

NO. 63497-6-I

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

REC'D
DEC 30 2009
King County Superior
Appellate Div.

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL LEE,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 DEC 30 PM 4: 07

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

The Honorable Susan Craighead, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE COURT MISADVISED LEE REGARDING HIS RIGHT TO BE IN THE VICINITY OF A FIREARM, AND SUCH ADVISEMENT WOULD NATURALLY BE IN DEROGATION OF HIS OTHER RIGHTS.

1. Either This is a Matter Appealable of Right, or Else it is a Perfect Matter For Discretionary Review.

The State first claims that this matter is not appealable as a matter of right, because it was a verbal statement made by the court at sentencing that was not made a part of the judgment and sentence. Brief of Respondent (BOR) at 4-7. The cases cited by the State, however, are inapposite, as shown below. But should this Court find that the matter is not appealable as of right, then it is a proper matter for discretionary review under RAP 2.3, as it is an error that is occurring with all convicted defendants before this sentencing judge, and it is an error that substantially limits those defendants' rights.

- a. This Matter, as Part and Parcel of Sentencing, Should be Appealable as of Right.*

The State wisely does not contest that the Court's incorrect, unlawful statement occurred at sentencing. See BOR at 2-3 (Statement of Facts). This was not a separate, post-sentencing matter. See 2RP. If, as happened here, a Court imposes an improper restriction on a defendant at sentencing, then that sentencing issue is generally appealable as of right,

although, admittedly, such restrictions are normally reflected in the J&S. See generally State v. Birch, 151 Wn. App. 504, 515, 213 P.3d 63 (2009) (errors made by a sentencing court that result in an unlawful sentence may generally be raised for the first time on appeal).

The cases cited by the State for this argument, moreover, are completely inapposite. For example, in In re Detention of Turay, a respondent in a SVP case sought appellate review of a post-trial motion to dismiss the petition based on unconstitutionality. 139 Wn.2d 379, 387, 986 P.2d 790 (1999), cert. denied, 531 U.S. 1125 (2001). Because the Superior Court had continuing jurisdiction over all SVP cases, the motion to dismiss – whatever the outcome – was not a final judgment allowing appeal as of right. Id. at 392-93. Here, of course, this statement by the sentencing court was part and parcel of sentencing, not a separate motion as in Turay. Moreover, Lee is not under the continuing jurisdiction of the superior court the way that an SVP respondent is.

Another SVP case cited by the State is in nearly the same posture. In re Det of Peterson, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999). In Peterson, the respondent appealed the denial of a separate, post-trial motion for a show cause hearing, and the Superior Court had special continuing jurisdiction because of the nature of an SVP case. 138 Wn.2d at 88. Again, neither of these circumstances applies to Lee.

In State v. Siglea, also cited by the State, a defendant in 1938 appealed his conviction for driving while intoxicated to the Superior Court, but supposedly did not pursue the appeal. 196 Wash. 283, 82 P.2d 583 (1938). The State moved for dismissal of the appeal, and the Superior Court obliged, both dismissing the appeal and ordering the defendant to come before the court for sentencing.¹ Id. at 284-85. The defendant then attempted to appeal the dismissal of his appeal, arguing that he had, in fact, been properly pursuing his appeal. Id. at 284.

The Court of Appeals affirmed the dismissal of the appeal, holding that Siglea did not have the right to the appeal until after he had been sentenced, something which had not yet happened. 196 Wash. at 286. Siglea's appeal was not gone forever, but it would have to wait until after he was sentenced by either the Superior or Justice Court. Id. Here, of course, Siglea does not apply, as the actions Lee is appealing occurred at Lee's actual sentencing.

And finally, in Dept. of Social and Health Svcs. v. Chubb, also cited by the State, a parent appealed three post-dependency hearings and also the final hearing where her parental rights were terminated. 112 Wn.2d 719, 720-21, 773 P.2d 851 (1989). A finding of dependency had

¹ This equivalent of a DUI was held in the Justice Courts, and so the Superior Court had jurisdiction over the appeal in the former incarnation of a RALJ appeal. See Siglea, 196 Wash. at 283-84.

already been made prior to those hearings, and an unsuccessful appeal had been taken from the finding of dependency. Id. at 720-21 (citing In re Chubb, 46 Wn. App. 540, 731 P.2d 537 (1987) (aka Chubb I)).

