

FILED

JUL 28 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 28877-3-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

KIRK WAYNE MICHAEL,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
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Ritzville, Washington 99169
(509) 659-0600

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ASSIGNMENTS OF ERROR

1. Count I of the Amended Information does not include the “knowledge” element of possession of an unlawful firearm.

2. Possession of an unlawful firearm and unlawful possession of a firearm constitute the “same criminal conduct” for purposes of sentencing.

3. Kirk Wayne Michael did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United State Constitution and Const. art. I, § 22.

ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Does Count I of the Amended Information comply with the essential elements rule and fully inform Mr. Michael of each and every element of the crime of possession of an unlawful firearm?

2. Are possession of an unlawful firearm and unlawful possession of a firearm “the same criminal conduct” for sentencing purposes?

3. Was defense counsel ineffective in not requesting an unwitting possession instruction?

STATEMENT OF CASE

Deputy's Anderberg and Smith of the Spokane County Sheriff's Office responded to a domestic violence incident on June 13, 2009. They were driving marked patrol cars. (Trial RP 126, l. 25; RP 127 ll. 21-23; RP 128, ll. 8-14; RP 133, ll. 8-11; RP 154, l. 20.)

Spokane County Dispatch advised them that rocks had been thrown and a gun was possibly involved. The deputies were looking for a white Blazer with two (2) males and a dog inside. (Trial RP 129, ll. 15-20; RP 130, ll. 5-8).

The deputies saw the Blazer on SR 2 as they were heading toward Espanola. They made a U-turn. The Blazer turned northbound (NB) on Dover Road. They temporarily lost sight of the Blazer until the railroad tracks on the other side of a small hill. (Trial RP 131, ll. 6-23; RP 132, ll. 1-2; RP 146, l. 18 to RP 147, l. 4; RP 158, ll. 11-14; ll. 16-21).

The deputies activated the lights and sirens as they pursued the Blazer NB on Dover. They were traveling approximately 80-90 mph in a 35-45 mph zone. Dover is a two lane road. There was southbound (SB) traffic. (Trial RP 132, ll. 10-23).

The Blazer traveled approximately seven tenths (.7) of a mile from SR 2 until it stopped. The total elapsed time was approximately two minutes from the turn onto Dover until the deputies had two males detained

outside the Blazer. (RP 132, l. 25 to Trial RP 132, l. 25 to RP 133, l. 2; RP 136, ll. 1-17).

Mr. Michael was identified as the driver. Deputy Smith read him the *Miranda*¹ warnings and asked what happened. Mr. Michael advised that nothing had occurred. (Trial RP 139, l. 18; RP 140, ll. 23-25).

Mr. Michael eventually stated there was a verbal argument and that Linda was drunk. He denied making any threats or stating that he had a gun. He denied throwing rocks. (Trial RP 141, l. 19 to RP 142, l. 3; RP 142, ll. 8-11; ll. 14-15).

Deputy Anderberg impounded the Blazer and conducted an inventory search. He found shotgun shells and a sawed-off shotgun in a bag on the rear seat. The shotgun was not fully assembled; but did have a round in it. Shotgun shells were also found in the center console. (Trial RP 165, ll. 1-2; RP 166, ll. 3-5; ll. 7-21; RP 168, ll. 10-19; RP 168, l. 25 to RP 169, l. 2; RP 169, ll. 4-8; RP 176, ll. 18-19).

In addition to the sawed-off shotgun the bag contained a woman's clothes. The deputy found a purple hairbrush in the center console and a pill bottle with the first name of Jennifer. There was also a bottle of fingernail polish in the Blazer. (Trial RP 185, ll. 2-8; ll. 18-20; RP 186, ll. 3-10).

¹ *Miranda v. Arizona*, 384 U.S. 436, 16 L. ED. 2d 694, 86 S. Ct. 1602, 10 A.L.R. 3d 974(1966)

Mr. Michael borrowed the Blazer from Jennifer Heaton. He claimed that he had no knowledge that the gun was in the backseat. (Trial RP 241, ll. 17-21; RP 254, ll. 15-25).

Detective Ricketts of the Spokane County Sheriff's Office measured the shotgun. It had an eleven and three sixteenths inches (11 3/16") barrel. Its overall length was nineteen (19") inches. He test fired it on September 28, 2009. Some assembly was required; but it did function properly. (Trial RP 194, l. 8; RP 197, l. 22 to RP 198, l. 4; RP 198, ll. 11-16; RP 199, ll. 4-5).

An Information was filed on June 16, 2009. Mr. Michael was charged with possession of an unlawful firearm, unlawful possession of a firearm second degree, possession of a controlled substance and fourth degree assault. (CP 1).

