

NO. 32514-4-II

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

STATE OF WASHINGTON,

Appellant,

v.

MARCUS CARTER,

Respondent.

COPIES TO APPEALS  
APR 13 2005  
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KING COUNTY  
COURT OF APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 99-1-01367-9

BRIEF OF APPELLANT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED April 13, 2005, Port Orchard, WA Kau Man  
Original +1 to the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402  
Copy to counsel listed at left

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## I. ASSIGNMENTS OF ERROR

1. The trial court erred in concluding as a matter of law that a firearm capable of firing 787 (seven hundred eighty seven) rounds per minute and designed to receive a magazine was not a machine gun because no magazine was actually present when the gun was seized.

2. The trial court erred in declining to consider the State's proffered evidence that there were magazines present when the gun was first observed by the State's witnesses.

3. The trial court erred in concluding that the State had to show that Carter had to possess a complete machine gun to be guilty of violating the statute under which he was charged.

## II. STATEMENT OF ISSUES

The defendant/respondent, pursuant to *State v. Knapstad*,<sup>1</sup> brought a motion to dismiss the charge of possession of a machine gun. Under RCW 9.41.010:

“Machine gun” means any firearm known as a machine gun, mechanical rifle, submachine gun, or any other mechanism or instrument not requiring that the trigger be pressed for each shot *and having a reservoir clip, disc, drum, belt, or other separable mechanical device for storing, carrying, or supplying ammunition which can be loaded into the firearm, mechanism, or instrument, and fired therefrom at the rate of five or more shots per second.*

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<sup>1</sup> *State v. Knapstad*, 107 Wn.2d 346, 729 P.2d 48 (1986).

The trial court concluded that the highlighted language required that a clip or other ammunition device actually be inserted into the gun before it could be considered a “machine gun.” The court declined to consider the State’s offer of evidence that magazines were present when the gun was first observed, and concluded that because the gun did not have a clip, it was not a machine gun, and dismissed the charges. The following issues are presented:

1. Whether the trial court correctly determined that a gun capable of firing 787 (seven hundred eighty seven) rounds per minute is not a “machine gun” because no clip has been inserted into it?
2. Whether the trial court erred in failing to consider a hearsay statement of a witness the State intended to call at trial that magazines were present when the gun was first observed?
3. Whether the trial court erred in failing to note that a violation of RCW 9A.02.020(1) can occur either by possessing a machine gun or any part intended to solely for use in a machine gun?

### **III. STATEMENT OF THE CASE**

On November 16, 1999, Marcus Carter was charged by information filed in Kitsap County Superior Court with possession of a machine gun. CP 1.

The trial court granted Carter’s motion to suppress the gun and the

State appealed. Ultimately, the Supreme Court reversed the suppression order and remanded the case for further proceedings.<sup>2</sup> The mandate issued on April 5, 2004.

The Supreme Court summarized the facts as follows:

Bruce Jackson and Frank Clark are criminal investigators with the Pierce County prosecutor's office. ... The defendant, Marcus Carter, was the chief instructor for Kitsap Rifle and Revolver Club and was certified by the Washington State Criminal Justice Training Commission to teach firearms training.

On May 15, 1999, Jackson and Clark attended a National Rifle Association certified firearms instructor class in Kitsap County taught by Carter. ... Carter brought out various firearms and set them on tables before the class. He asked the students to familiarize themselves with the firearm of their choice and prepare a demonstration during which they would describe the proper handling and safety functions of the firearm. Among the firearms was an AR-15 owned by Carter. Jackson was very familiar with the AR-15 and chose that weapon to demonstrate to the class.

The AR-15 rifle is the semiautomatic, civilian version of the automatic, military M-16 rifle. An automatic weapon will continue to fire as long as the trigger is held, and is commonly known as a machine gun. It is generally illegal to own an M-16. RCW 9.41.190.

