

NO. 38869-3-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BREITUNG,

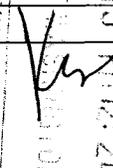
Appellant.

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COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUL 13 PM 3:47

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

The Honorable Thomas J. Felnagle, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS
DIVISION II

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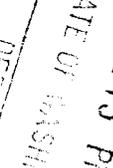
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A. ASSIGNMENTS OF ERROR

1. Ineffective assistance of counsel deprived appellant of his constitutional due process right to a fair trial.

2. Appellant's right to due process was violated when the court failed to provide statutorily required notice of the loss of the constitutional right to bear arms.

Issues Pertaining to Assignments of Error

1. Is reversal of the second-degree assault convictions required because defense counsel was ineffective in failing to request lesser degree instructions on fourth-degree assault when appellant testified he pointed a microscope, not a firearm, at the complaining witnesses?

2. Is reversal of the conviction for unlawful possession of a firearm required under RCW 9.41.047 and constitutional due process when appellant was misled by the predicate sentencing court's failure to notify appellant he was no longer permitted to possess a firearm?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Pierce County prosecutor charged appellant Robert Breitung with two counts of second-degree assault and one count of unlawful possession of a firearm. CP 1-2. The jury convicted him and the court

imposed a standard range sentence. CP 43-47, 57. This appeal timely follows. PC 65.

2. Substantive Facts

Breitung and his girlfriend lived on a dead-end road where the pavement deteriorated into gravel and ultimately was blocked by large concrete barriers. RP 300, 419, 421-22. Breitung was employed by a neighboring business owner to provide security. RP 469. On July 19, 2007, a car drove down the dead-end road and went around the concrete barriers. RP 364. Another neighbor called to Breitung to keep an eye on it because there had been thefts in the past. RP 470-71. Breitung's girlfriend recognized the car as belonging to two men who had been staring at her in the adjacent smoke shop a few minutes before. RP 227. She was concerned she was being followed. RP 227.

Breitung took the top lens barrel of the microscope he was using to clean his hearing aids and went to confront the car. RP 418-19. He watched as the car went down the road; one person got out, looked into a fenced area, and then turned around to leave. RP 420-21. Concerned they were investigating the area with an eye to future burglaries, Breitung gestured and yelled at the car to stop. RP 423. As the car approached, it accelerated. RP 423. Breitung pulled the microscope barrel from his pocket and pointed it at the car, which then stopped. RP 423-24. Breitung then placed the

microscope back in his pocket, approached the driver's side window, and asked what the problem was. RP 424. He told them they were scaring his girlfriend and that they'd better leave. RP 424.

The car's occupants, Ossie Cook and Richard Stevenson, testified they were mechanics and went down the gravel road to test the brakes on a customer's car. RP 295, 339, 343. They admitted they had stopped at the smoke shop and noticed Breitung's girlfriend and her car. RP 297, 351-52. They denied following her. RP 298, 351. They testified when they attempted to drive back out of the dead end road, they encountered Breitung pointing a gun at the car. RP 301-03, 345-46. When they stopped, they claim, Breitung approached the driver's window and continued to aim at them from only a few feet away. RP 301-03, 345-46. They testified he threatened to kill them. RP 304, 351. They described a handgun with a black handle and silver barrel. RP 303, 346. Although Breitung admitted owning several firearms, including a black and chrome .45 caliber Taurus, he denied having one with him when he encountered Cook and Stevenson. RP 291-92, 424-25, 427-28, 433.

C. ARGUMENT

1. DEFENSE COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST INSTRUCTIONS ON FOURTH DEGREE ASSAULT.

Breitung testified he pointed a microscope at Cook and Stevenson in an attempt to make them stop their car. RP 423-24. This evidence is sufficient to warrant instruction on fourth-degree assault, a lesser degree of the charged offense of second-degree assault with a deadly weapon. Given Breitung's testimony, there is a reasonable probability the jury would have inferred he committed only fourth-degree assault. Therefore, defense counsel was ineffective in failing to request instructions for the lesser degree offense.

a. Breitung Was Entitled to Instructions on Fourth Degree Assault Because the Jury Could Have Found He Used a Microscope, a Non-Deadly Weapon.

