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No. 60552-6-I

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

STATE OF WASHINGTON,

Respondent,

v.

R. P. H.

Appellant

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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REPLY BRIEF OF APPELLANT

On Appeal from the Superior Court of King County
The Hon. Julie Spector and Carol Schapira, Presiding

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ORIGINAL

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A. ISSUES IN REPLY

1. Can the State object to the rulings of the disposition judge years after the fact, when it did not object (a) at the time of disposition or (b) at any time in the many years since the disposition was imposed?
2. Can the issue regarding the constitutional right to bear arms be raised on appeal?
3. Is it constitutional to deny an adult the right to bear arms for life for actions committed when he was a child?
4. Did Mr. Hunter ask the trial court to restore his firearm rights under RCW 9.41.040(3)?
5. Should Mr. Hunter's firearm rights be restored under RCW 9.41.040(3)?
6. Should this Court follow the majority or dissent in State v. Swanson, 116 Wn. App. 67, 65 P.3d 343 (2003)?
7. Should this Court adopt Mr. Hunter's construction of RCW 9.41.040(4), which is the same construction shared by the judge who sentenced Mr. Hunter and shared by the State itself?

B. ARGUMENT

**1. *Judge Spector's Rulings at the Time of Disposition
Constitute the Law of the Case and Cannot be
Collaterally Attacked at this Late Date***

The State does not dispute that when Judge Spector sentenced young Ryan Hunter¹ she specifically entered an order that stated that Mr. Hunter was ineligible to possess a firearm “unless your right to do so is restored *by a court of record.*” CP 15 (emphasis added). The State does not claim it objected to the entry of this order, or any of the language on the order. The State also does not dispute that when the subject of firearms restoration came up at the disposition hearing, it did not object when Judge Spector clearly stated that Mr. Hunter would be eligible to possess firearms after he had completed treatment and supervision. RP 8-10.

Despite its failure to object, its failure to appeal, or its failure to seek timely relief under CrR 7.8, the State now argues that Judge Spector’s “incorrect statement about the law cannot be used to force another judge to

¹ While the State’s brief describes Mr. Hunter’s actions as forcible rapes and characterizes Mr. Hunter as if he were an adult who preyed on young children, it is very important to realize that Mr. Hunter was only thirteen years old when these acts occurred. Moreover, the description of the details of the allegations against Mr. Hunter comes from the State’s own certification of probable cause. The factual basis for the plea, however, was only that Mr. Hunter (then 13) had sex with his two sisters who were less than 12 years of age. CP 6.

do an act not permissible under the law.” Brief of Respondent at 30. This argument should be rejected.

Whatever the State’s opinion is of Judge Spector’s rulings in 2001, the fact is that her rulings, to which the State made no objection and from which the State never appealed, became final many years ago. Having become final, the rulings “bind” later courts as any other final ruling “binds” later courts, despite the fact that a party later comes to the conclusion that rulings may be incorrect. See State v. Ng, 110 Wn.2d 32, 39, 750 P.2d 632 (1988) (where State made no challenge to trial court’s instruction, it becomes law of the case even if the instruction was wrong). Basic principles of *res judicata*, collateral estoppel and issue preclusion prevent the re-litigation of the same claim, where there was a prior decision in a proceeding involving the same claim and the same parties. Carlton v. Black, 153 Wn.2d 152, 170, 102 P.3d 796 (2004); State v. Harrison, 148 Wn.2d 550, 560-62, 61 P.3d 1104 (2003).

Indeed, given the plea agreement, which clearly told young Ryan that his firearm rights would be suspended until a “court of record” restored those rights, CP 5, the State’s arguments to the contrary violate the plea and due process of law under U.S. Const. amend. 14 and Wash.

Const. art. 1, § 3. See State v. Miller, 110 Wn.2d 528, 535-37, 756 P.2d 122 (1988) (where plea bargain conflicts with statutory minimum, defendant has right to insist on specific performance, even if sentence would be illegal).

Here, the issue of whether young Ryan could ever possess firearms was the subject of extended discussions at the disposition hearing in 2001. The judge did not rule that Ryan could never possess firearms, nor did the judge rule that the only way that he could obtain the right to possess firearms was to obtain a pardon from the Governor. Rather, the judge ruled that Ryan could some day get his firearm rights restored, and entered a written order (likely supplied by the State itself) that Ryan was ineligible to possess a firearm “unless your right to do so is restored by a court of record,” CP 15, an order that would make no sense if the only way that the child could obtain firearm rights was through a pardon from the Executive Branch.

