

NO. 41828-2-II
Cowlitz Co. Cause NO. 08-1-01332-1

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

STATE OF WASHINGTON,

Respondent,

v.

ROY STEVEN JORGENSEN,

Appellant.

BRIEF OF RESPONDENT

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A. ANSWERS TO ASSIGNMENTS OF ERROR

1. The trial court did not err in entering the Conclusion of Law that found beyond a reasonable doubt that on November 25, 2008 in Cowlitz County, State of Washington, Mr. Jorgenson possessed two firearms contrary to RCW 9.41.040(2)(a)(iv).
2. The trial court did not err when it entered the verdict of guilty, against Defendant, as to Count 1 of the information.
3. The trial court did not err when it entered the verdict of guilty, against Mr. Jorgenson, as to Count 2 of the information.
4. The trial court did not err by finding Mr. Jorgenson guilty in section 2.1 of the Judgment and Sentence.
5. The trial court did not err when it denied Mr. Jorgenson's motion to dismiss the charges
6. RCW 9.41.040(2)(a)(iv) does not violate the Second Amendment of the United States Constitution.
7. RCW 9.41.040(2)(a)(iv) does not violate Article 1, Section 24 of the Washington Constitution.

B. STATEMENT OF THE CASE

On June 6, 2008, Mr. Jorgenson was arraigned before the Cowlitz County Superior Court on one count of Assault in the First Degree with a Firearm Enhancement RCW 9.41.010. CP 66. Assault in the First Degree is a serious offense as defined in RCW 9.41.010. CP 66. Mr. Jorgenson

posted bail and was free on bond pending trial on the assault charge. CP 66.

On November 25, 2008, while the Assault in the First Degree charge was still pending, someone placed a 911 call in regard to an illegal discharge of a firearm. CP 67. Deputies from the Cowlitz County Sheriff's Office and officers from the Woodland Police department responded to the scene and made contact with Mr. Jorgenson. CP 67. At that point, Mr. Jorgenson admitted to the deputies that he had two firearms in his vehicle. CP 67. Confirming his admission, deputies saw in plain view, inside Mr. Jorgenson's vehicle, an Olympic Arms AR-15 rifle. CP 67. Because deputies were aware of Mr. Jorgenson's pending Assault in the First Degree charge they arrested Mr. Jorgenson for Unlawful Possession of a Firearm in the Second Degree. CP 67. A later search of Mr. Jorgenson's vehicle, pursuant to a search warrant, turned up one 9mm Tokorov handgun in addition to the rifle. CP 67. Both firearms were tested and found to be in working condition. CP 67.

Consequently, the Cowlitz County Prosecuting Attorney charged Mr. Jorgenson with two counts of Unlawful Possession of a Firearm in the Second Degree under RCW 9.41.040(2)(a)(iv). *See* Appendix A; CP 3-4.

Mr. Jorgenson moved to dismiss these charges on the basis that the statute under which he was charged is unconstitutional in that it denied him due process, violated his right to equal protection under the law, and that it is unconstitutionally overbroad. CP 21-27. The court denied Mr. Jorgenson's motion as to due process and overbreadth, but requested supplemental briefing on the equal protection issue. RP 129-32, 146-47. After supplemental briefing by both parties, the trial court denied Mr. Jorgenson's motion to dismiss in total. RP 170-72.

Mr. Jorgenson then waived his right to a jury trial and proceeded to a stipulated facts bench trial. CP 65-69, RP 187-194. The trial court found Mr. Jorgenson guilty of two counts of Unlawful Possession of a Firearm in the Second Degree. CP 69, 73-84. Mr. Jorgenson filed a timely notice of appeal. CP 86- 87.

C. ARGUMENT

RCW 9.41.040(2)(a)(iv) IS A CONSTITUTIONAL REGULATION OF THE RIGHT TO USE AND POSSESS ARMS UNDER BOTH ARTICLE 1, § 24 OF THE WASHINGTON CONSTITUTION AND THE SECOND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES.