Defendants are entitled to have juries instructed not only on the charged offense, but also on all lesser degrees of that offense. RCW 10.61.003. A defendant is entitled to a lesser degree instruction if (1) the statutes for the charged offense and the proposed inferior degree offense "proscribe but one offense"; (2) the information charges an offense which is divided into degrees, and the proposed offense is an inferior degree of the charged offense; and (3) there is evidence the defendant committed only the inferior offense. State v. Peterson, 133 Wn.2d 885, 891, 948 P.2d

381 (1997) (quoting State v. Foster, 91 Wn.2d 466, 472, 589 P.2d 789 (1979)). The test is satisfied here.

The various assault statutes proscribe but one offense, namely, assault. Foster, 91 Wn.2d at 472; State v. Garcia, 146 Wn. App. 821, ___, 193 P.3d 181, 185 (2008), review denied, ___ Wn.2d ___, 208 P.3d 1125 (2009). The information charges Breitung with second-degree assault, which is divided into degrees ranging from the most serious, first-degree assault (a class A felony) to fourth-degree assault (a gross misdemeanor). CP 1-2; RCW 9A.36.011; RCW 9A.36.021; RCW 9A.36.031; RCW 9A.36.041. Fourth-degree assault is a lesser degree of second-degree assault.

The factual component is satisfied when the evidence would permit a jury to rationally find a defendant guilty of the lesser offense and acquit him of the greater. State v. Fernandez-Medina, 141 Wn.2d 448, 455, 6 P.3d 1150 (2000) (citing State v. Warden, 133 Wn.2d 559, 563, 947 P.2d 708 (1997)). In other words, instructions should be given when evidence raises an inference that the lesser offense was committed to the exclusion of the charged offense.¹ Id. In making this determination, the court must consider all evidence presented at trial by either party. Id. at

¹ The factual component of the test for lesser-degree offenses is the same as that for lesser-included offenses. Fernandez-Medina, 141 Wn.2d at 455.

455-56. On appellate review, the court views the supporting evidence in the light most favorable to the party seeking the instruction. Id.

A person is guilty of second-degree assault² if that person commits assault “with a deadly weapon.” RCW 9A.36.021(1)(c). A person is guilty of fourth-degree assault, if that person commits assault “under circumstances not amounting to assault in the first, second, or third degree, or custodial assault.” RCW 9A.36.041. Instruction on fourth degree assault is proper when the record supports “an inference that the assault was only committed with a non-deadly weapon.” State v. Winings, 125 Wn. App. 75, 87, 107 P.3d 141 (2005).

The factual prong is satisfied here because the jury could rationally have found Breitung intentionally caused apprehension of imminent harm using only the microscope, a non-deadly weapon. RP 163-64, 423-24. A deadly weapon is

any explosive or loaded or unloaded firearm, and shall include any other weapon, device, instrument, article, or substance, including a ‘vehicle’ as defined in this section, which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or substantial bodily harm.

² The jury was also instructed on the applicable common law definition of assault, “An assault is an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.” CP 24.

RCW 9A.04.110(6). Substantial bodily harm means a temporary but substantial disfigurement or impaired function of a body part. RCW 9A.04.110. These statutory definitions create two categories of deadly weapons. Winings, 125 Wn. App. at 87. Firearms and explosives are deadly weapons per se. Id. Other objects are deadly weapons only if they are capable of causing death or substantial bodily harm under the circumstances in which they are used. Id. The circumstances of use include intent, present ability of use, degree of force, part of the body to which it was applied, and the physical injuries inflicted. Id. at 88 (citing State v. Shilling, 77 Wn. App. 166, 171, 889 P.2d 948 (1995)).

For example, a dog was a deadly weapon when the defendant released the pit bull and it lunged at the victim's throat and chest. State v. Hoeldt, 139 Wn. App. 225, 230, 160 P.3d 55 (2007). A car was a deadly weapon when it was driven into a police car and motorcycle. State v. Baker, 136 Wn. App. 878, 883-84, 151 P.3d 237, review denied, 162 Wn.2d 1010 (2007). A pencil was a deadly weapon when the defendant forcefully swung the pointed end at the victim's eye, the victim deflected the pencil, and the pencil embedded in the victim's temple. State v. Barragan, 102 Wn. App. 754, 761-62, 9 P.3d 942 (2000). A bar glass was a deadly weapon when the defendant struck the victim over the head with

it, knocking the victim's glasses off and causing facial lacerations treated with five stitches. Shilling, 77 Wn. App. 166, 172, 889 P.2d 948 (1995).

