NO. 43702-3-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION II

STATE OF WASHINGTON,

Appellant,

vs.

MARK FRANCIS OWENS,

Respondent.

BRIEF OF APPELLANT

SCOTT ROSEKRANS
Jefferson County Prosecuting Attorney
Attorney for Respondent

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Date: November 2, 2012

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ASSIGNMENT OF ERROR

The Superior Court erred when it decided that Mr. Owens was in his "place of abode" while in his driveway.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

The Superior Court improperly reversed Mr. Owens' conviction.

STATEMENT OF THE CASE

On September 3, 2011, Jefferson County Sheriff's Deputy Tamura responded to a 911 call reporting a domestic violence assault at 10044 Center Road. VRP 100. On arriving at the scene, Deputy Tamura observed a man exit the house carrying a rifle. VRP 103. He identified himself as a Sheriff's Deputy and ordered the man to put the gun on the ground. VRP 103. The man ignored him, walked to a garage holding the rifle in a ready position and hid behind a car parked outside of the garage. VRP 103-105. A standoff ensued and eventually ended with no shots fired. Examination of the weapon showed it was loaded with several bullets, including one in the chamber, ready to fire. VRP 109-110.

Mr. Owens was charged with two counts of domestic violence assault in the fourth degree, obstructing a law enforcement officer, and unlawfully displaying a firearm.

Jury trial followed and during the trial the 911 call was played for the jury. On the recording Mr. Owens is heard to say "You call the cops? Are they coming here? Well good. I'll get the gun." VRP 203.

Moments later he was observed by Deputy Tamura carrying the 30-30 rifle he was convicted of unlawfully displaying. VRP 144. Cole Owens testified that the 30-30 rifle in question belonged to his father, the Defendant, Mark Owens. VRP 53-54.

Following conclusion of testimony and after excusing the jury, the court addressed proposed jury instructions. The State proposed WPIC 133.40 for a "to convict" instruction. VRP 227. Defense Counsel objected to this instruction and suggested a non-WPIC version that included the affirmative defense stated in RCW 9.41.270(3). VRP 228. The court rejected the Defense Counsel version and selected WPIC 133.40 because there was no evidence that the offense occurred in the Defendant's place of abode. VRP 229-230.

Mr. Owens was convicted of unlawful display of a firearm on December 28, 2011, and the firearm ordered forfeited.

Mr. Owens filed a motion to reconsider the sentence, which the District Court denied.

Mr. Owens timely filed a RALJ appeal.

The Jefferson County Superior Court heard arguments on May 4, 2012, and issued a Memorandum Opinion in favor of Mr. Owens filed on

July 13, 2012. The Superior Court reversed his conviction and remanded the case to the District Court for further action.

ARGUMENT

Mr. Owens was convicted of violating RCW 9.41.270(1), which states that:

> It shall be unlawful for any person to carry, exhibit, display, or draw any firearm, dagger, sword, knife or other cutting or stabbing instrument, club, or any other weapon apparently capable of producing bodily harm, in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons.

RCW 9.41.270(3) provides an affirmative defense:

> Subsection (1) of this section shall not apply to or affect any act committed by a person while in his or her place of abode or fixed place of business.

The Superior Court found that the trial court erred by refusing to give the jury an instruction on the affirmative defense, reasoning that "if one considers the curtilage of the home as part of his abode,

the state had to prove that Mr. Owens was not in his 'place of abode' when he displayed the rifle." Opinion 3.

The courts have long held that the driveway of a home is not a constitutionally protected area. *State v. Daugherty*, 22 Wn.App. 442, 444, 591 P.2d 801 (1979). *United States v. Brown*, 487 F.2d 208 (4th Cir. 1973*). See also Wattenburg v. United States*, 388 F.2d 853 (9th Cir. 1968). Although exactly where the curtilage ends and the open field begins is answered only on a case to case basis, we do not consider defendant's driveway in the present case to fall within the curtilage. Nor do we consider the driveway within the protection accorded the defendant in *Wattenburg v. United States*, 388 F.2d 853, 857 (19th Cir. 1968), wherein the court found an area immediately adjacent to defendant's abode within the curtilage and stated: 'We wish to add, however, that it seems to us a more appropriate test in determining if a search and seizure adjacent to a house is constitutionally forbidden is whether it constitutes an intrusion upon what the resident seeks to preserve as private even in an area which, although adjacent to his home, is accessible to the public.' *State v. Wright,* 74 Wash.2d 355, 444 P.2d 676 (1968).

When the Washington Supreme Court reviewed the constitutionality of RCW 9.41.270 it said:

> If a weapon is displayed in a manner, under circumstances and at a time and place so that it poses a threat to another person, such a display would warrant alarm for the safety of another. Thus, narrowly construing the phrase to apply to only conduct that poses a threat to others gives the phrase a narrow and definite focus and saves it from vagueness. Cf. Bellevue v. Miller, supra 85 Wash.2d at 547, 536 P.2d 603. Such a construction is also consistent with the statute's purpose, which is to prevent someone from displaying dangerous weapons so as to reasonably intimidate members of the public. House Journal, 41st Legislature (1969), at 201. *State v. Maciolek,* 101 Wash.2d 259, 676 P.2d 996 (1984).

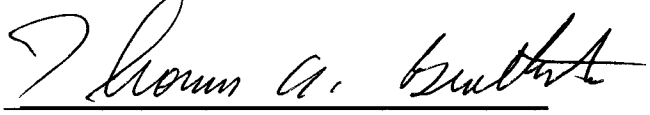
The Superior Court erred when it interpreted RCW 9.41.270(3)'s "abode" as referring to the resident's right to privacy rather than the drafter's intent "to prevent someone from displaying dangerous weapons so as to reasonably intimidate members of the public."

CONCLUSION

The State respectfully requests that this Court reverse the Superior Court and reinstate Mr. Owen's conviction.

Respectfully submitted this 4th day of November, 2012,

SCOTT W. ROSEKRANS, Jefferson County Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

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I, Janice N. Chadbourne, certify that on this date:

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I delivered an electronic version of same using the Court's filing portal to:

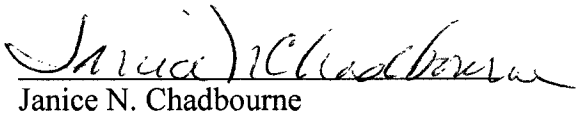
Brett Roberts
bretjacpd@gmail.com

And to Defendant via U.S. Mail, postage prepaid:

Mark Francis Owens
PO Box 634
Quilcene, WA 98376

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Port Townsend, Washington on February 20, 2013.



Janice N. Chadbourne
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