74779-7

NO. 74779-7-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

JOAQUIN DAVID GARCIA,

Respondent.

FILED
Jun 23, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by excluding Garcia's prior conviction for Rape of a Child in the First Degree as a predicate offense to a charge of Unlawful Possession of a Firearm in the First Degree.

2. The trial court erred by entering an order dismissing prosecution.

3. The trial court erred in stating that the parties agreed that the question presented was a question of law, not fact.

4. The trial court erred in ruling that the matter was purely a question of law.

B. ISSUE PRESENTED

Lack of notice of a firearm prohibition is an affirmative defense to a charge of unlawful possession of a firearm, requiring the defendant to prove by a preponderance of the evidence that he was not given oral or written notice of the firearm prohibition at the time of his predicate conviction and that he did not otherwise have actual notice or knowledge that he was prohibited from possessing firearms. Garcia was charged with Unlawful Possession of a Firearm in the First Degree based on a 1994 juvenile conviction for rape of a child, but the written juvenile record was silent on written

notice and the oral record no longer exists. Nevertheless, Garcia since acknowledged under oath that he knew the 1994 conviction affected his firearm rights; he has been subsequently convicted of several felonies where he was notified of his firearm prohibition; and in the present case he admitted to police that he has long been aware of the prohibition. Did the trial court err by disregarding the evidence of Garcia's actual knowledge, striking the child-rape conviction as a predicate offense as a matter of law, and dismissing the Unlawful Possession of a Firearm in the First Degree charge, where Garcia never even asserted an affirmative defense?

C. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Joaquin David Garcia was charged by Amended Information in King County Superior Court with six counts: (1) Unlawful Possession of a Firearm in the First Degree (UPFA-1); (2) Felony Harassment — Domestic Violence; (3) Tampering With a Witness – Domestic Violence; (4 and 5) Domestic Violence Misdemeanor Violation of a Court Order; (6) Unlawful Possession of a Firearm in the Second Degree (UPFA-2). CP 46-48. Count One alleged that in King County, Washington, on or about November 5, 2014, previously having been convicted in King County Superior Court of

the crime of Rape of a Child in the First Degree, a serious offense as defined in RCW 9.41.010, he knowingly did own, have in his possession, or have in his control, a .40-caliber Ruger semiautomatic pistol, a firearm as defined in RCW 9.41.010. CP 46.

Pretrial, Garcia filed a Defense Motion To Prohibit Use Of Juvenile Conviction As A Predicate Offense. CP 11-22, 526-33. The trial court granted the motion and dismissed Count One with prejudice. CP 537. The trial court found that the dismissal was appealable by the State under RAP 2.2(b)(1). Id. The trial court expressly found pursuant to RAP 2.2(d) that there was no just reason for delay of the State's appeal, and ordered that it should be allowed to commence immediately. Id. The State timely appealed. CP 538-40.

2. SUBSTANTIVE FACTS

a. Unlawful Possession Of A Firearm In The First Degree.

On November 5, 2014, Garcia's girlfriend, L.B., told a doctor at a clinic in South Seattle that Garcia had threatened her the previous night and was presently in the waiting room and armed

with a handgun. CP 4. Clinic staff called Seattle police, and when officers arrived, L.B. identified Garcia in the waiting room. Id. When the officers detained Garcia, he acknowledged that he had been in an argument with L.B. and added, "This is her gun and I am just carrying it for her. She knows I can't carry again." Id. Garcia also explained that he was a convicted felon and could not carry a gun. Id. He admitted that he had a handgun holstered on his right hip, under his coat. Id. Officers removed a loaded .40-caliber, semiautomatic Ruger pistol from the holster inside his waistband. Id.

Officers interviewed a frightened L.B. in the clinic exam room. CP 5. She said that she wanted to leave Garcia but feared for her safety. The previous evening, she and Garcia had argued over an unfamiliar phone number on her phone and Garcia accused her of seeing someone else. Id. Shortly thereafter, the couple were watching a television crime drama in which a man shot his girlfriend for infidelity. Id. Garcia turned to L.B. and said, "You can expect that to happen to you."

