

NO. 33184-9-III

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

FILED

Dec 04, 2015

Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON,

Respondent,

v.

RODOLFO TOLENTINO-CUEVAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
THE INFORMATION CHARGING TOLENTINO WITH ALIEN IN POSSESSION OF A FIREARM WAS CONSTITUTIONALLY DEFICIENT.....	1
B. <u>CONCLUSION</u>	4

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Carter
161 Wn. App. 532, 255 P.3d 721 (2011) 2, 3

State v. Fry
142 Wn. App. 456, 174 P.3d 1258 (2008) 2

State v. Ibrahim
164 Wn. App. 503, 269 P.3d 292 (2011) 1

State v. McCullum
98 Wn.2d 484, 656 P.2d 1064 (1983) 3

RULES, STATUTES AND OTHER AUTHORITIES

RCW 9.41.171 1, 3, 4

RCW 9.41.173 2

RCW 9.41.175 1, 2, 3

A. ARGUMENT IN REPLY

THE INFORMATION CHARGING TOLENTINO WITH ALIEN IN POSSESSION OF A FIREARM WAS CONSTITUTIONALLY DEFICIENT.

The State concedes that proof the defendant is not a lawful permanent resident is an essential element of the charged crime, the element was omitted from the charging documents, and Tolentino's conviction must be reversed. See Brief of Respondent, at 4-5 (citing State v. Ibrahim, 164 Wn. App. 503, 269 P.3d 292 (2011)). This Court should accept that concession. Apart from any other reason to treat lawful permanent residency as an element, to convert this proof requirement to an affirmative defense applicable solely to legal aliens would violate equal protection guarantees. See Ibrahim, 164 Wn. App. at 512-515.

As to the other requirements in RCW 9.41.171 – proof that the defendant has not obtained a valid alien firearm license under RCW 9.41.173 and proof the defendant does not meet the requirements of RCW 9.41.175 (setting forth criteria for possession without a license) – the State expresses less confidence in characterizing these as essential elements. See Brief of Respondent, at 5.

Specifically, the State notes that statutes are more likely to identify affirmative defenses, rather than elements of the State's proof, where the facts to be determined "lie immediately within the knowledge of the defendant" and argues proof of facts necessary under RCW 9.41.173 and .175 fall within this category. See Brief of Respondent, at 3 (citing State v. Carter, 161 Wn. App. 532, 255 P.3d 721 (2011); State v. Fry, 142 Wn. App. 456, 174 P.3d 1258 (2008)).

While the existence of an alien firearm license under RCW 9.41.173 and the existence of such documents as a passport, visa, and hunting license under RCW 9.41.175 would presumably be within the defendant's knowledge, such knowledge is hardly exclusive to the defendant. These same facts also are within the government's knowledge, since county, state, and federal government officials are the issuing entities for these documents. See RCW 9.41.173(2); RCW 9.41.175(1)(a)-(c). Indeed, in this very case, the State called Lana Funderburk, Record Clerk for the Benton County Sheriff's Office, to establish that Tolentino did not obtain a valid alien firearm license. See RP 85-87. For this class of evidence, the government (not the defendant) is likely the best and most reliable source.

Another consideration when distinguishing an element of the State's proof from an affirmative defense is whether the facts at issue and the definition of the crime are found in different subsections of the statute. If they are, the facts are more likely to be classified as part of an affirmative defense. Carter, 161 Wn. App. at 542. RCW 9.41.171 does not contain subsections. Rather, the defendant's status as a lawful permanent resident, his possession of a valid alien firearm license, and satisfaction of the requirements of RCW 9.41.175 are all contained in a single section defining the crime.

Another consideration that sometimes militates in favor of finding that a fact is an element of the State's proof is where proof of the fact constitutes a defense negating another element of the crime. Carter, 161 Wn. App. at 542. However, since the absence of a valid alien firearm license and the failure to meet the requirements of RCW 9.41.175 appear to be part of the definition of the crime itself under RCW 9.41.171, this consideration does not seem relevant. See State v. McCullum, 98 Wn.2d 484, 490, 656 P.2d 1064 (1983) (the absence of a defense must be proved by the State if included in the offense definition or if the defense negates another element).

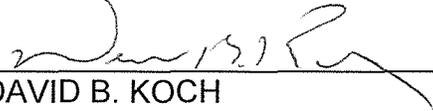
B. CONCLUSION

For all of the reasons discussed in Tolentino's opening brief and above, this Court should hold that RCW 9.41.171 contains the essential elements of the State's proof, find the charging documents deficient, and reverse Tolentino's conviction for Alien in Possession of a Firearm.

DATED this 4th day of December, 2015.

Respectfully Submitted,

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State v. Rodolfo Tolentino-Cuevas

No. 33184-9-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 4th day of December, 2015, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 4th day of December, 2015.

X  _____