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Court of Appeals
Division III
State of Washington

No. 34653-6-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

JOEL GALVAN SERRANO,
Defendant/Appellant.

APPEAL FROM THE CHELAN COUNTY SUPERIOR COURT
Honorable T. W. Small, Judge, Bench Trial
Honorable Judge Lesley A. Allan, Judge, Suppression Motions

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The charging documents violated appellant's constitutional rights because they omitted essential elements of the Alien in Possession of a Firearm charge.

Issue Pertaining to Assignment of Error

Appellant was charged with two counts of Alien in Possession of a Firearm. An essential element of the crime is that the defendant does not meet "the requirements of RCW 9.41.175." The charging documents in appellant's case, however, failed to include this element. In light of these omissions, is reversal of appellant's conviction required?

B. STATEMENT OF THE CASE

The Chelan County Prosecutor's Office charged Joel Galvan-Serrano with two counts of Alien in Possession of a Firearm. CP 8–10.

Following a CrR 3.5/CrR 3.6 hearing, Judge Lesley A. Allan ruled admissible statements Galvan-Serrano made during his pre-arrest contacts as law enforcement responded to reports of shots possibly being fired in a neighborhood. Judge Allan also ruled evidence found as a result of the statements' inclusion in the affidavit for search warrant of his basement apartment should not be suppressed. CP 107–11; RP 16–98.

Galvan-Serrano waived his right to trial by jury, and the Honorable T. W. Small presided at his stipulated facts bench trial. CP 67; RP[1] 100.

As described in Judge Small's written findings of fact and conclusions of law, the evidence established Galva-Serrano knowingly possessed a .380 caliber pistol and a Norinco SKS assault rifle on May 11, 2016, in Chelan County, Washington. CP 91.

Regarding the charges, Galvan-Serrano stipulated he was "not a citizen of the United States, was not a lawful permanent resident, had not obtained a valid alien firearm license pursuant to RCW 9.41.173, and did not then possess a valid passport and visa showing he was in the United States legally." CP 68.

Judge Small found Galvan-Serrano guilty of both unranked offenses. CP 92; RP 103, 106. The court imposed $1,250 in legal financial obligations. CP 97. Galvan-Serrano was sentenced under the first time offender option to 70 days confinement with credit for time

[1] "RP" refers to the verbatim report of proceedings reported by LuAnne Nelson.

served of 70 days. RP 109. He timely filed a Notice of Appeal. CP 131–32; Suppl CP 152–53[2].

C. ARGUMENT

1. The information charging Galvan-Serrano with alien in possession of a firearm was constitutionally deficient.

Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amendment 10)[3]; *State v. Kjorsvik*, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). "[A]n accused has a protected right, under our state and federal charters, to be informed of the criminal charge against him so he will be able to prepare and mount a defense at trial." *State v. McCarty*, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, this Court applies the "liberal construction" test set forth in *Kjorsvik*: "(1) do the necessary elements appear in any form, or by fair construction can they be found, in

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[2] Counsel is filing a supplemental designation of clerk's papers to include the amended notice of appeal filed on October 14, 2016, and anticipates the document will be given these page numbers.

[3] U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." Washington Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation . . . ."

the information, and if so (2) can the defendant show he was actually prejudiced by the inartful language." *McCarty*, 140 Wn.2d at 425 (citing *Kjorsvik*, 117 Wn.2d at 105-106). "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." *State v. Campbell*, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). And, if the necessary elements are not found, prejudice is presumed and reversal required without reaching the question of actual prejudice. *McCarty*, 140 Wn.2d at 425.

A challenge to the sufficiency of a charging document is a constitutional issue and may be raised for the first time on appeal. *Campbell*, 125 Wn.2d at 801. Review is de novo. *State v. Johnson*, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

Galvan-Serrano was charged with two counts of Alien in Possession of a Firearm. Under Washington law:

> It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, unless the person: (1) Is a lawful permanent resident[4]; (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173; or (3) meets the requirements of RCW 9.41.175.

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[4] "'Lawful permanent resident' has the same meaning afforded a person 'lawfully admitted for permanent residence' in 8 U.S.C. Sec. 1101(a)(20)." RCW 9.41.010(12). "Lawfully admitted for permanent residence" means "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed." 8 U.S.C. sec. 1101(a)(20).

RCW 9.41.171.

The information filed in Galvan-Serrano's case provides as follows regarding both counts:

> That the said JOEL GALVAN-SERRANO in the County of Chelan, State of Washington, on or about May 11, 2016, did then and there unlawfully, feloniously and knowingly possess a firearm, to wit: a rifle [count 1] [a pistol] [count 2], and at said time was not a lawful permanent resident of the United States of America, had not obtained a valid alien firearm license pursuant to RCW 9.41.173, and did not then possess a valid passport and visa showing he or she was lawfully within the United States of America; contrary to RCW 9.41.171, and against the peace and dignity of the State of Washington.

CP 68–69.

The information was constitutionally deficient because it failed to inform Galvan-Serrano that the State was required to prove he did not meet the requirements of RCW 9.41.175. Instead, the information merely indicates the State was required to prove he was not a lawful permanent resident and did not have a valid alien firearm license.

RCW 9.41.175 provides in relevant part:

> (1) A nonimmigrant alien, who is not a resident of Washington or a citizen of Canada, may carry or possess any firearm without having first obtained an alien firearm license if the nonimmigrant alien possesses:
>
> (a) A valid passport and visa showing he or she is in the country legally;

> (b) If required under federal law, an approved United States department of justice ATF–6 NIA application and permit for temporary importation of firearms and ammunition by nonimmigrant aliens; and
>
> (c) (i) A valid hunting license issued by a state or territory of the United States; or
>
> (ii) An invitation to participate in a trade show or sport shooting event being conducted in this state, another state, or another country that is contiguous with this state.

