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Court of Appeals
Division III
State of Washington

34222-1-III
COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

DEREK ROLAND WILLIAMS, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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APPELLANT'S ASSIGNMENT OF ERROR

The trial court violated the requirements of RCW 9.41.047(1)(a) when it did not notify Mr. Williams orally and in writing at the time of conviction that he must immediately surrender any concealed pistol license and that he may not possess a firearm unless his right to do so is restored by a court of record.

I. ISSUES PRESENTED

1. Is the trial court's partial, rather than complete oral advisement regarding the defendant's loss of gun rights appealable in this case and if so, was the issue preserved for appeal?

2. Where the trial court notified the defendant of his ineligibility to possess a firearm at his sentencing, for his twelfth conviction requiring such notification, should this court remand this case to the Superior Court to orally re-advise the defendant of what he already knows is required under the law?

II. STATEMENT OF THE CASE

The defendant was sentenced for his ninth felony conviction, after being convicted in the instant case for theft of a motor vehicle. His prior eight felony convictions required the court to provide notice of the loss of

any firearm rights at the time of conviction.¹ CP 24-26. His criminal history also included four prior domestic violence offenses which would have also required this notification. *Id.*

The defendant was not notified of the firearm prohibition at the time of his conviction – when the guilty verdict was returned, but was advised of the firearm prohibition requirements orally (partially), and completely in writing at the time of his sentencing. RPII² 367; CP 18. He was held in custody between the time of his conviction and the time of his sentencing. RPII 331. At sentencing, the court imposed a Drug Offender Sentencing Alternative (DOSA) requiring Mr. Williams to serve 19 months in DOC custody and 19 months closely supervised on community custody. RPII 236-66; CP 11-13.

¹ RCW 9.41.047(1)(a) provides:

At the time a person is convicted or found not guilty by reason of insanity of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.240, 71.05.320, 71.34.740, 71.34.750, or chapter 10.77 RCW for mental health treatment, the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity.

² “RPII” refers to volume II of the trial and sentencing verbatim report of proceedings transcribed by Allison Stovall.

The defendant appeals, claiming the trial court did not properly advise him orally and in writing of the firearm prohibition at the time the verdict was returned, but, instead, waited until sentencing to advise him of these warnings. His prayer for relief is to be sent back to court for a complete oral advisement of these rights.

III. ARGUMENT

A. THE TRIAL COURT'S PARTIAL ORAL ADVISEMENT REGARDING THE DEFENDANT'S LOSS OF GUN RIGHTS IS NOT APPEALABLE IN THIS CASE.

The defendant complains naught of the judgment and sentence, nor of the manner of trial. His *sole* assignment of error³ is that that the trial court did not notify him orally and in writing at *the time of conviction*⁴ that he must immediately surrender any concealed pistol license and that he may not possess a firearm unless his right to do so is restored by a court of record. To the extent the trial court did not *orally* inform him that he must surrender any concealed pistol license permit, that issue seems inapplicable in this case - the defendant could not legally possess a concealed pistol license or a firearm because he has never had five crime-free years in the community

³ He also requests the future denial of appellate costs as a second assignment of error, however, it seems this request is not an assignment of error.

⁴ It seems obvious that we cannot go back in time to the verdict and advise him of these rights.

since his 1993 second degree assault conviction. RCW 9.41.040(4)(a)(ii)(A); CP 9. Defendant confesses that he was advised of *all* of these rights in writing at the time of his sentencing. Appellant Br. at 5-6.

The defendant's sole assignment of error does not establish a valid basis for appeal. The defendant's overarching complaint is that no *complete* oral firearms warning was ever given. Appellant Br. at 4-6. RAP 2.2 sets forth the decisions which may be appealed. Normally, the failure "to mention a particular proceeding in RAP 2.2(a) indicates [the Supreme Court's] intent that the matter be reviewable solely under the discretionary review guidelines of RAP 2.3." *In re J.W.*, 111 Wn. App. 180, 185, 43 P.3d 1273 (2002) . RAP 2.2(a)(1) relates to the appealability of the final judgment. The final judgment *includes* the complete firearm prohibition warning, and is not subject to this singular complaint. None of the other appealable decisions in RAP 2.2(a)(2) - (13) have application in this case. Perhaps discretionary review would have been more appropriate?

Generally, an oral decision is not a judgment. *See, e.g., Earl v. Geftax*, 43 Wn.2d 529, 530, 262 P.2d 183 (1953). In most instances, an appeal does not lie solely from an oral decision. *See, e.g., In re Campbell*, 38 Wn.2d 140, 141, 231 P.2d 312 (1951). As a corollary to these principles, an appeal should not lie from the absence of an oral warning not affecting

the judgment and sentence. Therefore, the absence of a complete oral advisement of the gun prohibitions, or the existence of a partial oral advisement regarding the same, does not create an appealable issue in this case.

Even if appealable, the defendant failed to bring his complaint regarding the partial oral warning provided him to the court's attention. The appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5. No procedural principle is more familiar than that a right of any sort may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 8 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S. Ct. 660, 88 L. Ed. 834 (1944). RAP 2.5(a) affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal. *State v. Strine*, 176 Wn.2d 742, 749, 293 P.3d 1177 (2013). The theory of preservation by timely objection addresses several concerns. The rule serves the goal of judicial economy by enabling trial courts to correct mistakes and thereby obviate the needless expense of appellate review and further hearings. *See Strine*, 176 Wn.2d at 749-50 (2013); *State v. Scott*, 110 Wn.2d 682, 685-88, 757 P.2d 492 (1998). This Court should decline to

review this allegation that has no effect on the trial or judgment entered in this case.

