

FILED

APR 13 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

No. 28893-5-III

IN THE COURT OF THE APPEALS
OF THE STATE OF WASHINGTON

DIVISION III

THE STATE OF WASHINGTON, Respondent

v.

KIM ELLERY RICKMAN Jr., Appellant.

BRIEF OF RESPONDENT

MATT L. NEWBERG
Garfield County
Prosecuting Attorney
WSBA #36674

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I. ISSUES

- a. Whether the trial court abused its discretion by refusing to dismiss charges of felon in possession of a firearm and possession of a loaded rifle in a motor vehicle, based on alleged infringement upon a treaty tribal hunting right.
- b. Whether the trial court applied the incorrect definition of Constructive Possession to the charges of felon in possession of a firearm and possession of a loaded rifle in a motor vehicle.

II. STATEMENT OF THE CASE

On August 24, 2009, Washington Department of Fish and Wildlife Officer Ryan John was on patrol in the Umatilla National Forest in Garfield County, State of Washington. (RP 26) On that date, Officer John made contact with the occupants of a pickup traveling through the forest. (RP 27-28) Based on the contact, Officer John noted that there were two adult occupants in the front seat of the vehicle as well as an adult passenger and child passenger (approximately four or five years old) in the back seat of the vehicle. (RP 29-30) During the contact the officer observed two rifles in the front seat and asked the occupants if their rifles were loaded. (RP 29) The officer noted that the driver's rifle was open and not loaded, and the front passenger's rifle had a cartridge seated in the barrel. (RP 30) After inspecting the two rifles, Officer John asked if there were any additional rifles in the vehicle, to which the front passenger stated "Yeah, his," nodding towards the rear passenger. (RP 30) The front passenger then stepped out of the truck and removed the third rifle from the rear seat of the pickup. (RP 31) The Officer noted that the rifle was lying on the rear floorboard at the rear adult passenger's feet with the barrel pointing towards the child passenger's side of the vehicle. (RP 31) As the rifle was removed, the officer noted that the bolt was open and he could see cartridges in the rifle. (RP 31)

After requesting identification from the occupants, Officer John learned that the adult passenger from the rear seat provided a false name and/or date of birth. (RP 35-39) The officer then arrested the rear passenger for possessing a loaded rifle in a motor vehicle and for providing a false statement to a law enforcement officer. (RP 39) The rear passenger was identified as Kim Ellery Rickman Jr. Mr. Rickman voluntarily pleaded with the officer not to arrest him, stating he was unable to possess a firearm due to a hunting accident. (RP 39-41) Mr. Rickman stated he had been convicted of manslaughter. (RP 41) The officer was able to confirm Mr. Rickman's identity and conviction through dispatch. (RP 41)

The State then charged Mr. Rickman with Unlawful Possession of a Firearm, Possession of a Loaded Rifle in a Motor Vehicle and providing a False Statement to Law Enforcement. (CP 47-48)

The Defense moved to dismiss the firearms charges on the basis that they violated Mr. Rickman's hunting rights under the Nez Perce Treaty of 1855. (CP 37-43) (The State concedes that Mr. Rickman is a member of the Nez Perce Tribe). The trial court denied the motion to dismiss the firearms charges, holding that the relevant criminal statutes were laws of general applicability, were safety based, and did not violate treaty rights.(CP 31) The court noted further, that the defendant was still able to hunt, just that he could not possess a

firearm. (RP 13)

A Bench Trial was held on March 3, 2009. (RP 21) Officer John testified on behalf of the State and the Defendant provided testimony on his own behalf. (RP 21-89 generally) The defendant agreed that: he had contact with Officer John on August 24, 2009 in the Umatilla National Forest; that he was a passenger in the vehicle; that there was a rifle by his feet; and he admitted to having been convicted of Involuntary Manslaughter. (RP 60-65) The Defendant testified that he is a member in good standing of the Nez Perce Indian Tribe and that he and his companions were merely exercising their treaty rights. (RP 61-62) Mr. Rickman further testified ***that he was not hunting*** and that he was only riding along with his friends. (RP 63-64) Mr. Rickman testified that he at no time possessed or controlled the rifle. (RP 61) The trial court convicted the Defendant on all charges. (RP 79-81)

III. ARGUMENT

- A. The Trial Court Properly Declined to Dismiss the Weapons Charges against Rickman Because No Treaty Rights were Infringed Upon.