Applying the factors from Shilling, the microscope was not used as a deadly weapon. Breitung testified he pointed the microscope at an approaching car. RP 423-24. He intended to stop the car and induce the occupants to leave. Id. He was not inside the car with them, thus his ability to wield the microscope as a blunt object was nearly non-existent. Id. He used no force, did not apply it to any body part, and caused no injuries. Id.; Shilling, 77 Wn. App. at 88. Under those circumstances, the microscope is incapable of causing the requisite harm and is a non-deadly weapon.

The evidence, viewed in the light most favorable to Breitung, allowed the inference that he only committed fourth-degree assault. The trial court was required to give this lesser instruction, had defense counsel requested it.

b. Defense Counsel's Unreasonable Decision Not to Request Lesser Degree Instructions Undermines Confidence in the Outcome.

Every criminal defendant is constitutionally guaranteed the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816

(1987). Defense counsel is ineffective where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Thomas, 109 Wn.2d at 225-26. Deficient performance is that which falls below an objective standard of reasonableness. Id. at 226. Prejudice results from a reasonable probability that the outcome would have been different but for counsel's performance. Id. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. Here, counsel's decision to pursue an "all or nothing" strategy was deficient performance. Without instruction on the lesser degree, the jury may have voted to convict of second-degree assault only because outright acquittal was the only alternative. This undermines confidence in the outcome of the trial.

Like the lesser offense rule, the lesser degree rule "affords the jury a less drastic alternative than the choice between conviction of the offense charged and acquittal." Beck v. Alabama, 447 U.S. 625, 633, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980). "Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction." State v. Pittman, 134 Wn. App. 376, 388, 166 P.3d 720 (2006) (quoting Keeble v. United States, 412 U.S. 205, 250, 93 S. Ct. 1993, 36 L. Ed. 2d 844 (1973)). This result is avoided when the jury is given the option of finding a defendant guilty of a lesser degree of the offense, thereby giving

“the defendant the full benefit of the reasonable-doubt standard.” Beck, 447 U.S. at 633.

Only legitimate trial strategy constitutes reasonable performance. State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999). Counsel’s decision to pursue an all or nothing strategy must be measured against the likelihood that the jury, faced with evidence that Breitung committed some crime, was likely to resolve doubts in favor of conviction rather than acquittal. Breitung’s case compares favorably to others where counsel was held to be ineffective in failing to request instructions on a lesser offense.

In Pittman, the court held counsel was ineffective for failing to request a lesser-included offense instruction on first-degree attempted criminal trespass where the defendant was convicted of attempted residential burglary. Pittman, 134 Wn. App. at 379, 390. Pittman’s defense was that he never intended to commit a crime once he was inside the victim’s home. Id. at 388. This was a risky defense because he clearly committed a crime similar to the one charged but the jury had no option other than to convict or acquit. Id. at 388. Moreover the penalties for the lesser and greater offenses varied significantly (9 to 10 1/2 months for attempted residential burglary versus maximum of 90 days for attempted first degree trespass). Id. at 388-89.

In State v. Ward, the court held counsel was ineffective for failing to request a lesser-included instruction on unlawful display of weapon where the defendant was convicted of second-degree assault. State v. Ward, 125 Wn. App. 243, 246, 249-50, 104 P.3d 670 (2004). The failure was not a legitimate trial strategy because there was a significant difference in penalties between the lesser and greater offenses, Ward's defense was the same for both the lesser and greater offenses, and there was an inherent risk in relying solely on Ward's claim of self-defense because of credibility problems. Id. at 249-50.

As in Pittman and Ward, there is a stark difference in penalties between the charged crime and the lesser offense in Breitung's case. Based on Breitung's offender score of three, second-degree assault carries a standard range of 13 to 17 months, whereas fourth-degree assault carries a maximum penalty of one year. RCW 9.94A.510; RCW 9.94A.515; RCW 9.94A.525; RCW 9.92.020. Second-degree assault is a class B felony; fourth-degree assault is a gross misdemeanor. RCW 9A.36.021; RCW 9A.36.041. Second-degree assault is a "most serious offense," a "strike" under the Persistent Offender Accountability Act. RCW 9.94A.030(32), (37).

As in Pittman and Ward, the defenses considered by the jury in Breitung's case were risky. Defense counsel's attempts to create

reasonable doubt by poking holes in the State's case were unlikely to succeed. Based on the evidence produced at trial, the real issue was not whether Breitung assaulted Cook and Stevenson, but rather whether he did so armed with a deadly weapon or merely with a microscope. Thus, the all-or-nothing strategy was unreasonably deficient.

