

NO. 50256-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JIMMY NEWSOM,

Appellant.

BRIEF OF APPELLANT

John A. Hays, No. 16654
Attorney for Appellant

1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084

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ASSIGNMENT OF ERROR

Assignment of Error

1. Substantial evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, does not support the defendant's conviction for first degree possession of a firearm because the state failed to present any proof that the Jimmy Newsom with the serious offense conviction out of Oregon was the defendant.

2. The trial court erred when it ordered that three sentences imposed on the same day run consecutive to each other without entering a finding to support an exceptional sentence.

3. The trial court exceeded its authority when it imposed a no contact order prohibiting the defendant from having contact with the alleged victim of a crime for which he was acquitted.

Issues Pertaining to Assignment of Error

1. Does substantial evidence under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, support a defendant's conviction for first degree possession of a firearm when the only evidence proving that the defendant has a prior "serious offense" comes from a copy of an out of state conviction for a "serious offense" committed by a person with the same name but without proof that the defendant is that person?

2. Does a trial court err if it orders that three sentences imposed on the same day run consecutive to each other without entering a finding to support an exceptional sentence?

3. Does a trial court exceed its statutory authority if it imposes a no contact order prohibiting a defendant from having contact with an alleged victim of a crime for which the defendant was acquitted?

STATEMENT OF THE CASE

Factual History

Sometime around noon on August 27, 2016, Vancouver Officer Ron Stevens was on patrol on his way to cover another officer when he stopped at the light on 112th Street in Vancouver and then turned left onto Burton Road. RP 59-60. As he did some people in a car gestured down Burton Road as did some people walking down the street. *Id.* When Officer Stevens looked to the area they were indicating he saw one person frantically chasing another. *Id.* At that point they were about 30 to 40 feet apart. RP 72. Officer Stevens then pulled up next to the person in the rear and gestured for him to stop. RP 60. Although this person looked at the officer he kept on running. *Id.* Officer Stevens later identified the person doing the chasing as Tyler Lawhead and the person being chased as the defendant Jimmy Newsom. RP 61-69. Although Officer Stevens had a clear view of the defendant's hands and body, he did not see anything in the defendant's hands and he did not see the defendant in possession of a backpack. RP 90-96.

At this point the defendant turned right onto 109th Avenue as did Mr. Lawhead, who continued chasing the defendant. RP 60. By the time Officer Stevens turned right he had lost sight of both the defendant and Mr.

Lawhead as there were a number of semi trailers parked along the street that obstructed his view. RP 60-61. After driving down 109th Avenue a little Officer Stevens stopped his car, got out, and began looking for the two people he had seen. *Id.* As he did he walked between a couple of trailers, saw the defendant, and ordered him to sit down on the grass next to the sidewalk. RP 61-62. The defendant immediately complied. RP 93. Officer Stevens then began looking for the person he later determined was Mr. Lawhead. RP 59-60. At about that point Officer Stevens saw Mr. Lawhead just as backup officers arrived. *Id.* According to Officer Stevens, Mr. Lawhead's first statement to him was "Hey, he's got a gun" and then "Oh, it's a small gun, it looked to be silver." *Id.*

Once the backup officers got out of their vehicle they went and took custody of the defendant. Officer Stevens told them that Mr. Lawhead had claimed that the defendant had a small, silver gun. RP 60-61. The cover officers then searched the defendant for weapons but found none. RP 143-145. When asked, the defendant denied that he had a gun. RP 96. Upon running the defendant's name the officers discovered an outstanding warrant, placed the defendant under arrest based on that warrant, put him in handcuffs, and searched him incident to arrest. RP 143-145. During that search the officers found a small amount of a dark brown or black tar like

substance that later tested positive for heroin. RP 41, 143-145. The officers then walked over to Officer Stevens vehicle and put the defendant in it. RP 143-145. As the officer walked away from the vehicle they saw a small, silver pistol laying on the ground next to the curb. *Id.*

While the two cover officers were speaking with the defendant, Officer Stevens was interviewing Mr. Lawhead. RP 59-64, 96. During that interview and in subsequent testimony Mr. Lawhead claimed that earlier on that day he had agreed to give the defendant and an African American friend of the defendant's by the name of "Grumpy" a ride to a location in Vancouver. RP 107-108. According to Mr. Lawhead, once he stopped the vehicle Grumpy began hitting him in the head, after which they exited the vehicle and continued to fight. RP 109-113. The defendant then got into the driver's side of the car and drove away with Grumpy, thereby stealing the defendant's car and his possessions, which were in a backpack in the car. RP 113-116.

