

No. 295125

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, Respondent

v.

ERIC HUFFERD-OUELLETTE, Appellant

---

APPEAL FROM THE SUPERIOR COURT  
OF CHELAN COUNTY  
THE HONORABLE LESLEY A. ALLAN

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OPENING BRIEF OF APPELLANT

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## I. Assignment of Error

A. The Resentencing Court Erred When It Found The Requisite Nexus Between The Crime Of Possession of Cocaine, The Defendant, And A Weapon, Sufficient To Impose a Firearm Enhancement.

### *Issues Pertaining To Assignment Of Error*

Did the resentencing court err when it found the required nexus between the crime of possession of cocaine, the defendant, and a weapon, sufficient to impose a firearm enhancement?

## II. Statement of Facts

On August 6, 2006, seventeen-year old Eric Hufferd-Ouellette burglarized a home in Stevens County, stealing a firearm. Later that same day, using the firearm, he committed a robbery. (CP 37, 47). On August 9, 2006, he attempted a robbery in Chelan County. As he ran from the area, he threw the gun away. (RP 13). He was later apprehended and pleaded guilty to unlawful possession of a firearm second-degree, attempted first-degree robbery with a firearm, possession of a stolen firearm, and unlawful

possession of a controlled substance (cocaine) with a firearm enhancement. (CP 36).

He was sentenced for the Stevens County convictions on April 18, 2007. (CP 37, 47). He was sentenced to 193 months for the Chelan County crimes on August 16, 2007. (CP 36-46).

Mr. Hufferd-Ouellette filed a motion in the Chelan County Superior Court to vacate judgment and sentence and requesting to withdraw his plea of guilty on August 11, 2008. He argued his sentence was in excess of the statutory maximum. (CP 51-55;77-80). One month later, September 16, 2008, he filed a motion for discretionary review with the Court of Appeals. (CP 75). One year later, the Washington Supreme Court ordered his case remanded to the trial court to resolve the merits of the motion to vacate the judgment and sentence. (CP 76).

Mr. Hufferd- Ouellette raised three issues at the resentencing hearing. First, because he was punished for the August 6, 2006, crime of burglary in the first degree, when he stole a firearm in Stevens County, it was a violation of double jeopardy to be punished for possession of the same stolen firearm in Chelan County on August 9, 2006. Next, he argued there was an insufficient nexus between his cocaine possession and the firearm

enhancement. Lastly, Mr. Hufferd-Ouellette's offender score was miscalculated when the counts of unlawful possession of a firearm and possession of a stolen firearm were counted against one another for purposes of determining an offender score. (CP 85-90).

At resentencing, all parties agreed the original trial court had imposed a sentence beyond the statutory maximums and the offender scores were miscalculated on two counts. These were corrected. (CP 135). The court did not have a copy of the verbal report of proceedings from the August 16, 2007 sentencing, nevertheless, it reviewed and determined the remaining issues as follows. (RP 34-38).

The court found there was no violation of double jeopardy for the convictions of burglary in which the firearm was stolen and possession of that same stolen firearm at a later date. (RP 33-34). The nexus between the cocaine possession and the firearm enhancement was sufficient to uphold the firearm enhancement. (RP 37). Mr. Hufferd-Ouellette did not ask the resentencing court to rule on his motion to withdraw his guilty plea. (RP 38). The court declined to run the Stevens County sentence concurrent with the Chelan County sentence. (RP 61). He makes this timely appeal. (CP 148).

### III. ARGUMENT

The Required Nexus Between The Crime of Possession Of Cocaine And Possession Of A Firearm Was Insufficient To Sustain A Firearm Enhancement.

RCW 9.94A.125 authorizes an enhanced sentence if a defendant is armed with a deadly weapon at the time of the commission of the crime:

In a criminal case wherein there has been a special allegation and evidence establishing that the accused or an accomplice was armed with a deadly weapon at the time of the commission of *the* crime, the court shall make a finding of fact of whether or not the accused or an accomplice was armed with a deadly weapon at the time of the commission of *the* crime<sup>1</sup>. (emphasis added).