Moreover, the outcome would likely have been different because the jury's inconsistent verdicts showed either a desire for lenity or disagreement over the existence of a deadly weapon. Although the jury found Breitung guilty of second-degree assault with a deadly weapon, it could not agree whether he was armed with a firearm. CP 43-47. Jury lenity is a plausible explanation for this inconsistency. State v. Goins, 151 Wn.2d 728, 733, 738, 92 P.3d 181 (2004).

Counsel's deficiency prejudiced Breitung. Reversal is required when a defendant is entitled to instruction on a lesser degree but does not receive it. See State v. Parker, 102 Wn.2d 161, 163-64, 166, 683 P.2d 189 (1984) (where defendant has right to lesser offense instruction, appellate court barred from holding defendant not prejudiced by failure to submit instruction to jury). Recently, in State v. Grier, this Court reversed Grier's conviction because overwhelming evidence showed she was guilty of some offense and counsel unreasonably failed to request instruction on a lesser-included offense with a much lower sentence. State v. Grier,

____ Wn. App. ____, ____ P.3d ____ (No. 36350-0-II, June 2, 2009). The same result is compelled here.

2. BREITUNG'S CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM SHOULD BE REVERSED BECAUSE THE COURT'S FAILURE TO ADVISE HIM OF HIS LOSS OF A CONSTITUTIONAL RIGHT VIOLATED BOTH RCW 9.41.047 AND DUE PROCESS.

Persons with prior convictions for a felony or certain misdemeanors are prohibited from owning, possessing, or controlling firearms. RCW 9.41.040. This statute is in derogation of Washington's robust, long-standing history of protecting the right to bear arms. Const. art. I, § 24. See also State v. Eckenrode, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (discussing firearm sentencing enhancement and stating, "Courts are especially careful in this area because of the right to bear arms."); State v. Gurske, 155 Wn.2d 134, 118 P.3d 333 (2005) (analyzing nexus between gun and crime to avoid punishing the defendant for having a weapon unrelated to the crime); State v. Rupe, 101 Wn.2d 664, 704-08, 683 P.2d 571 (1984) (reversing death sentence because State used defendant's legal gun ownership to argue he was dangerous during sentencing phase).

Balancing the goals of protecting this constitutional right on the one hand and preventing violence on the other, the Legislature enacted a notice requirement. RCW 9.41.047; State v. Minor, 162 Wn.2d 796, 803, 174 P.3d 1162 (2008). At the time of a conviction resulting in loss of the right to

bear arms, the court must notify the offender both orally and in writing. RCW 9.41.047. The notice statute is “unequivocal in its mandate.” Minor, 162 Wn.2d at 803.

A conviction for unlawful possession of a firearm must be reversed when the defendant was prejudiced by lack of the statutorily required notice. Minor, 162 Wn.2d at 802; State v. Leavitt, 107 Wn. App. 361, 373, 27 P.3d 622 (2001). Washington courts have not yet determined whether lack of notice, without more, requires reversal of a conviction for unlawful possession of a firearm. Minor, 162 Wn.2d at 804 n.7; Leavitt, 107 Wn. App. at 366. However, Washington courts have reversed convictions when the circumstances surrounding the lack of notice misled the defendant, violating due process. Minor, 162 Wn.2d at 804; Leavitt, 107 Wn.2d at 372. Breitung’s conviction should be reversed because the sentencing court for his predicate offense violated the statute, frustrated the legislature’s intent, and violated his right to due process by failing to advise him he could no longer legally possess a firearm. Ex. 6, 7.³

- a. The Court’s Failure to Provide Notice of the Loss of the Right to Bear Arms Was Misleading and Violated Breitung’s Constitutional Right to Due Process.

Ignorance of the law is not a defense, and knowledge that possession is unlawful is not an element of the crime of unlawful possession of a

³ A supplemental designation of exhibits was filed on July 9, 2009 and exhibits 6 and 7 are attached as an appendix to this brief.

firearm. RCW 9.41.040; Minor, 162 Wn.2d at 802. Nevertheless, due process is violated when a statute requires notice and such notice is not given. State v. Wilson, 117 Wn. App. 1, 12, 75 P.3d 573 (2003). When the government has misled the defendant about the results of his conduct, application of the criminal statute violates the offender's right to due process. Leavitt, 107 Wn. App. at 372.

