

No. 39730-7-II

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

STATE OF WASHINGTON,

Appellant,

v.

CARMEN A. DAMIANI,

Respondent.

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

The Honorable Gary Tabor, Judge
Cause No. 09-1-00998-1

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR.

1. The trial court erred when it added to Damiani's judgment and sentence this language in section 4.4: "The court is not opposed to Defendant possessing a firearm in a military formation or in combat."

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the Superior Court exceeded its authority by giving a convicted felon permission to possess a firearm in a military formation or in combat, and whether that permission is therefore void.

2. Whether this language in the judgment and sentence, "The court is not opposed to Defendant possessing a firearm in a military formation or in combat," could support a defense of estoppel should the defendant later be charged with unlawful possession of a firearm.

C. STATEMENT OF THE CASE.

1. Substantive facts.

On June 10, 2009, Damiani was being held in the Thurston County Jail following his arrest for a domestic violence assault that occurred on June 9. The victim was Damiani's wife, Megan Dawley. Dawley reported to a Victim Advocate that Damiani had called her from the jail, telling her to change the statement that she had given to the police. Calls made from the jail are recorded, and a Thurston County deputy listened to the recording. The call was made to Dawley's phone number, a female answered, and Damiani

told her to tell the police that she was drunk, stumbled, and fell, and that he did not hit her. She agreed to tell the police anything he wanted her to, as long as he admitted to her that he hit her. Damiani stated that he would not make an admission over “this phone.” [CP 10-11]

2. Procedure.

On June 12, 2009, the court entered an order finding probable cause for witness tampering and fourth degree assault, both domestic violence. [CP 3] An information was filed, but the charging document which is relevant to this appeal is the first amended information filed on June 25, 2009, charging the same two crimes for which probable cause had been found. [CP 13]

On July 20, 2009, Damiani entered an *Alford*¹ plea to tampering with a witness, domestic violence, on the State’s agreement to dismiss the assault charge. [CP 26-32] He had an offender score of zero, and the standard range sentence was one to three months. [CP 17, 27] The State requested a mid-range sentence of 60 days [RP 8², CP 28]. Damiani agreed to that recommendation, however, he expressed concern about his military

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).

² The only verbatim report of proceedings is the plea and sentencing hearing of July 20, 2009.

career and the fact that he would not be able to possess a firearm.

[RP 10-13]

The superior court followed the joint recommendation and imposed a 60-day sentence. [CP 19] Over the State's objection, [RP 17-18] the court added this language to section 4.4 of the judgment and sentence: "The court is not opposed to D possessing a firearm in a military formation or in combat." [CP 19] The State brought a motion to reconsider [CP 33-38] which the court denied without a hearing. [CP 39-40]

The State sought discretionary review in the court of appeals. A court commissioner ruled that the matter is appealable pursuant to RAP 2.2. This appeal follows.

D. ARGUMENT.

1. A superior court does not have the authority to permit a convicted felon to possess firearms under any circumstances unless or until such rights are restored by the court.

RCW 9.41.040 criminalizes possession of a firearm if a person has been convicted of certain listed predicate offenses. State v. Weed, 91 Wn. App. 810, 959 P.2d 1182 (1998). Those offenses include all felony convictions. RCW 9.41.040 states, in part:

(2) (a) 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*:

(i) After having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of *any felony not specifically listed as prohibiting firearm possession under subsection (1) of this section*, or any of the following crimes when committed by one family or household member against another, committed on or after July 1, 1993: Assault in the fourth degree, coercion, stalking, reckless endangerment, criminal trespass in the first degree, or violation of the provisions of a protection order or no-contact order restraining the person or excluding the person from a residence (RCW 26.50.060, 26.50.070, 26.50.130, or 10.99.040);

RCW 9.41.040(2), (emphasis added).

Damiani pled guilty to one charge of Witness Tampering, Domestic Violence, which is a class C felony. RCW 9A.72.120(1)(a). This charge is not specified under the domestic violence prong of RCW 9.41.040(2)(a)(i). However, it falls within the category of “any felony not specifically listed” under 9.41.040 (1). Therefore RCW 9.41.040 applies to Damiani’s criminal conviction.

