

FILED

MAY 13, 2015

Court of Appeals
Division III
No. 32227-1-III State of Washington

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

PETER J. OSIADACZ, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....1

1. The court erred by giving instruction 8:

A firearm is a weapon or device from which a projectile may be fired by an explosion such as gun powder.

Issue Pertaining to Assignments of Error

A. Did the court err by giving instruction 8 as the definition of firearm was unconstitutionally overbroad, thus criminalizing innocent conduct?

II. STATEMENT OF THE CASE.....1

III. ARGUMENT.....6

IV. CONCLUSION.....9

TABLE OF AUTHORITIES

Table of Cases

City of Seattle v. Eze, 111 Wn.2d 22, 759 P.2d 366 (1988).....7

City of Seattle v. Huff, 111 Wn.2d 923, 767 P.2d 572 (1989).....7

State v. Anderson, 94 Wn. App. 151, 971 P.2d 585 (1999),
rev'd on other grounds, 141 Wn.2d 357, 5 P.3d
1247 (2000).....8, 9

State v. Immelt, 173 Wn.2d 1, 267 P.3d 305 (2011).....7

State v. Pam, 98 Wn.2d 748, 659 P.2d 454 (1983),
overruled on other grounds, *State v. Brown*,
111 Wn.2d 124, 761 P.2d 588 (1988).....8

State v. Pauling, 149 Wn.2d 381, 69 P.3d 331 (2003).....7

State v. Rupe, 101 Wn.2d 774, 783 P.2d 571 (1984)..... 8

Statute

RCW 9.41.010(1).....6

RCW 9.41.040(2).....6, 7, 9

Other Authorities

WPIC 2.10.....6

I. ASSIGNMENT OF ERROR

1. The court erred by giving instruction 8:

A firearm is a weapon or device from which a projectile may be fired by an explosion such as gunpowder.

Issue Pertaining to Assignment of Error

A. Did the court err by giving instruction 8 as the definition of firearm was unconstitutionally overbroad, thus criminalizing innocent conduct? (Assignment of Error 1).

II. STATEMENT OF THE CASE

Peter J. Osiadacz was charged by information with one count of second degree unlawful possession of a firearm. (CP 2). The parties stipulated that statements made by him to law enforcement officers were admissible as evidence at trial under CrR 3.5 and/or CrR 3.6 and no evidence in this case was subject to suppression under CrR 3.6. (CP 20).

The case proceeded to jury trial. (12/10/13 RP 62). Cle Elum Police Officer Nicholas Burson was on duty April 11, 2010, and had contact with Mr. Osiadacz, whom he knew, around 12:30 p.m. (*Id.* at 86, 88-89). The officer was parked in the entrance to the high school when he saw Mr. Osiadacz's car fail to stop at a

stop sign and he appeared to be speeding. (*Id.* at 90). Officer Burson stopped him. (*Id.* at 91).

Asking for his driver's license, registration, and insurance, the officer saw a container of black powder behind the driver's seat. (12/10/13 RP 92). He gave Mr. Osiadacz a verbal warning and let him go. (*Id.*). Checking on the driver's license, Officer Burson saw Mr. Osiadacz had a suspended license so he stopped him again. (*Id.* at 93). This time, the officer shined a light on what looked like the butt of a pistol next to the black powder container. Officer Burson told Mr. Osiadacz his license was suspended. (*Id.* at 94). He also suspected he was a convicted felon and could not have a firearm. (*Id.* at 95).

Officer Burson ran him through dispatch and confirmed his license was suspended and he was a convicted felon. (12/10/13 RP 95). Meanwhile, Mr. Osiadacz had put a box of doughnuts on top of the container. (*Id.* at 96). Officer Burson determined a convicted felon could not possess a black powder handgun and went back to talk to Mr. Osiadacz. (*Id.* at 95). The officer told him it was illegal for him to have the handgun, whereupon Mr. Osiadacz said it was not a real gun and was a toy. (*Id.* at 96-97).

Officer Burson removed the container to separate the gun from the vehicle. (*Id.* at 97).

