

66373-6

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No. 66373-9-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALI D.
(D.O.B. 7/19/92),

Appellant.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. THE FIREARMS PROHIBITION IMPOSED AS PUNISHMENT FOR ALI'S CONVICTION IS AN ELEMENT THAT MUST BE CHARGED AND PROVED UNDER CURRENT LAW

a. The law barring Ali D. from legally possessing a firearm imposes punishment as a result of a criminal conviction.

Ali D. was prohibited from possessing a firearm as a result of the court's determination that the misdemeanor fourth degree assault offense for which he was adjudicated guilty was one of "domestic violence." While prior cases have upheld such restrictions by labeling it regulatory, that distinction no longer holds sway, as the Supreme Court recognized in State v. Sieyes, 168 Wn.2d 276, 295 n.20, 225 P.3d 995 (2010) (casting doubt on "reasonable regulation" analysis used to justify firearms prohibitions, terming it merely "occasional rhetoric" used in other cases), cf. State v. Felix, 125 Wn.App. 575, 579-80, 105 P.3d 427 (2005) (using regulation analysis as justification for penalties imposed upon conviction such as no contact order).

Here, the prosecution contends that the law barring Ali D. from having a firearm based on his conviction is simply a "collateral consequence" and thus not part of the punishment imposed. But

the United States Supreme Court has recognized that labels such as “collateral” punishments resulting from criminal convictions have no constitutional import. Padilla v. Kentucky, _ U.S. __, 130 S.Ct. 1473, 1481, 176 L.Ed.2d 284 (2010); State v. Sandoval, 171 Wn.2d 163, 170 n.1, 249 P.3d 1015 (2011) (explaining Padilla “superceded” cases finding immigration consequences are “collateral consequences”).

Padilla demonstrates that the State’s insistence on labeling a punishment resulting from a criminal conviction “collateral” does not remove that punishment from the rubric of constitutional protection. Cases resting on a purported distinction between collateral and direct sentencing consequences focus on an illusory difference abrogated by Padilla.

Padilla involved the immigration consequences of a criminal conviction, which lower courts had labeled collateral because they arose in separate civil proceedings rather than directly through the criminal case. 130 S.Ct. at 1481. But even though immigration consequences from a conviction are not “in a strict sense, a criminal sanction,” they are “intimately related to the criminal process.” Id. Additionally, recent changes in the law have made

immigration consequences “nearly an automatic result” for most noncitizens convicted of crimes. Id.

Even more than immigration consequences for a noncitizen, a firearm prohibition is an “automatic result” of a criminal conviction for people convicted of certain classes of offenses. Yet the State claims it need not to prove the “domestic violence” trigger for this automatic consequence by any standard of proof, need not charge the factual trigger with any degree of specificity in the information or any citation to legal authority, thus circumventing the otherwise applicable rules of notice.

The prosecution’s reliance on State v. Schmidt, 143 Wn.2d 658, 676, 23 P.3d 462 (2001), is unavailing. Schmidt involved an ex post facto challenge to new laws restricting the defendants’ right to possess a firearm based on felony convictions that predated the change in the firearms prohibition law. Id. at 661, 673. The analysis upholding the laws as reasonable regulation predates the cases explaining the rights of an accused vis a vis firearm possession as well as sentencing consequences, including Heller,¹

¹ District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008).

McDonald,² Padilla, and Blakely.³ Id. at 675. In that case, the petitioner “cite[d] no authority” about his right to bear arms. Id. at 677. While Schmidt noted that other cases have upheld firearms restrictions as reasonable regulation, the Sieyes Court pointedly distanced itself from relying on regulation as the justification for denying a person the constitutional right to possess a firearm. Sieyes, 168 Wn.2d at 295 n.20 (explaining Court’s “occasional rhetoric” treating firearm restrictions as “reasonable regulation” did not define how prohibitions on firearms possession should be treated).