A court reviews challenges to the constitutionality of statutes *de novo*. *State v. Sieyes*, 168 Wn.2d 276, 281 225 P.3d 995 (2010) (citations omitted). In addition, a statute is “presumed constitutional, and the parties challenging it must prove it violates the Constitution beyond a reasonable doubt.” *City of Seattle v. Montana*, 129 Wn.2d 583, 589, 919 P.2d 1218 (1996) (citations omitted). Moreover, “[i]f possible, a court will construe a legislative enactment so as to render it constitutional.” *Id.* at 590. Here, Mr. Jorgenson must challenge RCW 9.41.040(1)(b)(iv) as it applies to him, not as it could theoretically apply to others. *See Broadrick v. Oklahoma*, 413 U.S. 601, 610, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973) (“Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may

conceivably be applied unconstitutionally to others, in other situations not before the Court.”).

Both Article 1, § 24 of the Washington Constitution and the Second Amendment of the Constitution of the United States guarantee an individual right to keep and bear arms. *Sieyes*, 168 Wn.2d at 292; *District of Columbia v. Heller*, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008). Because of the express textual exceptions of Article 1, § 24, however, “the right [to bear arms] exists only in the context of an individual's ‘defense of himself, or the state.’” *Sieyes*, 168 Wn.2d at 293, *citing* Const. art. I, § 24. Similarly, *Heller* specifically held that the Second Amendment protects the right to possess a handgun in the home for the purpose of self-defense. 554 U.S. at 635. Importantly, *Heller* notes that “[l]ike most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626. *McDonald v. City of Chicago*, --- U.S. ----, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010), extends the right recognized in *Heller* to the States.

a. Arms Regulations under the Washington Constitution

Our Supreme Court has “consistently held that the right to bear arms in art. I, § 24 is not absolute, but instead is subject to ‘reasonable regulation’ by the State under its police power.” *State v. Spiers*, 119 Wn.App. 85, 93, 79 P.3d 30 (2003); *citing Montana*, 129 Wn.2d 593; *accord Morris v. Blaker*, 118 Wn.2d 133, 144, 821 P.2d 482 (1992). Under the reasonable regulation test, a statute regulating arms is constitutional “if it is a ‘reasonable limitation,’ one that is reasonably necessary to protect public safety or welfare, and substantially related to legitimate ends sought.” *Spiers*, 119 Wn.App. at 93, *citing Montana*, 129 Wn.2d at 594. To make this determination, courts are required to “balance 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.*

Steyes, a post-*Heller* decision by our Supreme Court, followed *Heller's* lead in declining to analyze gun regulations under any level of

scrutiny. 168 Wn.2d at 295. Instead, *Sieyes* held that “we look to the *Second Amendment's* original meaning, the traditional understanding of the right, and the burden imposed on [those regulated] by upholding the statute.” *Id.* (emphasis added). Moreover, the court states in a footnote that “[d]espite this court’s occasional rhetoric about ‘reasonable regulation’ of firearms, we have never settled on levels-of-scrutiny analysis for firearms regulations.” *Id.* at 295 fn. 20. That said, while *Sieyes* may be eschewing the “reasonable regulation” test for determining whether a law passes muster under the Second Amendment, the test remains good law for determining whether an arms regulation violates Article 1, § 24. See *Warden v. Nickels*, 697 F.Supp.2d 1221 (W.D. Wash. 2010) (“The court in *Sieyes* left undisturbed existing Washington precedent that the right to bear arms in art. I, § 24 is not absolute, but instead is subject to ‘reasonable regulation’ by the State under its police power. . . . [T]he *Sieyes* court seems to recognize that [an arms regulation] can be reviewed under the [reasonable regulation] standard . . . which is not necessarily a ‘level-of-scrutiny’ test.”) (citations and quotations omitted).

In *Spiers*, the defendant was released on bond and pending trial on a serious offense when the police executed a search warrant at his home and found eight firearms. Six of the guns were located in a safe in the defendant's bedroom, one was in defendant's bedroom against the wall, and the last gun was found in an unlocked chest in his bedroom. At trial the defendant testified that he owned three of the guns. He was charged and convicted of eight counts of Unlawful Possession of a Firearm in the Second Degree under the statute and subsection at issue here, RCW 9.41.040(2)(a)(iv). The defendant appealed those convictions by challenging the constitutionality of RCW 9.41.040(2)(a)(iv), but only as it related to "ownership."