Whether a person is armed is a mixed question of law and fact, which is reviewed de novo. *State v. Schelin*, 147, Wn.2d 562, 565-66, 55 P.3d 632 (2002). Whether the facts are sufficient, as a matter of law, to prove the defendant was armed with a deadly weapon at the time of the offense, as a basis for a sentence enhancement in a prosecution for possession of a controlled substance is a question of law, to be reviewed de novo. *Id.*

Washington courts have consistently held that a person is “armed” if a weapon is easily accessible and readily available for

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<sup>1</sup> RCW 9.94A.125 was recodified as RCW 9.94A.825 in 2009. Mr. Hufferd-Ouellette was sentenced in 2007.

use, either for offense or defensive purposes, *and* there is a connection or nexus between the defendant, the weapon, and the crime. *State v. Easterlin*, 159 Wn.2d 203, 208-09, 149 P.3d 366 (2006) (*quoting State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d (1993)).

Mr. Hufferd-Ouellette argues that in this case, there was no connection between the crime of possession of cocaine and the firearm. He admittedly had actual possession of a gun when he attempted a robbery on August 9, 2006. (CP 2, 38, RP 41-42). However, when the robbery did not go as expected, Mr. Hufferd-Ouellette ran from the immediate area and tossed aside the gun. When he was shortly thereafter apprehended, he possessed a small amount of cocaine, but no weapon. (RP 13).

Firearm enhancements attached to possession of drug crimes have been well analyzed by Washington Courts. The Court reversed a firearm enhancement in *Gurske*. *State v. Gurske*, 155 Wn.2d 134, 118 P.3d 333 (2005). There, the defendant was stopped for driving with a suspended license. During an inventory search, prior to impounding the vehicle, officers discovered a backpack. The backpack was within arm's reach from the driver's position, but not removable without some effort. Inside the

backpack was an unloaded 9 mm gun, a fully loaded magazine, and three grams of methamphetamine. Gurske was convicted of possession of a controlled substance and a firearm enhancement was imposed. The court found he was armed with a deadly weapon while committing the crime. *Id.* at 136.

On appeal, Gurske argued that although the pistol was in close proximity to him, it was not easily accessible and readily available; and proximity alone was insufficient to establish that he was armed. *Id.* at 138. The State Supreme Court agreed. In reversing the enhancement, the Court commented the accessibility and availability requirement meant the weapon must be easy to get to for use against another person. *Id.* at 139.

Similarly, Mr. Hufferd-Ouellette did not have an easily accessible and readily available firearm to be used against another. He had used the weapon in the attempted robbery and then, threw the gun aside. Clearly there was no weapon available to be used to protect contraband or prevent officers from apprehending him.

In the same way, the Court affirmed a conviction of possession with intent to deliver, but struck the portion of the sentence based on the use of a firearm in *Valdobinos*. There, the evidence showed Valdobinos made an agreement to sell drugs to

an undercover agent. Officers arrested and removed Valdobinos from his home, and then executed a search warrant. *Valdobinos*, 122 Wn.2d at 273. During the search, Officers recovered cocaine and a rifle. *Id.* at 274. In reversing the firearm enhancement, the Court found there was no evidence the rifle had been used or was readily available for use to facilitate the commission of a crime. Moreover, at the time of the discovery, the defendant was under arrest and removed from the scene. *Id.* at 282. Valdobinos was not armed in the sense that he had a weapon accessible or readily available for offensive or defensive purposes.

Washington courts have found that a defendant is *not* “armed” even though he, presumably, could have obtained a weapon by taking a few steps. *Valdobinos*, 122 Wn.2d at 282; *State v. Johnson*, 94 Wn.App. 882, 894-895, 897, 974 P.2d 855 (1999); *State v. Call*, 75 Wn. App. 866, 867-69, 880 P.2d 571 (1994). Likewise, Mr. Hufferd-Ouellette, was not even near his weapon, and thus not “armed”.