The Supreme Court in the second Chubb case found that while both the initial finding of dependency and the termination of parental rights were appealable as a matter of right, the three intervening, separate dependency hearings were not, as they were not listed as appealable matters in either RAP 2.2 or the dependency statutes themselves. 112 Wn.2d at 722-25. Here, of course, the appeal was of Lee's sentencing, which is appealable as of right under RAP 2.2(a)(1), not an appeal of a completely separate hearing not listed under RAP 2.2(a). Because none of the State's cases are on point, this Court should presume there are no cases supporting the State's argument, and should permit this appeal as of right.

*b. If This Matter is not Appealable as of Right,
Then This is a Matter Upon Which This
Court Should Grant Discretionary Review.*

If the matter is not appealable as of right, it does not mean this appeal is dismissed, but rather that the appeal can be viewed as a motion for discretionary review. See, i.e., Warner v. Design & Build Homes, Inc., 128 Wn. App. 34, 38 n.2, 114 P.3d 664 (2005) (in case where matter was not appealable as of right, notice of appeal treated as motion for discretionary review in the interests of judicial economy); Glass v. Stahl

Specialty Co., 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982) (where matter below was not final and therefore not appealable as of right, appellate court could consider the matter as one for discretionary review). See also Turay, 139 Wn.2d 392-94 (State successfully redesignated part of SVP appellant's appeal as a motion for discretionary review). If so, this is a perfect situation for discretionary review to be granted – a time where: 1) the lower court has made an obvious error, 2) that error is one which the lower court repeats with all convicted defendants, and 3) that error is one which will naturally restrict the activities and rights of all the defendants sentenced by that court.

Any issue not appealable as a matter of right is appealable by discretionary review. RAP 2.3(a). Discretionary review may be accepted whenever:

The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;
[or]

The superior court has so far departed from the accepted and usual course of judicial proceedings...as to call for review by the appellate court....

RAP 2.3(b)(2); 2.3(b)(3).

Here, as noted below in sections A(3) and A(4), the warning by the trial court was in clear derogation of Lee's constitutional rights, and it was

moreover incorrect under Washington law. The trial court moreover noted that it gives this same warning in all cases, which makes this a matter of substantial public importance, calling for review of the matter by an appellate court. See 2RP 7-8. Thus, under both RAP 2.3(b)(2) and 2.3(b)(3), the matter is properly reviewed by this Court.

2. This is not a Request For An Advisory Opinion, but a Situation Where Any Reasonable Defendant Will be Trapped by The Incorrect Words of the Court.

The State next argues that Lee is asking for an “advisory opinion,” because he has not yet been charged with a Violation of the Uniform Firearms Act (VUFA). BOR at 6-7. Again, the State cites cases that are plainly inapposite. Moreover, the State’s argument presumes that a defendant will not obey a Superior Court’s verbal proscription, and so the court’s warning will have no negative effect until and unless a person is charged with the threatened crime. This presumption violates common sense.

In State v. Roberts, the first case cited by the State, the trial court postponed sentencing for 18 months for two sixteen-year old Native American youths for robbery. 77 Wn.App. 678, 680, 894 P.2d 1340 (1995). The postponement permitted the youths to accept the punishment for similar offenders in their tribe – a lengthy banishment to remote Alaskan islands – and the defendants themselves requested that the court

permit them to accept this traditional punishment. Id. at 680. The trial court stated that it hoped that either the SRA would become more lenient in the time before sentencing, or else the youths would perform so well during exile that the court would have a reason to depart from the stiff sentences required under the SRA. Id. at 680-81.

The State argued the trial court had “unlawfully deferred sentence” because the youths’ behavior after conviction could not legally justify deviation from the SRA sentencing guidelines. 77 Wn. App. at 682-83. This Court found that ruling on the hypothetical situation of the judge using the youths’ actions to alter the sentence under the SRA had not yet occurred, and so rendering an opinion on that subject would be an “advisory opinion” – a ruling this Court declined to make. Id.²

The Roberts case has little or nothing to do with Lee’s case. Lee’s sentencing court did not fail to rule, or postpone ruling – instead the judge ruled, but did so unlawfully. Lee does not ask this Court to regulate whether he can be charged with a crime in the future – instead, he asks that he be released from the Court’s unlawful prescription in the present.

² This Court nonetheless reversed the postponement of sentencing for the youths, raising sua sponte the issue that it was unfair for the youths to believe that they might avoid a prison sentence by enduring 18 months alone in the Alaskan wilderness. 77 Wn. App. at 684-86. “Substantial justice” required that the defendants know their sentences would not be reduced before they requested the lengthy banishment administered by their tribe. Id.