Spiers applied the reasonable regulation test and held that "[t]he statute's prohibition against firearm *ownership* is not 'reasonably necessary' to protect public safety, at least not as it applies to a person free on bond or personal recognizance pending trial for a serious offense. The prohibition against possession and control of a firearm is sufficient to protect public safety and welfare." 199 Wn.App at 94 (emphasis added). In reaching its decision, the court noted that to avoid prosecution the defendant "not only had to sell his guns, but he had to arrange for the sale

before he left custody.” *Id.* at 93. Thus, *Spiers* found, “the degree of frustration [of the constitutional right to bear arms] is both immediate and complete. Though the frustration need only be temporary if the defendant is acquitted, the burden outweighs the benefits . . . [because the] public does not derive much, if any, additional benefit by forbidding a person . . . from owning firearms beyond that benefit secured by forbidding such persons from possessing or controlling firearms.” *Id.* Consequently, five of the defendant’s convictions for Unlawful Possession of a Firearm in the Second Degree were affirmed on the basis that “there was substantial evidence of possession and control” of the firearms whereas three of his convictions were reversed because of the possibility that those convictions may have been on the basis of mere ownership. *Id.*

Here, Mr. Jorgenson was free on bond pending a charge of Assault in the First Degree¹ with a Firearm Enhancement when officers were dispatched to the report of an unlawful discharge of a firearm. Officers contacted Mr. Jorgenson outside his vehicle, and soon thereafter found

¹ RCW 9A.36.011 (1) reads in pertinent part as follows: “A person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm: (a) Assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death; or . . . (c) Assaults another and inflicts great bodily harm.”

two firearms in his vehicle. As the statute applies to Mr. Jorgenson, it is a reasonable regulation. The statute is reasonably necessary to protect public safety or welfare, is substantially related to that end, and it did not frustrate the constitutional provision's purpose, i.e., ensuring the self-defense of Mr. Jorgenson. The evidence in the record suggests that Mr. Jorgenson was unlawfully discharging his firearms, not utilizing them for self-defense.

Moreover, to avoid prosecution, Mr. Jorgenson need only have arranged for his firearms not to be in his possession once he left custody. Thus, the degree of frustration is neither immediate nor complete. Arrangements did not need to be made before his release but simply before Mr. Jorgenson's taking possession of the vehicle in which the firearms were found. Likewise, the firearms could have been returned to Jorgenson immediately upon acquittal or other resolution of the case if he was otherwise not prohibited from possession. This degree of "frustration" does not approach that of being required to relinquish ownership before release. As such, the statute's prohibition against firearm

possession pending trial for a serious offense is a reasonable regulation to further the goal of protecting public safety.

b. Arms regulations under the Second Amendment

The United States Supreme Court in *Heller* and *McDonald*, has held that “the Second Amendment . . . right to possess a handgun in the home for the purpose of self-defense . . . applies equally to the Federal Government and the States.” *McDonald*, 130 S.Ct. at 3050. In holding that such a right exists, the Court was quick to point out that the “right was not unlimited” and the right to keep and bear arms is not “a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.” *Heller*, 554 U.S. at 626. Moreover, *Heller* explained that “nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.” *Id.* at 626-27; at fn. 26 (“We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”).

The proper standard for determining the legality of an arms regulation under the Second Amendment is not entirely clear. *Heller* and *McDonald* explicitly declined to establish a level of scrutiny for evaluating Second Amendment regulations and also rejected an interest-balancing approach for the same. *Heller*, 554 U.S. at 634-635; *McDonald*, 130 S.Ct. at 3047, 3050. Instead, the decisions call for a historical inquiry into the scope of the right in question. *Heller*, 554 U.S. at 634-635 (“Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad.”); *See generally McDonald*, 130 S.Ct. 3020. Faced with little direction on the appropriate standard of review, intermediate Federal courts have been forced to reach their own conclusions on the issue and at least some have settled on intermediate scrutiny. *See U.S. v. Williams*, 616 F.3d 685 (7th Cir. 2010) (adopting an intermediate level of scrutiny for a challenge to the federal statute criminalizing possession of a firearm by felons and finding the statute constitutional); *see also U.S. v. Marzzarella*, 614 F.3d 85 (3rd Cir. 2010) (applying an intermediate level of scrutiny and holding that a federal statute criminalizing the sale of firearms with obliterated serial

numbers was constitutional). Under a middle level or intermediate scrutiny analysis, a law is upheld if substantially related to an important government purpose. *See United States v. Virginia*, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996).