Government conduct may be misleading even without an express affirmative assurance that the conduct is lawful. Action, inaction, or a combination of the two may create a due process violation. State v. Moore, 121 Wn. App. 889, 896, 91 P.3d 136 (2004) (citing Leavitt, 107 Wn. App. at 372). In Leavitt, the court reversed the conviction although there had been no express assurance that Leavitt retained his right to possess firearms. 107 Wn. App. at 372. After his conviction, Leavitt was not informed of an enduring loss of the right to possess firearms. Id. He was informed of a one-year loss of that and several other rights while on probation. Id. He was also not required to turn over his concealed weapons permit. Id. The court held this combination of actions and inactions, of statements and omissions, was misleading under the circumstances. Id.

Similarly, in Moore, the defendant was not expressly told he retained a right to possess firearms. 121 Wn. App. at 896. But the judge took pains to explain the loss of other important privileges, and told the juvenile

defendant that if he stayed out of trouble, when he became an adult he could put this all behind him. Id. at 896-97. The court held this combination of statements and omissions implicitly announced to Moore that the mentioned consequences were all he faced. Id. As in Moore and Leavitt, Breitung was advised of the loss of other privileges without mention of the enduring loss of his right to possess firearms. Ex. 6, 7. These circumstances misled Breitung and violated his right to due process.

The existence of the notice statute is misleading when notice is not given. The reason ignorance of the law is no defense is that sane persons are presumed to know the law. State v. Patterson, 37 Wn. App. 275, 282, 679 P.2d 416 (1984) (citing State v. Spence, 81 Wn.2d 788, 792, 506 P.2d 293 (1973)). At common law, most crimes were malum in se, prohibited because so inherently evil that persons should intuitively know of the prohibition. Leavitt, 107 Wn. App. at 369. Nevertheless, strict liability for prohibited conduct that is not inherently evil is justified because it encourages people to learn and know the law. Id. But in this case, one who learned and knew the law would be misled into believing that if his conviction had resulted in the loss of the right to bear arms, he would have been notified, as the law requires.

Breitung was additionally entitled to rely on the default presumption that his constitutional rights remained intact following his prior misdemeanor

convictions. Convicted persons, particularly those convicted of a misdemeanor, should not be expected to intuitively guess that they have lost their right to possess a firearm indefinitely. In general, those convicted of misdemeanors do not lose significant constitutional rights such as the right to free speech, assembly, or religion even while incarcerated, let alone for an indefinite period after they have paid their debt to society. Additionally, “‘It is neither fair nor practical’ to hold defendants ‘to a standard of care exceeding that exercised by a judge.’” Leavitt at 372 (quoting United States v. Barker, 546 F.2d 940, 947 (D.C. Cir. 1976)). Breitung’s right to due process was violated by the predicate sentencing court’s failure to advise him he had lost his right to bear arms.

b. The Proper Remedy for Violation of the Statute and Due Process Is Reversal of the Subsequent Conviction.

The Legislature did not see fit to expressly provide a remedy for violation of the notice statute. RCW 9.41.047. As discussed above, Washington’s courts have not yet decided whether violation of the statute would alone warrant reversal. Minor, 162 Wn.2d at 802 n.7. But the court’s reasoning in Minor supports a remedy for statutory violation. “Relief consistent with the purpose of the statutory requirement must be available where the statute has been violated.” Id. at 803-04. Without a remedy, neither the State nor the Court has an incentive or motivation to ensure the

required notice is given. Leavitt, 107 Wn. App. at 367. The only available remedy is reversal of the subsequent conviction. Minor, 162 Wn.2d at 803.

The court has the power to create a remedy for violations of statutes requiring notice. See In re Pers. Restraint of Vega, 118 Wn.2d 449, 823 P.2d 1111 (1992). In Vega, the State failed to provide notice of the one-year time limit on filing a personal restraint petition. The court held because the notice requirement had been violated, the court must consider the late petition on the merits. Similarly here, where a notice statute has been violated, defendant should be relieved of the obligation of which he was not properly notified, in this case the obligation to refrain from possessing firearms.

Even if this court declines to require a remedy for a mere statutory violation, Breitung has also demonstrated prejudice from the violation of his due process rights. Undersigned counsel has located no Washington case upholding a conviction for unlawful possession of a firearm when the statutorily required notice without evidence the defendant received actual notice he had lost the right to possess firearms.