Mr. Osiadacz got out of his car and was adamant the gun was a toy. (12/10/13 RP 97). He said it was a cap gun and there were little red caps in the container along with the black powder. (*Id.*). Officer Burson said it looked like a black powder handgun to him. (*Id.* at 98). He explained:

Because it was with black powder it had an initial ramrod added to it for loading. It had a channel where the cap goes into the barrel for where it could combust the black powder so it had all of the elements of being able to fire a propellant. (*Id.* at 98-99).

The officer testified the gun had obviously been modified. (*Id.* at 100). Mr. Osiadacz told him he had added the ramrod and done the modifications himself. (*Id.*). When Officer Burson commented it looked like a real gun to him, Mr. Osiadacz said it did look like a real gun, he fucked up, and he was sorry about that. (*Id.* at 101). The officer seized the gun, gave him a citation for driving while suspended, and let him go. (*Id.*).

Officer Burson acknowledged on cross examination that using toy caps, the gun could not send a projectile. (12/10/13 RP

120). The officer did fire caps with the gun, which was made by a toy company. (*Id.* at 131).

Tami Kee of the WSP Crime Lab tested residue inside the barrel of the gun. (12/10/13 RP 146, 155). Ms. Kee concluded “that the material from the inside of the barrel was consistent with combustion product from Pyrotechs.” (*Id.* at 157).

Kathy Geil was a firearm and tool mark examiner at the WSP Crime Lab. (12/10/13 RP 164). She examined the Kadet toy gun in 2012 and re-examined it in April 2013. (*Id.* at 168). She had never seen these modifications on a cap gun before. (*Id.* at 170). The metal rod was used as a ramrod to put material into the firearm. (*Id.* at 173-74). A real black powder weapon has nipples or projections on the post to hold percussion caps, which act as the primer that is slammed by the hammer to produce a little spark to light the gunpowder. (*Id.* at 178). But the cap gun just had center posts as “it was not meant to put black powder into.” (*Id.*). Ms. Geil tested the gun to see if it could be used as a black powder pistol. (*Id.*). It could. (*Id.* at 183, 187). Using a percussion cap, she found the modified toy gun could cause the cap to spark and ignite the powder in the barrel of the gun to project a projectile. (*Id.* at

183-84). Ms. Geil also found toy caps would ignite the powder, although she did not put a projectile in the barrel. (*Id.* at 185-86). She opined that the toy gun was a firearm “[b]ecause you can place an explosive material black powder in the weapon, place a projectile in there, give it a primer material system percussion caps, pull a trigger, and it will discharge a projectile.” (*Id.* at 188).

On cross examination, Ms. Geil testified the toy gun was manufactured to actually shoot a cork. (12/10/13 RP 201). It was her understanding that the gun shoots the cork by basically blowing a paper cap and creating a compressed area that blows the cork out. (*Id.*). She also acknowledged that the toy gun was manufactured by Kadet to send projectiles by way of explosive substances in that the primer material is a low explosive and paper caps are explosive and create “some sort of pressure if it’s allowed to put a cork out.” (*Id.* at 202).

Mr. Osiadacz testified in his own behalf. He did not fire black powder from the cap gun, which he found in a vehicle’s trunk at a wrecking yard. (12/11/13 RP 245, 250). He did not modify the cap gun. (*Id.* at 250). Mr. Osiadacz did not try to shoot a projectile from it. (*Id.* at 251). He said the gun was a toy with the barrel split

all the way down. (*Id.* at 252). He testified the cap gun was in his possession with black powder and the caps. (*Id.* at 268-69, 271).

Arguing the definition of firearm was constitutionally overbroad, Mr. Osiadacz objected to the court's instruction 8:

A firearm is a weapon or device in which a projectile may be fired or by an explosive such as gun powder. (12/11/13 RP 293; CP 111).

The court noted the objection and gave the instruction. (12/11/13 RP 294-95).

The jury found Mr. Osiadacz guilty as charged. (12/11/13 RP 329; CP 117). This appeal follows.

