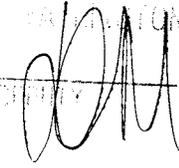


FILED
COURT OF APPEALS

10 JUN -2 PM 12:02

STATE OF WASHINGTON

BY 

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

~~NO. 43079-0-II~~ 398494-II

STATE OF WASHINGTON,

Appellant,

vs.

KENNETH EUGENE LAMB

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF CLALLAM
CAUSE NO. 09-1-00143-9

BRIEF OF RESPONDENT

LOREN D. OAKLEY WBA #18574
Attorney for Respondent
516 East Front Street
Port Angeles, Washington 98362
(360) 452-3307

P.N. 77-10

TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
ASSIGNMENTS OF ERROR	1
ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ...	1
STATEMENT OF THE CASE	1
ARGUMENT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Personal Restraint of Fonseca</i> , 132 Wn.App. 464 (2006)	3
<i>Personal Restraint of Matthews</i> , 128 Wn.App. 267 (2005)	3
<i>Personal Restraint of Mayer</i> , 128 Wn.App. 694 (2005)	3
<i>State v. Ammons</i> , 105 Wn.2d 175 (1986)	2
<i>State v. Holsworth</i> , 93 Wn.2d 148 (1980)	2, 3
<i>State v. Olvera-Avila</i> , 89 Wn.App. 313 (1997)	3, 4
<i>State v. Wilbur</i> , 110 Wn.2d 16 (1988)	6
Session Laws	
Laws of 1935, ch. 172.....	5
Laws of 1961, ch. 124.....	5
Laws of 1935, ch.172, § 1	5
Laws of 1935, ch. 172, § 4.....	5
Laws of 1935, ch. 172, §16.....	5
Laws of 1961, ch. 124, § 3.....	6
Laws of 1975, ch. 260, § 9A.88.100 (1st ex.sess.)	4
Laws of 1983, ch. 232, § 2(1)	5
Laws of 1983, ch. 232, § 2(5)	5
Laws of 1988, at ii	4
Laws of 1988, ch. 145, § 10.....	4

Laws of 1988, ch. 146, § 2.....	4
Laws of 1992, ch. 205, § 118(1).....	6
Laws of 1992, ch. 205, § 118(3).....	6
Laws of 1992, ch. 205, § 118(4).....	6
Laws of 1992, ch. 205, § 118(5).....	6
Laws of 1994, ch. 7, § 402 (Sp.Sess.).....	6
Laws of 2001, ch. 359, § 12 (2d Sp.Sess.).....	5

ASSIGNMENTS OF ERROR

The respondent's Motion to Dismiss counts IV through XIII of the Amended Information was erroneously granted.

The appellant's Motion for a Second Amended Information was erroneously denied.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the juvenile and superior courts abused their discretion in granting the respondent's Motion to Dismiss counts IV through XIII of the Amended Information, each count alleging the respondent unlawfully possessed a firearm, or in denying the appellant's Motion for an Amended Information.

STATEMENT OF THE CASE

On or about March 16, 2010, the Brief of Respondent in cause 39849-4-II was filed in this Court. That brief is hereby incorporated by this reference as if fully set forth herein.

After the Juvenile Division of the Superior Court of Washington in and for the County of Clallam (Juvenile Court) granted the respondent's Motion to Withdraw his Plea of Guilty and Vacate the Order of Disposition, the respondent filed a motion in this cause in the Superior Court of Washington in and for the County of Callam (Superior Court) to dismiss counts IV through XIII of the Amended Information.¹ The Superior Court granted that motion.² The Superior Court also granted

¹ CP 8-9, 11-12, and RP (11/19/09) 7.

