

NO. 83826-7

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SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SIMMS AKA TERRY JAY WEEKS,

Appellant.

**SUPPLEMENTAL BRIEF OF RESPONDENT LIMITED TO
NEWLY RAISED EQUAL PROTECTION ISSUE**

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NOTE: On May 17, 2010, the Respondent filed a "MOTION TO STRIKE ISSUE NEVER RAISED BELOW OR ACCEPTED BY THIS COURT", which was passed to the merits pursuant to the Commissioner's ruling of July 16, 2010. This supplemental brief is only to be considered by the Court if the State's motion to strike is denied.

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A. ISSUES PRESENTED

In enacting the Hard Time for Armed Crime act, RCW 9.94A.533, the legislature provided that recidivist facts that increase the punishment imposed upon a jury's finding that a defendant was armed with a firearm or deadly weapon be determined by the court; thus, the recidivist fact does not need to be in the Information. Should this Court reject Simms' claim that this creates an equal protection problem where the legislature in enacting the Unlawful Possession of a Firearm statute made recidivist facts an element of the crime?

B. STATEMENT OF THE CASE

As pertinent here, Simms was charged and convicted of first-degree robbery and two counts of second-degree assault. In the Information it was alleged that Simms was armed with a firearm during the commission of each crime. CP 1-3.

Simms had previously been convicted of second-degree assault with a firearm enhancement. CP 94-102. Under the Hard Time for Armed Crime provisions of the Sentencing Reform Act, Simms' prior conviction with a firearm enhancement was used to determine the length of the sentence imposed for Simms' current firearm enhancement.

In initial briefing to this Court, the parties addressed Simms' claim that the "essential elements" rule required the State to allege in the

Information that Simms had previously been convicted of second-degree assault with a firearm enhancement. In his Supplemental Brief, Simms raised this equal protection claim for the first time. While the State's motion to strike is currently pending with this Court, leave was given allowing for this response.

C. ARGUMENT

**EQUAL PROTECTION DOES NOT REQUIRE THAT
RECIDIVIST FACTS DEFINING THE LEVEL OF
PUNISHMENT FOR A SENTENCE ENHANCEMENT BE
INCLUDED IN AN INFORMATION.**

Simms contends that the statutory scheme regulating imposition of punishment for firearm/deadly weapon enhancements violates the equal protection clause. Under RCW 9.94A.533, a judge determines whether a defendant has a prior conviction with a firearm enhancement, thus dictating the amount of punishment to impose upon a jury finding that a defendant was armed with a firearm during the commission of the current offense. The prior conviction is not an element of the crime and there is no statutory or constitutional requirement that the prior conviction be alleged in the Information.

Under a different statute, RCW 9.41.040, the Unlawful Possession of a Firearm statute (UPFA), the legislature chose to make proof of a prior

conviction of a certain type an element of the crime.¹ Because proof of a prior conviction of a certain type is an element of the crime, and the name of the crime a fact proving the element, both must be pled in the Information. Simms asserts that this difference in how a prior conviction is treated violates his equal protection rights. This argument fails.

Subject to constitutional constraints, the legislature has the absolute power to define criminal conduct and assign punishment. State v. Calle, 125 Wn.2d 769, 776, 888 P.2d 155 (1995); also United States v. O'Brien, ___ U.S. ___, 130 S. Ct. 2169, 2175, ___ L. Ed. 2d ___ (2010) (subject to constitutional constraints, Congress determines whether a given fact is an element or a sentencing factor). Once the legislature defines a crime, in charging a defendant, all essential elements of the crime must be included in the Information. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); U.S. CONST. amend. VI; Wash. CONST. art. I, § 22. This rule--known as the essential elements rule--requires that the Information also allege facts supporting each element. Id. at 98. There is

¹ The name of a specific prior conviction is not an element, but a fact that supports proof of an element. For example, first-degree UPFA requires the State plead and prove the defendant had previously been convicted of a "serious offense." RCW 9.41.040(1)(a). "Serious offense" includes "[a]ny crime of violence" (second-degree assault is a crime of violence) and "[a]ny other felony with a deadly weapon verdict." RCW 9.41.010(16)(a) and (n).

no other rule of law requiring any other information be charged in the Information.