L.B. told the officers that Garcia kept two additional handguns in her home, which were under her name because of

Garcia's felony record. Id. The police advised L.B. to turn in the guns. Id.

After police read Garcia his rights, Garcia made several comments, recorded on patrol-car video, admitting that he knew that as a convicted felon he was prohibited from possessing firearms. Id. In fact, Garcia had numerous felony convictions, including a 1994 conviction in King County Juvenile Court for Rape of a Child in the First Degree. CP 3, 6, 146-48.

b. Exclusion Of Predicate And Dismissal.

Garcia did not announce an affirmative defense at his omnibus hearing on October 9, 2015.[1] Supp. CP __ (Sub #57, Omnibus Order). Instead, Garcia filed his Defense Motion To Prohibit Use Of Juvenile Conviction As A Predicate Offense on January 5, 2016, the week before trial. RP 8-9[2]; CP 11; Supp. CP __ (Sub# 75, 76, Orders On Continuance of Trial Date). Garcia argued that the 1994 child-rape conviction should be excluded, resulting in dismissal of Count One, because "Mr. Garcia did not receive notice of the loss of the right to possess firearms at the time

[1] In fact, he did not state the nature of a defense at all.

[2] The verbatim report of proceedings consists of one volume of transcribed pretrial hearings on January 20 and 26, 2016 and February 24, 2016.

of his 1994 conviction."[3] CP 20. The written records of the juvenile-court conviction did not mention firearm rights, and the juvenile-court clerk was unable to find the audio records of Garcia's 1994 juvenile hearings. CP 81; RP 27. Garcia argued that this proved that his statutory "right to notice was thus violated" under RCW 9.41.047(1).[4]

Garcia did not assert that at the time of the charged offense he was not aware of his firearm prohibition. CP 20-23, 527-31; RP 16-28. He agreed he was not affirmatively misled into believing he maintained the right to possess guns. RP 30. His declaration in support of his motion stated that his juvenile-court lawyer never told him about the firearm rights, but he did not assert that the juvenile court had not advised him of his loss of rights. CP 80.

Garcia's argument, in a nutshell, was that because the State could not now conclusively prove whether the juvenile court gave him formal notice in 1994, then the court must presume that the notice statute was violated and the child-rape conviction can never

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[3] While Garcia has also been convicted of Unlawful Possession of a Firearm in the Second Degree, Assault in the Third Degree, Attempting to Elude, Rape of a Child in the Third Degree and Failure to Register as a Sex Offender, none of those felonies is a "serious offense" under RCW 9.41.010(18). Garcia is charged with UPFA-2 in Count 6 based on all those predicates.

[4] The State had sought the audio records from Garcia's juvenile-court guilty plea, sentencing and subsequent revocation of a special sex-offender disposition alternative. CP 81; RP 27.

be used as a predicate offense for any UPFA charge. RP 20-23, 527-31; RP 16-28. All subsequent notice was immaterial, Garcia averred. It does not matter if he knew it was illegal to have the loaded pistol in his waistband, he contended, because the law requires that unless notice is given at the time of the predicate conviction, the crime is forever extinguished as a predicate.

The State agreed that based on the state of the 21-year-old juvenile-court records, it could not prove beyond a reasonable doubt that Garcia was given oral and written notice in juvenile court in 1994. RP 38. But the State maintained that the burden remained on Garcia to prove to the jury as an affirmative defense that he was not notified in court and did not otherwise know of his prohibition, and the State should be allowed to defeat the affirmative defense through Garcia's own admissions and actions showing longstanding actual knowledge of his prohibition. CP 95-98; RP 35-39. The State argued that Garcia's interpretation of the law improperly imposed notice as an element for the State to prove, among other "absurd results." RP 35.