The other cases cited by the State are in a similar posture. State ex rel. O'Connell v. Kramer, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) (constitutionality of an initiative would not be reviewed until after it had been enacted, as the public's failure to enact it would make the Court's actions useless); State v. Norby, 122 Wn.2d 258, 269, 858 P.2d 210 (1993) (persons arrested on drug charges, but upon whom charges had yet to be filed, could not have their nonexistent cases joined for a motion with those persons who had such cases filed). See also In re Elliott, 74 Wn.2d 600, 615-17, 446 P.2d 347 (1968) (case cited by the State for the premise that advisory opinions are disfavored is actually one in which Court delivered an advisory opinion, because of critical need for uniformity of laws where persons might alter actions based on which of two conflicting laws they thought might take precedence).³ The "advisory opinion" cases cited by

³ Although the State also cited National Elec. Contractors Ass'n v. Seattle Sch. Dist. No. 1, 66 Wn.2d 14, 17-18, 400 P.2d 778 (1965), for a reference to advisory opinions, that case was actually much more about mootness, an issue not raised or at issue here. In that case, a school had by the time of review already purchased and installed a switchboard. Id. at 15. The \$10,000 purchase was done through a public bidding process, but the school installed the switchboard via its own maintenance company, arguably avoiding a rule that improvements over \$2500 in value had to be put to a public bidding process. Id. at 15-17. Upon review, the Supreme Court found that the mootness did not prevent the Court from reviewing the issue of whether the contracts could be so segregated, because the Court found the issue to be of substantial public importance. Id. at 17-18, 20-21.

the State are thus wholly irrelevant to Lee's case, in which a judge actually imposed an unlawful restriction.

The State also seems to argue that Lee should have no recourse until and unless a court takes action (presumably, charging him with VUFA) based on the sentencing court's unlawful order. BOR at 6. But this ignores the fact that any defendant would be foolhardy to ignore the words of a Superior Court judge telling him what he can and cannot do. Again, Lee does not ask this Court to protect him from what a court might do in the future, and thus render an advisory opinion; Lee instead asks this Court to release him from a current, unlawful restriction imposed – or effectively imposed – by a sentencing court.

3. The Error Does Manifestly Affect Lee's Constitutional Rights of Freedom of Association and Freedom of Travel.

Lee argued in his opening brief that the sentencing judge's admonition restricted his constitutional rights to freedom of association and freedom of travel. Brief of Appellant at 3, 6-7. The State argues no such rights are affected, but fails to present any contradictory evidence to this effect. BOR at 7-13.

Under our constitutions, Lee has the right to travel where he wishes, and to associate with those he wishes. See BOA at 7 (citing Const., Art. I, §1, §3, §4; U.S. Const., Amend 1, Amend. 14). See also

Halsted v. Sallee, 31 Wn. App. 193, 196, 639 P.2d 877 (1982) (right of travel is a fundamental constitutional right protected in the States by equal protection clause of the 14th Amendment). See also Aptheker v. Sec'y of State, 378 U.S. 500, 517, 84 S.Ct. 1659, 12 L. Ed. 2d 992 (1964) (right of travel is a fundamental one protected by due process clause).

The State also argues that Lee's ineligibility to possess a firearm springs from his conviction, not the words of the court. BOR at 8-9 (citing inter alia, In re Personal Restraint of Ness, 70 Wn. App. 817, 822-24, 855 P.2d 1191 (1993), review denied, 123 Wn.2d 1009 (1994)). This is, insofar as it goes, perfectly true. The problem is, the words of the court went much further, preventing Lee from associating with people who had guns in their possession, in their cars, or in their houses, and preventing Lee from going to any location where a gun could be found. 2RP 7.

The State also argues that Lee has misused State v. Leavitt, which was cited in the BOA for the premise that a court could not actively misinform a defendant about the restrictions upon him. BOR at 9-11. See also BOA at 7-8 (citing State v. Leavitt, 107 Wn. App. 361, 27 P.2d 622 (2002)). The State's argument appears to be only that Leavitt detrimentally relied on the lower court's incorrect statement of the law, which implied he could possess a gun after a year, and therefore the Leavitt case is factually distinguishable, because Lee has not yet been

charged with VUFA. BOR at 9-11. But Leavitt plainly stands more broadly for the presumption that a defendant should not be prejudiced by his reliance upon what a sentencing court has told him. 107 Wn. App. at 367-68.