As argued in the State's Supplemental Brief, recidivist facts are not essential elements that must be pled in the Information. Still, Simms argues that if the legislature chooses to treat a recidivist fact as an element of a crime in one instance, then any time the legislature allows for a recidivist fact to be used by the court in determining the length of sentence imposed for committing a crime, equal protection is violated if the recidivist fact is not included in the Information--even though it is not an essential element of the offense or a fact necessary to prove an essential element. There is no support for this argument.

1. The Equal Protection Clause.

The equal protection clause² is not intended to ensure complete equality among individuals or classes. Rather, the equal protection clause prohibits governmental classifications that impermissibly discriminate among similarly situated groups. In re Silas, 135 Wn. App. 564, 145 P.3d 1219 (2006); State v. Coria, 120 Wn.2d 156, 839 P.2d 890 (1992). Under the equal protection clause, persons similarly situated with respect to the

² U.S. Const. amend. XIV; Wash. Const. art. I, § 12.

legislative purpose of the law must receive like treatment. State v. Shawn P., 122 Wn.2d 553, 561, 859 P.2d 1220 (1993).

2. The Standard Of Review.

Equal protection challenges are analyzed under one of three standards of review: strict scrutiny, intermediate scrutiny, or rational basis. State v. Manussier, 129 Wn.2d 652, 672-73, 921 P.2d 743 (1996), cert. denied, 520 U.S. 1201 (1997). Recidivist criminals are not a semisuspect class; thus, the proper test to apply where only a liberty interest is asserted is the rational basis test. Id.

The rational basis test "is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause." Shawn P., 122 Wn.2d at 561. In fact, "[o]nly in the rarest of cases will a statute fail to survive rational basis review." More v. Washington State Dept. of Retirement Systems, 133 Wn. App. 581, 585-86, 137 P.3d 73 (2006) (citing DeYoung v. Providence Med. Ctr., 136 Wn.2d 136, 144, 960 P.2d 919 (1998)).

Under a rational basis test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of legitimate state objectives. Shawn P., at 561. A "presumption of constitutionality exists for the statute in question." Arnold v. Dept. of Retirement Sys., 74 Wn. App. 654, 665, 875 P.2d 665 (1994), rev. on

other grounds, 128 Wn.2d 765 (1996). The burden is on the party challenging the classification to show that it is "purely arbitrary." Coria, 120 Wn.2d at 172. The challenging party must prove that the statute is unconstitutional beyond a reasonable doubt. Forbes v. Seattle, 113 Wn.2d 929, 941, 785 P.2d 431 (1990).

Two other caveats are important to any equal protection argument. First, if there is a legitimate objective for the classification, then there need not be a perfect fit between the objective and the means employed; all that is required is a rational relationship. DeYoung, 136 Wn.2d at 144. In other words, a statute survives rational basis review even if it is to some extent both underinclusive and overinclusive. Campbell v. Dep't of Soc. & Health Servs., 150 Wn.2d 881, 901, 83 P.3d 999 (2004).

Second, "[o]ne who challenges a statute under the rational basis test must do more than merely question the wisdom and expediency of the statute." Coria, at 174. "It is well established that a showing of discriminatory intent or purpose is required to establish a valid equal protection claim." Id. "[S]tatutes do not offend [the federal or state constitutions] unless they are invidiously discriminatory." Northshore Sch. Dist. No. 417 v. Kinnear, 84 Wn.2d 685, 722, 530 P.2d 178 (1974), overruled on other grounds by Seattle Sch. Dist. No. 1 v. State, 90 Wn.2d 476, 585 P.2d 71 (1978).

3. Not Similarly Situated.

Simms claims that persons charged with UPFA and persons charged with a firearm sentence enhancement are similarly situated with respect to the legislative purpose of the law. Simms is incorrect.

The UPFA statute serves two purposes. First, the statute defines certain classes of persons that the legislature has determined should not be allowed to possess a firearm. This includes persons found guilty, or not guilty by reason of insanity, of any felony offense, persons who have been involuntarily committed for mental health treatment, persons found guilty of certain domestic violence misdemeanor offenses, persons under a certain age, and persons pending trial for serious offenses. Second, the statute provides that it is a criminal offense for persons in these classifications to possess a firearm.

On the other hand, the purpose of the Hard Time for Armed Crime act is not to define a class of persons who are prohibited from possessing a firearm or to punish those persons who illegally possess a firearm. Rather, the purpose of the act is to punish more severely those individuals who are armed with a firearm or deadly weapon while committing a felony offense and to discourage the use of weapons by other criminals in the future. See State v. Broadaway, 133 Wn.2d 118, 128, 942 P.2d 363 (1997); State v. Berrier, 110 Wn. App. 639, 41 P.3d 1198 (2002). In enacting the statute,

the legislature recognized the more serious threat posed by persons committing a crime while armed with a weapon. Id.

