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NO. 65014-9

IN THE DIVISION I COURT OF APPEALS OF
THE STATE OF WASHINGTON

STATE OF WASHINGTON

Plaintiff / Respondent,

VS.

GEORGE ARNOLD POWELL, JR.,

Defendant / Appellant.

APPELLANT'S REPLY BRIEF

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ORIGINAL

CONTENTS

I. The State Attempts to Cobble Together Valid Notice by Combining Two Defective Documents and the Pre-Plea Colloquy..... 1

1.1 The Verbal Statement by the Predicate Sentencing Court 2

1.2 The Notice on the Plea Agreement..... 3

1.3 The Notice on the No Contact Order..... 4

1.4 The State Should Not be Permitted to Advance an Argument that Punishes Mr. Powell for not Consenting to a Warrantless Search of his Home..... 7

II. Conclusion..... 9

TABLE OF AUTHORITIES

Cases

State v. Breitung, 155 Wn.App. 606, 230 P.3d 614 (2010). 8
State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226 (2009)..... 8

Statutes

RCW 9.41.040. 4

Other Authorities

Article 1 § 7 7

I. THE STATE ATTEMPTS TO COBBLE TOGETHER VALID NOTICE BY COMBINING TWO DEFECTIVE DOCUMENTS WITH THE PRE-PLEA COLLOQUY.

The State's attempt to cobble together valid oral and written notice from the predicate offense sentencing court lacks the workmanship required by Due Process. *See* RCW 9.41.047(1) (notification of a lifetime firearms prohibition must be given by the sentencing court orally *and* in writing). Specifically, the foundation of the State's argument rests upon two insufficient documents—the defendant's guilty plea form and the No Contact Order—glued together using an ambiguous pre-plea colloquy. The resulting legal monstrosity is as shaky as its profoundly flawed foundation.

This Court should decline the State's invitation to reach into different grab-bags to piece together the requisite statutory notice. *See* RCW 9.41.047(1). The State's pedantic repetition of its flawed theory (two notices and the pre-plea colloquy can be mashed together into something resembling valid notice) does nothing to strengthen what is fundamentally an absurd argument.

1.1 The Verbal Statement by the Predicate Sentencing Court

At no time during the predicate offense sentencing court's pre-plea colloquy did the court explicitly inform Mr. Powell that he was prohibited for life from possessing firearms. Instead, the court told Mr. Powell, prior to accepting his plea of guilty, that "***there will be*** a written order" entered prohibiting Mr. Powell, for life, from firearm possession, ***unless that right is restored by a court.*** CP 137. By its terms, the court's statement merely advises the defendant that a written order will be entered, and then summarizes a major component of what that order will provide. Such a statement would put any defendant on notice to look carefully at any written orders *subsequently entered* to determine what conduct was in fact prohibited by that order. In effect, the court's statement encouraged Mr. Powell to examine and abide by the terms of the order as entered. The Judgment and Sentence Order entered against Mr. Powell did not contain a lifetime firearms prohibition, but rather prohibited Mr. Powell from possessing weapons only as a condition of his 24-month suspended sentence. CP 152, 154.

The predicate offense sentencing court's verbal admonition (one leg of the State's three-legged argument), which was framed in terms of a prohibition that had not yet been imposed on Mr. Powell, amplifies rather

than mitigates the defects in the written documents discussed at §§ 1.2, 1.3 below.¹

1.2 *The Notice on the Plea Agreement*

The plea agreement in the predicate offense proceeding contained multiple admonitions and warnings which had no application to Mr. Powell's case. Structurally, the plea form adopts the following scheme to advise defendants of which particular provisions apply and which do not apply: the applicable portions of the form that apply to a defendant who is contemplating a guilty plea are to be checked *and initialed* by the defendant, and the inapplicable portions of the form are to be neither checked nor initialed. CP 148. The State attempts to gloss over the objective fact that whatever else the Defendant knew or did not know, the box applicable to the firearm prohibition is neither checked nor initialed. CP 149. The State has offered no evidence as to when ¶j of the guilty plea form was circled or by whom.