Mr. Lawhead later testified that he was able to get a ride back to his apartment where he began a search for the defendant and his vehicle. RP 117. Eventually he found the defendant and Grumpy walking out of a business called The Tobacco Zone towards his vehicle. RP 116-117. Mr. Lawhead claimed that "Grumpy" was wearing his hat and watch, and that

the defendant had his backpack. *Id.* He stated that he walked up and told the defendant to give him back his car. *Id.* When the defendant did not respond, Mr. Lawhead stated that he walked over to his vehicle, saw that the keys were in it, and then grabbed the keys and locked the car. *Id.*

Mr. Lawhead went on to testify that later he located the defendant by the Safeway on 112th and Burton, stopped his vehicle, and began chasing him. RP 119. According to Mr. Lawhead, a short while into the chase Officer Stevens drove up and that he and backup officers then took him and the defendant into custody on outstanding warrants after finding them on 109th. *Id.* Mr. Lawhead denied ever telling the officers that he had seen the defendant with any kind of gun in his possession, much less a small silver gun. RP 128. Rather, he claimed that he had told the officers that the defendant might have a gun because he had previously gestured towards his waist as if he had one. RP 119.

Procedural History

By information filed on August 30, 2016, and later twice amended, the Clark County Prosecutor charged the defendant Jimmy Newsom with one count each of first degree robbery while armed with a firearm, possession of heroin, second degree unlawful possession of a firearm and first degree unlawful possession of a firearm. CP 1-2, 22-23, 35-37. The last

count alleged the following:

That he, JIMMY NEWSOM, in the County of Clark, State of Washington, on or about August 27, 2016 after being convicted in the State of Washington, or anywhere else, of the crime of Unlawful Delivery of Cocaine in Multnomah County Case No. 061136396 on April 16, 2007, a serious offense as defined in RCW 9.41.020(21)(o), did knowingly own or have in his possession or control a firearm, to wit: a pistol; contrary to Revised Code of Washington 9.41.040(1)(a).

CP 36.

This case later came on for trial before a jury with the state calling nine witnesses, including Officer Stevens, one of the backup officers who took the defendant into custody, an officer who took the defendant's DNA pursuant to a warrant, Tyler Lawhead, three forensic scientists, a deputy prosecutor, and an officer who tested the firearm. CP 57, 101, 137, 152, 179, 187, 204, 215, 233. Officer Stevens, one of the backup officers and Tyler Lawhead testified to the facts included in the preceding factual history. See Factual History, *supra*. The first forensic scientist testified he checked the firearm and clip for fingerprints, found none on the firearm but did find a readable print on the clip. RP 152-167. According to the witness, the fingerprint did not belong to either the defendant or to Tyler Lawhead. Id.

The second forensic scientist testified that he was able to extract DNA from the firearm and clip the officers found at the scene of the

defendant and Mr. Lawhead's arrests, that the DNA came from three different people, and that he could not say whether or not the defendant was one of those three. RP 187-204. The third forensic scientist testified that he tested the brown tar like substance the officers found on the defendant's person incident to arrest, that it weighed 3.1 grams, and that it "contained" heroin, although he did not know its purity. RP 204-214.

The deputy prosecuting attorney the state called testified that he was acquainted with the defendant, that he had represented the state in court in Clark County when the defendant pled to possession of heroin, possession of methamphetamine, two counts of second degree possession of stolen property and forgery. RP 23. While on the stand he also identified Exhibits 16, 17, and 18 as three documents from the Multnomah County Circuit Court case of *State of Oregon v. Jimmy Newsom*, No. 06-11-36396. RP 227-230. The birth date listed in the first document was "09/12/1981" and the birth date listed on the third as "09/12/81. See Exhibits 16 & 18.