² CP 9, 12, RP (12/30/09) 4, and RP (2/12/10).

the respondent's motion to deny the State's Motion to File a Second Amended Information re-instating the ten (10) counts of Unlawful Possession of a Firearm in the Second Degree but based on the respondent's 1986 adjudication for Indecent Liberties in Juvenile Court.³ The appellant then filed a Notice of Appeal to seek review of the Superior Court's granting of the respondent's motion to dismiss the charges of Unlawful Possession of a Firearm, and denial of the appellant's motion to file a Second Amended Information.⁴

ARGUMENT

To be knowing, intelligent, and voluntary and therefore constitutionally valid, guilty pleas must advise defendants of the nature of the offense and the consequences of pleading guilty.⁵ Otherwise the pleas violate defendants' constitutional rights to due process, and may result in a procedural defect of constitutional magnitude.⁶

Convictions determined to have been unconstitutionally obtained or constitutionally invalid on their faces may not be used for sentencing.⁷ The State may not rely on guilty pleas unless those pleas were entered with full knowledge of the offenses.⁸ A conviction based on a guilty

³ CP 8-9, 11-12.

⁴ CP 4-6.

⁵ *State v. Holsworth*, 93 Wn.2d 148, 153 (1980).

⁶ *Id.*, at 156 & 157.

⁷ *State v. Ammons*, 105 Wn.2d 175, 187-88 (1986) (citing *In re Bush*, 26 Wn. App. 486 (1980), *aff'd*, 95 Wn.2d 551 (1981); *United States v. Tucker*, 404 U.S. 443, 30 L. Ed.2d 592, 92 S.Ct. 589 (1972); and *Burgett v. Texas*, 389 U.S. 109, 19 L.Ed.2d 319, 88 S.Ct. 258 (1967)).

⁸ *Holsworth*, *supra* n. 5, at 158.

plea may be reversed where entered without knowledge of the nature of the crime because pleading guilty without understanding denies a constitutional right.⁹ A plea of guilty which does not contain an essential element of the crime is not voluntary; therefore, it is invalid because it deprives a defendant of due process of law.¹⁰

Dispositions based on involuntary guilty pleas are void, and violate respondents' rights to due process of law.¹¹ "...[W]ithout an accurate understanding of the relation of the facts to the law a [respondent] is unable to evaluate the strength of the State's case and thereby enter a knowing and intelligent guilty plea."¹² "An involuntary plea produces a manifest injustice."¹³

Counts IV through XIII of the Amended Information alleged that the respondent committed the crimes of Unlawful Possession of a Firearm in the Second Degree because he was in possession of a separate firearm for each count after having been convicted of a felony. The basis

⁹ *Id.*, at 158 (citing *State v. Taft*, 49 Wn.2d 98, 102, 103 (1956)).

¹⁰ *Holsworth*, *supra* n. 5, at 156 (citing *Henderson v. Morgan*, 426 U.S. 637, 645, 647, 49 L.Ed.2d 108, 96 S.Ct. 2253 (1976); and *McCarty v. United States*, 394 U.S. 459, 22 L.Ed.2d 418, 89 S.Ct. 1166 (1969)).

¹¹ *State v. Olivera-Avila*, 89 Wn.App. 313, 317-18 (1997) (citing *State v. Boyd*, 21 Wn.App. 465, 478 (1978), *vacated in Holsworth*, *supra* n. 5); and *Personal Restraint of Mayer*, 128 Wn.App. 694, 703 (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

¹² *Mayer*, *supra* n. 11, at 705 (citing *State v. Chervenell*, 99 Wn.2d 309, 319 (1983); and *State v. DeRosia*, 124 Wn.App. 138, 150 (2004)).

¹³ *Personal Restraint of Matthews*, 128 Wn.App. 267, 270 (2005) (citing *Personal Restraint of Isadore*, 151 Wn.2d 294, 298 (2004)); and *Personal Restraint of Fonseca*, 132 Wn.App. 464, 468 (2006) (citing *Isadore*, *ante*).

for the allegation that the respondent had been so convicted was his 1991 adjudication in juvenile court for Burglary.