In State v. Carter, 127 Wn. App. 713, 112 P.3d 561 (2005), Division Three of this Court upheld a conviction despite violation of the notice statute because the defendant had also been convicted of another crime in the intervening years. Id. at 721. Because notice was provided at the time of

intervening second conviction, the original lack of notice was not prejudicial.

Id.

By contrast, in Leavitt, the court found prejudicial reliance on the lack of notice because Leavitt spontaneously volunteered information about his incriminating possession of firearms. Leavitt, 107 Wn. App. at 367-68. In that case, the defendant, without being asked, explained that he kept his concealed weapons permit, brought his guns to his brother in Utah for the year of his probation, and then returned to Utah to retrieve them when the year was over. Id.

Breitung has no such intervening conviction that would have provided him actual notice despite the violation of the statute, as was the case in Carter. 127 Wn. App. at 721. His case is more like Leavitt in that his conduct shows detrimental reliance on the lack of notice. First, Breitung set out to acquire these weapons after his 1997 convictions, much like Leavitt set out to retrieve his weapons from Utah. RP 458; Ex. 6, 7; 107 Wn. App. at 367-68. Also like Leavitt, Breitung answered truthfully when asked if he had weapons, and then volunteered that he had not just one, but several. RP 47. When his girlfriend retrieved a gun from their trailer and gave it to police, Breitung further volunteered, not in response to any question, that the gun was his. RP 52. Breitung's honest revelation of his firearm possession shows he was prejudiced by predicate court's failure to notify him he had

lost his constitutional right to bear arms, and his conviction for unlawful possession of a firearm should be reversed.

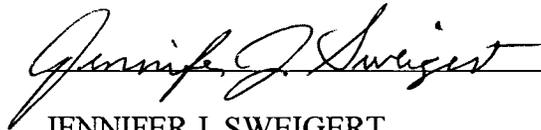
D. CONCLUSION

For the foregoing reasons, Breitung respectfully requests this Court reverse his convictions.

DATED this 13th day of July, 2009.

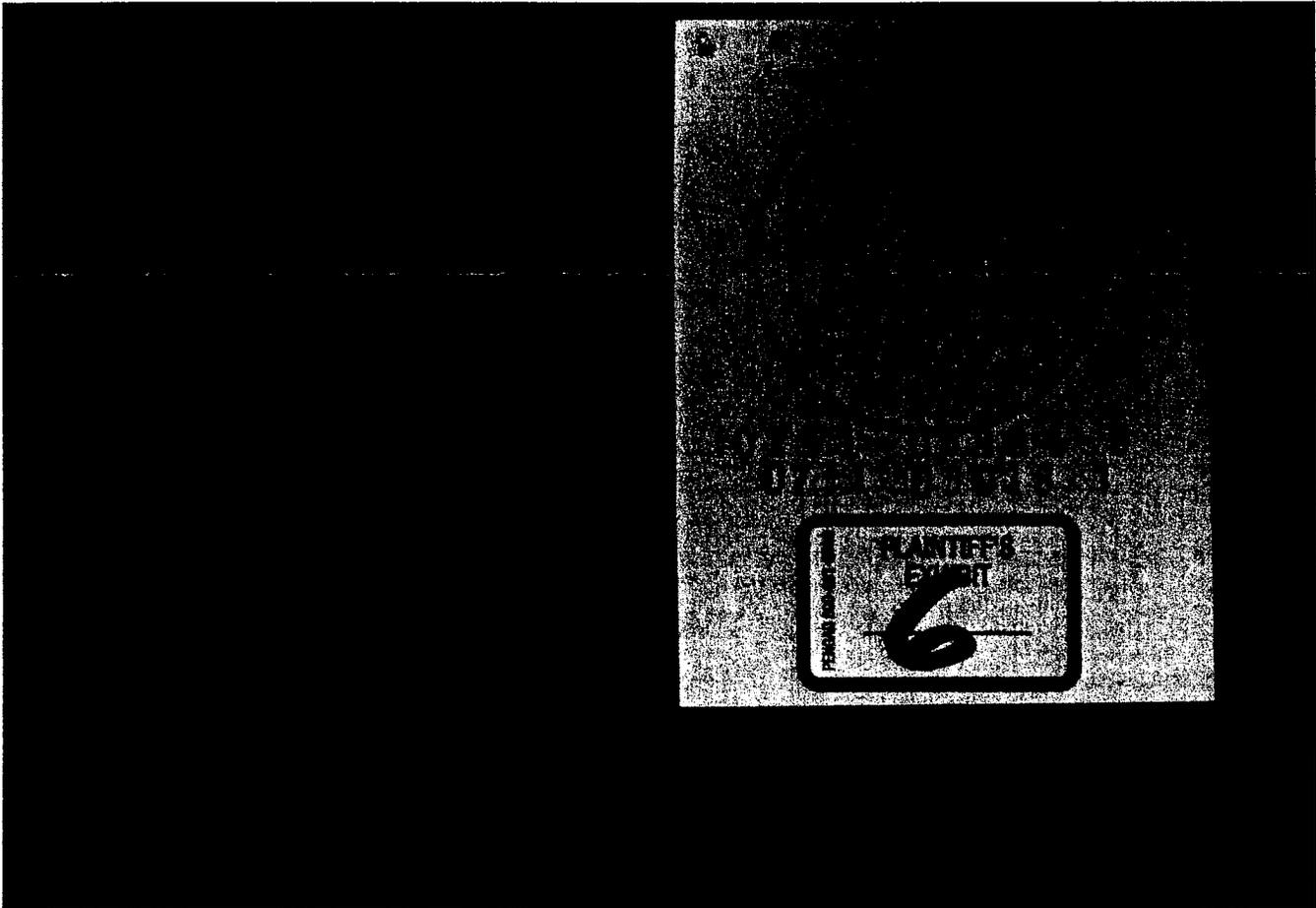
Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, reading "Jennifer J. Sweigert", written over a horizontal line.