Judge Spector’s rulings became final when the State did not appeal that ruling and when the State failed to apply for timely post-conviction relief. It “binds” later courts no differently than all sorts of orders routinely entered against criminal defendants who fail to appeal them or

fail to file for collateral relief within often unfair time-limits set by RCW 10.73.090. See In re Richey, 162 Wn.2d 865, 872, 175 P.3d 585 (2008) (“Richey also contends that the trial court's basis for imposing his exceptional sentences was invalid. We decline to address this ground because while the one-year time limit on collateral attack does not apply to sentences in excess of the court's jurisdiction, a sentence is not jurisdictionally defective merely because it is in violation of a statute or is based on a misinterpretation of a statute.”). Judge Spector’s rulings, under the State’s arguments, are “merely. . . . based on a misinterpretation of a statute,” and thus are not subject to collateral attack at this stage, even if the State is correct (which it is not).

2. *The Second Amendment Issue Is Properly Raised Here*

The State argues that Mr. Hunter cannot raise a constitutional challenge to a lifetime firearms’ ban in this appeal. While the State recognizes that constitutional issues can be considered for the first time on appeal, the State seems to argue that Mr. Hunter should have raised his objections to a lifetime ban on firearms possession when he was sentenced in 2001, and suggests that such a challenge is time-barred under RAP 3.2 and RCW 10.73.090. Brief of Respondent at 14-16.

The problem with the State's argument is that in 2001, as noted, Judge Spector never ruled that Mr. Hunter would have a lifetime ban on firearms. Rather, she told Mr. Hunter that he *could* obtain his firearms rights back, and entered an order stating that only a "court of record" could restore those rights. Mr. Hunter did not appeal or collaterally attack Judge Spector's order because he had no disagreement with it. It was for the State to file such an appeal, not Mr. Hunter.

The issue of a lifetime ban only arose on August 27, 2007 when the State, for the first time, in response to a motion for reconsideration, argued that Mr. Hunter was barred from ever possessing a firearm (having failed to make this argument previously). CP 47-48. Given the fact that even Judge Schapira's original order (that Mr. Hunter would be eligible for restoration but for his traffic tickets and that he should come back to court in another year, RP 26-27), never mentioned a lifetime ban on firearms ownership, the issue was simply not ripe until this appeal.

In January 2001, Judge Spector did not impose a lifetime ban; the State in this very matter, in August 2007, initially argued that "the respondent has technically met the requirements of RCW 9.41.040(4)(b)(i) enabling him to have his right to possess firearms restored," CP 36; and

Judge Schapira never, at any time, stated that Mr. Hunter was subject to a lifetime ban. Given this history, it is apparent that issues under U.S. Const. amend. 2 and Wash. Const. art. 1, § 24, have only become ripe now.

3. *A Lifetime Firearms' Ban for a Juvenile Conviction is Unconstitutional*

The United States Supreme Court has recently recognized that the Second Amendment to the United States Constitution protects the right of individuals to possess firearms for self-defense purposes. District of Columbia v. Heller, ___ U.S. ___, 76 U.S.L.W. 4631 (No. 07-290, June 26, 2008). While the Court made it clear that its decision “should not be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms,” Heller, Slip Op. at 54-55, still, Heller requires a reevaluation of prior decisions based on now-outmoded understandings of the constitutional right to bear arms.²

² For example, the State cites to two prior United States Supreme Court decisions for its argument that the right to bear arms is subject to “reasonable regulation” and that it
(continued...)

Previously, Washington courts have construed regulations of the right to bear arms under Wash. Const. art. 1, § 24 using a “reasonable regulation” standard and distinguished the right to bear arms from other constitutional rights such as voting, traveling and privacy. See State v. Schmidt, 143 Wn.2d 658, 676-77 & n. 76, 23 P.3d 462 (2001); State v. Felix, 125 Wn. App. 575, 581, 105 P.3d 427 (2005). Heller requires a change from this analysis because the Court not only rejected a “reasonable regulation” standard, but adopted an interpretation of the right to bear arms that places the right on an equivalent basis as other cherished rights in the Bill of Rights, such as the right to freedom of speech.

