

No. 32622-5-III  
(consolidated with No. 32624-1-III)

FILED  
JAN 22, 2015  
Court of Appeals  
Division III  
State of Washington

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,  
Plaintiff/Respondent,

vs.

THOMAS EDWARD KIVETT,  
Defendant/Appellant.

APPEAL FROM THE SPOKANE SUPERIOR COURT  
Honorable John O. Cooney, Judge

---

BRIEF OF APPELLANT

---

SUSAN MARIE GASCH  
WSBA No. 16485  
P. O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
Attorney for Appellant

**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....2

    1. The record is insufficient to sustain imposition of the  
    felony firearm offender registration requirement.....2

    2. Since the Washington State Patrol crime laboratory  
    already had a DNA sample from Mr. Kivett for a qualifying offense  
    a subsequent submission was not required.....6

D. CONCLUSION.....7

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<i>Hook v. Lincoln County Noxious Weed Control Bd.</i> , 166 Wn. App. 145, 269 P.3d 1056 (2012).....	3
<i>State v. Hurst</i> , 5 Wn. App. 146, 486 P.2d 1136 (1971).....	3
<i>State v. Pettitt</i> , 93 Wn.2d 288, 609 P.2d 1364 (1980).....	3
<i>State v. Potts</i> , 1 Wn. App. 614, 464 P.2d 742 (1969).....	3, 6
<i>State v. Rafay</i> , 167 Wn.2d 644, 222 P.3d 86 (2010).....	3

**Statutes**

Laws of 2008 c 97 § 2.....6

Laws of 2013, ch. 183.....4

Laws of 2013, ch. 183 §§ 1, 6.....4

Laws of 2013, ch. 183 § 2.....4

RCW 9.41.010(7).....4

RCW 9.41.010(8).....4

RCW 9.41.333.....2

RCW 9.41.330(1).....2

RCW 9.41.330(2).....2

RCW 9A.83.020(4).....7

RCW 42.56.240(1).....4

RCW 43.43.754(1)(a).....6

RCW 43.43.754(2).....6, 7

RCW 43.43.822.....4

RCW 48.30.230(2)(b).....7

**Other Resources**

Benjamin Cardozo, *The Nature of the Judicial Process*,  
Yale University Press (1921).....3

**A. ASSIGNMENTS OF ERROR**

1. The sentencing judge erred by imposing a felony firearm offender registration requirement.

2. The trial court erred by imposing a DNA collection fee.

*Issues Pertaining to Assignments of Error*

1. Is the record insufficient to sustain imposition of the felony firearm offender registration requirement?

2. If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense, is a subsequent submission required?

**B. STATEMENT OF THE CASE**

Thomas Edward Kivett, the defendant, pleaded guilty under separate cause numbers to first degree unlawful possession of a firearm and felony violation of a no contact order—domestic violence. 4/22/14 RP 10.

On the Judgment and Sentence for the possession of a firearm conviction, the sentencing court imposed a felony firearm offender registration requirement. CP 65, 69. The possibility of imposition of the requirement was not indicated in the plea paperwork and was not discussed at the plea hearing or at sentencing. See CP 33 at paragraph (hh); 4/22/14 RP 3–13; 6/24/14 RP 14–22.

Mr. Kivett's criminal history included prior felony convictions. CP 22, 36, 41, 57. He was previously sentenced on January 1, 2011, for money laundering and sentenced on July 27, 2010, for making a false insurance claim. CP 22, 36. The sentencing court imposed a \$100 DNA collection fee as part of the mandatory legal financial obligation (LFO) in each of the current cases. CP 46, 62; 6/24/14 RP 20.

This appeal followed. CP 70–71.

### **C. ARGUMENT**

#### **1. The record is insufficient to sustain imposition of the felony firearm offender registration requirement.**

When a defendant is convicted of a felony firearm offense on or after July 28, 2013, the court must consider whether to impose a requirement the person comply with the registration requirements of RCW 9.41.333 and may in its discretion impose such a requirement. RCW 9.41.330(1). In determining whether to require the person to register, the court shall consider all relevant factors including but not limited to (a) the person's criminal history; (b) whether the person has previously been found not guilty by reason of insanity of any offense in this state or elsewhere; and (c) evidence of the person's propensity for violence that would likely endanger persons. RCW 9.41.330(2).

A trial court abuses its discretion if it issues a manifestly unreasonable order or bases its decision on untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 222 P.3d 86 (2010). A court's failure to exercise discretion is also an abuse of discretion. See *State v. Pettitt*, 93 Wn.2d 288, 296, 609 P.2d 1364 (1980); *Hook v. Lincoln County Noxious Weed Control Bd.*, 166 Wn. App. 145, 160, 269 P.3d 1056 (2012). The personal judgment inherent in the exercise of discretion is nevertheless subject to limits:

'The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the "primordial necessity of order in the social life". Wide enough in all conscience is the field of discretion that remains.'

(Footnote omitted.) Benjamin Cardozo, *The Nature of the Judicial Process*, Yale University Press (1921).