The first document was an Indictment charging delivery of cocaine and possession of cocaine. See Exhibit 16. The second was a Statement of Defendant on Plea of Guilty to both charges in the indictment. See Exhibit 17. The third document was the Judgment and Sentence from the case. See Exhibit 18. The court admitted exhibit 16 into evidence over the

objection of the defense. RP 231. The court then admitted Exhibits 17 and 18 without objection. *Id.*

Although the deputy prosecutor the state called identified Exhibits 16, 17 and 18 as documents from the same Oregon Circuit Court case, he did not claim that he had been in Court for the pleas or for the sentencing hearing. RP 215-232. Neither did he claim that he had personal knowledge that the person whose name appeared on the Oregon documents was the same Jimmy Newsom in the case at bar. *Id.*

Following the presentation of the state's witnesses, the defense called Tyler Lawhead back to the witness stand for brief testimony. RP 271-283. The court then instructed the jury with the defendant objecting to the court's decision to give the state's proposed instruction on accomplice liability. RP 249-266. After argument from counsel, the jury retired for deliberation, eventually returning verdicts of "not guilty" on the charge of robbery, and "guilty" on the charges of second degree unlawful possession of a firearm, first degree unlawful possession of a firearm, and possession of heroin. RP 304-334, 336-341; CP 86-90.

On January 23, 2017, the court called this case for sentencing, as well as the defendant's Clark County cases in cause numbers 16-1-01268-0 and 16-1-01269-8. CP 143-172. In the former cause number the court was

sentencing the defendant for possession of heroin. CP 143-157. In the latter cause number the court was sentencing the defendant for possession of heroin, two counts of second degree possession of stolen property, and one count of forgery. CP 158-172. The defendant had pled guilty to the charges in both cases on July 22, 2016. CP 143, 158. The following gives a chart noting the current cause number, charges and standard ranges, along with the other two cause numbers, charges and standard ranges. CP 101-116, 142-172.

16-1-01803-3	
possession of heroin	12-24 months
second degree UPFA	51-60 months
first degree UPFA	87-116 months
16-1-01268-0	
possession of heroin	12-24 months
16-1-01269-8	
possession of heroin	12-24 months
second degree PSP	22-29 months
second degree PSP	22-29 months
possession of meth	12-24 months
forgery	22-29 months

CP 101-116; CP 142-172.

After hearing from the parties, the court imposed concurrent

standard range sentences of 24 months and 100 months in the case at bar and dismissed the charge of second degree possession of a controlled substance upon the agreement of the parties. RP 343-344; CP 104. The court also imposed a standard range sentence of 24 months in Cause No. 16-1-01269-8, and concurrent standard range sentences of 24 months, 29 months, 29 months, 24 months and 29 months in Cause No. 16-1-01269-8. CP 146-147; CP 161-162. Finally, although the court ran the sentences from Cause Numbers 16-1-01269-8 and 16-1-01269-8 concurrent to each other, the court ran those sentences consecutive with the sentences in the case at bar. *Id.* Thus, the defendant's total commitment was 129 months (the longest sentence from the case at bar of 100 months plus the longest sentence from the other two cause numbers of 29 months).

Although the court did not declare an exceptional sentence in this or the other two cases, it did give the following justification for ordering the sentence in the case at bar to run consecutive with the sentences in the other two cause numbers:

THE COURT: 208 credit time served. 12 months community custody concurrent with 16-1-01268-0 24 months, credit for 208 served. Which brings us to 16-1-01803-3, Mr. Vu, Count 4, 100354 months; Count 2, 24 months with 12 months community custody, Count 3 is dismissed, 0 credit time served, to run consecutive.

MS. ARDEN: Consecutive?

THE COURT: Consecutive.

MR. RUCKER: The drug court cases are concurrent to themselves and consecutive to the new –

THE COURT: The new charges.

MR. RUCKER: – the new charges.

THE COURT: And it's the only thing that makes any sense. I mean, they gave you drug court and you violated every condition of your drug court issue, and they had already entered the plea and you knew what the sentencing range was for that.

RP 353-354.

In the case at bar the court also imposed a no contact order forbidding the defendant from having contact with Tyler Lawhead, the alleged victim of the robbery for which the defendant was acquitted. CP 105. Following imposition of sentence the defendant filed timely notice of appeal. CP 119-135.

ARGUMENT

I. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT'S CONVICTION FOR FIRST DEGREE POSSESSION OF A FIREARM BECAUSE THE STATE FAILED TO PRESENT ANY PROOF THAT THE JIMMY NEWSOM WITH THE SERIOUS OFFENSE CONVICTION OUT OF OREGON WAS THE DEFENDANT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not

substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant in Count IV with first degree unlawful possession of a firearm under RCW 9.41.040(1)(a). CP 36.