Additionally, the State presented conviction records to show that between 1994 and the date of the charged offense, Garcia had been formally advised repeatedly of his loss of firearm rights while

being sentenced for his more recent felonies. See e.g., CP 226, 262, 277, 316, 349, 366, 444; RP 36. Moreover, in 1998 Garcia was charged in Pierce County Superior Court with Unlawful Possession of a Firearm in the First Degree based on the 1994 rape conviction as the predicate offense. CP 239; RP 32-33. Garcia subsequently pleaded guilty to Unlawful Possession of a Firearm in the Second Degree, and knowingly and intelligently stated, as a fact to support the conviction, "I was also convicted of a felony in 1994." CP 229, 233.[5] The State argued that it should be allowed to introduce all this evidence to a jury to rebut Garcia's affirmative defense. RP 36.

Nonetheless, the trial court proposed that because the missing audio record meant the State could not prove that notice was given in court in 1994, then the motion to dismiss was a question of law instead of factual question for the jury. RP 38. When the trial court asked the State whether it agreed that it was a question of law, the State disagreed: "I think the defense still needs

[5] When the trial court asked Garcia's attorney about this conviction, the lawyer alleged that the reduced charge of UPFA-2 was based on Garcia's possession of a firearm while underage, rather than on the rape conviction. RP 33. The record below does not include the amended information for UPFA-2, and there is no notation in the guilty plea or judgment and sentence clarifying which specific prong of the UPFA-2 statute he was convicted under. See CP 220 (denoting then-RCW 9.41.040(1)(b) but not the subparts below (b)).

to meet their burden, your honor, and provide something which would indicate that Mr. Garcia never affirmatively received notice." RP 38. Yet the trial court then said, "I am hearing both parties agree that this really is a question of — at this point a question of law; that is if this court concludes that the statute makes — mandates that notice needs to be given at the time, then the defense motion should be granted, dismissing count 1 at this time." RP 40.

On February 24, 2016, the court granted the defense motion and dismissed Count One. In its oral ruling, the trial court again asserted that whether Garcia received notice was a matter of law, and misstated that "the parties have also agreed" to that. RP 60. The trial court concluded that any subsequent notice not made at the time of the 1994 conviction was irrelevant, and found that there was "no evidence, circumstantial or direct, that in this case Mr. Garcia was at the time of the underlying conviction informed of his prohibition regarding possessing a firearm." RP 61. The court concluded:

> Thus I believe, as a matter of law, we need not at this stage conclude that this is any longer a matter of fact, and that it is -- that it would become Mr. Garcia's burden of proof, because as a matter of law, the evidence does not establish that at the time of the underlying conviction, Mr. Garcia

> received either oral or written notice. The motion to dismiss -- I believe it is count 1 – is granted.

Id.

In its written order, the trial court reiterated that there was no evidence that Garcia was "at the time of the underlying conviction relevant to count 1 informed for his prohibition concerning a firearm, in any way." CP 542. The trial court ruled that the controlling law did not allow that "subsequent 'otherwise' knowledge may be retroactively attached to the predicate conviction already charged." Id. The court concluded:

> As a matter of law, at the time of the underlying conviction and sentencing in question Mr. Garcia did not receive the statute's mandated written or oral notice of his ineligibility to possess firearms as required by RCW 9.41.047(1). The proper remedy for this violation is exclusion of that proposed predicate offense.

CP 542-43.

D. ARGUMENT

THE TRIAL COURT ERRED BY EXCLUDING GARCIA'S CHILD-RAPE CONVICTION AS A MATTER OF LAW AND DISMISSING THE CHARGE OF UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE.

Joaquin Garcia has known for decades that he is prohibited by law from possessing guns. The trial court erred by entirely disregarding that in favor of an untenable legal rule that improperly shifted the evidentiary burden to the State and ignored our

Supreme Court's focus on actual notice and knowledge rather than the rigidity of a *per se* rule. This Court should reverse the trial court's exclusion of Garcia's first-degree-child-rape conviction as a predicate offense and its dismissal of the Unlawful Possession of a Firearm in the First Degree charge.

A trial court's pretrial dismissal of criminal charges pursuant to CrR 8.3(c) is subject to de novo review.[6] State v. Conte, 159 Wn.2d 797, 803, 154 P.3d 194 (2007).