B. THE REMEDY FOR THE TRIAL COURT’S PARTIAL, RATHER THAN FULL ADVISEMENT OF THE LOSS OF GUN RIGHTS IS NOT A REMAND FOR AN ORAL RE-ADVISEMENT OF THE RIGHTS HE ALREADY UNDERSTANDS.

The defendant relies on *State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011), as supporting his claim that the *remedy* for an incomplete oral firearms warning is a return to court, apparently to be read what he already knows. His reliance on *Breitung* is inapt - that case stands for the proposition that a predicate offense court’s failure to provide the statutorily required oral and written notice to a defendant that he had lost his right to possess firearms warranted reversal of his subsequent conviction for second degree unlawful possession of a firearm because of the import the legislature had placed on the mandatory advisement, and because, without a remedy for the trial court’s failure to notify the defendant, there would be no bite to the statute.

Thus, despite RCW 9.41.047(1)’s failure to provide a remedy for violation, we explained that “[t]he presence of a notice requirement shows the legislature regarded such notice of deprivation of firearms rights as substantial. Relief consistent with the purpose of the statutory requirement *must* be available where the statute has been violated.” *Minor*, 162 Wn.2d at 803–04, 174 P.3d 1162 (emphasis added).

Breitung, 173 Wn.2d at 403.

Generally, ignorance of the law is no excuse to crime. However, because of the advisement of the loss of the right to possess firearms is mandatory, it is now established that the lack of notice of the firearm prohibition is an affirmative defense to unlawful possession of a firearm. *Breitung*, 173 Wn.2d at 403. The defendant has the burden of proving this defense by a preponderance of the evidence. *Id.* To succeed, the defendant must show that when he was convicted of the prior offense, he did not receive either oral or written notice that it was illegal for him to own a firearm. *Id.* *Breitung* stands for the proposition that the Court established a remedy for a violation of RCW 9.41.047(1) where the legislature did not, and that the remedy is the establishment of an affirmative defense which is “[r]elief consistent with the purpose of the statutory requirement.” *Id.* at 403. The defendant’s request that the case be remanded for a re-advisement of the rights that he has already received in full in writing and as explained in his brief, rights and law that he fully understands, does not comport with the remedy provided in *Breitung*.

C. THE RCW 9.41.047(1) WARNINGS PROVIDED IN THIS CASE REASONABLY CONVEYED THE MESSAGE INTENDED BY THE LEGISLATURE.

Even if the warnings required by RCW 9.41.047(1) were constitutionally required, which they are not, it is unlikely that any court would require an exact word-for-word rendition of the warnings to be

considered valid. For example, the adequacy of *Miranda* warnings and the validity of a purported waiver turn on the particular facts and circumstances surrounding the case; the dispositive inquiry is whether the warnings *reasonably convey* to a suspect his rights. *State v. Mayer*, 184 Wn.2d 548, 559–60, 362 P.3d 745 (2015).

Similarly, for statutorily required warnings, such as those required under our implied consent law, the exact words of the implied consent statute are not required “so long as the meaning implied or conveyed is not different from that required by the statute.” *Jury v. State Dep't of Licensing*, 114 Wn. App. 726, 732, 60 P.3d 615 (2002). A warning, either in general language or in statutory terms, which neither misleads nor is inaccurate and which permits the suspect to make inquiries for further details is adequate. *Lynch v. State Dep't of Licensing*, 163 Wn. App. 697, 707, 262 P.3d 65 (2011).

Here the defendant was neither misinformed nor misled by the trial court's oral warnings. The trial court informed him that he could not possess firearms. That is the overarching requirement of the statute. The written notification was complete in its terms, and was acknowledged as read by the defendant. CP 18 (warning); CP 19 (signature). These warnings given substantially satisfied the statutory requirements.

Harmless error

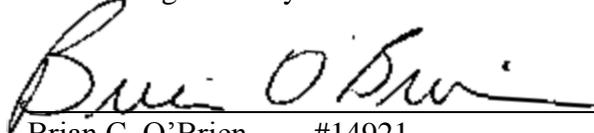
The defendant has neither alleged nor established any harm resulting from the partial oral advisement of rights. None is discernable.

IV. CONCLUSION

The defendant failed to preserve for review any issue regarding the alleged incomplete oral warning regarding his loss of gun rights. The lack of, or partial oral advisement of the loss of gun rights, does not create an appealable issue in this case. The defendant's request that the case be remanded for a re-advisement of the rights that he has already received, and that he fully understands, does not comport with the remedy provided in *Breitung*. The written notification was complete in its terms, and was acknowledged as read by the defendant. The warnings substantially satisfied the statutory requirements, and the defendant has established no harm in any event.

Dated this 6 day of January, 2017.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Brian C. O'Brien", written over a horizontal line.

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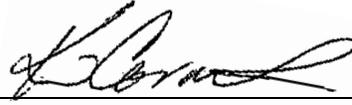
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on January 6, 2017, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Lisa Tabbut
ltabbutlaw@gmail.com

1/6/2017
(Date)

Spokane, WA
(Place)



(Signature)