As mentioned above, our Supreme Court in *Sieyes* followed *Heller*'s lead in declining to analyze gun regulations under the Second Amendment with any level of scrutiny. 168 Wn.2d at 295. In addition, and akin to *Heller*, *Sieyes* held that when determining the constitutionality of arms regulations "we look to the Second Amendment's original meaning, the traditional understanding of the right, and the burden imposed on [those regulated] by upholding the statute." *Id.* Specifically, *Sieyes* involved a challenge to RCW 9.41.040(2)(a)(iii), which criminalizes the possession of firearms by a child under the age 18 in certain circumstances.

Despite not analyzing the statute under an established level of scrutiny or employing a interest-balancing approach, *Sieyes*, nonetheless found the statute constitutional because the defendant failed "to provide convincing authority supporting an original meaning of the Second Amendment, which would grant all children an unfettered right to bear

arms.” *Id.* Moreover, the challenge to the statute had to be as it applied to the defendant and the court found that the defendant “makes no adequate argument specific to the facts of this case that a 17-year-old’s Second Amendment right to keep and bear arms has been violated by this statute.” *Id.* at 295-296.

Here, the statute in question survives a challenge under an intermediate level of scrutiny. Under an intermediate level of scrutiny a law is upheld if substantially related to an important government purpose. In this case, the statute’s clear purpose is to keep firearms out of the hands of the most violent individuals, i.e., those charged with a serious offense. This law is substantially related to this objective in Mr. Jorgenson’s case. Mr. Jorgenson was released on bail while a charge of Assault in the First Degree with a Firearm Enhancement was pending. Thus, the statute’s purpose of preventing violent individuals from possessing and using firearms is substantially related to Mr. Jorgenson and related to preventing him from committing further violence with a firearm. Consequently, the statute passes muster under an intermediate level of scrutiny.

Furthermore, Mr. Jorgenson’s challenge to the RCW 9.41.040(2)(a)(iv) is unsuccessful because like the defendant in *Sieyes*, he

fails to provide any authority supporting an original meaning of the Second Amendment, or Article 1, § 24, which would grant all people charged with serious offenses an unfettered right to bear arms. Notably, the statement in Mr. Jorgenson's Appellant's Brief stating, "[a] statute that proscribes possession of a firearm by virtue of being accused of an offense is not a historically recognized limitation on the fundamental right to be arms" does not cite any authority. Appellant's Brief at 17. Additionally, Mr. Jorgenson makes no adequate argument specific to the facts of this case, that a person's Second Amendment right to keep and bear arms has been violated by this statute, where that person has been charged with a serious offense and released on bond and where multiple firearms were found in his vehicle. As a result, the statute should be found constitutional under both the Second Amendment and Article 1, § 24 of the Washington Constitution and Mr. Jorgenson's convictions should be affirmed.

D. CONCLUSION

For the reasons argued above, Mr. Jorgenson's convictions should be affirmed.

Respectfully submitted this 15th day of Nov, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By:

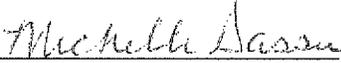

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CERTIFICATE OF SERVICE

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November 1, 2011.
Michelle Sasser

APPENDIX A

RCW 9.41.040. Unlawful possession of firearms--Ownership, possession by certain persons--Penalties

(1)(a) A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(b) Unlawful possession of a firearm in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

(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);

(ii) After having previously been involuntarily committed for mental health treatment under RCW 71.05.240, 71.05.320, 71.34.740, 71.34.750, chapter 10.77 RCW, or equivalent statutes of another jurisdiction, unless his or her right to possess a firearm has been restored as provided in RCW 9.41.047;

(iii) If the person is under eighteen years of age, except as provided in RCW 9.41.042; and/or

(iv) If the person is free on bond or personal recognizance pending trial, appeal, or sentencing for a serious offense as defined in RCW 9A.10.010.