RCW 9.41.047(1) requires a convicting court to give notice of the prohibition of the right to possess firearms. The statute provides:

> At the time a person is convicted ... of an offense making the person ineligible to possess a firearm ... the [convicting court] shall notify the person, orally and in writing, that the person ... may not possess a firearm unless his or her right to do so is restored by a court of record.

However, the legislature did not enact a remedy for a violation of RCW 9.41.047(1). State v. Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008). "Ignorance of the law is generally not a defense, and a convicted felon's knowledge that his right to firearm

[6] In its order of dismissal, the trial court cited CrR 8.3(b) (Motion of Court — governmental misconduct), but the court should have cited CrR 8.3(c) (Motion of Defendant — insufficient evidence of prima facie case). The dismissal was based on the fact that without the 1994 child-rape conviction as a predicate, the State had insufficient evidence for a prima facie case of UPFA-1. There was no allegation that the State committed misconduct in the present case.

ownership is prohibited is not an element of the crime of unlawful possession of a firearm." State v. Breitung, 173 Wn.2d 393, 402, 267 P.3d 1012 (2011).

With that in mind, our Supreme Court has developed a remedy for violations of RCW 9.41.047(1), most recently pronounced in Breitung: "Lack of notice under RCW 9.41.047(1) is an affirmative defense, which [a defendant] must establish by a preponderance of the evidence." 173 Wn.2d at 403. The defendant must establish that he was "not notified of his firearm prohibition as required under RCW 9.41.047(1) *and did not otherwise have notice of the prohibition against possession of firearms*. Id. at 404 (emphasis added). "*Absent that notice*, he is entitled to reversal of the unlawful possession of firearms conviction." Id. (emphasis added).

In other words, it is Garcia's burden to prove to a jury by a preponderance of the evidence that he *did not have notice* that he could not lawfully own a firearm. If, at the time of the predicate conviction, the court provided oral or written notice that Garcia could not possess a firearm, the defense fails. If Garcia was not notified by the court at the time of the prior conviction, but he otherwise had knowledge at the time of the current offense that he

was prohibited from possessing a firearm, or was given notice before the date of the current offense that he was prohibited from possessing a firearm, the defense fails.

Thus, Garcia needed to affirmatively assert the defense that he did not have notice (he has never actually done this — he has merely claimed lack of proof of in-court notice). Then the trial court should have treated the claim as the affirmative defense and the question of fact that it is, and required Garcia to prove it to a jury. The State had the right to rebut Garcia's claims with evidence that Garcia long had actual notice of his firearm prohibition at the time he possessed the pistol in this case. That includes, for example, the 1998 guilty-plea document in which Garcia acknowledged that the 1994 conviction affected his firearm rights.[7] And it includes all the other documentation, court records, circumstantial evidence and contemporary admissions by Garcia that he long has been aware that he is not allowed to have guns.

Our Supreme Court's requirement that the defendant must prove a lack of actual notice — that he did not know he was prohibited from having guns at the time he had one — fits squarely

[7] If Garcia believes, as he argued below, that this evidence does "not really necessarily" prove he knew the 1994 conviction affected his firearm rights, then he can certainly argue that to the factfinder. See RP 33-34.

with the history and spirit of both the notice legislation and the high court's judicially created remedy. Garcia's proffered rule, which the trial court accepted, discounts that history and spirit with harmful effect.

The notice requirement contained in RCW 9.41.047(1) "was one provision in a bill aimed at violence prevention, implying the legislature's concern with addressing the problem of violence without interfering with a citizen's right to possess and use firearms." Minor, 162 Wn.2d at 803 (citing Engrossed Second Substitute H.B. (ESSHB) 2319, 53d Leg., Reg. Sess. (Wash.1994)). "Indeed, in enacting this statute, the legislature balanced the concern with escalating violence, which some commentators blamed on the 'ready availability of firearms,' with the concern that restricting firearm availability will infringe upon the right of a law-abiding citizen to keep and bear arms." Id. (citing Final Bill Report on ESHB at 2).

