

FILED

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

82431-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES D. RIVARD, PETITIONER

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE LINDA G. TOMPKINS

SUPPLEMENTAL BRIEF OF RESPONDENT

STEVEN J. TUCKER  
Prosecuting Attorney

Andrew J. Metts  
Deputy Prosecuting Attorney  
Attorneys for Respondent

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I. INTRODUCTION

Respondent, State of Washington, respectfully submits this supplemental brief as permitted by RAP 13.7(d) to address the issue presented by the petition for review.

II. STATEMENT OF THE CASE.

The following facts are derived from *In re Rivard*, 146 Wn. App. 891, 193 P.3d 195 (2008).

The defendant was convicted of vehicular homicide by guilty plea in 1997. The legislature reclassified vehicular homicide from a Class “B” felony to a Class “A” felony in 1996. The trial court granted the defendant’s request for gun rights restoration in 2006.

The State filed an appeal of the trial court’s decision and Division III initially affirmed the trial court. Upon reconsideration at the State’s request, Division III reversed the trial court’s decision, agreeing with the State that the actions of the vehicular homicide sentencing court were irrelevant.

III. ARGUMENT

- A. DIVISION III, COURT OF APPEALS DID NOT ERR IN REVERSING THE TRIAL COURT'S RESTORATION OF THE DEFENDANT'S GUN RIGHTS.

The following facts and statutes apply in this case:

1. The defendant pled guilty to vehicular homicide in 1997.
2. RCW 9.41.010(12) states: "Serious offense" means any of the following felonies or a felony attempt to commit any of the following felonies, as now existing or hereafter amended:

---

(1) Vehicular homicide, when proximately caused by the driving of any vehicle by any person while under the influence of intoxicating liquor or any drug as defined by RCW 46.61.502, or by the operation of any vehicle in a reckless manner;

3. The statute defining the crime of unlawful possession of a firearm states:

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any *serious offense* as defined in this chapter.

RCW 9.41.040(1)(a). (emphasis added).

The defendant has never argued that his vehicular homicide conviction does not meet the criteria listed in the statute defining a “serious crime.” Instead, the defendant wishes to detour the argument into the past, the “savings clause” and how his vehicular homicide conviction should remain a class B. The definition of a “serious offense” listed above does not refer to the felony classification of the disabling crime. It defines a “serious offense” as vehicular homicide when the driver is intoxicated. The State has attached the 1994 information showing that the defendant was charged with vehicular homicide and was intoxicated. *See Attach. A*

Thus, by applying the defendant’s criminal history to the main possession statute, the result is that the defendant cannot possess a firearm. The defendant does not directly address the fact that the statutes state that a person convicted of certain vehicular homicides cannot possess a firearm. Rather, the defendant attempts to deflect the analysis into what occurred in the past and how the 1997 sentencing court erred.

This Court has already directly answered the supposed “issues of first impression” raised by the defendant. The issues presented by the defendant are, in fact, well settled law. This Court plainly answered the majority of issues involved in this case with its decision in *State v. Schmidt*, 143 Wn.2d 658, 23 P.3d 462 (2001). This court rejected

any *ex post facto* arguments in relation to statutory gun possession laws passed after a defendant's original crime. *Id.*

As an initial consideration, it is the law in effect at the time a criminal offense is actually committed that controls disposition of the case. In this case, *the law on the dates petitioners were charged in 1997 with unlawful possession of a firearm under former RCW 9.41.040 is controlling and not the law in effect on the dates of their prior convictions.*

*State v. Schmidt*, 143 Wn.2d at 673-74. (footnotes deleted, emphasis added).

The *Schmidt* Court also held that “The 1994 and 1996 amendments to RCW 9.41.040 do not alter the standard of punishment for prior felony convictions.” *State v. Schmidt*, 143 Wn.2d at 675.

The State has maintained from the outset that the defendant is mistaken in his pursuit of issues pertaining to the 1997 vehicular homicide conviction and attempts to argue issues from that viewpoint. It is from this mistaken viewpoint that the defendant argues the “savings clause” and that the vehicular homicide conviction should remain a class “B” felony. As noted previously, this Court in *Schmidt* stated that when analyzing a gun rights case, it is the law in effect at the time the new crime of illegal possession is committed. The entire “A” vs. “B” issue is pointless to the issues in this case. If the defendant possesses a firearm and is charged with illegal possession, nobody will care that his 1997

conviction was a “B” felony in 1997. The new crime is exactly that: a new crime, unrelated to anything that happened or did not happen in 1997. What matters in any future prosecution is what the classification of the disabling conviction is *now*?