An Amended Information was filed on August 13, 2009. It charged Mr. Michael with possession of an unlawful firearm, unlawful possession of a firearm first degree, possession of a controlled substance, fourth degree assault, attempting to elude a pursuing police vehicle, and reckless driving. (CP 14).

A CrR 3.6 hearing was conducted on November 12, 2009. The Court ruled that a valid impound of the Blazer occurred and the inventory search was permissible. (11/12/09 RP 69, l. 11 to RP 72, l. 6).

A CrR 3.5 hearing was conducted on January 25, 2010. The Court ruled that Mr. Michael waived his constitutional rights and any statements made to the deputies were admissible. (Trial RP 42, ll. 4-13).

Linda Oversby testified that Mr. Michael appeared at her home on 23911 West Manila Road in Espanola at approximately 8:30 p.m. on June 13, 2009. They got into a verbal argument. Mr. Michael threw rocks at her and hit a door. He told her that he had gun. She called 911. (Trial RP 83, ll. 14-16; RP 84, ll. 15-16; RP 86, ll. 6-9; RP 91, l. 10; RP 92, ll. 16-17; RP 92, l. 19 to RP 93, l. 5; RP 96, ll. 24-25).

Ms. Oversby's fifteen year old son, Seth Donaldson, confirmed that Mr. Michael said he had a gun. He saw Mr. Michael throw some rocks. (Trial RP 111, ll. 1-4; RP 115, ll. 12-17; RP 119, ll. 10-17).

Defense counsel did not object to the trial court's instructions. The trial court did not give an unwitting possession instruction. Defense counsel alluded to unwitting possession in his closing argument. (Trial RP 307, l. 7 to RP 308, l. 9; RP 309, ll. 1-4).

The State dismissed the possession of a controlled substance count prior to trial. A jury found Mr. Michael guilty of possession of an unlawful firearm, unlawful possession of a firearm first degree, fourth degree assault and reckless driving. (CP 147, CP 148, CP 149, CP 150).

A sentencing hearing was conducted on March 4, 2010. Defense counsel argued that possession of an unlawful firearm and first degree unlawful possession of a firearm constituted the "same criminal conduct."

The trial court ruled that the intent was different and denied a finding of “same criminal conduct.” (Trial RP 323, l. 6 to RP 326, l. 20; RP 336, ll. 2-8).

Judgment and Sentence was filed on March 5, 2010. (CP 229)

Mr. Michael filed his Notice of Appeal on March 12, 2010. (CP 248).

SUMMARY OF ARGUMENT

Failure to include the element of “knowledge” in Count I of the Amended Information violates the essential elements rule under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

Possession of an unlawful firearm and unlawful possession of a firearm constitute the “same criminal conduct” for sentencing purposes.

Defense counsel’s failure to request an unwitting possession instruction is deficient performance and resulted in the jury not being advised of Mr. Michael’s only available defense. He was prejudiced by this omission.

ARGUMENT

A. MISSING ELEMENT

RCW 9.41.190 (1) states, in part:

It is unlawful for any person to ...
own...transport, or have in his possession or
... control, any ... short-barreled shotgun...

The Legislature did not set forth a specific mental state in the statute. However, the Courts have interpreted RCW 9.41.190(1) as containing a “knowledge” element. *See: State v. Warfield*, 119 Wn. App. 871, 883-84, 80 P. 3d 625 (2003).

Count I of the Amended Information does not set forth the “knowledge” element as required by the *Warfield* decision.

Instruction 21 is the to-convict instruction for possession of an unlawful firearm. The instruction contains the knowledge element which is missing from Count I of the Amended Information. (CP 138 ; Appendix “A”).

...[T]his court has specifically held that an information which is constitutionally defective because it fails to state every statutory element of a crime *cannot* be cured by a jury instruction which itemizes those elements.

State v. Holt, 104 Wn. 2d 315, 322, 704 P. 2d 1189 (1985).

The appropriate remedy as to Count I is dismissal without prejudice. Dismissal without prejudice is required since the State failed to comply with the essential elements rule. *See: State v. Warfield, supra*; Sixth Amendment to the United States Constitution and Const. art. I, § 22; *see also: State v. Kjorsvik*, 117 Wn. 2d 93, 105, 812 P. 2d 86 (1991).

B. "SAME CRIMINAL CONDUCT"

RCW 9.41.040(1)(a) provides, in part:

A person... is guilty of the crime of unlawful possession of a firearm in the first degree, if the person... has in his or her possession, ... or control **any firearm** after having previously been convicted... of any serious offense as defined in this chapter.

