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Court of Appeals
Division II
State of Washington
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No. 53964-1-II

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

STATE OF WASHINGTON, Respondent

v.

DEPREE SMITH, Appellant

APPEAL FROM THE SUPERIOR COURT
OF CLARK COUNTY
THE HONORABLE JUDGE DAVID E. GREGERSON

BRIEF OF APPELLANT

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Constitutional Provisions

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Washington Statutes

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I. ASSIGNMENT OF ERROR

- A. The trial court violated Mr. Smith's Constitutional protection against double jeopardy when it failed to vacate the conviction for unlawful possession of a firearm in the second degree.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. The Double Jeopardy Clause of the State and Federal Constitutions protect a person from multiple punishments for the same offense. Does the trial court violate double jeopardy when it sentences a defendant under both RCW 9.41.040(1)(a) and (2)(a) based on previous convictions, but there was only a single firearm?

II. STATEMENT OF FACTS

On February 15, 2019, 20-year-old Depree Smith and two other young men were standing in the parking lot of an abandoned auto shop. RP 120. Officer James Kelly saw Rae Shaun Bolds, one of the men, whom he knew had a felony arrest warrant. Kelly turned his car around and called for other units. RP 121-22.

Officer Kelly walked toward the men and observed a large sandwich bag of marijuana, sticking out of Mr. Smith's pocket. He reported he could smell the marijuana. RP 123. Because he knew

Mr. Smith was under 21 years old, he told him he was under arrest for being a minor in possession of marijuana. RP 123. Mr. Smith reached into his right-hand pocket where the marijuana was located. Kelly grabbed him and as Smith twisted away, Kelly took him down to the ground. RP 124.

A firearm fell out of Mr. Smith's left front pocket and landed on the grass. RP 125. Kelly placed Mr. Smith into the backseat of a patrol car and advised him of his *Miranda* rights. RP 127. Kelly reported Mr. Smith said he obtained the firearm to defend himself. RP 12.

The State charged Mr. Smith with unlawful possession of a firearm in the first degree. CP 5. The State filed an amended information adding a count of unlawful possession of a firearm in the second degree, and a criminal street gang member or associate aggravator. CP 7. The State filed a second amended information, removing the aggravator. CP 15.

Mr. Smith stipulated to a previous juvenile conviction for attempted assault second degree, and a juvenile conviction for malicious mischief second degree. CP 17; Ex. 1, Supp. CP. Defense counsel did not object to the following two instructions or their verdict forms, saying, "For the purposes of sentencing, if

there's a conviction as to both, it's a merger or same criminal conduct analysis, (sic) there'd only be one anyway, so I don't think it matters." RP 148.

The court gave Jury Instruction No. 9:

To convict the defendant of the crime of unlawful possession of a firearm in the first degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 15, 2019, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of Attempted Assault in the second degree, a serious offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP 31.

The court gave Jury Instruction No. 11:

To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 15, 2019, the defendant knowingly had a firearm in his possession or control;
- (2) That the defendant had previously been convicted of malicious mischief in the second degree, a felony offense; and
- (3) That the possession or control of the firearm occurred in the State of Washington.

CP 33.

The jury found Mr. Smith guilty on both counts. CP 41-42. At the sentencing hearing the State argued that the two convictions were the same criminal conduct and concluded the offender score

was “one” for both convictions. RP 209. Defense counsel did not challenge the State’s use of both convictions, but, asked the court to run the sentences concurrently, “Because it’s the same firearm.” RP 212. Mr. Smith spoke up and questioned why he was being “charged with – for both counts” and the court answered, “Well, you’re convicted with both – yeah, convicted of both.” Mr. Smith again asked, “But am I being charged with both of them?” RP 214. Defense counsel answered, “...they’re running concurrent, (inaudible) so they don’t go back to back, they don’t count against each other...” wherein the court interrupted and said, “They’re not stacking on top of each other, they’re running at the same time. I’m going to order the eight months on the second degree and the 24 months on the first degree.” RP 215.

On the judgment and sentence, the court included both convictions, and noted the counts encompassed the same criminal conduct. CP 48-49.

II. Findings

2.1 Current Offenses: The defendant is guilty of the following offenses, based upon
 guilty plea jury-verdict 8/21/2019 bench trial :

<i>Count</i>	<i>Crime</i>	<i>RCW (w/subsection)</i>	<i>Class</i>	<i>Date of Crime</i>
01	UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE	9.41.040(1)(a)	FB	2/15/2019
02	UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE	9.41.040(2)(a)	FC	2/15/2019

Counts 01, 02 encompass the same criminal conduct and count as one crime in determining the offender score. RCW 9.94A.589.

The judgment and sentence as entered:

2.3 Sentencing Data:

<i>Count No.</i>	<i>Offender Score</i>	<i>Seriousness Level</i>	<i>Standard Range (not including enhancements)</i>	<i>Plus Enhancements*</i>	<i>Total Standard Range (including enhancements)</i>	<i>Maximum Term</i>
01	1	VII	21 MONTHS to 27 MONTHS		21 MONTHS to 27 MONTHS	10 YEARS
02	1	III - C	3 MONTHS to 8 MONTHS		3 MONTHS to 8 MONTHS	5 YEARS

CP 50. Section 4.1 lists 24 months of confinement on count 1 and 8 months confinement on count 2, however the actual number of months of total confinement ordered does not list a total number of months. CP 51.