JENNIFER J. SWEIGERT
WSBA No. 38068
Office ID No. 91051
Attorney for Appellant

Appendix



COURT ORDER

DEPT # 2 TAPE # _____
 PA _____

TACOMA MUNICIPAL COURT PIERCE COUNTY WASHINGTON

DEFENDANT: Beitung, Det. Charles
 ADDRESS: _____

AKA: Linda Hall
 I do hereby certify that this document is a full, true and correct copy of the original document on file in the above entitled court.

CITY, STATE, ZIP: _____

TELEPHONE NUMBER: 8-27
 Certified On: 20 08

I will notify the Court of any change of address: _____ Defendant's initials: _____

CASE NO.	CHARGE(S)	AMENDED TO	DISPOSITION	JAIL TIME IMPOSED	JAIL TIME SUSPENDED	CREDIT FOR TIME SERVED	PAY OR SERVE \$	FINES/COST	BAIL
<u>D2590</u>	<u>Asslt - DV</u>		<u>G</u>	<u>365</u>	<u>305</u>			<u>250</u>	
<u>S</u>	<u>DOP - DV</u>		<u>G</u>	<u>90</u>	<u>85</u>			<u>150</u>	

YOU MUST PAY Fine/Costs by _____. If not paid, the Defendant shall appear and request an extension, community service or show cause why payment cannot be made. Failure to appear or pay by the due date will result in the issuance of a bench warrant for Defendant's arrest.

Credit time served to fine/costs
YOUR JAIL STATUS Report to jail on 11/5/97 at 8:00 AM
 Flat Time Good Time Electronic monitoring Detox
 Authorized Bail: Cash only Cash/bond Defendant PR'd to _____
 PR Terminated Bail Bond exonerated/reinstated Cash bail refunded to poster Retain \$ _____ cash bail as _____
 Jail sentence to run (consecutively) (concurrently) with other Tacoma Municipal charges Charges with _____
 Appeal Bond \$ _____ cash/bond.

THIS CASE CONTINUED with/without stipulation to facts sufficient and with/without finding until _____
 Upon compliance: Dismissal Need Not Appear Amended to _____
 Upon non-compliance: Reading of Record and Sentencing

YOU MUST SURRENDER your driver's license immediately to the court. Surrendered: Yes No Affidavit of Non-Surrender

YOU ARE ORDERED TO DO THE FOLLOWING:

- Do not drive without valid license and insurance
- Have law abiding behavior
- No mood altering substances without a prescription
- Comply with terms and conditions of deferred prosecution
- Have no similar incidents
- Have no alcohol/drug related offenses
- Have no criminal traffic convictions