In passing the law, the legislature expressly found that "random violence, including homicide and the use of firearms, has dramatically increased over the last decade." LAWS OF 1994, ch. 7, § 101. Our lawmakers declared that "violence is abhorrent to the aims of a free society and that it cannot be tolerated," and "State

efforts at reducing violence must include" harsher penalties and "reducing the unlawful use of and access to firearms." Id. Within that climate, the legislature's goal for RCW 9.41.047(1) was not a technical hurdle to protect armed felons who clearly know they are barred from possessing guns. Our lawmakers created a procedure to ensure that people are not prosecuted for illegal gun possession when they are truly unaware that it is illegal for them to have guns.

In Minor, our supreme court interpreted the notice statute's "unequivocal mandate" of oral and written notice to mean that "the legislature regarded *such notice* of deprivation of firearms rights as substantial." 162 Wn.2d at 803 (emphasis added). Because the legislature had enacted no remedy for violation, our supreme court sought a remedy "consistent with the purpose of the statutory requirement." Id. at 803-04.

But our supreme court conspicuously did not hold that the failure to notify Minor of his firearm prohibition at the time of the conviction merited reversal *per se*, though it certainly could have done so. Id. at 804. Instead, the court held that reversal was required because Minor had been "affirmatively misled" by the failure of the sentencing court to check a box next to the firearm prohibition. Id. That lack of a checkmark had "affirmatively

represented to Minor that those paragraphs did not apply to him." Id. The supreme court's emphasis was on the effect of a violation of RCW 9.41.047(1) on the defendant's actual notice.

To highlight this, Justice Madsen concurred separately in Minor to clarify that "failure to check a box on a preprinted order on adjudication form will not always result in reversal" because ignorance of the law is no defense. Id. at 805 (Madsen., J. concurring).[8] "[I]f the individual has actual knowledge of the law or actual notice of the loss of firearm rights, *in whatever form*, the individual cannot legitimately claim he or she justifiably believes that firearm rights were not lost and therefore cannot claim to have been misled," Madsen wrote. Id. (emphasis added). Justice Madsen pointed to State v. Carter,[9] in which a defendant's challenge to a juvenile predicate failed because "in the interim between the juvenile offense and the possession charge the defendant had been convicted of a felony and notified at that time that he was disqualified from possessing firearms." Id. at 806 (citing Carter, 127 Wn. App. at 721). Madsen concluded:

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[8] Justice Bridge (pro tem) concurred with both the majority and Madsen.

[9] 127 Wn. App. 713, 112 P.3d 561 (2005).

> Individuals who have actual knowledge of the law or actual notice of the loss of firearm rights cannot show they were affirmatively misled by the failure to advise of the loss of firearm rights, and they are not entitled to reversal of an adjudication or conviction of unlawful possession of a firearm.

Id.

Three years later, in Breitung, the supreme court addressed whether a predicate court's failure to comply with RCW 9.41.047(1) — but without affirmatively misleading the defendant — warranted reversal of an unlawful possession of a firearm charge. The court of appeals had held:

> [T]hat where a convicting court has failed to give the mandatory notice directed in RCW 9.41.047(1) *and there is no evidence that the defendant has otherwise acquired actual knowledge of the firearm possession prohibition that RCW 9.41.047(1) is designed to impart*, the defendant's subsequent conviction for unlawful possession of a firearm is invalid and must be reversed.

State v. Breitung, 155 Wn. App. 606, 624, 230 P.3d 614 (2010) (emphasis added).

Our supreme court agreed with that holding, summarizing it this way: "Breitung was entitled to notice, and in its absence, to reversal."[10] Consequently, our high court again did not hold that failure of the predicate court to give the notice as directed in

[10] Justice Madsen now joined the unanimous opinion.

RCW 9.41.047(1) merited dismissal or reversal of the new firearms charge *per se*. Instead, the high court held:

> The State did not establish that Breitung *otherwise had knowledge* of the law or notice of the firearm prohibition. On the contrary, the record evidences *a lack of actual knowledge* on Breitung's part. *Based on this record*, we conclude Breitung was not notified of his firearm prohibition as required under RCW 9.41.047(1) *and did not otherwise have notice of the prohibition against possession of firearms.* Absent that notice, he is entitled to reversal of the unlawful possession of firearms conviction.

