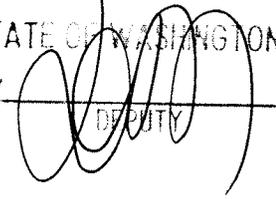


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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

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

NO. 39849-4-II

STATE OF WASHINGTON,

Appellant,

vs.

KENNETH EUGENE LAMB

Respondent.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON IN AND FOR
THE COUNTY OF CLALLAM
CAUSE NO. 91-8-00025-0

BRIEF OF RESPONDENT

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ASSIGNMENTS OF ERROR

That the respondent's Motion to Vacate the Order of Disposition and Withdraw the Plea of Guilty was erroneously granted.

That the appellant's Motion for Reconsideration was erroneously denied.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Whether the juvenile court abused its discretion in granting the respondent's Motion to Vacate his Order of Disposition and Withdraw his Plea of Guilty or in denying the appellant's Motion for Reconsideration

STATEMENT OF THE CASE

On April 9, 2009 the State filed a thirteen (13) count information in cause 09-1-143-9 in the Superior Court of Washington in and for the County of Clallam (Superior Court) charging the respondent with three (3) counts of Theft of a Firearm and ten (10) counts of Unlawful Possession of a Firearm in the Second Degree.¹ The Unlawful Possession of a Firearm counts were based on the respondent's conviction in the Juvenile Division of the Superior Court of Washington in and for the County of Clallam (Juvenile Court) for Burglary in the Second Degree.²

The respondent was charged in Juvenile Court on April 1, 1991.³

¹ CP 11 at Finding of Fact (F.O.F.) VI, 13 at Conclusion of Law (C.O.L.) V, 33, and 47-52.

² CP 11 at F.O.F. VI, 12 at F.O.F. IX and C.O.L. II, 13 at C.O.L. V, 1RP 16-17.

³ CP 62.

On June 5, 1991, the respondent completed a Guilty Plea Statement (Statement) which the Court accepted, and changed his plea to guilty.⁴ The Court immediately held disposition, and entered an Order of Disposition (Disposition) which included five (5) days of detention, six (6) months of community supervision, twenty-four (24) hours of community service, and a fine of twenty-five dollars (\$25.00).⁵ Nowhere do these documents include any mention that changing his plea to guilty, or being adjudicated for this crime would affect, let alone terminate the respondent's firearms rights.⁶ The Juvenile Court's file contains nothing to indicate the respondent was ever notified this adjudication would terminate or even affect his firearm's rights.⁷

The respondent has and had at the time of this adjudication a long family history of firearms and firearms usage.⁸ The respondent had been exposed to and used firearms since he was old enough to hold one, and went on family outings and picnics which included target shooting with his parents.⁹ He has carried on that tradition with his own family.¹⁰ The respondent also uses and has used firearms for potential self-defense and defense of his family, as well as to teach his children gun safety.¹¹

⁴ CP 58-61. 1RP 16-18.

⁵ CP 53-57.

⁶ CP 10 at F.O.F. I, and 53-61.

⁷ 1RP 48-49.

⁸ 1RP 18-20. CP 43.

⁹ *Id.*

¹⁰ 1 RP 20.

¹¹ *Id.* at 18-19. CP 43

The respondent's parents were involved with him during the pendency of this burglary charge; while he contemplated the prosecution's offer of settlement; and when the respondent accepted the plea offer, completed the Statement, changed his plea to guilty, and the Disposition was entered.¹² The respondent's parents recommended that the respondent accept the plea offer; however, they never discussed any ramifications being adjudicated for this offense would have on the respondent's firearms rights because there was no indication that being adjudicated would affect those rights.¹³ The respondent's father would have at least mentioned to the respondent that being adjudicated for this offense would affect his firearms rights for the respondent's consideration whether to accept the plea offer.¹⁴

The respondent considered this burglary charge weak.¹⁵ The respondent none the less changed his plea to guilty because he considered the recommendation, which contained no mention that such a disposition would affect or terminate his firearms rights, favorable or even lenient.¹⁶ The respondent never would have accepted the plea offer, completed or entered the Statement, or changed his plea to guilty had he known doing so would affect or terminate his firearms rights.¹⁷

¹² 1 RP 28-29.

¹³ 1 RP 28-30.

¹⁴ 1 RP 30.

¹⁵ 1RP 18-19. CP 43.

¹⁶ 1 RP 17, 18. CP 12 at F.O.F. VIII, and 43.

¹⁷ 1 RP 17-18. CP 12 at F.O.F. IX, and 43.

Approximately six (6) years after being adjudicated, the respondent went to a second hand store in Port Angeles, and purchased a rifle so he could go hunting.¹⁸ The respondent completed all necessary paperwork for the purchase and background check, waited the required period, and picked up the rifle without any problems.¹⁹ Upon picking-up the rifle, the respondent went to a Port Angeles-area supermarket to purchase a hunting license and deer tag.²⁰ The respondent paid the required fees, accurately completed all necessary paperwork, and obtained the license and deer tag without any complications.²¹

Approximately six years after that, the respondent went camping with friends.²² A wildlife enforcement officer contacted them, and asked whether any of them had a weapon.²³ The respondent answered that he did, and handed the officer a pistol and his identification.²⁴ The officer took the pistol and identification and appeared to use his patrol vehicle's radio to run a check.²⁵ After checking the respondent's status, the officer returned the pistol and identification to the respondent; said, "Have a nice day;" and sent the respondent and his party on their way.²⁶ The respondent has suffered no criminal or legal repercussions as a result of

¹⁸ 1 RP 8-9, 23. CP 11 at F.O.F. V, 43, and 45.