This statute provides as follows:

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

RCW 9.41.040(1)(a).

Thus, in Count IV, the state had the burden of proving both that the defendant possessed a firearm and that he has a prior conviction for a

“serious offense” as that term is used in RCW 9.41. In RCW 9.41.010(23)(b)&(o), the legislature has defined the term “serious offense” as it is used in RCW 9.41 to include the following:

(23) “Serious offense” means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

. . .

(b) Any felony violation of the uniform controlled substances act, chapter 69.50 RCW, that is classified as a class B felony or that has a maximum term of imprisonment of at least ten years;

. . .

(o) Any felony offense in effect at any time prior to June 6, 1996, that is comparable to a serious offense, or any federal or out-of-state conviction for an offense that under the laws of this state would be a felony classified as a serious offense; . . .

9.41.010(23)(b)&(o).

Under RCW 69.50.401 the crime of delivery of cocaine is a class B felony drug offense and does have a maximum term of ten years. See RCW 69.50.401. Thus, in the case at bar, this court cannot sustain the defendant’s conviction for first degree unlawful possession of a firearm if substantial evidence does not support the conclusion that the defendant has a prior conviction for a “serious offense.” As a review of the decision in *State v. Hunter*, 29 Wn.App. 218, 627 P.2d 1339 (1981), indicates,

substantial evidence does not support the defendant's conviction for first degree unlawful possession of a firearm. The reason is that there is insufficient evidence to prove that defendant was the person named in the Oregon conviction.

In *State v. Hunter, supra*, the court addressed the issue of what constitutes substantial evidence on this issue of identity. In that case, the state charged the defendant Dallas E. Hunter with attempted escape, alleging that he had tried to leave the Cowlitz County Jail where he was being incarcerated pursuant to a felony conviction. In order to prove that the defendant was being held "pursuant to a felony conviction," as was required under the statute, the state successfully moved to admit copies of two felony judgment and sentences out of Lewis County that named "Dallas E. Hunter" as the defendant. Following conviction, the defendant appealed, arguing in part that the trial court erred when it admitted the judgments because the state failed to present evidence that he was the person identified therein.

In addressing this argument, the court first noted that when the fact of a prior conviction is an element of the current offense, a prior judgment and sentence under the defendant's name alone is neither competent evidence to go to the jury, nor is it sufficient to prove the prior conviction.

The court stated:

Where a former judgment is an element of the substantive crime being charged, identity of names alone is not sufficient proof of the identity of a person to warrant the court in submitting to the jury a prior judgment of conviction. It must be shown by independent evidence that the person whose former conviction is proved is the defendant in the present action. *State v. Harkness*, 1 Wn.2d 530, 96 P.2d 460 (1939); *State v. Brezillac*, 19 Wn.App. 11, 573 P.2d 1343 (1978). See *State v. Clark*, 18 Wn.App. 831, 832 n.1, 572 P.2d 734 (1977).

State v. Hunter, 29 Wn.App at 221.

In *Hunter*, the state had also presented the evidence of a Probation Officer who had revoked the defendant from his work release program, had personal knowledge of the fact of the defendant's felony conviction, and had him incarcerated in the Cowlitz County jail pending his return to prison pursuant to his Lewis County Felony Convictions. Based upon this "independent" evidence that proved that the defendant was the person named in the judgments, the Court of Appeals found no error in admitting the documents. The court stated:

We hold that [the Probation Officer's] testimony was sufficient independent evidence to establish a prima facie case that defendant was the same Dallas E. Hunter as named in the certified judgments and sentences. After the State introduced this evidence, the burden was on defendant to come forward with evidence casting doubt on the identity of the person named in the documents. *State v. Brezillac, supra*.

State v. Hunter, 29 Wn.App. At 221-222.

By contrast, in the case at bar, the evidence admitted at trial does not include any claims in any form that the defendant was the person named in the Oregon Convictions. The deputy prosecutor who identified the documents and who had personal knowledge of the defendant's Washington convictions did not claim any personal knowledge that the defendant was the person named in the Oregon conviction. Additionally, the record does not include any fingerprint analysis from the Oregon judgment and sentence or any connection at all between the defendant and the conviction, other than the name and date of birth. Finally, the trial record does not include any admission by the defendant that he was the person named in the Oregon convictions. Thus, in this case sufficient evidence does not support an essential element of a prior conviction for a "serious offense," which is an essential element of crime of first degree unlawful possession of a firearm. As a result, this court should vacate the defendant's conviction and remand for resentencing.

