

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

NO. 33184-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

RODOLFO TOLENTINO-CUEVAS, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 14-1-01043-9

BRIEF OF RESPONDENT

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I. RESPONSE TO ASSIGNMENT OF ERROR

- A. **The State's charging document did omit an essential element that the defendant was not a lawful permanent resident; but the State was not required to prove that the defendant did not meet the requirements of RCW 9.41.175, instead, that is an affirmative defense.**

II. STATEMENT OF THE CASE

For purposes of responding to this appeal, the State will rely on the Statement of the Case provided in Appellant's Brief at pages 1 through 3.

III. ARGUMENT

- A. **The State's charging document should have included as an element that the defendant was not a lawful permanent resident.**

The defendant was charged in Count I with Alien in Possession of a Firearm under RCW 9.41.171, which reads as follows:

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,
- (2) has obtained a valid alien firearm license pursuant to RCW 9.41.173, or
- (3) meets the requirements of RCW 9.41.175.

CP 5.

The defense argues that all of the language included within the statute makes up the essential elements of this crime. However, many statutes include language that is not considered an essential element of the

crime. For example, RCW 69.50.4013 states: “It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.” It is well known that the elements of this crime are described in the first 11 words of the statute, “[i]t is unlawful for any person to possess a controlled substance,” and that the State is not required to prove the absence of a valid prescription. *See, e.g., State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (proving unlawful possession of a controlled substance requires proving only the nature of the substance and the fact of possession).

Similarly, in *State v. Carter*, 161 Wn. App. 532, 255 P.3d 721 (2011), the Court analyzed the statutory language of former RCW 9.41.190 (1999), which prohibits the possession of unlawful firearms, and determined that RCW 9.41.190(2) (1999) describes an affirmative defense, and not an element of the offense. That statute at the time read in pertinent part as follows:

(1) It is unlawful for any person to manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any machine gun . . . or any part designed and intended solely and exclusively for use in a machine gun . . . or in converting a weapon into a machine gun . . .

(2) This section shall not apply to:

(a) Any peace officer in the discharge of official duty or traveling to or from official duty, or to any officer or member of the armed forces of the United States or the state of Washington in the discharge of official duty or traveling to or from official duty; or

(b) A person . . . who or which is exempt from or licensed under federal law, and engaged in the production, manufacture, repair, or testing of machine guns

...

...

(3) It shall be an affirmative defense to a prosecution brought under this section that the machine gun . . . was acquired prior to July 1, 1994, and is possessed in compliance with federal law.

RCW 9.41.190 (1999). In concluding that RCW 9.41.190(2) (1999) constituted an affirmative defense, although not specifically indicated as an affirmative defense as is RCW 9.41.190(3) (1999), the Court stated that “it is generally held in criminal cases that, if the facts of an affirmative defense lie immediately within the knowledge of the defendant, the onus probandi, under the principle of “balancing of convenience,” should be his.” *Carter*, 161 Wn. App. at 541 (quoting *State v. Moses*, 79 Wn.2d 104, 110, 483 P.2d 832 (1971) (citing *United States v. Sisson*, 399 U.S. 267, 90 S. Ct. 2117, 26 L. Ed. 2d 608 (1970)); see also *State v. Fry*, 142 Wn. App. 456, 460-61, 174 P.3d 1258 (2008) (evidence of affirmative defense of medical use to charge of marijuana possession is more likely

within the defendant's knowledge).

In attempting to determine the essential elements of this offense, one discovers no pattern instruction in the Washington Practice Series, nor much guidance in case law. At first blush, the statute appears to lay out the essential elements in the first sentence: “[i]t is a class C felony for any person who is not a citizen of the United States to carry or possess any firearm” RCW 9.41.171. The three exceptions, then, appear to be affirmative defenses. However, the Court's reasoning in *State v. Ibrahim*, 164 Wn. App. 503, 269 P.3d 292 (2011), provides instruction with respect to the first exception listed in the statute.

In that case, the Court was analyzing former RCW 9.41.170 and concluded that its language violated equal protection because it required legal aliens to register their firearms. *Ibrahim*, 164 Wn. App. at 513-14. In holding that the statute violated equal protection, the Court stated that there was no lawful basis to “deny aliens legally in this county rights guaranteed by the constitution” including the right to bear arms. *Id.* at 514. With the principles of equal protection in mind, it is appropriate to read RCW 9.41.170 as to not distinguish between one who is a “lawful permanent resident” and one who is a “citizen.” Given that, when charging a violation of RCW 9.41.171, the State should be required to prove that the defendant is neither a citizen, nor a lawful resident. The State's

charging document in this case failed to do so, and consequently, it was deficient.

However, the State is less confident that the remaining two exceptions, whether the person has obtained a valid alien firearm license pursuant to RCW 9.41.173 or meets the requirements of RCW 9.41.175, constitute essential elements that the State must prove. Similar to RCW 9.41.190 (1999) and RCW 69.50.4013, a sensible reading of RCW 9.41.171 could lead one to conclude that the onus is on defendant to show that he has obtained a valid alien firearm license pursuant to RCW 9.41.173, or meets the list of requirements of RCW 9.41.175. Both of these inquiries require knowledge more immediately within the defendant's knowledge, and appear to require some interpretation of law, and thus, are more properly asserted initially to the court, rather than a jury.

The State respectfully awaits further instruction from the Court.

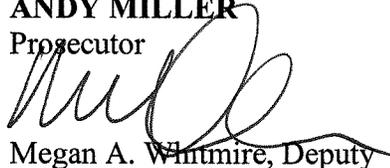
IV. CONCLUSION

Based upon the arguments above, the defendant's conviction as to Count I should be reversed and dismissed without prejudice.

RESPECTFULLY SUBMITTED this 13th day of October, 2015.

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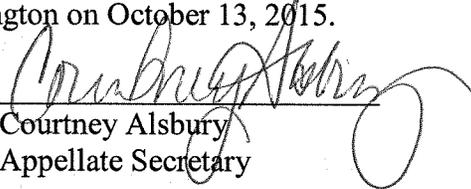
CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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Signed at Kennewick, Washington on October 13, 2015.



Courtney Alsbury
Appellate Secretary