82154-2

NO. 36799-8-II

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

ORIGINAL

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER SIEYES,

Appellant.

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DIVISION II
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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-8-00353-7

BRIEF OF RESPONDENT

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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 28, 2008, Port Orchard, WA _____
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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D. DOES RCW 9.41.040(2)(A)(III), THE PROHIBITION AGAINST FIREARM POSSESSION BY PERSONS UNDER AGE 18, CONSTITUTE AN UNREASONABLE RESTRICTION ON APPELLANT'S RIGHT TO BEAR ARMS?

E. IS THE STATE REQUIRED TO PROVE THE ABSENCE OF AVAILABLE DEFENSES TO UNLAWFUL POSSESSION OF A FIRARM?

II. STATEMENT OF THE CASE

On April 26, 2007, Appellant was the front seat passenger in a vehicle stopped by Kitsap County Sheriff's Deputy Vangesen for excessive speed. RP (08/01) 26, 28. Appellant was 17 years old at the time of the stop. RP (08/01) 20. Along with Appellant, there were two other persons in the vehicle. RP (08/01) 27.

As the vehicle was being pulled over, Deputy Vangesen noticed Appellant made a furtive movement. RP (08/01) 29. Specifically, Appellant had reached towards the floorboard in front of him with his right hand. RP (08/01) 29, 42, 44. Appellant's right shoulder dropped down along with his head, reaching for the floor. RP (08/01) 29-30, 44. Deputy Vangesen was concerned about what Appellant was doing with his hand down on the floorboard. RP (08/01) 42.

Upon making contact with the car, Deputy Vangesen had Appellant exit the vehicle immediately because he was concerned there may be something at or near Appellant's feet based on the furtive movement observed earlier. RP (08/01) 30, 45, 47, 50-51.

After securing the Appellant and making contact with the driver and rear seat passenger, Deputy Vangesen went back to look in the area where Appellant had been sitting. RP (08/01) 31, 48-49.

Deputy Vangesen's initial concern was confirmed when he looked under the passenger seat and found a handgun touching the front framework under the seat. RP (08/01) 32, 50. Deputy Vangesen described the framework as a "small ridge right at the front of the seat" and the gun was found leaning up against this ridge. RP (08/01) 32-33.

The handgun was located more towards the front of the seat than the rear. RP (08/01) 32, 58. The handgun was in a place accessible to Appellant by reaching down under his seat. RP (08/01) 58. Other than the handgun, nothing else was located on the front passenger floor where Appellant was seated. RP (08/01) 57-58.

The gun was a Bursa .380 semi-automatic handgun. RP (08/01) 35. It was found loaded with six rounds of ammunition at the time. RP (08/01) 36, 53. After finding the handgun, Appellant was placed under arrest. RP (08/01) 41.

On May 5, 2007, Appellant was charged with one count of Unlawful Possession of a Firearm in the Second Degree, RCW 9.41.040(2)(a)(iii), for being under the age of 18 and in constructive possession of a firearm.[1] CP 1-3.

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[1] 9.41.040(2)(a)(iii) reads: "A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the second degree, if the person does not qualify under subsection (1) of this section for the crime of unlawful possession of a firearm in the first degree and the person owns, has in his or her possession, or has in his or her control any firearm....If the person is under eighteen years of age, except as provided in RCW 9.41.042." 9.41.040(2)(a)(iii).

A fact-finding was held in August 2007. At the conclusion of the hearing, Appellant was found guilty of the charge. RP (08/29) 39; CP 11-13. In ruling on Appellant's guilt, the Court found:

1. Appellant was seen reaching to the floorboard of the car with his hand at the time of the stop. RP (08/29) 36-37; CP 12.
2. The gun was right in the area where the Appellant was seen to be reaching . RP (08/29) 37-38; CP 12.
3. Other than the Appellant, no one else could have reached the gun from where it was discovered. RP (08/29) 38.
4. The gun was within Appellant's constructive possession because he could immediately exercise dominion and control over it by reaching down. RP (08/29) 38; CP 12.
5. Based on the totality of circumstances, Appellant was in constructive possession of the gun. RP (08/29) 39; CP 12

On October 1, 2007, the court entered written Findings of Fact and Conclusions of Law, setting out the factors the court considered in finding guilt. CP 11-13. Finding number three indicates the gun was found underneath the front portion of the seat, against a ledge, in an area Appellant was seen reaching, and not easily accessible from the rear seat. CP 12.