Mr. Smith makes this timely appeal. CP 63.

III. ARGUMENT

A. This Court Should Remand With Instructions To Vacate The Conviction for Unlawful Possession of a Firearm Second Degree.

1. The Constitutional Guarantee Against Double Jeopardy Protects Against Multiple Punishments For the Same Offense.

A person may not be “subject for the same offense to be twice put in jeopardy of life or limb”. U.S. Const. Amend. V.

Similarly, the Washington Constitution provides that a person may not “be twice put in jeopardy for the same offense.” Wash. Const. art. I, § 9. These guarantees protect a person from receiving multiple punishments under the same statute if he commits only

one unit of the crime. *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998). Double jeopardy claims are reviewed de novo. *State v. Villanueva-Gonzalez*, 180 Wn.2d 975, 979-80, 329 P.3d 78 (2014).

Where, as here a defendant is convicted of multiple violations of the same statute, the Court analyzes the double jeopardy question by examining the “unit of prosecution” the Legislature intended as the punishable act under the statute. *Id.* at 634. A unit of prosecution can be an act or a course of conduct. *State v. Hall*, 168 Wn.2d 726, 731, 230 P.3d 1048 (2010). After determining the unit of prosecution, the Court examines the facts of the case to decide whether more than one unit of prosecution has occurred. *State v. Bobic*, 140 Wn.2d 250, 266, 996 P.2d 610 (2000).

2. RCW 9.41.040 Authorizes Punishment Based On The Number of Firearms Not The Number Of Previous Qualifying Convictions.

RCW 9.41.040 criminalizes possession of a firearm by certain individuals. A plain reading of RCW 9.41.040 shows the Legislature intended to criminalize the act of owning, possessing or controlling a firearm by individuals who have been convicted of a

felony. The precedent condition must be a conviction of a serious felony, or a felony that does not qualify as a serious felony. The statute discriminates degree by the seriousness of the underlying offense. RCW 9.41.040(1)(a), (2)(a).

The unit of prosecution is a single firearm: “*Each* firearm unlawfully possessed under this section *shall be a separate offense.*” RCW 9.41.040(7).

A person is guilty of unlawful possession of a firearm in the first degree if he has previously been convicted or found not guilty by reason of insanity of any *serious* offense. RCW 9.41.040(1)(a).

A person is guilty of unlawful possession of a firearm in the second degree *if does not qualify under subsection (1)*, and he owns or has in his possession or under his control any firearm. RCW 9.41.040(2)(a).

Here, at issue is possession of a single firearm. Mr. Smith stipulated that as a juvenile he had been convicted of a serious offense. Under RCW 9.41.040(1)(a), the stipulated underlying conviction qualified him to be charged with unlawful possession of a firearm in the first degree. Despite qualifying under the first-degree elements, the State added a second charge, for the same firearm,

under RCW 9.41.040(2)(a), based on a stipulated juvenile conviction for malicious mischief second degree.

After having been found guilty by the jury on both unlawful possession of a firearm counts, the parties agreed the appropriate judgment was two convictions for possession of a single firearm. Rather than vacating the lesser degree offense, the court incorrectly labeled the convictions as “same criminal conduct.” This is error: the unit of prosecution is the number of firearms, not the number of underlying qualifying convictions.

The State may bring, and a jury may consider, multiple charges arising from the same criminal conduct in a single proceeding. *State v. Freeman*, 153 Wn.2d 765, 770-771, 108 P.3d 753 (2005). But a trial court *may not* enter multiple convictions for the same offense without violating double jeopardy protections. *State v. Womac*, 160 Wn.2d 643, 658, 160 P.3d 40 (2007). Only if the court does not enter judgment on all counts is double jeopardy avoided. *State v. Trujillo*, 112 Wn. App. 390, 411, 49 P.3d 935 (2002); *State v. Ward*, 125 Wn. App. 138, 144, 104 P.3d 61 (2005).

To read the statute as the sentencing court has done leads to absurd results. Under the court’s interpretation, an individual could be convicted, and judgment entered for a single unlawful

possession of a firearm for potentially *every* felony conviction in a defendant's criminal history. Any reading of a statute that produces absurd results must be avoided because "it will not be presumed that the legislature intended absurd results." *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). There are no Washington cases where a defendant has been convicted and judgment entered under two subsections of RCW 9.41.040 for possession of a single firearm.

The conduct the Legislature criminalizes is possession of a firearm by an individual with a felony in his criminal history. The statute is clear the unit of prosecution is a single firearm. It is antithetical to the guarantees against double jeopardy, the legislative intent and the plain language of the statute to enter multiple judgments based on the number of previous felonies rather than the number of firearms.

3. The Remedy Is Vacation Of The Lesser Degree Offense.

A challenge to a sentence that is contrary to law may be raised on appeal for the first time. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a conviction violates double jeopardy protections, the reviewing Court must reverse and remand

with instructions to vacate the lesser degree conviction. *Villanueva-Gonzalez*, 175 Wn. App. at 8.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Smith respectfully asks this Court to reverse his conviction for the lesser degree offense, and remand to the trial court to vacate that conviction.

Respectfully submitted this 10th day of March 2020.



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CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on March 10, 2020, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Clark County Prosecuting Attorney at cntypa.generaldelivery@clark.wa.gov and to Depree Smith/DOC#402650, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

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