Padilla teaches that issues directly affecting a person’s life and imposed as a consequence of a conviction cannot be summarily written off by applying the label of collateral consequences. Penalties are not restricted to a strict sense of what are criminal sanctions. 130 S.Ct. at 1481. Penalties that bear a “close connection to the criminal process,” as discussed in Padilla, require due process protections. When a punishment will probably follow a conviction, and when the punishment is mandatory as in the case at bar, and thus its application denies a

² McDonald v Chicago, __U.S. __, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010).

person his or her right to exercise a constitutional entitlement, the punishment must be considered as part of the criminal process. While restrictions on the constitutional right to possess a firearm may occur, they must comport with due process, including the right to notice of the triggering fact and proof beyond a reasonable doubt.

b. This prohibition on Ali exercising his right to possess a firearm is reviewable by this Court. At sentencing, the court notified Ali he no longer had the right to possess a firearm. The prosecution contends that since Ali is not being presently prosecuted for illegally possessing a firearm, he lacks standing to challenge this prohibition, even though the prohibition derives solely from his adjudication in this matter.

“Pre-enforcement challenges” to the constitutionality of a sentencing restriction are properly raised on direct appeal. See State v. Bahl, 164 Wn.2d 739, 746, 193 P.3d 678 (2008) (collecting cases). As the Bahl Court explained, “the fact that a party may be forced to alter his behavior so as to avoid penalties under a potentially illegal regulation is, in itself, a hardship.” Id. at 747

³ Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531, 159 L.Ed.2d 403 (2004).

(quoting United States v. Loy, 237 F.3d 251, 257 (3rd Cir. 2001)).

The prosecution's effort to sidestep the issue should be rejected.

2. THE FACTUAL TRIGGER FOR DENYING A PERSON THE FUNDAMENTAL RIGHT TO BEAR ARMS SHOULD BE CHARGED AND PROVEN BEYOND A REASONABLE DOUBT

The prosecution offers a confused assessment of whether the domestic violence requirement, for which a new penalty attaches, is an element. It acknowledges that some facts require notice and proof beyond a reasonable doubt, such as aggravating factors for increasing the standard range or firearms enhancements. But it circles back to its contention that a collateral consequence is not a penalty, citing Schmidt, 143 Wn.2d at 676. Yet Schmidt was decided before Blakely, or Padilla, and it was an ex post facto challenge to the firearms prohibition statute. The analysis in the 5-4 decision rested on ex post facto analysis raised by people accused of possessing firearms illegally, not about the right to have the State charge and prove all facts necessary to trigger increased punishment. The four dissenting justices sharply disagreed with the assessment of a firearms prohibition as non-punitive. See Schmidt, 143 Wn.2d at 685 (J. Johnson, J.,

dissenting) (“The absolute prohibition against possession of any firearm is evidence of punitive intent.”).

As example of the prosecution’s misguided response, it cites United States v. Hayes, 555 U.S. 415, 129 S.Ct. 1079, 172 L.Ed.2d 816 (2009), claiming it “upheld” a federal statute involving a firearm prohibition for a domestic violence misdemeanor. Resp. Brf. at 12. But Hayes did not “uphold” a statute, instead it construed the terms of a federal statute using basic tools of statutory construction. There was no challenge to the legality of the statute, simply a debate over its language. Hayes does not address the lawfulness or constitutionality of prohibiting firearms possession based on prior convictions.

Here, article I, section 24 states that “[t]he right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired.” The information charging Ali. D. with a crime did not allege a family or household relationship with the complainant. CP 1. It did not cite to the firearms prohibition statute, RCW 9.41.040, or other authority for prohibiting Ali D. from possessing a firearm if convicted of having a family or household relationship with the person assaulted. It did not mention that if proven, the mandatory penalty would be that Ali D. would

necessarily lose his firearm rights and this loss would be permanent unless he succeeded in restoring them after the passage of several years. RCW 9.41.040(4). But by statute and upon the court's sua sponte finding of a domestic violence relationship, Ali D. may not bear arms in defense of himself or the state. The restriction imposed on Ali D.'s right to possess a firearm violates his state and federal constitutional rights because it is based on a fact not charged.

B. CONCLUSION.

For the foregoing reasons as well as those argued in Appellant's Opening Brief, Ali D. respectfully requests this Court strike the improperly ordered firearm prohibition.

DATED this 13th day of October 2011.

Respectfully submitted,



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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 66373-9-I
v.)	
)	
ALI D.,)	
)	
Juvenile Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 13TH DAY OF OCTOBER, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTOR'S OFFICE APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> ALI D. 10216 NE 20 TH PL BELLEVUE, WA 98005	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 13TH DAY OF OCTOBER, 2011.

X _____ 

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