

NO. 38869-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROBERT BREITUNG,

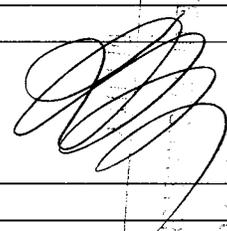
Appellant.

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2009 OCT 12 PM 3:52

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

The Honorable Thomas J. Felnagle, Judge

REPLY BRIEF OF APPELLANT



JENNIFER J. SWEIGERT
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

COURT OF APPEALS
STATE OF WASHINGTON

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A. ASSIGNMENT OF ERROR IN REPLY¹

The trial court erred in denying appellant's motion to dismiss count III for failure to provide statutorily required notice of the loss of the constitutional right to bear arms. 1/5/09RP 13.

B. ARGUMENT IN REPLY

1. COUNSEL'S DECISION NOT TO REQUEST LESSER-INCLUDED INSTRUCTIONS WAS UNREASONABLE GIVEN THE DISPARITY IN PENALTIES.

The State argues the difference between a 13-17 month prison sentence for a class B felony conviction and a misdemeanor conviction with a maximum of 365 days is insignificant. This argument should be rejected because the State has compared the standard range felony sentence with the maximum sentence possible for a misdemeanor. RCW 9.92.020; RCW 9A.36.041. If Breitung were convicted of only fourth-degree assault, the court would have discretion to impose a far lesser sentence than the maximum twelve months. *Id.* Additionally, under misdemeanor sentencing, even if the court imposed the maximum twelve months, it would have discretion to suspend the entire sentence in favor of probation. RCW 9.92.060. Such flexibility is not possible under the Sentencing Reform Act for felony convictions. RCW 9.94A.505 ("Unless another term of

¹ In *Goehle v. Fred Hutchinson Cancer Research Center*, 100 Wn. App. 609, 614, 1 P.3d 579 (2000), the court reproached the appellant for failing to correct, in the reply brief, deficiencies in the assignments of error. A more complete assignment of error is therefore included in this reply brief.

confinement applies, the court shall impose a sentence within the standard sentence range.”) Thus, the disparity is not between 12 months and 13-17 months. The disparity is between a potential for no jail time, and a minimum sentence of over a year. This is a significant disparity, and thus the risk of failing to request lesser-included instructions on fourth-degree assault was unreasonable.

2. THIS COURT HAS DISCRETION TO REVIEW A DUE PROCESS VIOLATION TO WHICH ERROR WAS ASSIGNED.

The State argues this Court should decline to consider whether Breitung’s due process rights were violated because undersigned counsel inadvertently assigned error to the constitutional violation without mention of the trial court’s ruling on the matter. Breitung requests this Court exercise its discretion to review this issue despite the error because as in Goehle v. Fred Hutchinson Cancer Research Center, 100 Wn. App. 609, 613, 1 P.3d 579 (2000), the “nature of the challenge” is clear from the assignment of error to the due process violation. See Brief of Appellant at 1. In contrast to the cases cited by the State, Breitung’s argument is not “unsupported by any assignment of error.” See, e.g., Hafer v. Marsh, 16 Wn.2d 175, 132 P.2d 1024 (1943).

In support of its argument, the State cites Rutter v. Rutter, 59 Wn.2d 781, 379 P.2d 862 (1962), Boyle v. King County, 46 Wn.2d 428, 282 P.2d

261 (1955), and Hafer v. Marsh, 16 Wn.2d 175, 132 P.2d 1024 (1943). In Rutter, the appellant assigned error only to the trial court's legal conclusion and judgment that the terms of the divorce decree entitled the respondent ex-wife to the full face value of her deceased former husband's insurance policies, as opposed to an amount reduced by loans made to the ex-husband while he was alive. 59 Wn.2d at 787. In the argument on that issue, the appellant also raised an entirely new issue, arguing that, in contradiction to the unchallenged findings of fact, that the divorce decree only covered one of the deceased husband's two insurance policies. Id.

In Boyle, the appellant assigned error the court's findings (and lack thereof) regarding negligence and implied warranty, but did not assign error based on express warranty. 46 Wn.2d at 432-33. The court then declined to consider the express warranty argument. Id. at 433. The plaintiff in Hafer whose appeal was not considered, failed to assign any error whatsoever. 16 Wn.2d at 180-81. Breitung did not raise an entirely new issue from those to which error was assigned, as in Rutter and Boyle. Nor did Breitung entirely fail to assign error as in Hafer.

This case is far more like Goehle, where the appellant failed to include anywhere in the brief the text of the proposed instruction she argued was improperly refused. Despite this failing, Goehle's "argument that the court erred in refusing to instruct the jury on her age discrimination claim is

clear enough.” Id. at 614. Moreover, the text of the proposed jury instruction was “easily discovered upon perusal of the proposed jury instructions in the clerk’s papers.” Id. The nature of Breitung’s challenge to the lack of notice of his firearm prohibition is similarly clear, and the motion and ruling in the trial court are evident in the clerk’s papers and the transcripts.

Additionally, the State does not appear to have been prejudiced in responding to this issue, which is thoroughly briefed in the Brief of Respondent. See State v. Olson, 74 Wn. App. 126, 129, 872 P.2d 64 (1994), aff’d, 126 Wn.2d 315, 893 P.2d 629 (1995) (reviewing issue on State’s appeal despite technical defects in assignments of error and notice of appeal because brief was sufficient for response, defendant responded and was not prejudiced, and review was not significantly impeded).

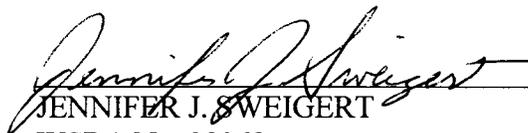
C. CONCLUSION

For the foregoing reasons and the reasons stated in the Brief of Appellant, this Court should reverse Breitung's convictions.

DATED this 12th day of October, 2009.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

A handwritten signature in cursive script, appearing to read "Jennifer J. Sweigert", is written over a horizontal line.

JENNIFER J. SWEIGERT

WSBA No. 38068

Office ID No. 91051

Attorney for Appellant

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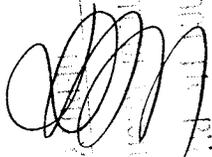
DECLARATION OF SERVICE

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 12TH DAY OF OCTOBER 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] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

- [X] ROBERT BREITUNG
DOC NO. 779109
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN, WA 98520


BY: _____
STATE CLERK
OCT 12 2009
COUNTY OF PIERCE
CLERK OF SUPERIOR COURT

SIGNED IN SEATTLE WASHINGTON, THIS 12TH DAY OF OCTOBER 2009.

x Patrick Mayovsky