Here, Lee has been told that he can be prosecuted for associating with people who possess guns or for going into a house or a car – or indeed, any location – wherein another person possesses a gun. 2RP 7. Here, Lee, like Leavitt, should not be forced to guess whether the law will apply differently than the sentencing court informed him. The restrictions on Lee are real and current, and so Leavitt applies.

The State’s final response to this is to attack the studies Lee provided in his opening brief to show that guns were prevalent in the U.S. and in Washington state. BOR at 11-12; see also BOA at 6. The State cites the minimal restrictions on the study participants (that the households involved had residential telephone lines and that they had persons who spoke either English or Spanish sufficiently to answer the survey questions), and then argues that the studies “exclude a significant proportion of the population.” BOR at 12. The State also argues that the surveys rely on self-reporting and are therefore “of questionable reliability.” BOR at 12.

The State, notably, cites no research or articles for its argument about study exclusion or unreliability. See BOR at 11-12. For all this Court (and the State) knows, the “limitations” on these studies might have biased them in favor of fewer guns in the general population than actually exist.

The State, moreover, cites no studies whatsoever about the prevalence of guns that establishes any other numbers. See BOR at 11-12. If the State cannot find studies that establish that guns are rarer than expected in the U.S. or Washington, this Court should presume that there are no such studies.

And finally, the State ignores the fact that two studies cited were published and/or relied upon by the federal Department of Justice (via its policy research arm, the National Criminal Justice Reference Service) and by our own county government, and they were apparently reliable enough for those entities to utilize. See Philip Cook & Jens Ludwig’s “Guns in America: National Survey on Private Ownership and Use of Firearms,” published by the National Institute of Justice Research in Brief, May 1997, and located at <http://www.ncjrs.gov/pdffiles/165476.pdf>; and “Firearm Related Statistics,” or “The Firearm Fact Sheet,” published by King County Public Health, May, 2003. Given this, as well as the absence of

studies cited by the State, this Court can reasonably rely upon the numbers provided in the BOA.

4. The Advisement Was in Clear Derogation of Washington Law.

The State ends its argument with a section arguing that Judge Craighead's advisement was correct under Washington law. Brief of Respondent (BOR) at 13-15. The State argues:

The court was trying to convey to Lee that to avoid even the possibility of being arrested and charged with a felony, regardless of whether a conviction would follow, Lee should not allow himself to be in the vicinity of a firearm. The court's remarks were sound advice that accurately informed Lee of the potential consequences of being in a situation where the State could conclude that he possessed a firearm in violation of the law.

BOR at 15 (emphasis in original).

If, in fact, the sentencing court had warned Lee that he "could" be charged with VUFA, or that there was some "possibility" of being arrested in such a situation, then it is unlikely this appeal would have followed.

The court did no such thing, but said:

Mr. Lee, I'm holding up a very important document. This is your notice of ineligibility to possess a firearm and loss of your right to vote. When we say, "possess a firearm," we don't just mean own a firearm, we mean be anywhere near a firearm. So you cannot be in the same house or the same car with a firearm. This lasts forever, unless a judge signs an order that changes it. So don't let anyone tell you it's expired. It's important that we make sure to get his signature on that.

2RP 7 (emphasis added).

There is no indication in the judge's statement – either explicit or implied – that a resulting violation of the law would be a “possibility,” it is stated as simple fact: “So you cannot be in the same house or the same car with a firearm.” This is not the law in Washington, and the State wisely never argues that it is. See Brief of Appellant (BOA) at 3-6; BOR at 13-15.

Moreover, as noted in the BOA, this advisement is given by the judge to every defendant, those represented and those unrepresented. 2RP 7-8. Perhaps some lucky represented defendants will feel free to ignore the lower court's incorrect statement of the law. Many, certainly, will not.

The State argues, in sum, that a defendant cannot raise this issue, and that this Court cannot correct the sentencing court's incorrect statement of the law. This is incorrect. This Court can, and should, inform the lower court that it cannot actively misadvise criminal defendants about their firearm restrictions.

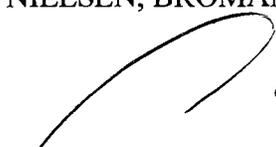
B. CONCLUSION

This Court should remand Lee's case for resentencing, at which the sentencing court can correct its advisement regarding the loss of Lee's firearms rights.

DATED this 30th day of December, 2009.

Respectfully Submitted,

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 63497-6-1
)	
MICHAEL LEE,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF DECEMBER, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] MICHAEL LEE
 1484 S. COLUMBIAN WAY, UNIT 1
 SEATTLE, WA 98144

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF DECEMBER, 2009.

x *Patrick Mayovsky*