the case for an “in fact” sex offense.⁴

There was no abuse of discretion because the evidence was that the Defendant pointed a firearm.

The Defendant argues that it was an abuse of discretion for the court to find that a firearm was used, despite every eyewitness testifying that the Defendant was armed with a pistol. This argument appears to be based on a) the firearm was never recovered; and b) a hypothetical argument in the State’s closing argument.

“An abuse of discretion occurs only when the decision or order of the court is ‘manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.’” *State v. Cunningham*, 96 Wn.2d 31, 34, 633 P.2d 886, 888 (1981) (quoting *State v. Blight*, supra 89 Wn.2d 38, 41, 569 P.2d 1129 (1977).) An abuse of discretion “exists ‘only where it can be said no reasonable man would take the view adopted by the trial court.’” *Id.* (quoting *Blight* at 41.)

⁴ *See* RCW 9.94A.835 and RCW 13.40.135 (requiring the prosecutor to file a special allegation of “sexual motivation” whenever the facts support such an allegation.)

All three witnesses to the incident said they had seen the Defendant with a pistol. Jorge Topate said the gun looked like a .45 or 9mm. RP at 16-17. He said he had shot guns before, implying that he was somewhat familiar with firearms. RP at 23. He denied it could have been a plastic gun, such as a toy. RP at 23-24.

Guadalupe Bolanos also said the Defendant pulled out a gun. RP at 35. She denied that it could have been a knife. *Id.* Edwin Torres, who was with Ms. Bolanos, also said it was a pistol, and believed it was a 9mm. RP at 49-50.

Officer Pearsall testified that the Defendant had a knife on his person when he was arrested. RP at 61. Officer Pearsall also said that the Defendant claimed that he “only” used a knife, not a gun, when the Defendant was arrested. RP at 67.

In this case all three eyewitnesses specifically said that the Defendant pointed a pistol at Mr. Topate. The prosecutor’s argument, which was a hypothetical anticipating an argument by the defense, was not evidence. The judge’s finding was based upon the evidence adduced at trial. It was hardly unreasonable to find a firearm was used. There was no abuse of discretion.

Felony firearm registration is a collateral consequence that does not require a jury finding.

Although the statutory scheme enacting the felony firearm registration requirement does not require a jury finding, punitive consequences of conviction do require that specific facts be pled and proven. In *Apprendi v. New Jersey*, the U.S. Supreme Court ruled that, “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” *Apprendi*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362–63, 147 L. Ed. 2d 435 (2000). The Supreme Court repeated this decision in *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004), applying it to Washington’s determinate sentencing scheme. Subsequent case law, however, has distinguished *punishment* from *collateral* consequences of a conviction. Examples of such collateral consequences are driver’s license suspensions, no-contact orders, and sex offender registration. These collateral consequences do not require a jury verdict.

For example, in *State v. Griffin*, the trial court made a factual determination that the defendant had used a motor vehicle in the commission of the crime of possession of cocaine. *Griffin*, 126 Wn. App. 700, 703-04, 109 P.3d 870, 872 (2005). As a result, the Department of

Licensing revoked the defendant's driver's license. *Id.* The defendant appealed, claiming that the license revocation constituted additional punishment, and therefore required a jury verdict. *Id.* at 704. Division 1 of this court disagreed, finding that, "license revocation... is not punishment, the trial court's finding did not violate Griffin's due process and Sixth Amendment rights under *Apprendi* and *Blakely*." *Id.* at 708. Thus, no jury verdict was required for this collateral consequence of conviction.

In *State v. Felix* the defendants⁵ had been convicted of crimes of domestic violence. *State v. Felix*, 125 Wn. App. 575, 576, 105 P.3d 427, 428 (2005). They argued that the consequences of the domestic violence tag, such as the post-conviction no-contact order and the loss of firearm rights, required a jury finding under *Apprendi* and *Blakely v. Washington*. *Id.* at 577. Division 1 of this court again disagreed, finding that these collateral consequences were not "punishment," and therefore required no jury finding.

This court has also ruled that neither a reduction in early release time nor an increased fine requires a jury finding under *Blakely*. *State v. Winston*, 135 Wn. App. 400, 408, 144 P.3d 363, 367 (2006).

⁵ Felix's case was joined with another defendant's, Hammond.

Although there is little case law regarding felony firearm registration requirements,⁶ there is no reason to distinguish it from sex offender registration requirements in its impact of offenders. In *State v. Ward* the Washington Supreme Court has ruled that sex offender registration “is regulatory and not punitive.” *State v. Ward*, 123 Wn.2d 488, 500, 869 P.2d 1062, 1069 (1994).

Because registration requirements have been found to be regulatory and not punitive, such requirements do not require that specific facts be pled and proven. Like driver’s license suspensions, no-contact orders, and other collateral consequences, *Apprendi* does not require this court to impose a special jury finding. The statute puts the decision in the court’s hands, and is lawful.

CONCLUSION

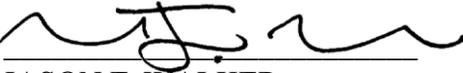
There is no law – case or statute – that requires a special jury verdict for a court to impose a felony firearm registration requirement. In this case, the evidence was unanimous that the Defendant displayed a firearm in the commission of the offense. There was no “abuse of

⁶ The statutory scheme was passed in 2013. *See* Laws of 2013, ch. 183.

discretion” to require him to register as a felony firearm offender. The trial court’s decision ought to be upheld.

DATED this 12th day of November, 2017.

Respectfully Submitted,

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JFW / jfw

GRAYS HARBOR PROSECUTING ATTORNEY

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Transmittal Information

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