Comply with attached:
 No Contact Order
 SOAP Order
 SODA Order
 Have no hostile contact with apud Beitung

YOU MUST COMPLETE THE FOLLOWING WITH WRITTEN PROOF TO THE COURT BY _____

- Obtain a valid driver's license
- Obtain valid insurance
- Defensive driving school
- Alcohol/Drug Assessment and any recommended treatment
- Anger management evaluation and any recommended treatment
- Batterer's assessment and any recommended treatment
- Alcohol information school (AIS)
- Consumer awareness program
- HIV testing at Health Department
- Mental health evaluation
- 10.05 evaluation
- Psychosexual evaluation and program
- Presentence Report

Community service (CS) in lieu of \$ _____ fine/costs by _____
 Pay restitution:
 Amount to be determined
 \$ _____ to _____
 Attend Alcoholics/Narcotics Anonymous meetings _____ times week
 Work Crew in lieu of jail time
 Work Crew in lieu of \$ _____
 Other conditions _____

YOU MUST REPORT IN PERSON TO PRE-TRIAL SERVICES, 901 Tacoma Avenue South, Suite 204, Tacoma, WA 98402, (206) 597-3478 Today for screening to qualify for: Batterers Assessment/Treatment Funding Public defender Community Service Work crew eligibility

YOU MUST RETURN TO COURT ON _____ **AT** _____ **FOR** _____ **ROOM** _____

I have read the above order and understand that if I fail to do exactly what is ordered, the Court will issue a warrant for my arrest and additional costs and/or jail time will be imposed. Failure to respond, appear for any hearing or failure to pay a monetary assessment on a traffic offense will result in the suspension of my driver's license or privilege to drive until I have paid all penalties required by law.

DONE IN OPEN COURT: 10/6/97
[Signature]
 Judge/Commissioner/T-10-Term

CLERK OF COURT
AUG 27 2008
Pierce County Clerk
By *[Signature]*
Deputy 3

07-1-038843
07-1-039181

PERIOD 800-431-6868
PLAINTIFF'S
SUBMIT
7

IN THE MUNICIPAL COURT OF TACOMA
PIERCE COUNTY, STATE OF WASHINGTON

CITY OF TACOMA,

Plaintiff,)

vs)

Rebecca Breitang Defendant)

Case No. D 2590

STATEMENT OF DEFENDANT
ON SUBMITTAL OR
STIPULATION TO FACTS

I am the defendant in this case. I wish to submit the case on the record. I understand that this means that the Judge will read the police report and other materials and, based upon that evidence, the Judge will decide if I am guilty of the crime(s) of Assault-DV + DDP-DV

I understand that, by this process, I am giving up the constitutional right to a jury trial, the right to hear and question witnesses, the right to call witnesses in my own behalf, and the right to testify or not to testify.

I understand that the maximum sentence for the crime(s) is 365 days / \$5,000 - on Assault
destruction of property 90 days / \$1,000
and that the Judge can impose any sentence up to the maximum, no matter what the prosecution or the defense recommends.

No one has made any threats or promises to get me to submit this case other than the prosecuting authority's promise to take the following action and/or make the following recommendations: 15 days on Assault DV
+ 15 days on DDP-DV concurrent; Defendant free to argue for 0 jail
\$250 = 4 Batterer's Assessment, 1 on DDP \$150. = set over state court

Dated this 29th day of Sept, 19 97

[Signature]
For the Prosecuting Authority

[Signature]
Defendant
[Signature]
Lawyer for Defendant

After being fully advised of my right to counsel, including possible appointment of counsel should I be indigent, I hereby waive same.

TACOMA MUNICIPAL COURT, PIERCE COUNTY, WASHINGTON
I, Linda Hall do hereby certify that this document is a full, true and correct copy of the original document on file in the above entitled court.

Certified on 8-27 20 08

Defendant

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

STATE OF WASHINGTON)
)
Respondent,)
)
vs.)
)
ROBERT BREITUNG,)
)
Appellant.)

COA NO. 38869-3-II

09 JUL 15 PM 12:24
STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

COURT OF APPEALS
DIVISION II

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 13TH DAY OF JULY 2009, 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] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

- [X] ROBERT BREITUNG
DOC NO. 779109
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUL 13 PM 3:47

SIGNED IN SEATTLE WASHINGTON, THIS 13TH DAY OF JULY 2009.

x *Patrick Mayovsky*