At issue here is the authority, or more accurately, lack of authority, of state superior courts. The State does not speculate on the potential legal positions which could be taken by federal and military courts regarding Damiani’s conviction. Rather, the State

appeals solely regarding the authority of a Washington superior court, and the State maintains there is no authority for superior courts to permit any exemptions from the statutory prohibition against convicted felons possessing firearms.

RCW 2.28.080 defines the powers of judges of the supreme and superior courts. It states,

The judges of the supreme and superior courts have power in any part of the state to take and certify –

- (1) The proof and acknowledgment of a conveyance of real property or any other written instrument authorized or required to be proved or acknowledged.
- (2) The acknowledgment of satisfaction of a judgment in any court.
- (3) An affidavit or deposition to be used in any court of justice or other tribunal of this state.
- (4) To exercise any other power and perform any other duty conferred or imposed upon them by statute.

[RCW 2.28.080]

RCW 9.41.040 contains no mention of judicial discretion. This court noted in State v. Swanson, 116 Wn. App. 67, 70, 65 P.3d 343, (2003), a case dealing with the restoration of the right to possess firearms, that “the only discretion that the statute contemplates belongs to the petitioning individual, and that discretion concerns his decision to petition the court in the first place.” Swanson, 116 Wn. App. at 75.

While RCW 9.41.040 is “not a model of clarity,” Swanson, 116 Wn. App. at 70, there is no authority for the sentencing court to grant individual exemptions for any reason, including employment. Although most case law surrounding procedural discretion of firearm possession rights relates to reinstatement, the lack of court discretion under RCW 9.41.040 has been addressed in dicta. In Swanson this Court drew a parallel between the restoration procedure of RCW 9.41.047 and the procedural mechanisms of RCW 9.41.040. This Court stated “the convicting or committing court has no discretion to decide which crimes or commitments shall affect a person's firearm rights.” Swanson, 116 Wn. App. at 75. This Court further elaborated on this by stating “This clear lack of discretion in the right removal context is consistent with the lack of discretion in the restoration context.” Id.

The court must notify a defendant, orally and in writing, at the time he or she is convicted of a crime making him or her ineligible to possess a firearm, that the defendant “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.” RCW 9.41.047(1). There is no

exemption for persons in the military. "Courts must follow the law as they find it." Cunningham v. Seattle, 42 Wash. 134, 141, 84 P. 641 (1906).

The sentencing court in the case clearly thought it had authority to allow Damiani to possess a firearm in "military formation or in a combat situation." [RP 16] It did not identify that authority, but presumably it would be a federal statute. However, 18 USC § 922 prohibits felons from possessing any firearms that were involved in interstate commerce, which realistically speaking, will be almost every firearm:

(d) It shall be unlawful for any person to sell or otherwise dispose of any firearm or ammunition to any person knowing or having reasonable cause to believe that such person—

(1) is under indictment for, or has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year; [or]

.

(8) is subject to a court order that restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had the opportunity to participate; and

.

(B) (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

.

(g) It shall be unlawful for any person—

(1) who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year; [or]

.

(8) who is subject to a court order that—

(A) was issued after a hearing of which such person received actual notice, and at which such person had an opportunity to participate;

(B) restrains such person from harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child; and

.

(C) (ii) by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury;

.

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 USC § 922(d) and (g).

It is apparent from the record of the sentencing hearing that Damiani understood that if he was prohibited from possessing

firearms his military job was at risk. [RP 12-13] Not only did he have a felony conviction, but was subject to a no-contact order meeting the requirements of the statute. [CP 24-25]

The State does bring to the court's attention that 18 U.S.C. § 925(a)(1) seems to permit an exception to most of the prohibitions of 18 U.S.C. 922(d) for law enforcement and military personnel. United States v. Lewitzke, 176 F.3d 1022 (7th Cir. 1999). However, as argued above, the federal statutes are a separate matter from Washington law. A Washington superior court judge is bound to apply Washington law to a Washington conviction, and whatever exemptions apply in the federal arena are not factors for a state court to consider.

