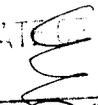


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COURT OF APPEALS
B. COLACURCIO

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STATE OF WASHINGTON
BY  DEPUTY

NO. 33193-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

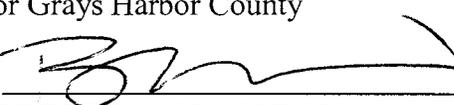
JACOB L. T. MINOR,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE GORDON GODFREY,
JUDGE OF SUPERIOR COURT, PRESIDING

STATE'S RESPONSE TO APPELLANT'S MOTION FOR
ACCELERATED REVIEW

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BY: 
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I. PRELIMINARY MATTERS

1A¹. IDENTITY OF RESPONDING PARTY

Comes now the State of Washington through Senior Deputy Prosecuting Attorney Brett D. Colacurcio, in response to the Motion For Accelerated Review filed by counsel for the appellant herein.

B-D. STATEMENT OF THE CHARGE AND DISPOSITION

The respondent does not object to the appellant's statement.

E. STATEMENT OF DISPOSITION URGED BY RESPONDING PARTY

The respondent asks this court to affirm the adjudication below and uphold the disposition imposed by the trial court.

F. SUMMARY OF ISSUES RELATING TO ALLEGED ASSIGNMENTS OF ERROR

1-3. While the predicate-offense court assumedly failed to notify the respondent of his lost firearms rights, this fact alone is not fatal to a subsequent conviction for unlawful possession of a firearm in the first degree.

¹

Headings and enumeration follow those of the appellant to the extent possible

- 4-5. The trial judge did not err when finding facts sufficient to warrant an exceptional sentence. The disposition imposed was not clearly excessive.
- 6-7. The court at a juvenile's bench trial and disposition may find the offense committed and impose an exceptional sentence without violating state or federal constitutional mandates.

II. STATEMENT OF THE CASE

The respondent does not object to the appellant's statement.

Additional facts are noted in context below.

III. ANALYSIS

1. Issues Relating to Notice of Non-Eligibility to Carry Firearms.

The state acknowledges that RCW 9.41.047 was not fully followed at the appellant's disposition for his 2003 Residential Burglary. A "check the box" error was made and the appellant was not notified in writing of the loss of his firearms rights. The record being silent on oral notification, we must assume for purposes of this appeal that the appellant was given no such notice. Such an error would not typically accrue to a defendant's benefit, due to the age-old common law maxim that "ignorance of the law

is no excuse.” This was analyzed in *State v. Leavitt*, 107 Wn. App. 361

(2001):

“The *Miller* court articulated the basic conflict here -- between the long-standing principle that "ignorance of the law is no defense" and the inherent unfairness of an authority figure, here, a sentencing judge, inadvertently misleading a defendant about his legal obligations such that the defendant relied on this misinformation to his detriment:

‘Reflecting the axiom that everyone is "presumed to know the law," the common law rule that "ignorance of the law is no excuse" admitted of few exceptions. The common law position was based on the fact that most common law crimes were *malum in se*. Seen as "inherently and essentially evil without any regard to the fact of [their] being noticed or punished by the law of the state," BLACK'S LAW DICTIONARY 959 (6th ed.1990), ignorance of the prohibition of such crimes was simply untenable. The rationale underlying the rule is less compelling for crimes that are *malum prohibitum*, viz., acts that are "wrong because prohibited," not by virtue of their inherent character. BLACK'S LAW DICTIONARY 960 (6th ed. 1990). Yet, the proposition that ignorance of the law is no excuse generally maintains with respect to crimes *malum prohibitum*, largely for pragmatic purposes. Although leading at times to seemingly "unfair" results, rigid application of the rule promotes the policy it serves: "to encourage people to learn and know the law." . . . E.g., . . . Oliver W. Holmes, *The Common Law* 48 (1881)

Nonetheless, "[w]ith 'the increasing complexity of law, the multiplication of crimes *mala prohibita*, and a more exact definition of fundamental principles of criminal liability,' certain exceptions to the general rule have emerged." The exception at issue addresses the legal consequences of a violation of the criminal law by an individual who takes measures to learn what conduct the government has proscribed, but is misadvised by the government itself. A number of states have adopted statutes bearing on the subject, but Virginia has not.”

107 Wn. App. at 368-69 (citing *Miller v. Commonwealth*, 25 Va. App. 727 (1997) (footnotes omitted)).

Under what circumstances may a defendant successfully claim ignorance of the law as a defense? In *Leavitt*, the appeals court was confronted with a real mess of a sentencing hearing. To start with, the sentencing court used an outdated plea form, which lacked required notices. *Id.*, at 367 (footnote 7). The court imposed a one-year sentence which included “no possession of firearms (forfeit guns)” and stated,

“Termination date is to be 1 year(s) after date of sentence.”

Id., at 363.

Importantly, Mr. Leavitt showed a good-faith effort to comply with the misunderstood conditions of his sentence.

Id., at 363-64.

