

08767-1

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NO. 68767-1-I

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

STATE OF WASHINGTON,

Respondent,

v.

TINA RICH,

Appellant.

**FILED**  
COURT OF APPEALS  
DIVISION ONE

OCT 17 2012

**REC'D**  
OCT 17 2012  
King County Prosecutor  
Appellate Unit

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

The Honorable Laura Gene Middaugh, Judge  
The Honorable Catherine M. Shaffer, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The sentencing court erred by misadvising appellant regarding the breadth of the restriction on her right to possess a firearm.

Issue Pertaining to Assignment of Error

Appellant pled guilty to numerous felony charges and was advised that as a result she could no longer possess a firearm. The sentencing court went further, however, and advised appellant that this meant she had to "stay away from guns or people that you know are in possession of them." RP 52. Was this advisement, which is inconsistent with Washington law, improper and unnecessarily restrictive of appellant's rights?

B. STATEMENT OF THE CASE

On March 2, 20012, appellant Tina Rich pled guilty to nine counts of second degree theft and 4 counts of first degree theft. CP 31057; RP 3-18. As part of the plea, Rich agreed that a "vulnerable victim" sentencing aggravator applied to 12 of the 13 counts such that a aggravated exceptional sentence could be imposed by the sentencing court. CP 40; RP 5, 8-10, 13.

On April 13, 2012, the court imposed the 68-month aggravated exceptional sentence contemplated by the plea agreement and recommended by the prosecutor. CP 35, 58-65; RP 23, 41, 44-45.

Rich also received and signed a notice regarding her ineligibility to possess a firearm or to vote. CP 68. At the time she received the notice, the court advised Rich:

[Y]ou need to be alert that from here forward in Washington you're not allowed to have any kind of firearm because you could be convicted of a felony from everybody's point of view. That means that if you have a gun that's yours or if you are in a position to control or possess somebody else's gun, okay, and the State can prove that beyond a reasonable doubt, you're subject to being charged for being a felon in possess, which would put you back in prison because your offender score is really high. . . . Be really careful to stay away from guns. I think you will be eligible in the future to have your right to carry a firearm --

MS. RICH: I don't want a gun.

THE COURT: I know. But, it's safer, frankly, to get back your right if you can. So, you'll be eligible in the future to petition to have that right restored. But, until that day comes and you have an order saying you can have a gun, be really careful to stay away from guns or people that you know are in possession of them.

RP 51-52 (emphasis added).

Rich appeals. CP 66.

C. ARGUMENT

THE COURT MISADVISED RICH REGARDING THE CONSEQUENCES OF HAVING ACCESS TO OR BEING IN THE VICINITY OF A FIREARM.

Rich was subject to the prohibition on possessing firearms because she was convicted of felony offenses. RCW 9.41.040(2)(a)(i); RCW 9.41.047(1)(a). In this regard, the sentencing court advised Rich that until she had her gun possession rights restored, she needed "to stay away from guns or people that you know are in possession of them" and failure to follow this admonishment would subject her further felony prosecution. RP 52. This was an incorrect statement of the law on constructive possession and what conduct exposes Rich to further punishment. The Court's misadvisement should be stricken. State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

a. The Court's Advisement Incorrectly Stated the Law.

A person is guilty of unlawful possession of a firearm if she possesses a firearm after being convicted of any felony. RCW 9.41.040(2)(a)(i). Accordingly, RCW 9.41.047(1)(a) 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 must immediately surrender any

concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record."

In Lee, the sentencing court orally advised the defendant that he could not be "anywhere near a firearm" or "in the same house or the same car with a firearm." Lee, 158 Wn. App. at 515. Because the trial judge's remarks misstated the law on constructive possession, this Court struck the oral advisement in favor of the written statutory advisement. Id. at 515, 517.

The judge here admonished Rich "to stay away from guns or people that you know are in possession of them" and that failure to follow this admonishment would subject her to another felony prosecution. RP 52. This advisement is comparable to the erroneous advisement in Lee and may be raised for the first time on appeal. Lee, 158 Wn. App. at 516 n.3 (citing State v. Armstrong, 91 Wn. App. 635, 638–39, 959 P.2d 1128 (1998) (no waiver of right to review legality of sentencing condition by failing to object below)).

In any prosecution for unlawful possession of a firearm, the State must prove knowing possession of the firearm. Lee, 158 Wn. App. at 517 (citing State v. Anderson, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000)). Possession may be actual or constructive. State v. George, 146 Wn. App.

906, 919, 193 P.3d 693 (2008); State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Here, the judge's comments incorrectly stated the law of constructive possession. RP 51-52. Being around guns or being in the vicinity of a person who has one does not establish constructive possession.

Constructive possession is established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found. Lee, 158 Wn. App. at 517. Proximity alone is insufficient to establish constructive possession. Id. (citing State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (citing State v. Spruell, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990))). An automobile passenger does not exercise dominion and control over a car just because he is inside it. See George, 146 Wn. App. at 920 (constructive possession of a glass pipe in a car could not be imputed by the mere fact of being a passenger in the car); United States v. Soto, 779 F.2d 558, 560-61 (9th Cir. 1986) ("The mere proximity of a weapon to a passenger in a car goes only to its accessibility, not to the dominion or control which must be proved to establish possession."), cert. denied, 484 U.S. 833, 108 S. Ct. 110, 98 L. Ed. 2d 70 (1987).