Moreover, in determining whether the requisite nexus for a firearm enhancement exists, the Court must examine the nature of the crime, the weapon, and the circumstances under which the weapon is found. *State v. Ague-Masters*, 138 Wn. App. 86, 104,

156 P.3d 265 (2007). For example, the Court reviewed a case in which officers executed a search warrant of a defendant's home and discovered marijuana. The Court noted there was a loaded gun near where the defendant stood in his basement. In affirming the firearm enhancement, it held the weapon was easily accessible and readily available for use against officers in a possible escape attempt, or to protect the contraband, or prevent apprehension for possession of the marijuana. *Schelin*, 147 Wn.2d at 564.

In *State v. Eckenrode*, 159 Wn.2d 488, 150 P.3d 1116 (2007), the Court concluded a sufficient nexus existed for a firearm enhancement. There, the defendant had called 911 to report an intruder, alerting dispatch he was armed. *Id.* at 491. When deputies arrived, they swept the house for an intruder and noticed dried marijuana, methamphetamines, a marijuana grow operation, a rifle, a pistol, and a police scanner. *Id.* at 492. Although the defendant was not near his firearms, the Court still concluded it was a reasonable to infer he used the police scanner to monitor police activity against the chance he would be raided. Thus, it was logical to infer the weapons were there to protect his ongoing criminal activities. *Id.* at 434.

Similarly, the Court affirmed the firearm enhancement in *Easterlin*. There, the defendant was sleeping in his car with a loaded weapon in his lap and cocaine in his sock.<sup>2</sup> *Easterlin*, 159 Wn.2d at 206. The Court held it was a reasonable inference that Easterlin was armed to protect possession of his drugs.

At the resentencing, the court here relied heavily on *Easterlin* in its decision, stating,

“I suppose that it is possible that if this goes up again that the Court of Appeals or the State Supreme court will say that if you are in possession of a gun and using it to attempt to carjack someone and you have drugs at the same time, that that’s not sufficient to constitute the crime of possessing an illegal drug while armed with a firearm. But under *Easterlin*, it is enough, in this court’s view.” (RP 37).

The court was mistaken. A nexus between a firearm and a crime exists only if the firearm is related to that crime. *Gurske*, 155 Wn.2d at 142. Cases in which the Court has affirmed a firearm enhancement, in connection with drug possession, involved either an ongoing drug operation, or as in *Easterlin*, the weapon was clearly displayed, and readily accessible.

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<sup>2</sup> The Court noted the procedural posture of the case was unusual in that Easterlin had pleaded guilty, but was asking the Court to reverse his conviction and remand the case to the trial court so he could move to withdraw the plea to the firearms enhancement. *Easterlin*, 159 Wn.2d at 209. Here, the Washington Supreme Court had already remanded this case to the trial court to resolve the merits of his motion to vacate judgment and sentence.

Mr. Hufferd-Ouellette's case is distinguished on the facts. He was not armed as defined by case law. He was not involved in an ongoing drug operation. Under the statute authorizing a firearm enhancement, the defendant must be armed with a deadly weapon at the time of the commission of *the* crime. RCW 9.94A.125. His earlier weapon possession was related to a different crime, not the particular crime of possession of cocaine. The nexus between the cocaine possession and a weapon was insufficient to sustain a firearm enhancement.

#### IV. CONCLUSION

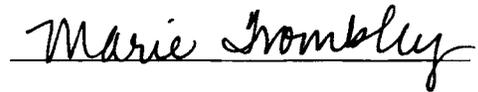
Based on the foregoing facts and authorities, Mr. Hufferd-Ouellette respectfully asks this Court to reverse the imposition of the firearm enhancement and remand for resentencing.

Dated this 2nd day of February 2011.

  
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CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for Appellant Eric Hufferd-Ouellette, do hereby certify under penalty of perjury under the laws of the United States and the State of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on February 2, 2011, to Eric Hufferd-Ouellette, DOC # 309647, Washington State Penitentiary, 1313 N. 13<sup>th</sup> Street, Walla Walla, WA 99362; James A. Hersey, Attorney at Law, PO Box 2596, Wenatchee, WA 98807-2596.



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