Jackson noticed that the safety lever on the AR-15 rotated into a position that corresponds to the automatic fire selection on an M-16. The AR-15 safety lever cannot rotate into this position without having been modified. Jackson also noticed that the lever had the silver color and the finish of an M-16, rather than the traditional charcoal-black color of an AR-15. Jackson suspected that the AR-15 had been modified to allow it to fire automatically. He operated the firing mechanism and determined the weapon was capable of

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<sup>2</sup> *State v. Carter*, 151 Wn.2d 118, 130, 85 P.3d 887 (2004).

automatic fire. Jackson showed the gun to Clark, who concurred with Jackson's observations.

Jackson then opened the gun by removing a pin that allows the gun to pivot open. Jackson noticed immediately that a small aluminum block called an autosear had been added. An autosear, which prevents an automatic gun from jamming, is not available for purchase. Jackson asked Carter if the gun had been modified and Carter admitted that it had. As Jackson began to close the gun, Carter removed the autosear from the gun and put it in his pocket.

After class when the other students had left, Jackson and Clark approached Carter about the rifle. Carter admitted that he had put M-16 parts in the rifle to replace those AR-15 parts that were designed for semiautomatic operation, specifically identifying the bolt carrier, hammer, selector switch, and autosear. Carter admitted that the rifle could fire in fully automatic mode. With the gun still in their possession, Jackson and Clark told Carter that it was a felony to own such a weapon.

Carter then denied that the gun was illegal and insisted that the gun would not fire in a full-automatic mode. Carter wanted to demonstrate it to Jackson and Clark if they would let him take it to the range with a loaded magazine. Carter went to his car to collect some ammunition. Carter then engaged in what Jackson and Clark described as furtive movements. Carter began rummaging through items in the backseat of his car, and then returned to the classroom, and called out to another man that he needed a punch, a straight steel pin that would disable the autosear. Jackson told Carter that he would not be allowed to destroy or modify the autosear.

Jackson and Clark testified to feeling that the situation was quickly getting out of control and that Carter was very agitated and antagonistic. Carter grabbed the gun from Clark's hands and walked briskly back to his car. Jackson and Clark noticed a loaded 30-round magazine for the rifle in Carter's rear pocket. As Carter knelt on the front seat in his car and fumbled with metal objects on the floor, Jackson saw that Carter had a loaded pistol under his shirt. Jackson told Carter that he felt Carter was posing a potentially lethal

hazard to them. Jackson told Carter to turn around and bring his hands into view, which Carter failed to do. Jackson and Clark then gave Carter a choice: either he give them the rifle and autosear and they would give him a receipt for it and submit it for testing to the Washington State Patrol Crime Lab, or they would call the police. Carter delayed, so Clark placed a 911 call and asked that a deputy be sent. When Carter discovered the call had been made, he relinquished the rifle and autosear, and Jackson and Clark gave Carter a receipt. A deputy arrived, who asked Jackson and Clark to maintain custody of the AR-15. Jackson and Clark filed a report on the incident.<sup>[3]</sup>

Crime lab testing determined that the operative parts of the AR-15 were from an M-16, which allowed the gun to be fired at 787 (seven hundred eighty seven) rounds per minute, or at 743 (seven hundred forty three) rounds per minute with the sear in place. CP 32.

After remand, Carter moved to dismiss pursuant to *State v. Knapstad*, arguing that the weapon was not a machine gun because it had no magazine or clip. CP 54. At the beginning of the hearing, the State offered supplemental evidence in the form of an email to one of the deputy prosecutors in the case from the State's primary witness that

[T]here were magazines present at the scene, at the time, that were part of the demonstration. Each student was required to lock the magazine in place, into an AR-15.

RP 4.

In response to Carter's assertion that there was no evidence

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<sup>3</sup> *Carter*, 151 Wn.2d at 122-24; *see also* CP 2, 33-50.

magazines were present, RP 9, the court specifically inquired about whether there was a dispute as to that fact:

THE COURT: Is there a dispute under the facts as to whether or not there was a magazine present for this gun?