II. THE TRIAL COURT ERRED WHEN IT ORDERED THAT THREE SENTENCES IMPOSED ON THE SAME DAY RUN CONSECUTIVE TO EACH OTHER WITHOUT ENTERING A FINDING TO SUPPORT AN EXCEPTIONAL SENTENCE.

Under RCW 9.94A.535, a trial court may not impose a sentence outside the standard range without first finding substantial and compelling reasons justifying an exceptional sentence and without then entering written findings and conclusions in support of that exceptional sentence.

The introductory section of this statute states:

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.535 (introductory paragraphs only).

In this case at bar the trial court did not declare an exceptional sentence, it did not find any substantial and compelling reasons for exceeding the standard range, and it did not enter written findings in support of an exceptional sentence. As the last paragraph to the introductory section of RCW 9.94A.535 indicates, any departure from the standards for imposing concurrent and consecutive sentences under RCW 9.94A.589(1) and (2) constitutes an exceptional sentence. A review of this latter statute in the context of this case indicates that this is precisely what the court did in this case. Section (1)(a) of RCW 9.94A.589 states:

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ***Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional sentence provisions of RCW 9.94A.535.*** "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

RCW 9.94A.589(1)(a) (emphasis added).

In the case at bar the court sentenced the defendant in three

current cases on the same day without declaring an exceptional sentence under RCW 9.94A.535. Thus, the trial court erred when it failed to order that all of those sentences run concurrently. As a result, this court should vacate the defendant's sentence in the case at bar and remand with instructions ordering the trial court to run the sentences in all three cases concurrently.

III. THE TRIAL COURT EXCEEDED ITS AUTHORITY WHEN IT IMPOSED A NO CONTACT ORDER PROHIBITING THE DEFENDANT FROM HAVING CONTACT WITH THE ALLEGED VICTIM OF A CRIME FOR WHICH HE WAS ACQUITTED.

A trial court has no inherent authority to sentence a defendant in a criminal case; it is limited to that authority the legislature expressly provides in the applicable statutes. *In re Postsentence Review of Leach*, 161 Wn.2d 180, 184, 163 P.3d 782 (2007). Under RCW 9.94A.505(9) the legislature permits a trial court to impose and enforce crime-related prohibitions as part of any sentence. Section 9 of this statute states:

(9) As a part of any sentence, the court may impose and enforce crime-related prohibitions and affirmative conditions as provided in this chapter.

RCW 9.94A.505(9).

Under RCW 9.94A.030(10), a "crime-related prohibition" is a court order "prohibiting conduct that directly relates to the circumstances of the

crime for which the offender has been convicted.” RCW 9.94A.030(10). A no-contact order is a crime-related prohibition if it “directly relates” to the circumstances for the offense for which the defendant is being sentenced. *In re Pers. Restraint of Rainey*, 168 Wn.2d 367, 376, 229 P.3d 686 (2010).

In the case at bar the defendant was convicted of possession of heroin and first degree unlawful possession of a firearm. These two offenses had no relation to the defendant’s contacts with Tyler Lawhead, who was the alleged victim of the robbery charge for which the defendant was acquitted. Much less did these convictions “directly relate” to the defendant’s contacts with Tyler Lawhead.

Neither can this no contact order be justified as a condition of community custody. Under RCW 9.94A.703(3)(b). This provision states:

When a court sentences a person to a term of community custody, the court shall impose conditions of community custody as provided in this section.

. . . .

(3) Discretionary conditions. As part of any term of community custody, the court may order an offender to:

. . . .

(b) Refrain from direct or indirect contact with the victim of the crime or a specified class of individuals; . . .

RCW 9.94A.703(3)(b).

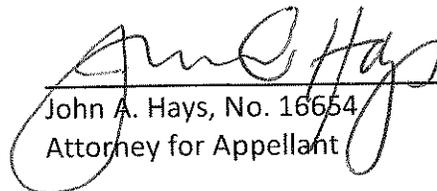
Under this statute the legislature has only given the court the authority to impose a no contact order as part of a community custody condition “with the victim of the crime or a specified class of individuals.” In the case at bar the defendant was not convicted of robbing Tyler Lawhead. Thus, Tyler Lawhead was not the “victim of the crime.” Rather, he was the complaining witness on a charge that the state failed to prove. Thus, in this case, the trial court erred when it imposed a no contact order that prohibits the defendant from having contact with Tyler Lawhead. As a result, this court should order the trial court to vacate that portion of the judgment and sentence imposing a no contact order.