Proximity and the ability to reduce contraband to actual possession do not establish constructive possession. George, 146 Wn. App. at 923. Even handling an item may not establish possession: "possession entails actual control, not a passing control which is only a momentary handling." Id. at 920 (quoting Callahan, 77 Wn.2d at 29). Thus, a person with a prior qualifying conviction does not violate the law simply by being near a firearm in the absence of exercising dominion or control over the weapon or premises where the weapon is found. Lee, 158 Wn. App. at 517. Because the judge affirmatively misrepresented the law to Rich, this Court should strike the improper advisement. Id.

b. Review Is Warranted Either As A Matter Of Right Or Through Discretionary Review.

In Lee, this Court determined relief from the trial court's oral advisement was not a final judgment appealable as a matter of right under RAP 2.2(a)(1) but that relief may be granted through discretionary review. Lee, 158 Wn. App. at 516. Rich disagrees that the court's oral advisement is not appealable as a matter of right. A sentencing court's oral remarks, even if not reduced to final judgment, may still be appealable as a matter of right.

In State v. Faagata, the defendant appealed as a matter of right from a trial court's oral remarks that conditionally vacated a lesser offense

conviction that was not reduced to judgment and sentence. State v. Faagata, 147 Wn. App. 236, 242, 193 P.3d 1132 (2008), rev'd sub nom., State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). The Court of Appeals held there was no double jeopardy violation, accepting the State's argument that the trial court's oral ruling was irrelevant because the judgment and sentence was silent regarding the lesser conviction. Faagata, 147 Wn. App. at 245-48.

The Supreme Court reversed, holding a sentencing court's oral remarks conditionally vacating a lesser conviction, even though not reduced to judgment and sentence, violated double jeopardy. State v. Turner, 169 Wn.2d 448, 453, 465, 238 P.3d 461 (2010). In so doing, the Supreme Court implicitly and necessarily rejected the notion that a sentencing court's oral remarks cannot in and of themselves constitute an appealable legal error.

Furthermore, appellate courts routinely look to a trial court's oral remarks to clarify ambiguity in a written order, in effect importing the oral remarks into the written order. See, e.g., State v. Iniguez, 143 Wn. App. 845, 859-60, 180 P.3d 855 (2008) (ambiguity in sentence clarified by court's oral ruling), rev. on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009); State v. Smith, 82 Wn. App. 153, 159, 916 P.2d 960 (1996) (court's written decision may be clarified by resort to the court's oral

opinion); State v. Parada, 75 Wn. App. 224, 234-35, 877 P.2d 231 (1994) ("when the trial court's interlineations and its oral opinion are considered in conjunction with the written findings of fact and conclusions of law, the court's findings support its conclusions.").

The court's oral remarks here regarding firearm possession may be treated in the same manner. The court was attempting to clarify what it meant to "possess" a firearm as per the written notice of ineligibility. The court's oral remarks and the written notice go hand in hand. A defendant faced with both the oral and written advisement is unlikely to draw any meaningful distinction between the two, especially where, as here, the sentencing court's oral remarks on the matter constitutes an interpretation of the written notice.

If the matter is not appealable as of right, appeal from the court's oral advisement may be treated as a motion for discretionary review in the interest of judicial economy. See 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); RAP

1.2(c) ("The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice").

RAP 2.3(b)(2) allows for discretionary review when "[t]he 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." Although brought as a direct appeal as of right, this Court in Lee granted discretionary review of the trial court's remarks on firearm possession because they involved probable error implicating constitutional freedoms. Lee, 158 Wn. App. at 516.

There is no sound reason why the same should not be done here. In light of Lee, the sentencing court here committed not just probable error but definite error. And Rich, like Lee, has the constitutional right to travel and associate with others. U.S. Const. Amend. I; U.S. Const. Amend. XIV; Aptheker v. Sec'y of State, 378 U.S. 500, 505, 507, 517, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (right of travel is a fundamental one protected by due process clause and "freedom of association is itself guaranteed in the First Amendment"); Dawson v. Delaware, 503 U.S. 159, 163, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) ("We have held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs.").

The court's misadvisement regarding what constitutes possession of a firearm curtails those freedoms. The issue thus involves probable error by the sentencing court that substantially alters the status quo by limiting Rich's constitutional freedoms to associate with others and to travel. Granting discretionary review will help put an end to the practice of misadvising defendant about the extent of the felony firearm possession prohibition. This Court should therefore grant discretionary review and strike the erroneous oral advisement regarding firearm possession. Lee, 158 Wn. App. at 517.

D. CONCLUSION

This Court should remand Rich's case for resentencing.

DATED this 17<sup>th</sup> day of October 2012.

Respectfully Submitted,

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

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| STATE OF WASHINGTON | ) |                   |
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| Respondent,         | ) |                   |
|                     | ) |                   |
| v.                  | ) | COA NO. 68767-1-I |
|                     | ) |                   |
| TINA RICH,          | ) |                   |
|                     | ) |                   |
| Appellant.          | ) |                   |

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**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 17<sup>TH</sup> DAY OF OCTOBER 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] TINA RICH  
DOC NO. 357056  
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2012 NOV 27 PM 4:32  
STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION ONE

**SIGNED** IN SEATTLE WASHINGTON, THIS 17<sup>TH</sup> DAY OF OCTOBER 2012.

x Patrick Mayovsky