The *Leavitt* court noted that the sentencing court made “express ‘affirmative assurances’” in the Virginia case of *Miller v. Commonwealth*, *supra*. The *Leavitt* court recognized that although no such express assurances were made to Mr. Leavitt, the court here failed to advise Leavitt that he lost his right to possess firearms for an indefinite period as required by statute, gave Leavitt written notice of an apparently one-year firearm-possession restriction, and implicitly allowed Leavitt to retain his concealed weapon permit. *These combined actions and inactions of the predicate-sentencing court misled Leavitt reasonably to understand that his firearm possession restriction was limited to one year. . . .*

“Under these unique circumstances, it would be a denial of due process to require Leavitt to speculate about additional firearm-possession restrictions beyond his one-year probation where the sentencing court did not inform him otherwise, in spite of the Legislature's clear requirement to do so. . . .

Accordingly, we hold that where a defendant can demonstrate actual prejudice arising from a sentencing court's failure to comply with the statute's mandate to advise him about the statutory firearm-possession prohibition, *RCW 9.41.047* cannot serve as the basis for convicting him of unlawful firearm possession. We reverse Leavitt's 1999 convictions for unlawful possession of a firearm.”

Id., at 628 (citations and footnotes omitted) (emphasis added).

Later Washington decisions have addressed this issue, typically hinging on whether the appellant was affirmatively misled by the predicate offense's sentencing court. This is the core issue in *State v. Carter*, 127 Wn. App. 713 (Div III, 2005):

Here, Mr. Carter contends that his due process rights were violated because the juvenile court failed to advise him that he could not possess firearms. At the time Mr. Carter was sentenced for burglary, the juvenile court was required to "notify the person, orally and in writing, that the person may not possess a firearm unless his or her right to do so is restored by a court of record." Former *RCW 9.41.047(1)(a)* (1994). The disposition order upon which the unlawful firearms possession charge is based contains no notification provision. There is nothing else in the record to indicate that Mr. Carter was notified in compliance with the statute.

Washington courts recognize that due process requires dismissal of an unlawful firearms possession charge when a court misleads a defendant into believing that his conduct was not prohibited and the defendant demonstrates prejudice. *State v. Moore*, 121 Wn. App. 889, 896, 91 P.3d 136 (2004), review denied 154 Wn.2d 1012, 114 P.3d 657, 2005 Wash. LEXIS 412 (Wash. May 5, 2005); *State v. Leavitt*, 107 Wn. App. 361, 372-73, 27 P.3d 622 (2001). In *Moore*, this court affirmed the trial court's dismissal of an unlawful possession of a firearm charge because the defendant was not advised that he lost his right to possess a firearm and he was affirmatively told that "he could put the ordeal behind him if he stayed out of trouble." *Moore*, 121 Wn. App. at 896. **In *Leavitt*, Division Two of this court reversed a conviction for unlawful firearm possession where under the unique circumstances of the case, the court's combined actions and inactions misled the defendant to believe that his firearm possession restriction was limited to one year. *Leavitt*, 107 Wn. App. at 372. Here, while the predicate offense court apparently failed to inform Mr. Carter according to the**

statute, he was not affirmatively misled. Moreover, since he was convicted of a felony in 2002 and notified at that time that he was disqualified from firearms possession, Mr. Carter cannot establish prejudice. Accordingly, the court's denial of his motion was a proper exercise of discretion.

Id., at 720-21(emphasis added).

In the case at bar, there is no evidence that the respondent was misled by any affirmative actions of the predicate conviction's sentencing judge.

2-3. Disposition in This Case Was Appropriate.

The appellant correctly states the law relating to manifest injustice dispositions. To be upheld, a sentence outside the standard range must a) be supported by the record before the disposition judge, b) said record must clearly and convincingly support the conclusion that a disposition within the standard range would constitute a manifest injustice, and c) clearly be neither too lenient nor too excessive. RCW 13.40.230. *See also, State v. Rhodes*, 92Wn.2d 755 (1979).

The appellant's criminal record is accurately characterized by his counsel as "robust." Motion For Accelerated Review at 27. His criminal history is set out in the Predisposition Diagnostic Report as follows:

Jacob's criminal history dates back to June, 2000. He was given diversion on his first 3 offenses; possession of a

dangerous weapon from June 6, 2000, and assault in the fourth degree from February 20, 2001 and September 20, 2001.

On August 7, 2002, he was granted a CDDA in Pierce County on 3 counts of assault in the fourth degree and 1 count of minor in possession from July 14, 2002. A 26 week manifest injustice up sentence to JRA was suspended. He did not comply with any conditions and reoffended on September 23, 2002 by obstructing a police officer. On September 3, 2002 the CDDA was revoked and Jacob was given the remaining time of the original 26 week sentence and an additional 30 days on the obstructing charge. He entered Echo Glen on October 11, 2002 and was released to parole on March 28, 2003.

On November 6, 2003 Jacob was committed to JRA by this court on a charge of residential burglary which occurred on October 8, 2003 (a charge of assault in the fourth degree from October 5, 2003 is awaiting disposition). He was given a manifest injustice up sentence of 30 to 40 weeks and was placed at Maple Lane.