CONCLUSION

Substantial evidence does not support the defendant's conviction for first degree unlawful possession of a firearm. As a result, this court should vacate that conviction. In addition, the trial court erred when it ordered the sentence in this case to run consecutively to the other sentences imposed on the same day and when it imposed a no contact order without statutory authority. Consequently, this court should also vacate the sentences and remand for resentencing.

DATED this 15th day of September, 2017.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

RCW 9.94A.535
Departures from the Guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

RCW 9.94A.589
Consecutive or Concurrent Sentences

(1)(a) Except as provided in (b), (c), or (d) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: PROVIDED, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. Sentences imposed under this subsection shall be served concurrently. Consecutive sentences may only be imposed under the exceptional

sentence provisions of RCW 9.94A.535. "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. This definition applies in cases involving vehicular assault or vehicular homicide even if the victims occupied the same vehicle.

(b) Whenever a person is convicted of two or more serious violent offenses arising from separate and distinct criminal conduct, the standard sentence range for the offense with the highest seriousness level under RCW 9.94A.515 shall be determined using the offender's prior convictions and other current convictions that are not serious violent offenses in the offender score and the standard sentence range for other serious violent offenses shall be determined by using an offender score of zero. The standard sentence range for any offenses that are not serious violent offenses shall be determined according to (a) of this subsection. All sentences imposed under this subsection (1)(b) shall be served consecutively to each other and concurrently with sentences imposed under (a) of this subsection.

(c) If an offender is convicted under RCW 9.41.040 for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, the standard sentence range for each of these current offenses shall be determined by using all other current and prior convictions, except other current convictions for the felony crimes listed in this subsection (1)(c), as if they were prior convictions. The offender shall serve consecutive sentences for each conviction of the felony crimes listed in this subsection (1)(c), and for each firearm unlawfully possessed.

(d) All sentences imposed under RCW 46.61.502(6), 46.61.504(6), or 46.61.5055(4) shall be served consecutively to any sentences imposed under RCW 46.20.740 and 46.20.750.

(2)(a) Except as provided in (b) of this subsection, whenever a person while under sentence for conviction of a felony commits another felony and is sentenced to another term of confinement, the latter term shall not begin until expiration of all prior terms.

(b) Whenever a second or later felony conviction results in

community supervision with conditions not currently in effect, under the prior sentence or sentences of community supervision the court may require that the conditions of community supervision contained in the second or later sentence begin during the immediate term of community supervision and continue throughout the duration of the consecutive term of community supervision.

(3) Subject to subsections (1) and (2) of this section, whenever a person is sentenced for a felony that was committed while the person was not under sentence for conviction of a felony, the sentence shall run concurrently with any felony sentence which has been imposed by any court in this or another state or by a federal court subsequent to the commission of the crime being sentenced unless the court pronouncing the current sentence expressly orders that they be served consecutively.

(4) Whenever any person granted probation under RCW 9.95.210 or 9.92.060, or both, has the probationary sentence revoked and a prison sentence imposed, that sentence shall run consecutively to any sentence imposed pursuant to this chapter, unless the court pronouncing the subsequent sentence expressly orders that they be served concurrently.

(5) In the case of consecutive sentences, all periods of total confinement shall be served before any partial confinement, community restitution, community supervision, or any other requirement or conditions of any of the sentences. Except for exceptional sentences as authorized under RCW 9.94A.535, if two or more sentences that run consecutively include periods of community supervision, the aggregate of the community supervision period shall not exceed twenty-four months.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

JIMMY NEWSOM,
Appellant.

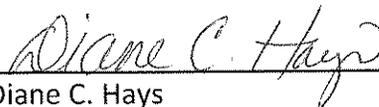
NO. 50256-9-II

AFFIRMATION
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Tony Golik
Clark County Prosecuting Attorney
1013 Franklin Street
Vancouver, WA 98666-5000
prosecutor@clark.wa.gov[PA Macro]
2. Jimmy Newsom, No.374794
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 15th day of September, 2017, at Longview, WA.


Diane C. Hays

JOHN A. HAYS, ATTORNEY AT LAW

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