(Emphasis supplied.)

The statute specifically states that "any firearm" will serve to support a conviction. Thus, an unlawful firearm will suffice to support a conviction under RCW 9.41.040(1)(a).

RCW 9.94A.589(1)(a) defines "same criminal conduct" as follows:

"Same criminal conduct" as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim. ...

There is no dispute that the sawed-off shotgun was in the Blazer. Thus, the two offenses meet the same time and place requirement.

"...[T]he victim of the offense of unlawful possession of a firearm is the general public." *State v. Haddock*, 141 Wn. 2d 103, 110-11, 3 P. 3d 733 (2000).

Mr. Michael asserts that the offense of possession of an unlawful firearm also has the general public as its victim. The State conceded that fact at sentencing. (CP 163).

The remaining factor to be considered is “same criminal intent.” The only case that Mr. Michael has been able to locate that addresses the issue of intent involves unlawful possession of a firearm. The objective intent is “voluntary possession of a gun.” *See: State v. Thompson, 55 Wn. App. 888, 894, 781 P. 2d 501 (1989).*

Mr. Michael takes the position that possession of an unlawful firearm also requires “voluntary possession.” Moreover, as previously addressed, unlawful possession of a firearm first degree can be based upon the possession of “any firearm.”

Mr. Michael contends that the trial court’s determination that the two offenses do not constitute the “same criminal conduct” is erroneous. He is entitled to be resentenced if Count I is not dismissed.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment to the United States Constitution states, in part:

In all criminal prosecutions, the accused shall enjoy the right... to have the assistance of counsel for his defense.

Const. art. I, § 22 provides, in part:

In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel... .

Mr. Michael's only defense was unwitting possession. Defense counsel did not request an unwitting possession instruction. Defense counsel alluded to unwitting possession in closing argument.

"A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory." *State v. Powell*, 150 Wn. App. 139, 154 (2009).

Mr. Michael testified that he did not know the sawed-off shotgun was in the back seat of the Blazer. It was in a duffle bag along with a woman's clothes. Mr. Michael testified that he borrowed the Blazer from his friend Jennifer Heaton. There were other items belonging to a woman in the car.

Mr. Michael contends that there is more than sufficient evidence in the record to support the giving of an unwitting possession instruction. Defense counsel's failure to submit an unwitting possession instruction amounts to error of constitutional magnitude.

"Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel." *Personal Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P. 3d 1282 (2007).

The Courts in *Powell* and *Hubert* determined that defense counsel was ineffective in not requesting an appropriate instruction. The *Powell*

Court, in particular, concluded that there was no tactical basis for failing to request the instruction under consideration. *State v. Powell, supra*, 155.

Mr. Michael further contends that there is no tactical reason, under the facts and circumstances of his case, why defense counsel did not request an unwitting possession instruction.

Both the *Powell* and *Hubert* Courts found prejudice to the respective defendants and that the requirements of *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) were met. They are also met in this case.

CONCLUSION

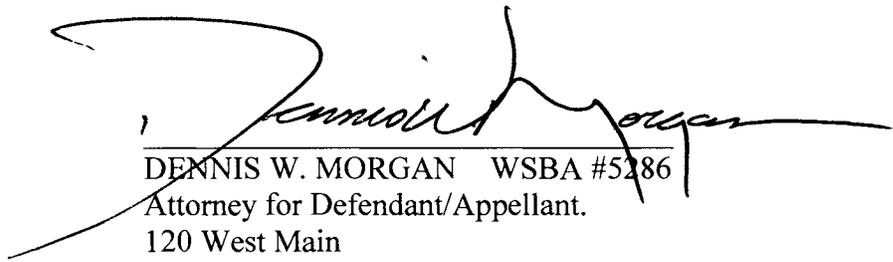
Mr. Michael's conviction for possession of an unlawful firearm must be reversed for non-compliance with the essential elements rule.

Even if the court declines to reverse the possession of an unlawful firearm conviction Mr. Michael is entitled to be resentenced since this conviction constitutes the "same criminal conduct" as unlawful possession of a firearm.

Ineffective assistance of counsel requires reversal of Mr. Michael's convictions on Counts I and II and remand for a new trial.

DATED this 27th day of July, 2010.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dennis W. Morgan", is written over a horizontal line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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APPENDIX "A"

INSTRUCTION NO. _____

To convict the defendant of the crime of unlawful possession of a short-barreled shotgun, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about 13th of June, 2009, the defendant knowingly had a short-barreled-shotgun in his possession or control;
- (2) That the possession or control of the short-barreled shotgun occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all of the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.