The court reviews an order denying a motion to dismiss for manifest abuse of discretion. *State v. Gary J.E.*, 99 Wn. App. 258,

261, 991 P.2d 1220, review denied, 141 Wn. 2d 1020, 10 P.3d 1074 (2000). Rickman challenges the trial court's refusal to dismiss the firearms charges based on his status as a Nez Perce Indian. Specifically, Rickman challenges his conviction for violating RCW 9.41.040, which makes it unlawful for a felon to possess a firearm, and RCW 77.15.460, which prohibits the possession of a loaded firearm in a motor vehicle, arguing that the convictions violate his Indian hunting rights pursuant to the Nez Perce Treaty of 1855.

As more fully explained below, the trial court did not abuse its discretion in denying Rickman's motion. Because Rickman was not hunting at the time of his arrest, the Tribe's reserved hunting rights are not relevant in this case. Moreover, Defendant lost the privilege of possessing a firearm by virtue of his prior criminal conduct—not any State intrusion on Tribal treaty rights. Finally, the trial court's conclusion that RCW 9.41.040 and RCW 77.15.460 do not affect a treaty right is consistent with well settled law.

1. Because Rickman Was Not Hunting at the Time of His Arrest, Indian Treaty Hunting Rights are Irrelevant.

The State concedes that the Nez Perce Treaty of 1855 exists, that it contains language reserving a right to hunt for the Nez Perce

Tribe, and that Mr. Rickman is a member of the Nez Perce Tribe. However, this case does not implicate any Treaty hunting rights because Mr. Rickman was not hunting at the time of the violations. Mr. Rickman specifically testified at trial that he was *not* hunting. Rather, Mr. Rickman testified that he was merely riding along with his friends.

Because of Mr. Rickman's own admission at trial, the Right to Hunt pursuant to the Nez Perce Treaty of 1855 is not relevant to either the loaded weapon or the felon in possession charge. On this basis alone, this court should uphold the trial court's denial of Rickman's motion to dismiss.

2. Rickman Lost the Privilege of Possessing a Firearm by Virtue of His Prior Criminal Conduct Rather than State Regulation of a Treaty Hunting Right.

Mr. Rickman was previously convicted of manslaughter. RCW 9.41.040 states "[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.” Manslaughter is a “serious offense” for purposes of RCW 9.41.040. See RCW 9.94A.030 and 9.41.010. A person convicted of manslaughter therefore can no longer possess a firearm.

Federal and state case law has consistently recognized that treaty hunting and fishing rights do not insulate a person from the consequences of their prior criminal conduct. See *United States v. Gallaher*, 275 F.3d 784 (9th Cir. 2001); *United States v. Fox*, 573 F.3d 1050 (10th Cir. 2009), cert. denied 130 S.Ct. 813 (2009); *United States v. Burns*, 529 F.2d 114 (9th Cir. 1975); *United States v. Three Winchester 30-30 Carbine Lever Actions*, 504 F.2d 1288 (7th Cir. 1974); *State of Minnesota v. Roy*, 761 N.W.2d 883 (2009); and *State of Wisconsin v. Jacobs*, 302 Wis. 2d 675, 735 N.W. 2d 535 (2007).

In *Three Winchester 30-30's*, the federal government seized and forfeited three Winchester 30-30 rifles from a member of the Menominee Indian Tribe after he was convicted of a felony. The Defendant alleged he used the weapons for hunting in Menominee County, a former reservation. *Three Winchester 30-30's* at 1290. The Defendant argued that incidental to his right to hunt is the right to possess firearms, and he should therefore be exempt from liability under the federal statute preventing a felon from possessing a firearm. *Id.* The court ruled that the felony forfeiture had “nothing to

do with the regulation of any Menominee Indian treaty right. Any effect on the defendant's right to hunt is merely incidental, and applicable only to him." *Three Winchester 30-30's* at 1290. "Here the government has not made the exercise of a treaty right illegal, but rather the defendant's own actions have limited him from participating fully in his tribe's hunting rights." *Id.* "Congress has made a reasonable determination that convicted felons should not be able to possess...firearms." *Id.* at 1291. "We can see no basis on which to hold that that decision is only reasonable and necessary when applied to non-Indian felons." *Id.*