Appellant filed a notice of appeal to this Court on September 25, 2007.

III. ARGUMENT

A) SUFFICIENT EVIDENCE SUPPORTS FINDING OF FACT III, THAT THE GUN WAS LESS ACCESSIBLE FROM THE BACKSEAT, WHERE TESTIMONY INDICATES THE GUN WAS UNDERNEATH THE FRONT PASSENGER SEAT, LEANING ON A RIDGE TOWARDS THE FRONT AND WOULD NEED TO BE PUSHED OVER THE RIDGE AND BACK A FOOT AND A HALF TO THE BACKSEAT.

Following adjudication in juvenile court, the court is required to reduce its findings and conclusions to writing, which shall include the ultimate facts and evidence it relied upon in reaching the decision. JuCR 7.11(d).[2] A trial court's written findings are reviewed "to determine whether they are supported by substantial evidence, which is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the allegation." *State v. Echeverria*, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997), citing, *State v. Halstien*, 122 Wash.2d 109, 128-29, 857 P.2d 270 (1993).

In this case the court found the handgun was located underneath the front passenger seat by Deputy Vangesen. CP 12 (Finding of Fact III). There

[2] JuCR 7.11(d) states: "The court shall enter written findings and conclusions in a case that is appealed. The findings shall state the ultimate facts as to each element of the crime and the evidence upon which the court relied in reaching its decision. The findings and conclusions may be entered after the notice of appeal is filed. The prosecution must submit such findings and conclusions within 21 days after receiving the juvenile's notice of appeal." JuCR 7.11(d).

is no dispute regarding the discovery of the gun underneath the Appellant's seat. RP (08/29) 33.[3]

The court also found the gun leaning against a ledge just under the front portion of the seat, and in an area Appellant was seen reaching. CP 12 (Finding of Fact III). In support of this finding is testimony from Deputy Vangesen, who found the gun "right up against that framework at the front of the seat." RP (08/01) 32. The gun "was leaning against the front, front little hump at the front of the seat on the floorboard." RP (08/01) 58. Based on the Appellant's seated position, the Deputy testified that the gun was within the reach of the Appellant. Id. There is no evidence presented to the contrary.

Finally, the court found the gun not easily accessible from the backseat. CP 12 (Finding of Fact III). The court implicated Appellant as having sole access to the gun as others in the car could not reach it. RP (08/29) 38.[4] This finding was again supported by the uncontroverted testimony of Deputy Vangesen, who said the gun would need to go over a ridge and be pushed a foot and a half into the backseat. RP (08/01) 33. He also testified that no one else in the vehicle made any movement to the floorboard. RP (08/01) 50-51.

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[3] Respondent's counsel states: "It [the gun] was under that seat at some location, as that's what the Officer testified to." RP (08/29) 33.

[4] The court noted: "[N]either Mr. Lawing or Ms. Schnabel could have reached the gun from

In conclusion, there was sufficient evidence to support the courts written Finding of Fact number III.

B) EVIDENCE IS SUFFICIENT TO CONVICT APPELLANT OF UNLAWFUL POSSESSION OF A FIREARM WHERE A REASONABLE INFERENCE EXISTS THAT HE HAD DOMINION AND CONTROL OVER THE FIREARM BASED ON HIS ACTIONS LEANING FORWARD, REACHING DOWN TO ACCESS OR PLACE SOMETHING IN THE AREA WHERE THE FIREARM WAS FOUND.

The trial court's findings are again reviewed for substantial evidence. *Echeverria*, 85 Wn. App. at 783. Evidence is sufficient if, when viewed in the light most favorable to the State, the fact finder could find the essential elements of the crime beyond a reasonable doubt. *State v. Womble*, 93 Wn. App. 599, 602, 969 P.2d 1097 (1999), *citing*, *State v.Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that can be reasonably drawn from it. *Id.*

Appellant argues he did not have constructive possession of the handgun because there is insufficient evidence that Appellant saw the gun or touched it. Brief of Appellant, page 7.