The UPFA statute deals with the prohibition on certain persons possessing or owning a firearm. The Hard Time for Armed Crime statute deals solely with the amount of punishment armed criminals should receive based on the class of the crime, the nature of the weapon, and whether the person has been convicted of using a deadly weapon in the past. With such diverse purposes, a person subject to one statute is not similarly situated in regards to the legislative purpose of the other statute.

4. A Rational Basis.

Simms' argument that there is no rational basis for the legislature's differing treatment of persons charged with UPFA and persons being sentenced after being convicted of committing a crime with a firearm enhancement ignores the distinction between a prior conviction that actually alters or defines the crime charged, and a prior conviction that is used solely to establish recidivism.

Under the Hard Time for Armed Crime provisions, the recidivist fact of a prior conviction is used like all recidivist facts of prior convictions throughout the Sentencing Reform Act; the prior conviction dictates the amount of punishment to be imposed upon a jury's finding that the underlying offense--an enhancement here--has been committed. Here,

Simms would still be guilty of robbery and assault with a firearm whether or not the State proved that he had been convicted of assault with a firearm in the past.

On the other hand, the legislature chose to prohibit convicted felons from possessing a firearm, thus making the prior conviction an element of the crime. The fact that persons with a conviction of a certain type can be charged with a higher degree of crime, does not change the fact that the conviction for the crime is based on proof of the prior conviction. It is certainly rational for the legislature to elevate the crime of unlawful possession of a firearm for those felons who have committed more serious prior offenses.³

The fact that the legislature has chosen to handle these situations differently is not wholly irrational. Making certain actions a crime based on prior convictions or making the crime more serious based on specific recidivist facts evinces a legislative intent to deter specific conduct. Increasing punishment for felonies in general, and for armed criminals

³ First-degree UPFA not only carries a higher penalty than second-degree UPFA, it is a Class B felony and has a longer washout period. See RCW 9.41.040(1)(b) and (2)(c); RCW 9.94A.525(2)(b) and (c). Further, persons convicted of second-degree UPFA have additional sentencing alternatives available to them, such as a first-time offender waiver or partial confinement alternatives. See RCW 9.94A.650; RCW 9.94A.680.

who have used deadly weapons in the past, by taking recidivism into account reflects a generalized legislative choice to protect the public. Simms can point to no invidious discrimination nor can he support his claim that the different treatment of the fact is wholly irrelevant to the legislative purposes of each statute.

Further, Simms' equal protection argument, taken to its logical conclusion, would invalidate not only the Hard Time for Armed Crime act, but the sentencing scheme of the SRA in general – all prior convictions would have to be treated as "elements" of the current crime, charged in the Information and proven to a jury beyond a reasonable doubt. But Washington courts have rejected such claims. See In re Stanphill, 134 Wn.2d 165, 175, 949 P.2d 365 (1998) (no equal protection violation when legislature changed its view of criminal punishment, resulting in offenders being subject to different punishment schemes); State v. Ross, 152 Wn.2d 220, 240-41, 95 P.3d 1225 (2004) (same); Manussier, 129 Wn.2d at 672-74 (POAA passes rational basis test and thus does not violate equal protection clause); State v. Langstead, 155 Wn. App. 448, 228 P.3d 799 (2010) (POAA does not violate equal protection where other crimes treat prior conviction as an element).

D. CONCLUSION

For the reasons cited above, this Court should affirm Simms' firearm enhancement penalty.

DATED this 13 day of September, 2010.

Respectfully submitted,

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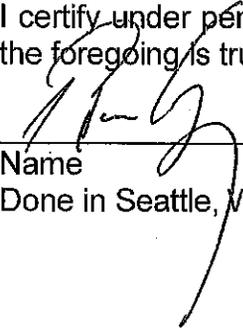
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BY RONALD R. CARPENTER

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Gregory Link, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Supplemental Brief of Respondent Limited To Newly Raised Equal Protection Issue, in STATE V. SIMMS, Cause No. 83826-7, in the Supreme Court, for the State of Washington.

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



Name
Done in Seattle, Washington

09-13-10

Date