The Ninth Circuit adopted the 7th Circuit's analysis in *Burns*. In that case, the Shoshone-Bannock Tribe appointed Defendant Burns as a tribal game warden; and although Burns was a convicted felon, the tribe authorized him to carry a firearm. "Indian tribes are recognized as quasi-sovereign entities with the power to regulate their own affairs...." *Burns* at 116. And as such, the defendant argues the tribe has the power to police their own reservation and can appoint whomever they wish to act as law enforcement. *Id.* The defendant further argued that the federal government cannot regulate how the sovereign governs itself. *Id.* The Ninth Circuit Court of Appeals upheld Burns' conviction for being a felon in possession of a firearm, holding that the law preventing Burns from possessing a firearm was

not an improper infringement upon the Tribal council's right to appoint game wardens and to authorize the carrying of firearms. *Burns* at 116. "Burns is merely precluded from possessing a firearm because of his previous felony conviction." *Id.* at 117. See also *U.S. v. Gallaher*, 275 F.3d 784 (9th Cir. 2001) (reaching the same conclusion in a felon in possession case).

In *U.S. v. Fox*, the defendant was a member of the Navajo Nation and was also a convicted felon. *Fox* at 1050. When the defendant was arrested on the Navajo Reservation, he was found to be in possession of a shotgun and a rifle. *Id.* The defendant argued that pursuant to the 1868 Treaty between the U.S. and the Navajo Nation, he was entitled to possess guns for the limited purpose of hunting on the Navajo Reservation. *Id.* at 1051. The court followed *Three Winchester 30-30's* stating that "the government has not made the exercise of a treaty right illegal, but rather the defendant's own actions have limited him from participating fully in his tribe's hunting rights." *Id.* at 1055. The court went on to say "[c]onvicted felons – even those whose terms of imprisonment have been completed – are often subject to legal obligations and restrictions that differ from those of the general population." *Fox* at 1057 citing *Green v. Berge*, 354 F.3d 675 (7th Cir. 2004). "Persons convicted of felonies often lose the right to serve on juries, to vote, and of course, the right to possess

firearms. *Fox* at 1058. “If citizens may forfeit their most precious constitutional rights by commission of a felony, it is not surprising that members of Indian tribes may similarly forfeit important treaty rights.” *Id.*

This Court should also note that State courts of Minnesota and Wisconsin have made similar rulings. In *State of Minnesota v. Roy*, the court found that the state statute prohibiting a felon from possessing a firearm was a generally applicable criminal statute and not a specific hunting regulation or a hunting restriction. *citing Gallaher and Three Winchester 30-30’s*. “Any effect [the state statute] has on appellant’s ability to possess a firearm is an incidental result of [his] past criminal conduct; the statute has no effect on the hunting rights of the tribe as a whole.” *Id.* at 887. Likewise, in *State of Wisconsin v. Jacobs*, the court found that “application of [the state statute regulating a felon’s ability to possess a firearm] does not, in and of itself, make Jacobs’ exercise of treaty hunting rights illegal. Rather, Jacobs’ own actions in committing a felony have limited him from fully enjoying those rights.” *citing Three Winchester 30-30’s*.

Like the case at hand, the courts in *Three Winchester 30-30’s*, *Burns*, *Gallaher*, *Fox*, *Roy* and *Jacobs* found that the prohibition on possessing a firearm based on prior criminal conduct was not an improper infringement of the rights of a sovereign tribe. Each court

found that the government did not unduly infringe treaty rights, but each defendant's individual actions prevented them from participating fully in their respective tribes' hunting rights. *See also State v. Cayanne*, 165 Wn.2d 10, 195 P.3d 521 (2008) (sentencing condition preventing Chehalis Tribal member from owning a gillnet, based on conviction for off-reservation conduct, does not conflict with Tribe's aboriginal on-reservation fishing right, but stems from member's own criminal conduct)

3. The Trial Court Properly Relied on *State v. Olney* in Refusing to Dismiss the Charges of Felon in Possession of a Firearm and Loaded Weapon in a Motor Vehicle.