To be found guilty of Unlawful Possession of a Firearm, RCW 9.41.040(2)(a)(iii), the State must prove the Appellant, under 18, knowingly possessed a firearm. RCW 9.41.040(2)(a)(iii); *State v. Marcum*, 116 Wn.

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the point where it was discovered under the front seat." RP (08/29) 38.

App. 526, 534, 66 P.3d 690 (2003). Possession may be constructive, showing the defendant had dominion and control over contraband. *Echeverria*, 85 Wn. App. at 783.

Constructive possession can be established by showing, under the totality of circumstances, there is substantial evidence from which a fact-finder could reasonably infer the defendant exercised dominion and control over contraband. *State v. Collins*, 76 Wn. App. 496, 501, 886 P.2d 243, review denied, 126 Wn.2d 1016, 894 P.2d 565 (1995).

The Appellant compares his situation to the defendant in *Echeverria*,, supra, arguing that, unlike *Echeverria* the handgun here was not visible, and, furthermore, there is no evidence Appellant ever touched or handled the handgun. Brief of Appellant, page 7. Therefore, according to the Appellant, proximity to the weapon alone is insufficient evidence to prove he knew about the weapon and exercised dominion and control over it. Id, citing, *State v. Spruell*, 57 Wn. App. 383, 388-89, 788 P.2d 21 (1990).

However, while the firearm in *Echeverria* was clearly visible, that does not alone determine prior knowledge or handling of the weapon. *State v. Alvarez*, 105 Wn. App. 215, 221, 19 P.3d 485 (2001), citing, *Collins*, supra.

The Court is allowed to draw reasonable inferences from all the evidence presented here. *Salinas* 119 Wn.2d at 201. Here Appellant is seen

inside the vehicle making furtive movements towards the floor area where the gun is located only minutes later. RP (08/01) 29, 42, 44, 58. The testimony indicates the Appellant appeared to be reaching for something in the area where the gun was located. RP (08/01) 42, 47, 58. Here the gun is located more towards the front seat than the back and would have been accessible from the Appellant's reach. RP (08/01) 32, 58. These actions support a reasonable inference that Appellant was exercising dominion and control over the handgun at the time of the stop. *Salinas*, supra.

It is reasonable to infer that Appellant not only knew of the handgun in close proximity, but was in actual possession at some point, attempting to either retrieve it or hide it from being discovered. Id.

C) THE FINDINGS OF FACT PROVIDE A REASONABLE INFERENCE THAT THE APPELLANT HAD KNOWLEDGE OF THE GUN BY CONCLUDING HE WAS IN CONSTRUCTIVE POSSESSION OF THE SAME.

Appellant argues that the trial court's findings fail to mention that the possession was "knowing" and, therefore, reversal is required. Brief of Appellant, page 8-9.

However, the Appellant's argument fails to take into consideration that the court found him to be in constructive possession because he exercised dominion and control over the handgun during the stop. CP 12; RP

(08/29) 37-39. The trial court drew a reasonable inference that, under the totality of circumstances, including Appellant's furtive movements, that Appellant knew the gun was in the car because he was reaching for the gun at the time Deputy Vangesen pulled the car over. RP (08/29) 37-38.

Based on that reasonable inference that Appellant knew about the gun, the trial court concluded he was in constructive possession of it. RP (08/29) 39. The court made its factual analysis clear in the written findings. The fact that the findings fail to mention the word "knowledge" is harmless error. State v. Banks, 149 Wn.2d 38, 46, 65 P.3 1198 (2003).[5]

D) RCW 9.41.040(2)(A)(III), THE PROHIBITION AGAINST FIREARM POSSESSION BY PERSONS UNDER AGE 18, DOES NOT CONSTITUTE AN UNREASONABLE RESTRICTION ON APPELLANT'S RIGHT TO BEAR ARMS.