Jacob's parole has been revoked some 4 times. There were 4 warrants issued for his arrest while on parole. Violations have included: curfew, school, contact, and drug issues.

Since October 31, 2001 there have been 9 probation violations filed. Since October 31, 2001 there have been some 10 warrants issued. Truancy petitions were first filed in October, 2001.

Charges either dismissed or note filed upon by the prosecutor include: disorderly conduct from July 14, 2002, possession of drug paraphernalia from September 23, 2002, and theft in the third degree from October 8, 2003.

CP at 21.

There are other troubling aspects to this offense. A group of

minors were drinking alcohol when the respondent introduced a loaded .38 revolver into the mix. RP at 7. The consequences of this decision could easily have been tragic for the respondent and for others. The respondent tampered with the state's witness. RP at 8-9. He has shown serious disregard and downright contempt for authority of all sorts, as noted throughout the Predisposition Diagnostic Report. CP at 20-24. When he strikes out, his crimes are often violent (including four assaults and a prior possession of a dangerous weapon.) CP at 21. In all, a standard range sentence in this case would have clearly posed a serious and clear danger to society. The finding of a manifest injustice is well grounded in the record. The exhaustive efforts expended in prior JRA commitments and during parole and probation have led nowhere for Mr. Minor. When *outside* of a structured setting, he refuses to take prescribed medication. CP at 22. He gets expelled from treatment. When he does complete the intensive phase of a treatment program, he ignores aftercare. *Ibid.* He commits assaults in "the community, at home and at school," as well as in detention. *Ibid.* The list goes on and on.

To compound matters, the respondent is deeply involved in hard drugs. A brief summary appears in his predisposition report:

Jacob has used and been dependent on alcohol, marijuana, inhalants, amphetamines, hallucinogens and opiates. At the age of 5 he began using nicotine and at the age of 8 he was

smoking pot and using alcohol. Regular use began at age 11. Methamphetamine use also began at the age of 11 and valium use at 13. Jacob has also used ecstasy, mushrooms, and LSD. He has sole drugs and he comes from a family with a along history of substance abuse. He has 9 siblings who were (are) involved with drugs and his parents were interested in becoming counselors. He has also inhaled Formaldehyde extensively.

While in the community, Jacob never complied with orders to get involved in treatment programs. While at Echo Glen he completed the Exodus program and while at Maple Lane he completed the OMNI program. However, he never followed up with aftercare.

A U.A. taken on November 21, 2004 was positive for opiates and marijuana. Jacob was also arrested for minor in possession 2 times since September 17, 2004.

CP at 23.

Ultimately, the respondent has earned his sentence. Just as importantly, he needs it for his own sake and that of the community.

4. Exceptional Sentences Remain Available to Juvenile Court Judges.

Cases in Washington's juvenile courts are tried without a jury pursuant to RCW 13.04.021(2). Washington courts have repeatedly and consistently upheld this statute. See *State v. Schaaf*, 109 Wn.2d 1, 743 P.2d 240 (1987), its predecessors and progeny.

The appellant cites *Blakely v. Washington*, 124 S. Ct. 2531, *reh. denied* 125 S. Ct. 21 (2004) for the proposition that defendants are no longer subject to enhanced sentences. Mr. Blakely was an adult facing

criminal charges, and thus enjoyed the right to a jury trial under the 6th Amendment. Because his right to a jury trial was violated, his exceptional sentence was invalid. The appellant in this case is a juvenile found to have committed an offense. His right to a jury trial could not have been violated for the simple fact that he had no such right. Where the right to a jury was extended to sentencing considerations in *Blakely*, the appellant here has no such right to extend.

IV. CONCLUSION

The appellant was ineligible to carry a firearm. His asserted ignorance of the law, which prohibited him from carrying a firearm, is no excuse. Such a conviction should be upheld where, as here, no affirmative acts misled the offender into believing he could carry a handgun.

The record in this case fully justifies the disposition imposed. An exceptional sentence was available to the trial court and was appropriately applied. Finally, the *Blakely*, rationale is not applicable to juvenile cases.

For these reasons, the finding and disposition should be upheld.

Respectfully submitted,

By: 

BRETT D. COLACURCIO
Senior Deputy Prosecuting Attorney
WSBA #13858

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

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

STATE OF WASHINGTON,

No.: 33193-4-II

Respondent,

v.

**DECLARATION OF HAND DELIVERY
AND OF MAILING**

JACOB L.T. MINOR,

Appellant.

DECLARATION

I, Brett D. Colacurcio hereby declare as follows:

On the 29th day of August, 2005, I hand delivered an original and one copy of the State's Response to Appellant's Motion for Accelerated Review to Mr. David Ponzoha,, Clerk, Court of Appeals, Division II, 950 Broadway, Suite 300, Tacoma, WA 98402-4454, and mailed a copy to Peter B. Tiller, Attorney at Law, P. O. Box 58, Centralia, WA 98531, and to Jacob L.T. Minor #682274, c/o Green Hill School, 375 SW 11th Street, Chehalis, WA 98532, by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