The Juvenile Court granted the respondent's Motion to Withdraw his Plea of Guilty and Vacate the Order of Disposition (Motion) because the respondent's plea was not voluntary; therefore, his adjudication was and is void.¹⁴ The State may not rely on a void adjudication because it proves nothing. A void adjudication can not be the basis for anything, especially a predicate for a subsequent felony; therefore, the Superior Court could not allow the prosecutions for Second Degree Unlawful Possession of a Firearm to go forward or do anything other than grant the respondent's motion to dismiss counts IV through XIII of the Amended Information.

The respondent was convicted of Indecent Liberties based on acts occurring in April 1986 for having sexual contact with someone less than fourteen (14) years of age even though the respondent was less than twelve (12) years of age at the time the crime occurred.¹⁵ That crime, or that definition of Indecent Liberties, not only no longer exists;¹⁶ the acts alleged have not constituted a crime since June 9, 1988.¹⁷ Not until 2001 did any

¹⁴ *Olivera-Avila, supra* n. 11.

¹⁵ CP (39849-4-II) 59, 87-90.

¹⁶ "A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another...(b) when the other person is less than fourteen years of age..." Laws of 1975, ch. 260, §9A. 88.100 (1st ex.sess.).

¹⁷ Laws of 1988, ch 145, § 10; Laws of 1988, ch. 146, § 2; and Laws of 1988, at ii.

version of Indecent Liberties constitute a class A felony.¹⁸

Not until 1935 were those convicted of a crime of violence prohibited from owning or possessing pistols, leaving intact their right to own or possess rifles.¹⁹ “Crime of violence” meant Murder, Manslaughter, Rape, Mayhem, Robbery, Burglary, or Kidnapping; or an attempt to commit any of those felonies.²⁰ “Crime of violence” also meant First, but not any other, degree Assault or an attempt.²¹ “Crime of violence did not include Indecent Liberties.²² Violating this statute was apparently a gross misdemeanor or class B felony at the court's discretion.²³ There was no provision for reinstating a defendant's right to possess pistols.²⁴

In 1983 the State amended this law to add Indecent Liberties to the list of offenses convictions of which terminated one's right to possess short firearms' or pistols, leaving intact such persons' right to possess rifles.²⁵ This statute made it impossible for one convicted of Indecent Liberties to ever possess a short firearm or pistol but left unaffected his right to possess rifles.²⁶ This statute for the first time created a mechanism for those convicted of qualifying offenses to re-instate their right to possess short firearms.²⁷ This statute forbid those convicted of Indecent Liberties from ever

¹⁸ Laws of 2001, ch. 359, § 12 (2d Sp.Sess.).

¹⁹ Laws of 1935, ch. 172, § 4.

²⁰ *Id.*, at § 1.

²¹ *Id.*

²² *Id.*

²³ *Id.*, at § 16.

²⁴ Laws of 1935, ch. 172; and Laws of 1961, ch. 124.

²⁵ Laws of 1983, ch. 232, § 2(1) & (5).

²⁶ *Id.*

²⁷ *Id.*, at (5).

reinstating their right to possess short firearms, but did not apply to the respondent because it was not until at least 1992, after the respondent changed his plea and was adjudicated, that the law was amended to include juvenile adjudications within the offenses disqualifying one from possessing firearms, short or otherwise.²⁸ To include juvenile offenses in those disqualifying one from firearm possession, the State amended subsections one, three, and four to add “adjudicated”, “disposition”, and “fact-finding”.²⁹ These terms are the language of the Juvenile Justice Act.

Conspicuously absent from this statute was any amendment to subsection five which is the operative subsection because that is the subsection which includes Indecent Liberties among the offenses which prevent firearms rights from ever being restored.³⁰ This absence shows that the State intended juvenile adjudications not to create a life-time ban on the possession of short firearms because “fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.”³¹ The 1994 amendment corroborates this because it was that amendment which made it a crime for “an adult or juvenile”, to possess a firearm after having been “convicted” of a predicate offense.³²

The 1992 and 1994 amendments occurred after the respondent

²⁸ Laws of 1992, ch. 205, § 118(1) & (5).

