

NO. 33184-9-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

RODOLFO TOLENTINO-CUEVAS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

The Honorable Cameron Mitchell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The charging documents violated appellant's constitutional rights because they omitted essential elements of the Alien in Possession of a Firearm charge.

Issue Pertaining to Assignment of Error

Appellant was charged with Alien in Possession of a Firearm. An essential element of that crime is that the defendant was not "a lawful permanent resident." Another is that the defendant does not meet "the requirements of RCW 9.41.175." The charging documents in appellant's case, however, failed to include these elements. In light of these omissions, is reversal of appellant's conviction required?

B. STATEMENT OF THE CASE

The Benton County Prosecutor's Office charged Rodolfo Tolentino-Cuevas with (count 1) Alien in Possession of a Firearm; (count 2) Aiming a Firearm or Dangerous Weapon; and (count 3) Driving Under the Influence. CP 12-13. Tolentino waived his right to trial by jury, and the Honorable Cameron Mitchell presided at his bench trial. CP 11; 1RP¹ 2.

¹ This brief refers to the verbatim report of proceedings as follows: 1RP – March 2, 2015; 2RP – March 4, 2015.

Following a CrR 3.5 hearing, Judge Mitchell ruled admissible statements Tolentino made following his arrest. CP 27-29; 1RP 4-21.

As described in Judge Mitchell's written findings of fact and conclusions of law, the evidence at trial established that, on September 13, 2014 – after consuming several beers – Tolentino became angry when Jose Llamas attempted to enter Tolentino's truck to retrieve a purse for Llamas's girlfriend without first seeking Tolentino's permission. CP 30. Tolentino pulled out a .40 caliber handgun and may have pointed it in Llamas's direction. CP 30-31. Tolentino drove away in his truck, but was stopped by police shortly thereafter. CP 31. Officers recovered the gun, along with several rounds of ammunition. CP 31. Tolentino admitted to drinking three or four beers and that he was in the United States illegally. CP 31-32. Tolentino provided breath samples, resulting in readings of .074 and .073. This, in combination with the results of a Horizontal Gaze Nystagmus test and the fact Tolentino was swaying while standing, led police to conclude he was under the influence and affected by alcohol. CP 32.

Regarding the charge in count 1, Tolentino stipulated that he was neither a citizen of the United States nor a lawful permanent

resident. CP 32; 1RP 3. Moreover, the evidence demonstrated that he did not possess a valid alien firearm license or otherwise qualify to possess a firearm in this country. 1RP 86-87, 92-93; CP 32.

Judge Mitchell found Tolentino guilty on counts 1 and 3, but found him not guilty on count 2. CP 33. Tolentino was sentenced to four months on count 1 and a concurrent sentence of 364 days (with 363 suspended) on count 3. CP 18-19. He timely filed his Notice of Appeal. CP 25-26.

C. ARGUMENT

THE INFORMATION CHARGING TOLENTINO WITH ALIEN IN POSSESSION OF A FIREARM WAS CONSTITUTIONALLY DEFICIENT.

Under both the Federal and Washington Constitutions, a charging document must include all essential elements of a crime. U.S. Const. amend. VI; Const. art. I, § 22 (amendment 10)²; State v. Kjorsvik, 117 Wn.2d 93, 98, 812 P.2d 86 (1991). "[A]n accused has a protected right, under our state and federal charters, to be informed of the criminal charge against him so he will be able to

² U.S. Const. amend. VI provides, "In all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . ." Washington Const. art. I, § 22 provides, "In criminal prosecutions, the accused shall have the right to . . . demand the nature and cause of the accusation"

prepare and mount a defense at trial.” State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

Where a challenge to the constitutional sufficiency of a charging document is raised for the first time on appeal, this Court applies the "liberal construction" test set forth in Kjorsvik: "(1) do the necessary elements appear in any form, or by fair construction can they be found, in the information, and if so (2) can the defendant show he was actually prejudiced by the inartful language." McCarty, 140 Wn.2d at 425 (citing Kjorsvik, 117 Wn.2d at 105-106). "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). And, if the necessary elements are not found, prejudice is presumed and reversal required without reaching the question of actual prejudice. McCarty, 140 Wn.2d at 425. Review is de novo. State v. Johnson, 180 Wn.2d 295, 300, 325 P.3d 135 (2014).

Tolentino was charged in count 1 with Alien in Possession of a Firearm. Under Washington law:

It is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm, unless the person: (1) Is a lawful permanent

resident;³ (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173; or (3) meets the requirements of RCW 9.41.175.⁴

RCW 9.41.171.

The third amended information filed in Tolentino's case provides as follows regarding count 1:

That the said RODOLFO TOLENTINO-CUEVAS in the County of Benton, State of Washington, on or about the 13th day of September, 2014, in violation of RCW 9A.41.171, was not a citizen of the United States and did carry or possess a firearm, to wit: a .40 caliber hand gun without having obtained a license pursuant to RCW 9.41.173, contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Washington.

CP 12.

The third amended information was constitutionally deficient because it failed to inform Tolentino that the State was required to

³ "‘Lawful permanent resident’ has the same meaning afforded a person ‘lawfully admitted for permanent residence’ in 8 U.S.C. Sec. 1101(a)(20).” RCW 9.41.010(12). “Lawfully admitted for permanent residence” means “the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed.” 8 U.S.C. sec. 1101(a)(20).

⁴ RCW 9.41.175 permits aliens who are not residents of Washington or citizens of Canada to carry and possess firearms without licenses if certain criteria are met, including possession of a valid visa and hunting license. See RCW 9.41.175(1). Tolentino did not qualify to possess a firearm under this statute. See 1RP 93 (no visa or hunting license).

prove he was not a lawful permanent resident and prove that he did not meet the requirements of RCW 9.41.175. Instead, the information merely indicates the State was required to prove he did not have a valid alien firearm license.⁵

While it is not necessary to use the precise words of a statute in the charging document, the words chosen must convey the same meaning and import. State v. Moavenzadeh, 135 Wn.2d 359, 362, 956 P.2d 1097 (1998); Kjorsvik, 117 Wn.2d at 108. The third amended information in Tolentino's case fails to do so. Even under the most liberal of readings, it omits essential elements of the offense in count 1.

Finally, the fact that the information cites to the relevant statute does not save it. "The primary goal of a charging document is to give notice to the accused so that he or she can prepare an adequate defense, without having to search for the violated rule or regulations." State v. Armstrong, 69 Wn. App. 430, 433, 848 P.2d 1322 (citing Kjorsvik, 117 Wn.2d at 101-02), review denied, 122 Wn.2d 1005, 859 P.2d 602 (1993). Merely citing to the pertinent statute and naming the offense is insufficient unless that name

⁵ The first three versions of the information also omitted these elements. See CP 1 (information), 5 (first amended information), 7 (second amended information).

informs the defendant of each of the essential elements. State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995). That did not occur here.

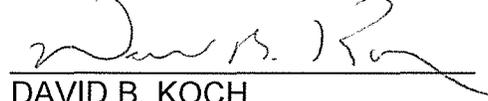
D. CONCLUSION

Tolentino's conviction for Alien in Possession of a Firearm must be reversed. See State v. Simon, 120 Wn.2d 196, 199, 840 P.2d 172 (1992) (proper remedy is reversal without prejudice to the State refiling the information and retrying the defendant).

DATED this 27th day of July, 2015.

Respectfully submitted,

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Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 27^h day of July, 2015, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Benton County Prosecuting Attorney
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Signed in Seattle, Washington this 27^h day of July, 2015.

x  _____