

28877-3-III  
COURT OF APPEALS  
DIVISION III

**FILED**  
SEP 08 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

KIRK W. MICHAEL, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
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**INDEX**

APPELLANT’S ASSIGNMENTS OF ERROR.....1

ISSUES PRESENTED.....1

STATEMENT OF THE CASE.....2

ARGUMENT .....2

    A.    *MENS REA* ELEMENTS HAVE BEEN  
          ADDED BY THE COURTS TO THE  
          STATUTORY LANGUAGE OF  
          RCW 9.41.190 WHICH DOES NOT  
          CONTAIN ANY *MENS REA* ELEMENTS .....2

    B.    SAME CRIMINAL CONDUCT ARGUMENTS  
          ARE MOOT .....3

    C.    THE DEFENDANT HAS NOT SHOWN  
          THAT HIS TRIAL COUNSEL WAS  
          INEFFECTIVE .....3

CONCLUSION.....6

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

STATE V. BOWERMAN, 115 Wn.2d 794,  
802 P.2d 116 (1990)..... 4

STATE V. BRADSHAW, 152 Wn.2d 528,  
98 P.3d 1190 (2004)..... 5

STATE V. KJORSVIK, 117 Wn.2d 93,  
812 P.2d 86 (1991)..... 2

STATE V. McNEAL, 145 Wn.2d 352,  
37 P.3d 280 (2002)..... 5

STATE V. THOMAS, 109 Wn.2d 222,  
743 P.2d 816 (1987)..... 4

STATE V. VANGERPEN, 125 Wn.2d 782,  
888 P.2d 1177 (1995)..... 3

STATE V. WARFIELD, 119 Wn. App. 871,  
80 P.3d 625 (2003)..... 2

STATE V. WILLIAMS, 158 Wn.2d 904,  
148 P.3d 993 (2006)..... 2

**SUPREME COURT CASES**

STRICKLAND V. WASHINGTON, 466 U.S. 668,  
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 4

**STATUTES**

RCW 9.41.190 ..... 2

RCW 9.41.190(1)..... 1

I.

APPELLANT'S 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 Sixth Amendment to the United States Constitution and Const. Art. I, section 22.

II.

ISSUES PRESENTED

1. Have the courts added knowledge elements to RCW 9.41.190(1) converting the strict liability language of the statute into a non-strict liability crime?
2. Is the concept of "same criminal conduct" applicable to this case?
3. Has the defendant shown that his trial counsel was ineffective?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the Statement of the Case.

IV.

ARGUMENT

- A. *MENS REA* ELEMENTS HAVE BEEN ADDED BY THE COURTS TO THE STATUTORY LANGUAGE OF RCW 9.41.190 WHICH DOES NOT CONTAIN ANY *MENS REA* ELEMENTS.

The defendant was charged under RCW 9.41.190 with possession of an illegal firearm. The statute contains no *mens rea* language. RCW 9.41.190. However, the courts have "written in" a knowledge requirement that includes not only knowledge of the possession of the firearm but the particulars of why the particular firearm is illegal. *State v. Williams*, 158 Wn.2d 904, 148 P.3d 993 (2006). *See also*, *State v. Warfield*, 119 Wn. App. 871, 878, 80 P.3d 625 (2003).

The information for Count I, Possession of an Illegal Firearm does not contain any *mens rea* language. According to *State v. Kjorsvik*, 117 Wn.2d 93, 812 P.2d 86 (1991), all essential elements, including court added elements not found in the statute, must be available in the

information. *Id.* at 97. The State concedes that the full set of court added elements is not contained in the information for Count I.

As for the remedy, the Court in *State v. Vangerpen*, 125 Wn.2d 782, 792-93, 888 P.2d 1177 (1995) stated: “We have repeatedly and recently held that the remedy for an insufficient charging document is reversal and dismissal of charges without prejudice to the State’s ability to re-file charges.”

The State agrees to reversal with leave to re-file the charges as to Count I. The defendant does not raise any specific challenges to the remaining counts.

**B. SAME CRIMINAL CONDUCT ARGUMENTS ARE MOOT.**

Since the State has conceded that the charging document was insufficient as to Count I, any arguments regarding “same criminal conduct” are pointless. Count I is one of two counts argued by the defendant for a finding of “same criminal conduct.”

**C. THE DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE.**

The defendant claims that his counsel was ineffective because counsel did not request an “unwitting possession” instruction. The decision to request such an instruction is a tactical decision.

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to "an objective standard of reasonableness based on consideration of all of the circumstances." *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, "but for the ineffective assistance, there is a reasonable probability that the outcome would have been different." *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed." *Strickland*, 466 U.S. at 697.

In both firearm possession related counts, the jury was instructed that the State must prove knowing possession of the firearm. CP ? Since the “to convict” instruction properly informed the jury that the State had to prove that the defendant knowingly had a firearm in his possession, an “unwitting possession” instruction was superfluous. Further, an “unwitting possession” theory would be inconsistent with the main defense theory that the defendant did not know of the shotgun in the back seat.

“The unwitting possession defense ameliorates the harshness of a strict liability crime.” *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). As the jury was instructed, there was no strict liability crime for Counts I and II.

The record indicates that defense counsel was not restricted from arguing as he wished in closing. The decision not to propose an “unwitting possession” instruction was a tactical one and therefore not a reason supporting an ineffective assistance of counsel argument. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The defendant has failed to show that the trial counsel’s decision was anything other than a tactical decision.

V.

CONCLUSION

For the reasons stated, the conviction of the defendant on Count I should be reversed without prejudice and the remaining counts affirmed.

Dated this 8<sup>th</sup> day of September, 2010.

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