"Absent federal law to the contrary, Indians going beyond the reservation boundary have generally been subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-49 (1973); *State v. Olney*, 117 Wn. App. 524, 72 P.3d 235 (2003). In *Olney*, two members of the Yakama Indian Nation were off-reservation, hunting and transporting a bull elk when they were contacted by a Fish & Game officer. Pursuant to the contact, both tribal members were found to possess loaded firearms within their

vehicle and were each cited for same. Both members then claimed that the Yakama Treaty of 1855 guarantees their right to hunt, and that the treaty preempted the State statute prohibiting the possession of a loaded firearm in a vehicle.

The Court in *Olney* concluded that the law preventing persons from possessing loaded weapons in a vehicle (RCW 77.15.460), was a law of general applicability and did not unlawfully interfere with the Tribe's right to hunt. In coming to this conclusion the court reasoned that "absent ambiguity, a statute's meaning must be derived from the wording of the statute itself without judicial construction or interpretation." *Olney* at 528. "When the statutory language is clear and unequivocal, courts must assume the legislature meant exactly what it said and apply the statute as written." *Id.* Although the statute which prevents possession of a loaded firearm in a vehicle, is located within Title 77 (Fish & Wildlife), the court explained that the criminal statute specifically used the term "person". The court reasoned that the legislature purposely used the term "person" rather than "hunter" several times throughout Title 77, and therefore did not specifically limit the application of the law to "hunters." *Olney* at 528. In fact, the court pointed out that a person could violate the statute by carrying a loaded shotgun in their vehicle while hunting or while driving to a football game. *Id.* "Since RCW 77.15.460 is a safety-based statute of

general application under the state police powers, it does not infringe on [the Defendants'] treaty hunting rights." *Olney* at 529.

The U.S. District Court for Eastern Washington recently called the *Olney* decision into doubt through the case of *Confederated Tribes of the Colville Reservation v. Anderson*, -- F. Supp.2d--, (E.D. Wash. 2011).

"Because *Olney* failed to appreciate the distinction between federal and state governments and their relationships with an Indian treaty, *Olney* incorrectly relied on *Gallaher*. 117 Wn.App. at 530-31. Therefore, *Olney's* conclusion that the defendants failed to identify a "specific treaty right exempting them from [state] laws of general applicability off reservation boundaries" contravenes U.S. Supreme Court treaty-interpretation principles. *Id.* at 531.

While certain language within *Olney* was questioned, *Olney* is still good law and applicable in this case for at least three reasons. First, the issue in *Confederated Tribes* was the question of "what legal standard applies to determine whether the State's hunting-safety laws apply to tribal members exercising 'in common' hunting rights." Because Mr. Rickman was not hunting, he was not exercising any "in common" hunting rights, and the State therefore did not regulate any treaty rights by virtue of its enforcement of the felon in possession and loaded weapon statutes. Thus, *Confederated Tribes* is irrelevant to Rickman's conviction.

Second, the decision in *Confederated Tribes* simply decided what legal standards should apply when the State *does* regulate in common hunting rights. “Notably absent from the binding Supreme Court and Ninth Circuit cases dealing with state regulation of “in common” usufructuary rights, is any reference to a state’s exercise of its public-safety police power.” *Confederated Tribes*, slip opn. at p.8. “Therefore, the Court elects to focus on the principles announced in the binding precedents when developing the standards to apply to the state’s hunting safety laws as applied to a tribal member exercising ‘in common’ hunting rights.” *Id.* The court did not apply the new standards nor determine which state laws are subject to them, leaving those issues for a subsequent phase of the litigation. In the case at hand we are not dealing with hunting regulations, but general criminal statutes that apply to hunters and non-hunters equally.

Finally, the Washington Court of Appeals is bound only by the decisions of the Washington Supreme Court and nonsupervisory decisions of the United States Supreme Court, *In re Crace*, 157 Wn.App. 81, 236 P.3d 914 (Div. II, 2010), and, this court should follow its prior decision unless it can be shown that the earlier decision is both incorrect and harmful. *State v. Stalker*, 152 Wn.App. 805, 219 P.3d 722 (Div. I, 2009). Because Rickman is unable to prove that *Olney* is both incorrect and harmful, *Olney* should govern this case.