²⁹ *Id.*, at (1), (3), and (4).

³⁰ *Id.*, at (5).

³¹ *State v. Wilbur*, 110 Wn.2d 16, 19 (1988) (quoting *State v. Hornaday*, 105 Wn.2d 120, 127 (1986)).

³² Laws of 1994, ch. 7, § 402 (Sp. Sess.).

changed his plea, was adjudicated, and the disposition was entered in the Indecent Liberties case. As before, the respondent was never advised that changing his plea or being adjudicated in the Indecent Liberties case would affect his firearms rights, let alone that it would permanently terminate those rights.

The restrictions on re-instatement of firearms rights which require compliance with the “wash-out” rules of the Sentencing Reform Act did not become effective until well after the respondent was adjudicated for Indecent Liberties. There is no showing that at the time respondent would have become eligible to re-instate his firearms rights, had he known he had any need to, he would not have been able to.

The respondent’s plea to Indecent Liberties was not voluntary. He had no knowledge that changing his plea to guilty and being adjudicated for that offense would affect his firearms rights because it was not until afterwards that the adjudication terminated his firearms rights.

The crime of Indecent Liberties with which the respondent was charged, to which he pled guilty, and for which he was adjudicated no longer exists. More importantly, the act giving rise to that charge is no longer a crime, and has not been since 1988. Although Indecent Liberties was included in the offenses giving rise to terminating firearms rights when the respondent was adjudicated of that offense, that prohibition did not apply to him because when he was adjudicated juvenile offenses did not affect firearms rights. It was not until 1994, eight years after the respondent was adjudicated for Indecent Liberties, that his firearms rights were

terminated despite never receiving notice of that fact. After 1994, the State further conditioned re-instatement on compliance with the Sentencing Reform Act's "wash-out" rules.

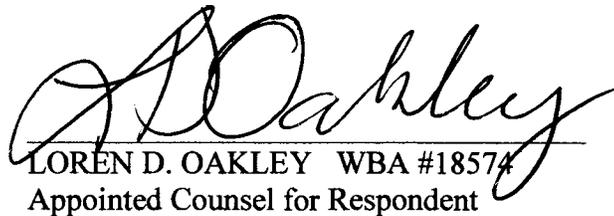
CONCLUSION

In its opinion of December 23, 2009, the Juvenile Court ruled that it would be unjust to allow the respondent's adjudication for Indecent Liberties to serve as the predicate for any charge of Unlawful Possession of a Firearm because the respondent had no way of knowing that adjudication had retroactively terminated his firearms rights. The Superior Court adhered to that ruling in entering the Order denying the appellant's motion for a Second Amended Information. The Court did not make that ruling arbitrarily or capriciously. The Court made a well-reasoned and considered ruling after taking extensive testimony, receiving extensive briefing, and hearing comprehensive argument on the respondent's motion to withdraw his guilty plea and vacate the disposition order. The Court concluded that denying this motion would be manifestly unjust and fundamentally unfair because the retroactive termination of the respondent's firearms rights coupled with the lack of any notice to the respondent that his rights would be terminated would render his prosecution for Unlawful Possession of a Firearm fundamentally unfair.

The Juvenile Court granted the respondent's motion to withdraw his plea to Burglary and vacate the order of disposition, ruling that this plea was not voluntary. That ruling rendered the conviction void; so it could not

form the basis or predicate conviction for a prosecution for Unlawful Possession of a Firearm. Given the Juvenile Court's ruling, the Superior Court had no choice but to grant the respondent's motion to dismiss counts IV through XIII of the amended information. For all these reasons, the Superior Court's granting of the respondent's motion to dismiss counts IV through XIII and denying the appellant's motion for a second amended information should be affirmed.

DATED this First day of July, 2010.


LOREN D. OAKLEY WBA #18574
Appointed Counsel for Respondent