For instance, the Supreme Court recognized that the law at issue in Heller would “pass rational basis scrutiny.” Slip Op. at 56 n.27. Yet, the Court rejected this standard:

²(...continued)
is permissible to prohibit felons from possessing firearms. Brief of Respondent at 17-18, citing United States v. Miller, 307 U.S. 174 (1939) & Lewis v. United States, 445 U.S. 55 (1980). In Heller, the Court essentially limited both decisions significantly. For instance, the Court noted that Miller “stands only for the proposition that the Second Amendment right, whatever its nature extends only to certain types of weapons” and that it is “particularly wrongheaded to read Miller for more than what it said, because the case did not even purport to be a thorough examination of the Second Amendment.” Heller, Slip Op. at 50. As for Lewis, the Court noted that while the case involved a challenge to a conviction for being a felon in possession of a firearm, the challenge was simply based on a contention that the prior felony conviction was unconstitutional: “No Second Amendment claim was raised or briefed by any party.” Heller, Slip Op. at 53 n.25. The Court then wrote off Lewis’ “gratuitous” comments about the Second Amendment in a footnote as dicta. Id.

But rational-basis scrutiny is a mode of analysis we have used when evaluating laws under constitutional commands that are themselves prohibitions on irrational laws. [Citation omitted]. In those cases, "rational basis" is not just the standard of scrutiny, but the very substance of the constitutional guarantee. Obviously, the same test could not be used to evaluate the extent to which a legislature may regulate a specific, enumerated right, be it the freedom of speech, the guarantee against double jeopardy, the right to counsel, or the right to keep and bear arms. See United States v. Carolene Products Co., 304 U.S. 144, 152, n. 4, 58 S. Ct. 778, 82 L. Ed. 1234 (1938) ("There may be narrower scope for operation of the presumption of constitutionality [*i.e.*, narrower than that provided by rational-basis review] when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments . . . "). If all that was required to overcome the right to keep and bear arms was a rational basis, the Second Amendment would be redundant with the separate constitutional prohibitions on irrational laws, and would have no effect.

Slip Op. at 56 n.27.

Similarly, the Supreme Court made it clear that the right to bear arms must be viewed at the same level of importance as other fundamental rights:

We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding "interest-balancing" approach. The very enumeration of the right takes out of the hands of government--even the Third Branch of Government--the power to decide on a case-by-case basis whether the right is *really worth* insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no

constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad. We would not apply an "interest-balancing" approach to the prohibition of a peaceful neo-Nazi march through Skokie. See National Socialist Party of America v. Skokie, 432 U.S. 43, 97 S. Ct. 2205, 53 L. Ed. 2d 96 (1977) (*per curiam*). The First Amendment contains the freedom-of-speech guarantee that the people ratified, which included exceptions for obscenity, libel, and disclosure of state secrets, but not for the expression of extremely unpopular and wrong-headed views. The Second Amendment is no different. Like the First, it is the very *product* of an interest-balancing by the people--which JUSTICE BREYER would now conduct for them anew. And whatever else it leaves to future evaluation, it surely elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.

Slip Op. at 62-63.³

³ This conclusion – that the right to bear arms is as important as the right to freedom of speech – answers the question left open in Heller as to whether the Second Amendment now applies to the states through the Fourteenth Amendment’s due process and privileges and immunities clauses. See Heller, Slip Op. at 48 n. 23. As the Court noted, prior decisions that the Second Amendment only applied to actions of the Federal Government, United States v. Cruikshank, 92 U.S. 542 (1876), were of questionable validity as (1) they also held that even the First Amendment did not apply to the states, and (2) they did not engage “in the sort of Fourteenth Amendment inquiry required by our later cases.” Heller, Slip Op. at 48 n.23.

Given the Court’s clear mandate that the Second Amendment’s right to bear arms is as fundamental as, for instance, the rights protected by the First Amendment, there is little doubt that the Second Amendment is now incorporated into the Fourteenth Amendment and applies to the States. See Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968) (test to determine if rights have been incorporated into the 14th Amendment is to see whether the right is among “fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,” or whether it is “basic in our system of jurisprudence.”). The Court’s comprehensive survey of the history of the right to bear

(continued...)

A restriction of the right to bear arms, then, can now be only justified under the same strict scrutiny test as is used in the First Amendment context – namely, whether there is a compelling government interest, with the restriction narrowly drawn to achieve that end. See Rickert v. Public Disclosure Comm’n., 161 Wn.2d 843, 848, 168 P.3d 826 (2007) (setting out strict scrutiny test in First Amendment context).