Thus RCW 9.41.175 permits aliens who are not residents of Washington or citizens of Canada to carry and possess firearms without licenses if certain criteria are met, including possession of a valid passport and visa and hunting license. See RCW 9.41.175(1). The information omitted any reference to RCW 9.41.175 or the allegation that Galvan-Serrano failed to meet its requirements including possession of a valid passport and visa and a valid hunting license.

While it is not necessary to use the precise words of a statute in the charging document, the words chosen must convey the same meaning and import. *State v. Moavenzadeh*, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998); *Kjorsvik*, 117 Wn.2d at 108. The information in Galvan-Serrano's case fails to do so. Even under the most liberal of readings, it omits essential elements of the offense in both counts.

The fact that the information cites to the relevant statute does not save it. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." *State v. Armstrong*, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing *Kjorsvik*, 117 Wn.2d at 101-02), review denied, 122 Wn.2d 1005, 859 P.2d 602 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name informs the defendant of each of the essential elements. *State v. Vangerpen*, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). That did not occur here.

In attempting to determine the essential elements of this offense, one discovers no pattern instruction in the Washington Practice Series, nor definitive guidance in case law. Under existing authority it is more likely the statute identifies elements of the State's proof in the three enumerated conditions following the phrase "unless the person," rather than affirmative defenses.

For equal protection purposes, the State must treat a lawful permanent resident the same as a citizen. *See State v. Abrahim*, 164 Wn. App. 503, 513, 269 P.3d 282 (2011). It is appropriate to read RCW 9.41.171 as to not distinguish between one who is a "lawful permanent

resident" and one who is a "citizen." Thus when charging a violation of RCW 9.41.171, the State should be required to prove that the accused is not a lawful permanent resident. RCW 9.41.171(1). 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 512–15. The determination the first condition is an essential element weighs in favor of finding all three enumerated conditions are elements the State must allege.

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)—case law additionally supports characterizing these as essential elements.

For example, 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." *State v. Carter*, 161 Wn. App. 532, 255 P.3d 721 (2011); *State v. Fry*, 142 Wn. App. 456, 174 P.3d 1258 (2008). Yet, while the existence of an alien firearm license under RCW 9.41.173 and the existence of such documents

as a valid passport, visa and valid 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 presented an Alien Firearms License Certification from the Firearms Section of the Washington Department of Licensing to establish Galvan-Serrano did not obtain a valid alien firearm license. CP 90. 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 dynamic 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 <u>or</u> if the defense negates another element).

For the reasons discussed 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 Galvano's convictions for Alien in Possession of a Firearm. See *State v. Simon*, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information and retrying the defendant).

2. Appeal costs should not be awarded.

In determining whether costs should be awarded in the trial court our Supreme Court has held:

> The record must reflect that the trial court made an individualized inquiry into the defendant's current and future ability to pay. Within this inquiry, the court must also consider important factors . . . such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 838, 344 P.3d 680 (2015). Under RCW 10.73.160(1), the appellate courts have broad discretion whether to grant or deny appellate costs to the prevailing party. *State v. Nolan*, 141 Wn.2d 620, 626, 8 P.3d 300 (2000).

Ability to pay is an important factor in the exercise of that discretion, although it is not the only relevant factor. *State v. Sinclair*, 192 Wn. App. 380, 388, 367 P.3d 612, *rev. denied*, 185 Wn.2d 1034 (2016); *see also State v. Grant*, 196 Wn. App. 644, 649–50, 385 P.3d 184 (2016). The appellate courts should also consider important nonexclusive factors such as an individual's other debts including restitution and child support (*Blazina*, 182 Wn.2d at 838) and circumstances including the individual's age, family, education, employment history, criminal history, and the length of the current sentence in determining whether a defendant "cannot contribute anything toward the costs of appellate review." *Sinclair* 192 Wn. App. at 391. *Sinclair* held, as a general matter, that "the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., 'increased difficulty in reentering society,

the doubtful recoupment of money by the government, and inequities in administration.' " *Sinclair*, 192 Wn. App. at 391 (quoting *Blazina*, 182 Wn.2d at 835).

Galvan-Serrano is 31 years old and is an illegal alien. RP 101; CP 68. The record establishes he owns no real or personal property, has no income, and has had some seasonal work in the past. CP 6, 126. The court found Galvan-Serrano indigent for purposes of this appeal. CP 129–30. In light of Galvan-Serrano's indigent status, and the presumption under RAP 15.2(f), that he remains indigent "throughout the review" unless the appellate court finds his financial condition has improved "to the extent [he] is no longer indigent,"[5] this court should exercise its discretion to waive appellate costs. RCW 10.73.160(1).

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[5] *Accord*, RAP 14.2, which provides in pertinent part:

> When the trial court has entered an order that an offender is indigent for purposes of appeal, that finding of indigency remains in effect, pursuant to RAP 15.2(f) unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances **have significantly improved since the last determination of indigency.** (Emphasis added).

D. CONCLUSION

For the reasons stated, Galvan-Serrano's convictions for Alien in Possession of a Firearm must be reversed. Alternatively, this court should exercise its discretion to waive appellate costs.

Respectfully submitted on April 7, 2017.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 7, 2017, 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:

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