*State v. Potts*, 1 Wn. App. 614, 620, 464 P.2d 742 (1969). The record must reveal a basis for the exercise of a discretionary determination. *State v. Hurst*, 5 Wn. App. 146, 148, 486 P.2d 1136 (1971). In the absence of some meaningful insight which could explain the trial court's discretionary action, the action is arbitrary. See *Potts*, 1 Wn. App. at 620–21.

In enacting the discretionary registration requirement, the Legislature did not announce an intended purpose. See Laws of 2013, ch. 183. Offenses potentially subjecting an offender to the registration requirement include felony crimes listed in Title 9, chapter 41 [Firearms and Dangerous Weapons], drive-by shooting, theft of a firearm, possessing a stolen firearm and any felony offense committed while armed with a firearm. Laws of 2013, ch. 183 § 2; RCW 9.41.010(7), (8). The resulting Washington State Patrol offender database is for the use of law enforcement and is generally exempt from disclosure under the public records act. Laws of 2013, ch. 183 §§ 1, 6; RCW 42.56.240(1); RCW 43.43.822. From these provisions one would reasonably surmise the registry is intended to aid law enforcement in being aware of and monitoring individuals who have a recent and perhaps past history of firearms and dangerous weapons offenses posing a risk of danger to others. Had the Legislature intended a mandatory registration for all individuals convicted of qualifying offenses it would not have granted discretionary authority to the sentencing court to consider imposing a registration requirement.

Here, the court did not mention or discuss the potential felony firearm offender registration requirement during the plea and sentencing

hearings. On the Judgment and Sentence the court merely checked boxes stating it had considered “[X] the defendant’s criminal history” and “[X] evidence of the defendant’s propensity for violence that would likely endanger persons” in making the decision Mr. Kivett should register as a felony firearm offender. CP 59.

But according to his criminal history none of Mr. Kivett’s prior crimes involved firearms or are classified as violent crimes. CP 57. The record is silent as to why or how the court may have considered his particular criminal history that contained no firearm-related offenses a relevant factor sufficient to impose a firearm registration requirement on Mr. Kivett.

Nor does the record contain any evidence of a “propensity for violence that would likely endanger persons”. The court acknowledged the facts of Mr. Kivett’s current offense of first degree unlawful possession of a firearm simply represented a status offense: “You’re precluded from possessing a firearm, yet you were caught with a firearm.” 6/24/14 RP 19. Further, the record is silent as to why or how the court decided a propensity existed and, if it did exist, why the propensity qualified as an additional relevant factor sufficient to justify imposition of the firearm registration requirement on Mr. Kivett.

Since the court did not provide insight specific to Mr. Kivett for imposition of the firearm offender registration requirement, there is no way of knowing whether the court exercised its discretion at all or, if it did exercise its discretion by silence, whether that exercise was based upon tenable grounds. Because of the insufficient record this Court should conclude the trial court's action was arbitrary. The case should be remanded for resentencing with instruction that the registration requirement be removed or reasons given why it should be imposed. See *Potts*, 1 Wn. App. at 621.

2. Since the Washington State Patrol crime laboratory already had a DNA sample from Mr. Kivett for a qualifying offense a subsequent submission was not required.

A biological sample must be collected for purposes of DNA identification analysis from every adult convicted of a felony. RCW 43.43.754(1)(a). If the Washington state patrol crime laboratory already has a DNA sample from an individual for a qualifying offense a subsequent submission is not required to be submitted. RCW 43.43.754(2). The effective date of subsection (2) was June 12, 2008. Laws of 2008 c 97 § 2, eff. June 12, 2008.

Mr. Kivett's criminal history included prior convictions for money laundering and making a false insurance claim. He was sentenced for these convictions after June 12, 2008. CP 22, 36. These prior convictions, class B<sup>1</sup> and class C<sup>2</sup> felonies respectively, required collection of biological samples for purposes of DNA identification analysis pursuant to the statute. Under RCW 43.43.754(2) a subsequent DNA sample was therefore not required. The sentencing court should not have imposed a \$100 DNA collection fee as part of Mr. Kivett's mandatory legal financial obligation (LFO). The \$100 DNA collection fee should be stricken from each judgment and sentence.

**D. CONCLUSION**

For the reasons stated, the matter should be remanded for resentencing to remove the felony offender registration requirement and to strike the \$100 DNA collection fee from each judgment and sentence.

Respectfully submitted on January 22, 2015.

---

s/Susan Marie Gasch, WSBA  
Gasch Law Office  
P.O. Box 30339  
Spokane, WA 99223-3005  
(509) 443-9149  
FAX: None  
[gaschlaw@msn.com](mailto:gaschlaw@msn.com)

---

<sup>1</sup> Money laundering is a class B felony. RCW 9A.83.020(4).

<sup>2</sup> Making a false insurance claim is a class C felony. RCW 48.30.230(2)(b).

PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on January 22, 2015, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

Thomas Edward Kivett (#755774)  
Coyote Ridge Corrections Center  
P. O. Box 769  
Connell WA 99326-0769

**E-mail:**  
[SCPAAppeals@spokanecounty.org](mailto:SCPAAppeals@spokanecounty.org)  
Mark E. Lindsey/Andrew Metts  
Deputy Prosecuting Attorney  
1100 West Mallon Avenue  
Spokane WA 99260-2043

---

s/Susan Marie Gasch, WSBA #16485