(b) Unlawful possession of a firearm in the second degree is a class C felony punishable according to chapter 9A.20 RCW.

(3) Notwithstanding RCW 9A.10.047 or any other provisions of law, as used in this chapter, a person has been “convicted”, whether in an adult court or adjudicated in a juvenile court, at such time as a plea of guilty has been accepted, or a verdict of guilty has been filed, notwithstanding the pendency of any future proceedings including but not limited to sentencing or disposition, post-trial or post-factfinding motions, and appeals. Conviction includes a dismissal entered after a period of probation, suspension or deferral of sentence, and also includes equivalent dispositions by courts in jurisdictions other than Washington state. A person shall not be precluded from possession of a firearm if the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted or the conviction or disposition has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence. Where no record of the court's disposition of the charges can be found, there shall be a rebuttable presumption that the person was not convicted of the charge.

(4)(a) Notwithstanding subsection (1) or (2) of this section, a person convicted or found not guilty by reason of insanity of an offense prohibiting the possession of a firearm under this section other than murder, manslaughter, robbery, rape, indecent liberties, arson, assault, kidnapping, extortion, burglary, or violations with respect to controlled substances under RCW 69.50.401 and 69.50.410, who received a probationary sentence under RCW 9A.02.200, and who received a dismissal of the charge under RCW 9A.02.240, shall not be precluded from possession of a firearm as a result of the conviction or finding of not guilty by reason of insanity. Notwithstanding any other provisions of this section, if a person is prohibited from possession of a firearm under subsection (1) or (2) of this section and has not previously been convicted or found not guilty by reason of insanity of a sex offense prohibiting firearm ownership under subsection (1) or (2) of this section and/or any

felony defined under any law as a class A felony or with a maximum sentence of at least twenty years, or both, the individual may petition a court of record to have his or her right to possess a firearm restored:

(i) Under RCW 9.41.047; and/or

(ii)(A) If the conviction or finding of not guilty by reason of insanity was for a felony offense, after five or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525; or

(B) If the conviction or finding of not guilty by reason of insanity was for a nonfelony offense, after three or more consecutive years in the community without being convicted or found not guilty by reason of insanity or currently charged with any felony, gross misdemeanor, or misdemeanor crimes, if the individual has no prior felony convictions that prohibit the possession of a firearm counted as part of the offender score under RCW 9.94A.525 and the individual has completed all conditions of the sentence.

(b) An individual may petition a court of record to have his or her right to possess a firearm restored under (a) of this subsection (4) only at:

(i) The court of record that ordered the petitioner's prohibition on possession of a firearm; or

(ii) The superior court in the county in which the petitioner resides.

(5) In addition to any other penalty provided for by law, if a person under the age of eighteen years is found by a court to have possessed a firearm in a vehicle in violation of subsection (1) or (2) of this section or to have committed an offense while armed with a firearm during which offense a motor vehicle served an integral function, the court shall notify the department of licensing within twenty-four hours and the person's privilege to drive shall be revoked under RCW 46.20.265.

(6) Nothing in chapter 129, Laws of 1995 shall ever be construed or interpreted as preventing an offender from being charged and subsequently convicted for the separate felony crimes of theft of a firearm or possession of a stolen firearm, or both, in addition to being charged and subsequently convicted under this section for unlawful possession of a firearm in the first or second degree. Notwithstanding any other law, if the offender is convicted under this section for unlawful possession of a firearm in the first or second degree and for the felony crimes of theft of a firearm or possession of a stolen firearm, or both, then the offender shall serve consecutive sentences for each of the felony crimes of conviction listed in this subsection.

(7) Each firearm unlawfully possessed under this section shall be a separate offense.

COWLITZ COUNTY PROSECUTOR

November 01, 2011 - 5:00 PM

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Court of Appeals Case Number: 41828-2

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Statement of Arrangements

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Answer/Reply to Motion: _____

 Brief: Respondent's

Statement of Additional Authorities

Cost Bill

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