Not only was the firearms prohibition not checked and initialed as directed by the form, but also the court did not direct Mr. Powell's attention to this paragraph during the pre-plea colloquy to ensure that he

¹ What's more, in light of the State's reliance on the no contact order (discussed in §1.3) as the operative 'written notice,' a reasonable defendant would have been led to believe that the expiration of the order obviated all of the conditions built into the order, and that the expiration of the temporal limit of the order constituted a restoration by a court of competent jurisdiction of the defendant's right to own and possess firearms.

knew it applied to him as it did for other paragraphs in the plea form. In addition, unlike other paragraphs, such as ¶k which identifies a consequence generally attaching to drug offenses, nothing in the language of ¶j indicates that it would likely apply to Mr. Powell’s particular plea of guilt. Given these circumstances, Mr. Powell had no reason to believe that ¶j applied to him.

1.3 The Notice on the No Contact Order

To appreciate the absurdity of the State’s position—that the No Contact Order entered at the time of Mr. Powell’s predicate offense sentencing proceeding contained the “written notice” required to be given— the paragraph in which the “notice” appears must be read in its entirety:

Effective immediately, and continuing as long as this protection order is in effect, you may not possess a firearm or ammunition. Title 18, United States Code, Section 922(g)(8). A violation of this federal firearms law carries a maximum possible penalty of 10 years in prison and a \$250,000 fine. An exception exists for law enforcement officers and military personnel when carrying department/government issued firearms. Title 18 United States Code, Section 925(a)(1). If you are convicted of an offense of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. Title 18 United States Code, Section 922(g)(9); RCW 9.41.040.

See CP 61; *see also* Appendix 1 attached hereto.

The “No Contact Order - Domestic Violence” form containing the language that the State seeks to characterize as the statutorily required

Notice of firearms prohibition was also signed by the Defendant. The Statement of Defendant provides, in full:

I have read the order and I understand that any violation of the order is a criminal offense, punishable by fine and/or imprisonment. I further understand that any assault, drive-by shooting, reckless endangerment, ***or possession of a firearm or ammunition that is a violation of this order*** is a felony and may constitute a federal offense. A copy of this order has been given to me and I agree to abide by the conditions set forth.

See CP 61; Appendix 1 hereto.

The State has not substantively responded to the fact that the No Contact Order, the written document upon which it (and the trial court judge in the instant case) relied, is by its terms temporally limited with an explicit expiration date of 11/18/2005. *Id.* The only firearms prohibition specifically imposed upon Mr. Powell by the No Contact Order is also explicitly limited by the words “[e]ffective immediately, and continuing as long as this protection order is in effect” firearms may not be possessed. *Id.* Accordingly, the duration and language of the No Contact Order appear to prohibit firearms possession only for the life of the order, or 24 months.

The terms of the No Contact Order, as well as the trial court’s Findings of Fact No. 6 and No. 7, support the conclusion that Mr. Powell was misled by the court’s statements and the written documents he received. After describing the verbal colloquy in which the predicate

offense sentencing court advised Mr. Powell that a written order *would be* entered, the trial court in the present case found that “[t]he firearm prohibition was not specifically mentioned again; though, the defendant did receive a copy of a Domestic Violence No Contact Order that read, in part, ‘If you are convicted of a crime of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. Title 18, United States Code, 922(g)(9); RCW 9.41.040.’” *See* Finding of Fact No. 6, at CP 69-70. Similar to the pre-plea colloquy given by the predicate sentencing court, the language quoted above in the No Contact Order mentioning a lifetime prohibition is framed only in terms of possible consequences not actually imposed by the document itself. The language used is not an unequivocal statement of an existing fact, but instead requires reference to additional sources in order to determine its actual effect—a quality that renders the statement far from clear. Moreover, the trial court found at Finding of Fact No. 7 (at CP 70), that “[t]he judgment and sentence prohibited the defendant from possessing any weapons for a two year period. During this two year period, he transferred possession of his firearms to another person.” Thus, both the No Contact Order and the Judgment and Sentence indicated to Mr. Powell that he was to possess no weapons only for the 24-month lifespan of the orders. Mr. Powell

mistakenly believed these representations to be true and relied on them to his detriment.