If the defendant is arrested for possessing a firearm, the laws at the time of the arrest will apply because it is a brand new crime. The new crime is not connected to the 1997 crime other than its existence. It is this complete disconnection from the 1997 sentencing that apparently flummoxes the defendant. The point is, the defendant does not separate the past and the present. The vehicular homicide case is long done and will have no bearing in the here and now. The only reason to even mention the 1997 vehicular homicide is that it forms the disabling crime that will prevent the defendant from possessing a gun in perpetuity.

The defendant raises challenges based on *ex post facto* laws under U.S. Const. art 1, § 10, cl. 1; Const. art 1, § 23. The passing of a statute by the legislature does not automatically create an *ex post facto* situation. The court in *State v. Watkins*, 76 Wn. App. 726, 887 P.2d 492 (1995) dealt with an *ex post facto* argument in a gun possession case where the disabling crime was a drug crime:

The statute involved here, however, does not enhance Watkins' sentence because it did not alter or increase punishment for an existing crime. Rather, the provision of

the statute under which Watkins was charged created a new substantive offense, i.e., possession of a short firearm or pistol by an adult or juvenile who has previously been convicted of a felony VUCSA. Although Watkins committed the predicate offense before the statute became effective, he committed the crime which constituted a violation of the firearms statute after the amendment became effective. Thus, as applied to Watkins, the statute neither increased the punishment for a crime already committed nor did it impose punishment for an act that was not punishable when committed. It is not a prohibited ex post facto law.

*State v. Watkins*, 76 Wn. App. at 732.

The State points out to the Court, that as a practical matter, it makes no difference whether the defendant had his gun rights restored one week after his conviction, two years after his conviction or any other time between the date of the conviction for vehicular homicide and the date the defendant began pursuing the restoration of his gun rights. The law today is that the defendant may not possess firearms. Even if this Court decides to restore the defendant's gun rights, the defendant will be subject to arrest and prosecution if he possesses a firearm. The legislature has said that the defendant cannot have firearms because his criminal history contains a vehicular homicide, which is a class "A" felony. The defendant will be subject to arrest for illegal possession of a firearm.

Each time the defendant possesses a firearm, he is subject to being charged with a new crime of illegal possession of a firearm. The new charges will not recognize some sort of immunity because this Court restored the defendant's gun rights at some time in the past.

A person with no criminal history could purchase a firearm today with only the usual checks. The defendant could go to the same store and a check of his background would show the disabling vehicular homicide conviction. At that point, the store should not sell the firearm to the defendant. If the defendant obtained a firearm from other sources, he would be subject to arrest at any time a police officer connects his criminal history with the firearm.

This case has nothing whatever to do with actions taken at the time of the 1997 conviction, other than the fact that the conviction provides the disabling crime for RCW 9.41.045. The only action that will grant the defendant the right to possess a firearm is this Court to declare null and void RCW 9.41.045.

IV. CONCLUSION

For the reasons stated above the decision of Division III should be affirmed.

Dated this 27<sup>th</sup> day of May, 2009.

STEVEN J. TUCKER  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", written over a horizontal line.

Andrew J. Metts #19578  
Deputy Prosecuting Attorney  
Attorney for Respondent

# ATTACHMENT A

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
 IN AND FOR THE COUNTY OF SPOKANE

**FILED**  
**FEB 08 1994**  
 THOMAS R. FALLQUIST  
 SPOKANE COUNTY CLERK

STATE OF WASHINGTON,	)	
	)	INFORMATION
Plaintiff,	)	
	)	NO. 94-1-00132-0
v.	)	
	)	STEVEN J. KINN
	)	Deputy Prosecuting Attorney
JAMES DOUGLAS RIVARD	)	
WM 102067	)	
	)	PA# 94-9-86604-0
	)	RPT# 02-93-98284-0
	)	RCW 46.61.520-F (#23001)
Defendant(s)	)	

*2*

Comes now the Prosecuting Attorney in and for Spokane County, Washington, and charges the defendant(s) with the following crime(s):

VEHICULAR HOMICIDE, committed as follows: That the defendant, JAMES DOUGLAS RIVARD, in Spokane County, Washington, on or about December 1, 1993, operated a motor vehicle while under the influence of or affected by intoxicating liquor and any drug, and in a reckless manner, and with disregard for the safety of others, and as a proximate result of operating said vehicle in that manner or condition did cause injuries to James Mecsko, who died on or about December 1, 1993, as a proximate result of the injuries received,

  
 Deputy Prosecuting Attorney

*12984*  
 WA St. Bar ID# *Mecsko*