MR. LINDSAY: My understanding from reading the e-mail, which is a statement written up by Bruce Jackson, who was present, who was one of the individuals involved, was that there was in fact magazines present for that gun there that day. They were not seized when that gun was taken.

RP 12.

The trial court found that the definition of "machine gun" under RCW 9.41.010 required the State to prove that the gun have had a magazine inserted in it at the time that the defendant possessed the gun in order to show a violation of RCW 9.41.190:

I think one has to read RCW 9.41.010 to mean that there must be a firearm that has a clip. It doesn't necessarily have to be a permanent clip, but it has to be a reservoir clip, disc, drum, belt, or other separable mechanical device for storing ammunition with the gun. And it doesn't appear from the facts that are before the court that there was clip, disc, drum, belt, or other separable mechanical device for storing, carrying, or supplying ammunition that would allow the gun to fire five or more shots per second.

RP 13. The court further concluded that there was no evidence that there was a magazine:

On that basis, I think -- this is not part of the record and not part of what has been considered up to now, and I don't believe that there are facts that can be available to the State that would put this gun, that was seized, as a machine gun. And consequently, I think it's appropriate to grant the

Knapstad motion in this matter and dismiss the charge. And that will be the order.

RP 13. The court thus granted Carter's motion to dismiss and entered an order to that effect. CP 70.

#### IV. ARGUMENT

**A. THE TRIAL COURT'S CONCLUSION THAT CARTER'S AR-15, WHICH HAD BEEN MODIFIED WITH PARTS FROM AN M-16 MACHINE GUN AND WHICH WAS CAPABLE OF SHOOTING MORE THAN 13 ROUNDS PER SECOND, WAS NOT A MACHINE GUN ONLY BECAUSE IT HAD NO MAGAZINE IN IT WHEN IT WAS SEIZED IS AN ABSURD READING OF THE STATUTORY DEFINITION OF "MACHINE GUN."**

The trial court determined that a machine gun is not a machine gun unless its magazine is in place. This construction of the statute is contrary to the intent of the legislature. The dismissal should therefore be reversed.

Appellate courts review a trial court's statutory interpretation *de novo* as a question of law.<sup>4</sup> Statutory construction begins by reading the text of the statute or statutes involved.<sup>5</sup> If the language is unambiguous, a reviewing court is to rely solely on the statutory language.<sup>6</sup> Where statutory language is amenable to more than one reasonable interpretation, it is deemed to be

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<sup>4</sup> *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002).

<sup>5</sup> *State v. Roggenkamp*, 153 Wn.2d 614, 106 P.3d 196, 199 (2005)

<sup>6</sup> *Roggenkamp*, 106 P.3d at 199.

ambiguous.<sup>7</sup> Legislative history, principles of statutory construction, and relevant case law may provide guidance in construing the meaning of an ambiguous statute.<sup>8</sup> The Court’s primary duty in interpreting any statute is to discern and implement the intent of the legislature.<sup>9</sup> Statutes must be construed to effect their purpose and to avoid strained or absurd results.<sup>10</sup>

RCW 9.41.010(7) defines “machine gun”:

“Machine gun” means any firearm known as a machine gun, mechanical rifle, submachine gun, or any other mechanism or instrument not requiring that the trigger be pressed for each shot and having a reservoir clip, disc, drum, belt, or other separable mechanical device for storing, carrying, or supplying ammunition which can be loaded into the firearm, mechanism, or instrument, and fired therefrom at the rate of five or more shots per second.

The trial court found that under this definition, a gun that was designed to accept a magazine, but did not actually have a magazine inserted into it, did not meet this definition. The State had argued that the conjunctive “and having” did not literally mean that such device had to be present. Rather, the term was a descriptor, and therefore any firearm into which a magazine could be inserted and which could then fire five or more shots per second was a machine gun. Some ambiguity is concededly present.<sup>11</sup>

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<sup>7</sup> *State v. Keller*, 143 Wn.2d 267, 276, 19 P.3d 1030 (2001).

<sup>8</sup> *Roggenkamp*, 106 P.3d at 199.