Like the defendants in *Olney*, the Defendant in the case at hand is an enrolled member of an Indian Tribe; and like the Yakama tribe, the Nez Perce Tribe is a party to a Treaty of 1855 which includes language guaranteeing the Tribe's right to hunt. Again, like *Olney*, the defendant was contacted by a Fish & Game officer and found to have a loaded rifle in a motor vehicle. Because the facts and law are almost identical between *Olney* and the case at hand with regards to the charge of Unlawful Possession of a Loaded Rifle in a Motor Vehicle, the same result should follow.

Furthermore, applying the above rules of statutory interpretation, this court must also interpret RCW 9.41.040 based on the wording and plain meaning of the statute. And, because the wording is clear, the court must assume the legislature meant what it said and apply the statute as it is written. RCW 9.41.040 specifically uses the term "person" and does not reference hunters or Indians in any manner. Because the language of the statute is clear, and there is no reference limiting its application to hunters or Indians, the Court must rule that RCW 9.41.040 is also a statute applicable to individuals in general.¹

¹ RCW 9.41.040 is a restriction on the right to bear arms which has to meet a strict scrutiny standard. The strict standard was met by this statute which addresses a legitimate governmental interest in protecting the public and was narrowly tailored to satisfy said interest. *State v. Hunter* 147 Wn. App. 177, 195 P.3d 556 (2008).

B. The Trial Court Used the Appropriate Standard for
Establishing Constructive Possession of a Firearm.

Mr. Rickman, through a Statement of Additional Grounds for Review, claims that the court applied the incorrect definition of Constructive Possession, stating that the “Court adopted the State’s proposed instruction...[which], however, applies when the state seeks to prove a defendant committed a crime with a deadly weapon in order to enhance a defendant’s sentence.”

At the pre-trial hearing on the defendant’s motion to dismiss, the State argued that possession of a firearm may be actual or constructive. (RP 53) The State argued that constructive possession can be proved by “dominion and control,” and asked the court to consider factors including “whether or not the Defendant had the immediate ability to take actual possession of the item” and “[w]hether the Defendant had the capacity to exclude others from possession of the item.” (RP 55)

The law argued by the State, and relied upon by the trial court, is the appropriate standard for proving Constructive Possession. WPIC 133.52, the suggested instruction when possession is an element of a weapon offense, states:

“Constructive Possession occurs when there is no actual

physical possession but there is dominion and control over the item... In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include [whether the defendant had the [immediate] ability to take actual possession of the item,] [whether the defendant had the capacity to exclude others from possession of the item]..." (brackets theirs)

State v. Echeverria, 85 Wn.App. 777, 934 P.2d 1214 (1997) and *State v. Howell*, 119 Wn.App. 644, 79 P.3d 451 (2003) each support WPIC 133.52 and further describe Constructive Possession. In *Echeverria*, the court found constructive possession had been established where a gun was found at the feet of, and in sight of, the defendant in a vehicle. *Echeverria* at 783. The court stated further, that constructive possession is established if the defendant has dominion and control over the firearm or the premises where it was found. *Id.* The *Howell* court explained that when possession is an element of a weapon offense, a factor that *may* be considered in determining constructive possession is immediate access to the weapon. The court then went on to distinguish possession as an element of a weapon offense, versus possession of a firearm for sentence enhancement purposes, stating that in order to prove possession of a firearm for sentence enhancement purposes, the State *must prove* immediate access. *Howell* at 649. Because possession is an element of each of the firearm charges against Mr.

Rickman, the court was allowed to consider, although was not required to consider, immediate access to the firearm as a factor of constructive possession.

IV. CONCLUSION

In conclusion, the appeal in this matter should be dismissed. Because Mr. Rickman was not hunting at the time of the offenses, his treaty-based defense is inapplicable. Moreover, his loss of his right to possess a firearm derived from his own prior criminal conduct rather than the State's regulation of Nez Perce Tribe treaty hunting rights. Finally, the criminal statutes which the State has enforced against Mr. Rickman are not hunting regulations, but laws of general application which do not unduly infringe on the defendant's treaty rights. The State respectfully requests this Court enter a decision affirming the Trial Court.

Dated this 12 day of April, 2011.

Respectfully submitted,



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