While perhaps life-long ban on firearm possession by felons who committed their crimes as *adults* may pass muster under this standard (an issue not before the court), such a ban is not constitutional when applied to individuals who commit offenses when they are only thirteen years of age. Under the State’s construction of RCW 9.41.040, Mr. Hunter can never, ever – even when he is a senior citizen -- use a firearm “in defense of hearth and home”; he can never serve this country as a soldier; and he can never be a law enforcement officer, all because he had sexual relations with his sisters when he was a mere child. Could a lifetime ban on freedom of speech as a consequence for acts committed as a thirteen-year-old child be upheld? Is such a ban “narrowly drawn,” particularly where

³(...continued)
arms and its treatment of this right as being of the same level as the right to freedom of speech leaves little room for debate on the incorporation issue.

there has been a judicial determination that Mr. Hunter no longer is a threat to public safety? What is the compelling interest that the State is protecting?

While the State is correct that no case has ever struck down such a lifetime ban, the State cannot cite to any cases which have upheld such a ban. Moreover, given the fact that Heller was the Supreme Court's "first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." Heller, Slip Op. at 63. Heller re-opened the entire area of Second Amendment jurisprudence, and, given the fact that the case came out only last month, it is unlikely that there would be any cases to cite on the subject of a lifetime ban on firearm possession for children convicted of sex offenses.

Accordingly, under Heller, this Court should reject the State's arguments that the Second Amendment allows Mr. Hunter to be barred from firearm possession for the rest of his life. Such a ban does not serve compelling state interests and is not narrowly drawn and violates U.S. Const. amend. 2, as incorporated through U.S. Const. amend. 14.

4. *Mr. Hunter Raised Arguments Under RCW 9.41.040(3) Below*

The State complains that Mr. Hunter cannot “avail himself” of RCW 9.41.040(3) because he never asked the court below to reinstate his firearm rights under that section. Brief of Respondent at 21-23. The problem with this argument is that the issue of RCW 9.41.040(3) did not arise until after the hearing that was held before Judge Schapira on August 7, 2007. Up until that hearing, even the State itself believed that Mr. Hunter was statutorily eligible for reinstatement under RCW 9.41.040(4). CP 36. Moreover, there was no equivalent finding to a “certificate of rehabilitation” until Judge Schapira at the August 7th hearing entered the order relieving Mr. Hunter of registration requirements. It was only after this hearing, after Judge Schapira relieved Mr. Hunter of registration requirements, and after the State changed its argument and argued a position inconsistent with what it previously argued, CP 47-48, that the issue of a certificate of rehabilitation arose. In response to the State’s new arguments, that Mr. Hunter in fact did argue that even sex offenders were eligible for firearms’ restoration under RCW 9.41.040(3) if they “received a ‘certificate of rehabilitation’ or other equivalent procedure,” and noted that while he had not received a “certificate of rehabilitation,” he had been

successfully treated such that he “satisfied this court that he no longer presented a threat of sexual offense recidivism such that he was relieved of his duty to register as a sex offender.” CP 55-56.

Given the procedural posture of the case, Mr. Hunter did raise an issue under RCW 9.41.040(3) sufficiently below for it to be reviewed on appeal.

5. *Mr. Hunter Received the Equivalent of a Certificate of Rehabilitation*

The State argues that Mr. Hunter did not receive the equivalent of a “certificate of rehabilitation” when Judge Schapira relieved him of his duty to register. The State argues that language in RCW 9.41.040(3) about “certificates of rehabilitation” only applies to out-of-state procedures, and that such certificates must be tantamount to making the conviction a “non-conviction” - an expungement of sorts. Brief of Respondent at 23-30.

In State v. Radan, 143 Wn.2d 323, 21 P.3d 255 (2001), however, the Supreme Court specifically rejected a similar argument and never restricted the terms “certificate of rehabilitation” or “other equivalent procedure” to procedures which resulted in “expungements” or which made the convictions “non-convictions.” In Radan, the defendant was only the beneficiary of a procedure that granted him an “early” discharge

from supervision. 143 Wn.2d at 334-35. There was no expungement or vacation of the conviction involved and Mr. Radan still had a conviction for theft on his record.