Breitung, 173 Wn.2d at 404 (emphasis added).

If our supreme court preferred a per se rule that made subsequent notice irrelevant, it could have created one. Then it would not have bothered to consider whether Breitung "otherwise had knowledge of the law or notice of the firearm prohibition," and "actual knowledge on Breitung's part." But our supreme court firmly anchored its holding "on this record" of a genuine absence of any notice.[11] The supreme court has repeatedly stressed that a defendant is entitled "to notice." The trial court here erred by

[11] In his pretrial motion, Garcia described Breitung's discussion of actual knowledge as dicta. RP 22. But a court's comments that are material to the outcome are not dicta. See City of Seattle v. Holifield, 170 Wn.2d 230, 244 n.13, 240 P.3d 1162 (2010) (court's comments in an opinion that are immaterial to the outcome are dicta); State v. Halgren, 137 Wn.2d 340, 346 n.3, 971 P.2d 512 (1999) (court's comments that do not bear on the outcome of a case are dicta). Here, the supreme court's holding was "based on this record" that "evidences a lack of actual knowledge."

concluding that notice only counts if it is given in court simultaneous with the conviction.

The trial court accepted Garcia's argument that the phrases "has otherwise acquired actual knowledge" and "otherwise have notice" in Breitung meant only that there might be other ways of obtaining notice "at the time," i.e., in court. See RP 24. If not orally or in writing, what other ways are there? That misreading contorts the plain meaning of the high court's language and demonstrates how strained this interpretation of the rule is. For one thing, the verb tense in "has otherwise acquired actual knowledge" naturally means gaining knowledge subsequently or elsewhere.

The trial court's interpretation of Breitung as a strict per se rule — that a lack of evidence of in-court notice during the predicate conviction always precludes a subsequent gun charge — would create problems that the legislature and our supreme court surely did not intend. Primarily, by treating the absence of proof of notice as proof of a violation as a matter of law — even where, as here, the verbatim record simply no longer exists — the trial court improperly shifted the burden to the State to prove notice and relieved Garcia of his obligation to prove his affirmative defense by a preponderance of the evidence. See State v. Mitchell, 190 Wn.

App. 919, 929, 361 P.3d 205 (2015) ("neither Minor nor Breitung shifted the burden of establishing oral notice to the State").

Shifting this burden of proof and applying a per se standard that discounts actual notice effectively means that a dangerous, violent felon, who unequivocally knows of his prohibition on firearms, becomes immune to a gun-possession charge if a court clerk misplaces either the written or oral record of the conviction. The fact that Garcia happens to be a repeat felon does not alter the absurdity of that result. What if this were his only conviction? Surely the legislature did not intend for child rapists to regain their gun rights via a recordkeeping snafu. Yet by the trial court's untenably rigid reading of Breitung, they would. By this interpretation, any felon fortunate enough to have the audiotape of his conviction go missing can never be prosecuted for gun possession.

In actuality, our legislature and high court were concerned with the balance of public safety and firearm rights, which means paying attention to equity, not technicality. In passing RCW 9.41.047(1), our legislature said that when someone loses his right to have a gun, he should be told that it is illegal to have a gun. To enforce that, our supreme court has said that if someone illegally

has a gun, but can prove he was never told and did not know that it was illegal, then he cannot be prosecuted. The onus was on Garcia to prove he was never told and did not know. The trial court erred by relieving him of that burden and dismissing the charge. This Court should reverse the trial court's exclusion of the 1994 predicate offense and the resulting dismissal of the gun charge.

E. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to reverse the trial court's order excluding Garcia's 1994 first-degree child rape conviction as a predicate offense to a charge of unlawful possession of a firearm in the first degree and dismissing Count One in his case.

DATED this 23rd day of June, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Nielsen Broman Koch PLLC, the attorney for the respondent, at Sloanej@nwattorney.net, containing a copy of the BRIEF OF APPELLANT in State v. Joaquin David Garcia, Cause No. 74779-7, in the Court of Appeals, Division I, 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.

Dated this 23rd day of June, 2016.

Name:
Done in Seattle, Washington