<sup>9</sup> *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

<sup>10</sup> *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987).

<sup>11</sup> *See State v. Padilla*, 95 Wn. App. 531, 534, 978 P.2d 1113, *review denied*, 139 Wn.2d

The trial court's interpretation of the statute, however, is contrary to legislative intent and leads to absurd results. The legislature enacted RCW 9.41.010(7) and substantially modified and added to the remainder of RCW ch. 9.41 in 1994.<sup>12</sup> The legislative intent was succinctly stated:

The legislature finds that the increasing violence in our society causes great concern for the immediate health and safety of our citizens and our social institutions. ... Additionally, random violence, including homicide and the use of firearms, has dramatically increased over the last decade.

The legislature finds that violence is abhorrent to the aims of a free society and that it can not be tolerated. State efforts at reducing violence must include changes in criminal penalties, reducing the unlawful use of and access to firearms, increasing educational efforts to encourage nonviolent means for resolving conflicts, and allowing communities to design their prevention efforts.<sup>[13]</sup>

The term "firearm" is also defined in RCW 9.41.010, and was significantly modified by the 1994 act. The interpretation of that term in *State v. Padilla* is instructive. There the issue was whether a disassembled firearm that was not permanently disabled was a weapon "from which a projectile may be fired."<sup>14</sup> The Court found this term ambiguous. It therefore turned to the legislative history and intent cited above.<sup>15</sup> The Court

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1003 (1999).

<sup>12</sup> Laws of 1994, 1<sup>st</sup> spec. sess., ch. 7, §§ 401-31.

<sup>13</sup> Laws of 1994, 1<sup>st</sup> spec. sess., ch. 7, § 101.

<sup>14</sup> *Padilla*, 95 Wn. App. at 534.

<sup>15</sup> *Padilla*, 95 Wn. App. at 535.

distilled that intent to its essence:

The plain language of the prohibitions in RCW Chapter 9.41 demonstrates the Legislature's clear goals of keeping all firearms out of the hands of certain individuals and certain firearms out of the hands of all individuals.<sup>[16]</sup>

The trial court's reading of the statute in this case thwarts this intent.

Applying its reasoning, a machine gun does not become contraband until the magazine is inserted. By this reasoning a group of thugs on their way to a drive-by shooting could not be relieved of their machine guns<sup>17</sup> so long as they did not insert their magazines into their guns. This surely was not the legislative intent, as the Court reiterated in *Padilla*:

As we observed in *State v. Anderson*, 94 Wn. App. 151, 971 P.2d 585, 591 (1999), [*reversed on other grounds*, 141 Wash.2d 357 (2000)], “[i]t begs reason to assume that our Legislature intended to allow convicted felons to possess firearms so long as they are unloaded, or so long as they are temporarily in disrepair, or so long as they are temporarily disassembled, or so long as for any other reason they are not immediately operable.”<sup>[18]</sup>

As in *Padilla*, the evidence produced at the *Knapstad* hearing showed that merely by inserting a loaded magazine, Carter's gun could (in the words of his teenage son) “spray[] a lot of bullets everywhere” at nearly three times the legal rate of shots per second.<sup>19</sup> Clearly magazine present or not, this was

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<sup>16</sup> *Padilla*, 95 Wn. App. at 534-35.

<sup>17</sup> See RCW 9.41.220.

<sup>18</sup> *Padilla*, 95 Wn. App. at 535.

<sup>19</sup> CP 11, 48.

a “machine gun.” ““To reach the opposite conclusion could lead to potentially absurd results.””<sup>20</sup> The ruling below should be reversed.

**B. THE STATE PRESENTED A SUFFICIENT FACTUAL BASIS TO UPHOLD THE CHARGE EVEN IF THE TRIAL COURT’S INTERPRETATION OF THE STATUTE IS ACCEPTED.**

Even accepting, *arguendo*, that the trial court’s interpretation of the statute was correct, it overlooked and erroneously rejected relevant evidence that created an issue of fact. Its ruling should therefore be reversed.