III. ARGUMENT

A. The court erred by giving instruction 8 as the definition of firearm was constitutionally overbroad, thus criminalizing innocent conduct.

Instruction 8 was based on WPIC 2.10. (CP 98). It tracked the definition of firearm in former RCW 9.41.010(1) as used in RCW 9.41.040(2), the unlawful possession of a firearm statute. Mr. Osiadacz objected to the instruction, *i.e.*, the statutes, because it was constitutionally overbroad. Noting the objection, the court nonetheless gave instruction 8. Although couched as an objection

to the instruction as overbroad, it was actually a challenge to the statutory definition of a firearm and RCW 9.41.040(2).

A statute is overbroad if it prohibits constitutionally protected speech. *City of Seattle v. Eze*, 111 Wn.2d 22, 31, 759 P.2d 366 (1988). A law will be invalidated on its face for overbreadth only if it “substantially overbroad.” *City of Seattle v. Huff*, 111 Wn.2d 923, 925, 767 P.2d 572 (1989). “Criminal statutes require particular scrutiny and may be facially invalid if they ‘make unlawful a substantial amount of constitutionally protected conduct . . . even if they also have legitimate application.’” *Huff*, 111 Wn.2d at 925; *State v. Immelt*, 173 Wn.2d 1, 4, 267 P.3d 305 (2011). A defendant can challenge a statute on overbreadth grounds even if his own conduct is not constitutionally protected because prior restraints on free speech pose a greater harm to society than the possibility that some unprotected speech will go unpunished. *State v. Pauling*, 149 Wn.2d 381, 386, 69 P.3d 331 (2003). But a statute will be invalidated only if the court is unable to limit sufficiently its standardless sweep by a limiting construction. *Id.* Here, the court could not do so as reflected in the record. (12/11/13 RP 294-95).

Indeed, “constitutionally protected behavior cannot be the

basis of criminal punishment.” *State v. Rupe*, 101 Wn.2d 664, 704, 683 P.2d 571 (1984). Mr. Osiadacz claims RCW 9.94A.040(2), RCW 9.41.010(7) and instruction 8 are overbroad because they sweep into its prohibition constitutionally protected conduct.

The undisputed evidence at trial showed that the Kadet toy cap gun possessed by Mr. Osiadacz fit into the definition of a firearm under the challenged statutes and instruction 8 because the toy paper caps, a low explosive, could compress an area and shoot a cork out the barrel. (12/10/13 RP 202). But the toy gun, put to its intended use, cannot be within the Legislature’s proscription against possession of a firearm as defined by statute and made into a crime by RCW 9.41.040(2). The courts have determined the Legislature clearly had in mind a “real gun” and not a gun-like replica or toy. *State v. Anderson*, 94 Wn. App. 151, 159, 971 P.2d 585 (1999), *rev’d on other grounds*, 141 Wn.2d 357, 5 P.3d 1247 (2000); *State v. Pam*, 98 Wn.2d 748, 753-54, 659 P.2d 454 (1983), *overruled on other grounds*, *State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988).

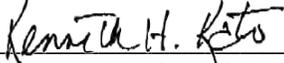
Accordingly, Mr. Osiadacz cannot be held criminally liable for possessing a toy gun that impermissibly fell into the overbroad

statutory definition of a firearm that in turn criminalized his innocent conduct under RCW 9.41.040(2). The statutes and instruction 8 are overbroad and must be struck down as they make criminal a substantial amount of constitutionally protected conduct. A father or grandfather cannot be a criminal for possessing or being around a toy gun. *Anderson*, 141 Wn.2d at 366-67) (“entirely innocent conduct may fall within the net cast by the [second degree unlawful possession of a firearm] statute”).

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Osiadacz respectfully urges this Court to reverse his conviction.

DATED this 13th day of May, 2015.



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on May 13, 2015, I served a copy of the brief of appellant by USPS on Peter Osiadacz, PO Box 522, Roslyn, WA 98941; and by email on Jodi Hammond at jodi.hammond@co.kittitas.wa.us.