Appellant argues that RCW 9.41.040(2)(a)(iii), which makes is illegal for juveniles to possess firearms in the absence of various exceptions, is unconstitutionally overbroad. Brief of Appellant, page12-14. Yet Appellant provides no case authority for any of the challenges made to the statute.

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[5] "The State's error is harmless beyond a reasonable doubt because Banks argued that he did not know about the gun and the findings of fact clearly indicate that the judge considered knowledge. The trial court's error is also harmless beyond a reasonable doubt because from the existing findings and conclusions we infer that Banks had knowledge." State v. Banks, 149 Wn.2d at 46.

In the absence of case authority to the contrary, statutes are presumed constitutional, and the burden of proof falls on the party challenging a statutes constitutionality to prove it beyond a reasonable doubt. *State v. Maciolek,* 101 Wn.2d 259, 263, 676 P.2d 996 (1984), citing, *State v. Dixon,* 78 Wn.2d 796, 479 P.2d 931 (1971); and, *State v. Rhodes,* 92 Wn.2d 755, 600 P.2d 1264 (1979)). Under the Washington State Constitution, Art. 1, §1, the Legislature is empowered to make laws to promote health, peace, and safety of the citizenry, and should be granted broad discretion in determining what laws are necessary to promote those ends. *State v. Schmdit*, 143 Wn.2d 658, 676, 23 P.3d 462 (2001).

We may presume the legislature intended to promote the safety of our youth when it enacted RCW 9.41.040(2)(a)(iii), by restricting use of firearms by persons under the age of 18 unless they fall into one of the narrowly drawn exceptions that promote safety.

E) THE STATE IS NOT REQUIRED TO PROVE THE ABSENCE OF AVAILABLE DEFENSES TO UNLAWFUL POSSESSION OF A FIRARM.

Appellant argues that the State should be required to prove the absence of any defenses provided by RCW 9.41.042, the exceptions that allow a person under the age of 18 to possess a firearm.[6]

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[6] RCW 9.41.040(2)(a)(iii) shall not apply to any person under the age of eighteen years who is:

(1) In attendance at a hunter's safety course or a firearms safety course;

However, Appellant provides no case authority for the proposition that the State is required to prove that he did not fall into one of those exceptions. None of the exceptions constitute an element of the offense. Nor do the facts of this case establish that any of the conditions existed for which Appellant would be otherwise entitled to possess a firearm, especially a loaded handgun hidden under the seat of a speeding vehicle.

IV. CONCLUSION

For the foregoing reasons, the Appellant's conviction should be affirmed.

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(2) Engaging in practice in the use of a firearm or target shooting at an established range authorized by the governing body of the jurisdiction in which such range is located or any other area where the discharge of a firearm is not prohibited;

(3) Engaging in an organized competition involving the use of a firearm, or participating in or practicing for a performance by an organized group that uses firearms as a part of the performance;

(4) Hunting or trapping under a valid license issued to the person under Title 77 RCW;

(5) In an area where the discharge of a firearm is permitted, is not trespassing, and the person either: (a) Is at least fourteen years of age, has been issued a hunter safety certificate, and is using a lawful firearm other than a pistol; or (b) is under the supervision of a parent, guardian, or other adult approved for the purpose by the parent or guardian;

(6) Traveling with any unloaded firearm in the person's possession to or from any activity described in subsection (1), (2), (3), (4), or (5) of this section;

(7) On real property under the control of his or her parent, other relative, or legal guardian and who has the permission of the parent or legal guardian to possess a firearm;

(8) At his or her residence and who, with the permission of his or her parent or legal guardian, possesses a firearm for the purpose of exercising the rights specified in RCW 9A.16.020(3); or

(9) Is a member of the armed forces of the United States, national guard, or organized reserves, when on duty.

RCW 9.41.042.

DATED April 28, 2008.

Respectfully submitted,

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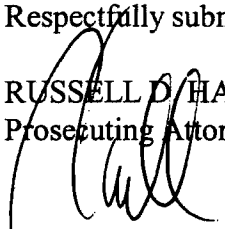

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