Since the State relies on the No Contact Order entered on November 18, 2003 (a copy of which is attached hereto as Appendix 1), this Court should examine that document closely. Read alone or, particularly, in light of the trial court's Findings of Fact No. 6 and No. 7, the evidence makes inescapable the conclusion that (a) Mr. Powell was given misleading written warnings regarding his right to possess firearms, and (b) he was in fact misled.

1.4 The State Should Not be Permitted to Advance an Argument that Punishes Mr. Powell for not Consenting to a Warrantless Search of his Home.

The decision to proceed on the basis of a Stipulated Facts trial was made following the hearing on Defendant's Motion to Dismiss which occurred in September 2009. The defense was required to make a strategic decision as to whether to press forward on what appeared to defense counsel as a clear-cut violation of Article I, §7 of the Washington Constitution. The officers responding to the verbal argument between Appellant and his neighbor, Mr. Warsame, took Mr. Powell into custody (outside of Powell's home), then proceeded to enter Mr. Powell's residence without Mr. Powell's consent and without a warrant, looked

under a bed, removed a small box, examined its contents (determining that it contained a firearm), then returned the box to its position under the bed and sought a warrant. Defense counsel was reluctant to place defendant's liberty at stake and risk having multiple additional charges added out of fear that the court would not suppress the firearm evidence due to the inevitable discovery doctrine and/or the good faith exception to the warrant requirement. In September 2009, when the decision was made to proceed via a trial on stipulated facts, the Washington Supreme Court had not yet ruled in *State v. Winterstein*, 167 Wn.2d 620, 220 P.3d 1226 (2009) (decided in December 2009), that no 'good faith' exception to the warrant requirement existed in Washington, nor in *State v. Afana*, _____ Wn.2d _____, 233 P.3d 879 (Decided July 1, 2010), that no 'inevitable discovery rule' existed in Washington.

The State argues, at p. 14 of its brief, that "Powell has not established detrimental reliance [in the nature of what the defendant in *Breitung*² had demonstrated], as he lied to police, telling them that he did not own any guns and refused to consent to a search of his home, where his guns were located."

Such an argument seeks to impose negative consequences on Appellant Powell for the apparently unforgivable 'crime' of not

² *State v. Breitung*, 155 Wn.App. 606, 230 P.3d 614 (2010).

consenting to a police intrusion into the home. Such an argument is improper, and should be disregarded by this Court. That the police sought consent, were refused, then conjured up a bogus 'protective sweep' story so that they could go into Mr. Powell's home notwithstanding Mr. Powell's refusal to consent is sinful. That the State would seek to capitalize on Mr. Powell's refusal to consent is indefensible.

II. CONCLUSION

Mr. Powell was not given oral and written notice of the firearms prohibition as required by statute, and the notices he was given affirmatively misled him. Accordingly, although Mr. Powell was convicted of Violation of a No Contact Order – Domestic Violence, this prior conviction cannot serve as the predicate offense for the present conviction of unlawful possession of a firearm.

For the reasons stated above and in Appellant's Appeal Brief, Mr. Powell respectfully requests that this Court dismiss this case or remand with instructions to the trial court to dismiss.

SUBMITTED this 15TH day of September, 2010.

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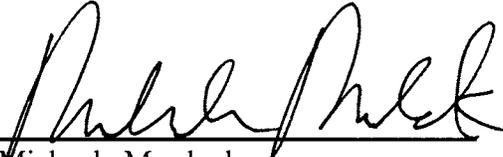
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CERTIFICATE OF SERVICE

I swear under penalty of perjury under the laws of the state of Washington that on the date and in the manner stated below, I served the following individuals or entities with the Reply Brief of Appellant to which this Certificate is subjoined:

SERVED UPON	VIA
Donna Wise King County Prosecutors Office W-554 King County Courthouse 516 – 3 rd Avenue Seattle, WA 98104-2390	<input type="checkbox"/> U.S. Mail
	<input checked="" type="checkbox"/> Legal Messenger
	<input type="checkbox"/> Facsimile
	<input type="checkbox"/> E—Mail
	<input type="checkbox"/> Other

DATED at Seattle, Washington, this Wednesday, September 15, 2010.


Michaela Murdock