***1. The State presented direct and circumstantial evidence that there were magazines present with the gun.***

In ruling on *Knapstad* motions, the trial court looks at the evidence and the reasonable inferences drawn therefrom in the light most favorable to the State.<sup>21</sup> The trial court must consider the prosecution’s affidavit as an offer of proof.<sup>22</sup> This follows because the trial court does not rule on factual questions in a *Knapstad* hearing; *i.e.* the court may *not* weigh conflicting statements and base its decision on the statement it finds the most credible.<sup>23</sup>

Here the State presented evidence that its chief witness would testify

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<sup>20</sup> *Padilla*, 95 Wn. App. at 536 (quoting *State v. Rardon*, 185 Wis. 2d 701, 518 N.W.2d 330, 330-31 (1994)).

<sup>21</sup> *Knapstad*, 107 Wn.2d at 353.

<sup>22</sup> *State v. Freigang*, 115 Wn. App. 496, 503, 61 P. 3d 343 (2002), *review denied*, 149 Wn.2d 1028 (2003).

<sup>23</sup> *Freigang*, 115 Wn. App. at 504 (citations omitted).

that insertion of magazines into the AR-15 was part of the steps the students at the class were required to demonstrate. Without explanation, the trial court ignored this evidence. In addition to this direct evidence there was considerable circumstantial evidence that Carter had magazine(s) for the gun. According to the reports Carter offered to take Jackson and Clark to the range and to fire the gun to demonstrate how it operated.<sup>24</sup> Carter asked Clark to demonstrate how to “unload” the gun, presumably by removing the magazine.<sup>25</sup> Likewise, Jackson reported Carter’s son commenting on how the gun fired on “full auto.”<sup>26</sup> All of this information suggests that there were magazine(s) for the gun. The trial court therefore erred in granting Carter’s motion to dismiss.

**2. *Regardless of whether the gun was a “machine gun” without a magazine in it, the State presented prima facie evidence of a violation of RCW 9.41.190(1), under which Carter was charged.***

In addition to the standards discussed above, when ruling on a *Knapstad* motion, the trial court should not dismiss only a portion of a criminal prosecution if the case can still go to trial on alternative theories.<sup>27</sup> Under RCW 9.41.190(1), under which Carter was charged, it is a crime to

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<sup>24</sup> CP 42.

<sup>25</sup> CP 41.

<sup>26</sup> CP 48.

<sup>27</sup> *State v. Brown*, 64 Wn. App. 606, 611, 825 P.2d 350, *review denied*, 119 Wn.2d 1009 (1992).

possess a machine gun or to possess “any part designed and intended solely and exclusively for use in a machine gun, ... or in converting a weapon into a machine gun.”

The State clearly presented evidence establishing this alternative basis for guilt under the statute. Only the M-16 selector lever permits full automatic fire.<sup>28</sup> Similarly, the M-16 hammer is constructed differently to allow full automatic fire capability.<sup>29</sup> According to Carter’s own statements to Jackson and Clark, it was necessary also to use an M-16 bolt carrier and selector shaft for the gun to operate fully automatically.<sup>30</sup> Carter’s gun contained all these parts.<sup>31</sup> The auto sear had a similar purpose.<sup>32</sup> As such even without a magazine, Carter’s possession of the gun and its parts violated RCW 9.41.190(1). The trial court therefore erred in granting his *Knapstad* motion.

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<sup>28</sup> CP 42.

<sup>29</sup> CP 42.

<sup>30</sup> CP 43-44.

<sup>31</sup> CP 32.

<sup>32</sup> CP 43.

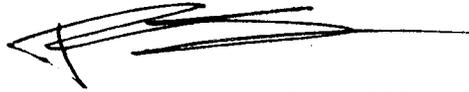
**V. CONCLUSION**

For the foregoing reasons, the State urges this Court to reverse the trial court's order of dismissal and remand the cause for further proceedings

DATED April 13, 2005.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "RANDALL AVERY SUTTON", with a long horizontal stroke extending to the right.

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