Moreover, nothing in Radan or the plain language of RCW 9.41.040(3) itself limits the terms “certificate of rehabilitation” or “other equivalent procedure” to procedures from other states. While a Washington court may not have the power to issue a “certificate of rehabilitation” per se, Washington courts do have the power to make findings in other contexts that are no different than the findings made in Montana in Mr. Radan’s case that he was no longer a danger to the victim or society. If Washington courts under Radan can recognize such findings as the equivalent of a “certificate of rehabilitation,” nothing prohibits a Washington court from recognizing an decision to relieve a juvenile sex offender of registration requirements as the same thing.

The State argues that under RCW 43.43.830, if a certificate of rehabilitation was entered in Mr. Hunter’s case, his child rape conviction would not be considered as his “conviction record.” Brief of Respondent at 27. Given the uniqueness of the procedure to relieve a someone convicted as a child of a sex offense of registration requirements under RCW

9A.44.140(4), it may well be the case that the State is correct, although that is not the issue before the Court now.

If Mr. Radan was eligible under RCW 9.41.040(3) to possess a firearm in Washington because he obtained an early discharge from supervision, Mr. Hunter is similarly eligible because Judge Schapira found that he no longer was a risk to society.

6. ***A Trial Court Does Not Have Discretion to Deny a Motion under RCW 9.41.040(4) if the Person is Statutorily Eligible***

The State would have this Court follow the dissent to State v. Swanson, 116 Wn. App. at 78-79 (Houghton, J., dissenting). It criticizes the majority in that case for not addressing rules of statutory construction. Brief of Respondent at 12-13. In fact, the majority decision in Swanson spent much time dealing with issues of statutory construction, considering and rejecting the State's arguments. The majority also addressed the significance of the "Hard Time for Armed Crime Act" and the significance of the constitutional right to bear arms on statutory construction (an issue that the State ignores). 116 Wn. App. at 70-78.

Moreover, the discretion suggested by the State is unworkable. What guidelines are there to govern the exercise of discretion in this

instance? If Judge Schapira found that Mr. Hunter was safe enough not to register as a sex offender, by what standards could she deny him the right to bear arms because of traffic tickets? The lack of any standards would certainly lead to arbitrary and inconsistent application of the statute, and should make this Court reluctant to construe the statute in the manner suggested by the State.

Swanson's holding (which the Legislature has never sought to circumvent) is well-reasoned and grounded in practicality. The State offers no real reason why this Court should not follow it.

7. ***Mr. Hunter is Not Ineligible under RCW 9.41.040(4)***

The State argues that “previously been convicted” of a sex offense in RCW 9.41.040(4) means the disqualifying offense. The State’s statutory interpretation, though, ignores several canons of statutory interpretation, such as the Rule of Lenity and the necessity of avoiding constitutional issues. Moreover, the intent of the “Hard Time for Armed Crime Act” has little to do with whether the Legislature (and the voters) intended to adopt a lifetime ban on firearm ownership for child convicted of offenses that did not involve firearms. Opening Brief of Appellant at 15-18.

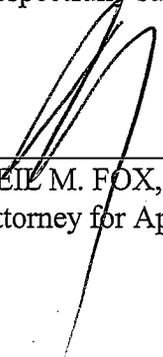
The problem really is the fact that RCW 9.41.040 is written in a very confusing manner. Given the Rule of Lenity, and given the importance of the state and federal constitutional right to bear arms, U.S. Const. amend. 2 and Wash. Const. art. 1, § 24, this Court should adopt a construction of RCW 9.41.040(4) which favors restoration of firearm rights to Mr. Hunter.

C. CONCLUSION

For the foregoing reasons, and the reasons set out in the opening brief, Mr. Hunter requests that the trial court's orders be reversed and asks this Court to order the trial court to restore Mr. Hunter's right to bear arms.

Dated this 17 day of July 2008.

Respectfully submitted,



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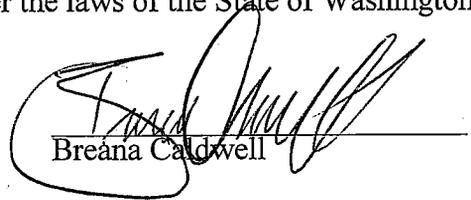
COA NO. 60552-6-I
CERTIFICATE OF SERVICE

I, Breana Caldwell, certify and declare that on the 17th day of July 2008, I deposited into the United States mail with proper first class postage attached a copy of the Reply Brief of the Appellant addressed to:

Dan Satterburg
King County Prosecutor
Dennis McCurdy, Deputy
516 Third Ave. W-554
Seattle WA 98104

I certify or declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

7/17/08 Seattle, WA
DATE AND PLACE


Breana Caldwell