

FILED
JULY 13, 2015
Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 32227-1-III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

PETER J. OSIADACZ,

Defendant/Appellant

Respondent's Brief

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TABLE OF CONTENTS

A. RESPONSE TO ASSIGNMENTS OF ERROR.....4

B. ISSUES PRESENTED4

C. STATEMENT OF THE CASE.....4

D. ARUGMENT.....5

E. CONCLUSION.....8

TABLE OF AUTHORITIES

Cases

<u>Hoffman Estates v. The Flipside, Hoffman Estates, Inc.</u> , 455 U.S. 489, 494 (1982).....	5
<u>Kolender v. Lawson</u> , 461 U.S. 352, 359, n. 8 (1983)	5
<u>State v. Human Relations Research Foundation</u> , 64 Wn.2d 262, 391 P.2d 513 (1964).....	6
<u>State v. Lundquist</u> , 60 Wn.2d 397, 374 P.2d 246 (1962).....	7
<u>Winters v. New York</u> , 333 U.S. 507, 515 (1948)	5

Statutes

RCW 9.41.040(2).....	4
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Washington Pattern Jury Instructions

WPIC 2.10	4
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A. RESPONSE TO ASSIGNMENTS OF ERROR

- a. The court did not err in giving WPIC 2.10 giving the jury the legal definition of a firearm.

B. ISSUES PRESENTED

- a. Did giving the WPIC defining a firearm unlawfully infringe upon a Constitutional right of the defendant, making the instruction and statute overbroad and illegal?
- b. May a defendant allege a hypothetical violation of his rights?

C. STATEMENT OF THE CASE

Mr. Osiadacz was charged via information with one count of Unlawful Possession of a Firearm in the Second Degree for violating RCW 9.41.040(2). (CP 2).

Respondent agrees with Appellant's summation of the statement of the case provided in his appellant brief, with the following addition:

The most important modification to the toy gun was that the flat face plate was modified from being flat to being a cylinder, creating a firing pin for the gun, as Ms. Geil with the State Patrol testified to the jury. (12/10/2013 RP at 178). Additionally, Ms. Geil testified that she herself purchased a nearly identical gun via the internet, duplicated the modifications made on the gun

possessed by Mr. Osiadacz and was able to fire projectiles from her modified gun. (Id. at 181).

D. ARGUMENT

- a. WPIC 2.10 defining a firearm does not infringe upon a defendant's Constitutional right and is not overbroad.

In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct." Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982); Kolender v. Lawson, 461 U.S. 352, 359, n. 8 (1983). Criminal statutes must be scrutinized with particular care, e. g., Winters v. New York, 333 U.S. 507, 515 (1948); those that make unlawful a substantial amount of constitutionally protected conduct may be held facially invalid even if they also have legitimate application. E. g., Kolender, supra, at 359, n. 8.

Most of the cases decided by the courts, those most cited by defense, deal with free speech.

Challengers allege that certain statutes (like those

against disorderly conduct, noise ordinances, etc.) criminalize constitutionally protected speech and are therefore overbroad. This case involves no allegation that the criminal statute criminalizes any constitutionally protected right, lest of all free speech. Defense argues instead that it potentially criminalizes possession of a toy. Possessing a toy is not a constitutionally protected activity, like free speech, and therefore the statute survives Constitutional scrutiny.

- b. The defendant actually possessed a modified toy gun that was capable of firing a projectile using black powder, therefore the hypothetical scenario that the conduct criminalized was simple possession of a toy gun is a hypothetical scenario and cannot provide relief.

A person cannot resort to hypothetical behavior in urging the unconstitutionality of a statute; one must be adversely affected by the statute challenged. State v. Human Relations Research Foundation, 64 Wn.2d 262, 391 P.2d 513 (1964);

State v. Lundquist, 60 Wn.2d 397, 374 P.2d 246
(1962).

Appellant argues that the statute defining firearms is “overbroad” because it hypothetically criminalizes possessing the unmodified toy gun that the defendant possessed in this case.

This is not an accurate statement of the law or the facts of this case. The modifications made to the cap gun in this case made it into a black powder pistol. Whether or not, unmodified it would qualify as a firearm under the statute is irrelevant because the fact is that it was modified and the defendant possessed it in the modified form. The hypothetical scenario cannot provide relief.

E. CONCLUSION

For the reasons stated, the judgment and sentence should be affirmed; appellant’s requests must be denied.

Respectfully submitted July 13, 2015,

/s/
/s/ Jodi M. Hammond
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WSBA #043885

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

State of Washington,)	Court of Appeals No. 32227-1-III
Respondent.)	
)	AFFIDAVIT OF SERVICE
PETER J. OSIADACZ,)	
Appellant.)	
_____)	

STATE OF WASHINGTON)
) ss.
 County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 29th day of July, 2015, affiant an electronic copy directed to:

Renee Townsley	Kenneth H. Kato,
Court of Appeals	khkato@comcast.net
Division III	
500 N. Cedar Street	
Spokane, WA 99210	

containing copies of the following documents:

- (1) Affidavit of Service
- (2) Respondent's Brief

Theresa Burroughs

SIGNED AND SWORN to (or affirmed) before me on this 29th day of July, 2015, by THERESA BURROUGHS.



Lorraine A Hill
 NOTARY PUBLIC in and for the
 State of Washington.
 My Appointment Expires: 09-10-17