

NO. 41828-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROY STEVEN JORGENSON,

Appellant.

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

Before the Honorable James Stonier, Judge, and Gary B. Bashor,
Judge Pro Tem

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

In its response, the State discusses *State v. Spiers*, 119 Wn. App.85, 79 P.3d 30 (2003), and argues that Mr. Jorgenson could have avoided prosecution simply by arranging not to have firearms in his possession after he was released from custody while he was charged with first degree assault. Brief of Respondant at 8-9. Mr. Jorgenson disagrees with the State's reading of RCW 9.41.040(2)(a)(iv), and submits that "ownership," as well as possession, is proscribed by the statute. A statute that prohibits ownership of a firearm from the moment a person is released on bond of a serious offense is an unreasonable regulation that violates the state constitutional right to bear arms.

Mr. Jorgensen was convicted of second degree unlawful possession of a firearm. The statute provides that a person is guilty of unlawful possession of a firearm in the second degree if the person:

owns, has in his or her possession, or has in his or her control any firearm;

...

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

RCW 9.41.040(2)(a)(iv) (Emphasis added.)

The plain terms of the statute criminalize mere ownership of a firearm, aside from possession or control of it, from the moment a person

is free on bond or personal recognizance pending trial. Therefore, Mr. Jorgenson was in violation of the statute the instant he was freed on bond or his personal recognition, if he happened to own weapons at that moment, and was therefore subject to prosecution for the crime of second degree unlawful possession of a firearm.

In *State v. Spiers*, supra, Division 1 of this Court addressed a similar statute criminalizing firearm ownership by persons charged with a "serious offense" who are free pending trial. As here, the statute in *Spiers* criminalized mere firearm ownership regardless of whether the person had relinquished possession and control of the firearm. *Id.* at 87, 93.

The statute addressed in *Spiers* was former RCW 9.41.040(1)(b)(iv), recodified as RCW 9.41.040(2)(a)(iv) provided:

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 (a) of this subsection 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 free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9.41.010.

In other words, a person subject to the regulation "could turn his firearms over to the police and still be found guilty of unlawful firearm possession because he would retain ownership of the firearms." *Id.* at 93.

Therefore, the Court recognized that criminalizing mere ownership of a firearm could run afoul of the constitutional guarantee, even if limiting the right to possess guns is reasonable. *Id.* The *Spiers* Court affirmed that "[a]n arms regulation is constitutional only if it is a 'reasonable limitation, one that is reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.'" *Id.* at 93 (quoting *Montana*, 129 Wn.2d at 594 (internal quotation omitted)). Under this analysis, the Court balances the regulation's public benefit against the degree to which it frustrates the constitutional provision's purpose—to ensure self-defense or defense of state. *Id.* (citing *Montana*, 129 Wn.2d at 594). The *Spiers* Court concluded the statute was unreasonably overbroad in violation of *Spiers*'s constitutional right to bear arms.

The degree of frustration of the right was "both immediate and complete," as in order to avoid prosecution, *Spiers* not only had to sell his guns, but he had to arrange for the sale before he left custody, at a time when he still retained his constitutional right to own the guns. *Id.* at 93. The Court explained, "[t]hough the frustration need only be temporary if the defendant is acquitted, the burden outweighs the benefits." *Id.* at 93-94. Moreover, the Court concluded the statute's prohibition against firearm ownership was not "reasonably necessary" to protect the public, as the prohibition against possession and control of a firearm was alone

sufficient:

The public does not derive much, if any, additional benefit by forbidding a person who is free on bond pending trial for a serious offense from owning firearms beyond that benefit secured by forbidding such persons from possessing or controlling firearms. That is, the public faces little danger from a defendant released on bond pending trial who owns, but may not possess guns.

Id. at 94.

As in *Spiers*, frustration of the right to bear arms by a person released from custody pending trial is “both immediate and complete.” *Id.* at 93. In order to avoid prosecution, the defendant must arrange for the sale of any firearms before he can step out of the jail, while he still retains a constitutional right to own the guns.

In addition, the sanction for the crime is severe and the statute does not require the court notify the defendant that he has lost the right to own firearms. Thus, a gun owner who is charged with a serious offense faces a severe penalty for committing a crime that he can hardly avoid and that he may not even be aware is a crime. These burdens on the constitutionally protected right to own firearms are unduly severe. A gun owner jailed pending resolution of a serious offense faces substantial challenges in timely divesting himself of ownership of his firearms in order to comply with the statute. A gun owner who is incarcerated faces substantial hurdles if he wishes to comply with the law, in that he must make

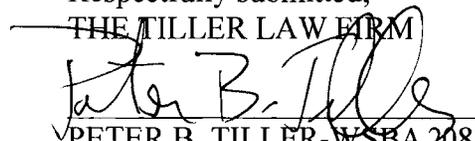
arrangements for the sale or transfer of his firearms from a prison cell—often a difficult proposition. It is not certain that a person in custody would have friends or family members who are able to assist someone in jail to handle such a transaction. The statute on its face does not allow a reasonable time after being released to divest oneself of ownership. For someone in Mr. Jorgenson’s situation, the only way to avoid criminal liability under the plain wording of the statute is to divest oneself of one’s firearms before release. This places a significant burden on the gun owner, who is required to not only arrange for a bond, but must somehow divest himself of any firearms during a time when his constitutional right to own guns should not be so limited.

The severe criminal sanction imposed for violating the statute compounds the undue burden placed on gun owners.

B. CONCLUSION

For the reasons stated herein, and in appellant’s opening brief, Mr. Jorgensen respectfully requests that this Court reverse his convictions for unlawful possession of a firearm in the second degree.

DATED: December 9, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

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The undersigned certifies that on December 9, 2011, that this Opening Brief was mailed by U.S. mail, postage prepaid, to the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copies were mailed by U.S. mail, postage prepaid to Ms. Susan Baur, Cowlitz Co. Prosecutor's Office, 312 SW 1st Ave., Kelso, WA 98626, and to the appellant, Roy S. Jorgenson, 5600 Green Mountain Rd., Woodland, WA 98674, true and correct copies of this Brief.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 9, 2011.


PETER B. TILLER