There are, of course, military bases in the state of Washington. Military bases remain a part of the state in which they are located for the purpose of criminal law enforcement. Williams v. Department of Licensing, 85 Wn. App. 271, 277, 932 P.2d 665, (1997) citing DuPont-Fort Lewis Sch. Dist. v. Clover Park Sch. Dist., 65 Wn. 2d 342, 350, 396 P.2d 979 (1964) citing Howard v. Commissioners of the Sinking Fund of Louisville, 344 U.S. 624, 73 S. Ct. 465, 97 L. Ed. 617 (1953). The state loses jurisdiction to regulate within federal property only where State and Federal law

conflict. Id. In this case, there is no conflict between federal and state firearm restrictions. If, however, while on a base Damiani was exempted from the prohibition on possessing firearms, the State would not have jurisdiction to enforce the judgment and sentence, but that is a different matter from the state court giving a defendant permission to possess a firearm.

Because the sentencing court had no authority to give Damiani permission to possess a firearm under any circumstances, that sentencing term is void.

2. Even though the language in the judgment and sentence purporting to give Damiani permission to possess a firearm while in military formation or combat is void, it could provide a defense of estoppel should he be charged in the future with unlawful possession of a firearm.

Even though the court lacked authority to give Damiani permission to possess a firearm under any circumstances, if he were to be arrested for unlawful possession of a firearm at some future date the State may well be foreclosed from prosecuting him. Where a defendant relies upon “an express representation by a government agent that certain proscribed activity was in fact legal, the defendant may raise the defense of entrapment by estoppel against any charge based on that proscribed activity.” State v. Sweeney, 125 Wn. App. 77, 83, 104 P.3d 46 (2005), *citing to State*

v. Krzeszowski, 106 Wn. App. 638, 646, 24 P.3d 485 (2001).

Before that defense applies,

“[T]he government must actively mislead the defendant by inducing him to rely on ‘an affirmative misrepresentation of the law by [the government official].’” “In order for his reliance to be reasonable, the defendant must establish that ‘a person sincerely desirous of obeying the law would have accepted the information as true, and would not have been put on notice to make further inquiries.’”

Krzeszowski, 106 Wn. App. at 646.

In State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008), a juvenile had been convicted of unlawful possession of a firearm. He appealed on the grounds that when he was adjudicated on the predicate offense, which was residential burglary, the sentencing court had not given him the oral and written notice required by RCW 9.4.047(1) that he was prohibited from possessing firearms. The preprinted warning on the adjudication form, which was preceded by a box to be checked when that provision applied, was not checked. The court of appeals affirmed, but the Supreme Court reversed, finding that “by failing to check the appropriate paragraph in the order, the predicate offense court not only failed to give written notice as required by former RCW 9.41.047(1) but also, we

conclude, affirmatively represented to Minor that those paragraphs did not apply to him.” Id., at 803.

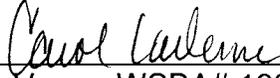
In the present case, a defendant would have every right to rely on a provision specifically included in the judgment and sentence. Even though at sentencing the court issued oral disclaimers about the effect of this provision, [RP 15, 18-19] it is the judgment and sentence that is going to be presented in any future prosecution; it is unlikely that the court’s oral remarks would be.

Even though the language used by the court may be void, it may still have consequences detrimental to the State. It was error for the court to include it in the judgment and sentence.

E. CONCLUSION.

The sentencing court lacked the authority to give Damiani permission to possess a firearm under any circumstances, and thus the provision which the State appeals is void. However, it could still have consequences by allowing an estoppel defense to a later charge of illegal possession of a firearm. The State respectfully asks this court to strike this provision from the judgment and sentence or remand the judgment and sentence to Thurston County Superior Court with an order to strike it.

Respectfully submitted this 21st day of January, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Appellant via US Mail
Postage Prepaid to below:

TO: DAVID C. PONZOHA, CLERK
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I certify that I served a copy of the Brief of Appellant and copy of
Verbatim Report of Proceedings to all parties or their counsel of record on
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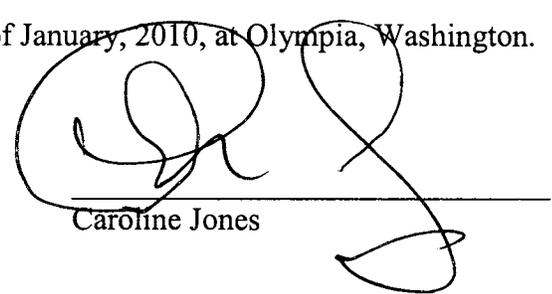
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I certify under penalty of perjury under laws of the State of
Washington that the foregoing is true and correct.

Dated this 21 day of January, 2010, at Olympia, Washington.



Caroline Jones