¹⁹ 1 RP 9, 23-24. CP 11 at F.O.F. V, 43, and 45.

²⁰ 1 RP 9-10, 24-26. CP 11 at F.O.F. V, 43 and 45.

²¹ *Id.*

²² 1 RP 12, 21-22. CP 11 at F.O.F. V, 43, and 46.

²³ 1 RP 13, 21. CP 11 at F.O.F. V, 44, and 46.

²⁴ 1 RP 13, 21-22. CP 11 at F.O.F. V, 44, and 46.

²⁵ 1 RP 13-14, 22-23. CP 11 at F.O.F. V, 44, and 46.

²⁶ 1 RP 13, 22-23. CP 11 at F.O.F. V, 44, and 46.

the contact with the wildlife officer or purchasing the rifle, hunting license, or deer tag.²⁷

After his motion to dismiss under *State v. Knapstad* was denied in the pending Superior Court cause, the respondent filed a Motion to Vacate Order of Disposition and Withdraw Plea of Guilty (Motion) in this cause.²⁸ After response and reply briefs,²⁹ the Juvenile Court held a hearing on whether to grant the Motion.³⁰ After taking testimony and reviewing the documents, exhibits, and testimony; and arguments, the Juvenile Court granted the Motion because it concluded that failing to do so would constitute a gross miscarriage of justice and be fundamentally unfair in view of all the facts and circumstances of this case.³¹

One week later on September 30, 2009, the Court entered Findings of Fact; Conclusions of Law; and Order Granting Motion to Vacate Order of Disposition and Withdraw Plea of Guilty (Findings and Conclusions).³² Upon entering the Findings and Conclusions, the Court clarified its ruling, giving additional reasons for granting the Motion.³³ The State immediately filed a Notice of Appeal.³⁴

On October 26, 2009 the State filed a Motion for Reconsideration and Memorandum in Support of Motion for Reconsideration (Reconsi-

²⁷ 1 RP 9-10, 13, 15, 23, 24. CP 11 at F.O.F. V, 44, 45, and 46.

²⁸ CP 29-52.

²⁹ CP 21-21 and 16-20.

³⁰ CP 14.

³¹ 1 RP 52-53. CP 14.

³² 2 RP. CP 10-13, and 9.

³³ 2 RP 11-13.

³⁴ CP 4-8

deration). The Court denied the Reconsideration on November 18, 2009.

ARGUMENT

Not until 1935 did the State prohibit those convicted of a crime of violence from owning or possessing pistols, leaving intact their right to own or possess rifles.³⁵ “Crime of violence” meant Murder, Manslaughter, Rape, Mayhem, Robbery, Burglary, or Kidnapping; or an attempt to commit any of those felonies.³⁶ “Crime of violence” also meant First, but not any other, degree Assault or an attempt.³⁷ Violating this statute was apparently a gross misdemeanor or class B felony at the court’s discretion.³⁸

This remained the law for twenty-six years until the State made its violation a class B felony.³⁹ Another twenty-two years elapsed before the State again amended the law to make owning or possessing a short firearm or pistol after having been convicted of a crime of violence or a crime in which a firearm was displayed or used, or a violation of the Uniform Controlled Substances Act a class C felony.⁴⁰ “Short firearm” meant any firearm with a barrel less than twelve inches long.⁴¹ “Crime of violence” was amended to include all class A felonies; attempts, conspiracy, or solicitation to commit class A felonies; Manslaughter; Inde-

³⁵ Laws of 1935, ch. 172, § 4.

³⁶ *Id.*, at § 1.

³⁷ *Id.*

³⁸ *Id.*, at § 16.

³⁹ Laws of 1961, ch. 124, § 3.

⁴⁰ Laws of 1983, ch. 232, § 2.

⁴¹ *Id.*, at § 1(1).

cent Liberties; the second degree offenses of Rape, Kidnapping, Arson, Assault, Burglary, or Robbery; and First Degree Extortion.⁴²

This law remained intact until 1992 when the State included adjudications for juvenile offenses equivalent to crimes of violence, felonies in which a firearm was displayed, or violations of the Uniform Controlled Substances Act among the predicate offenses terminating one's right to bear, keep, own, or possess firearms; and made one so adjudicated subject to being charged, adjudicated or convicted, or punished for Unlawful Possession of a Firearm.⁴³ This amendment terminated the firearms rights of those adjudicated guilty of qualifying juvenile offenses and made them subject to conviction for Unlawful Possession of a Firearm;⁴⁴ so when this adjudication occurred, it could and did not form the predicate offense for a prosecution for Unlawful Possession of a Firearm.

Only two years later the State made more explicit that adjudication of qualifying juvenile offenses terminated one's firearms rights and subjected him to charging, adjudication or conviction, and punishment for the crime or juvenile offense of Unlawful Possession of a Firearm.⁴⁵ This amendment also deprived everyone adjudicated or convicted of a serious or domestic violence offense, or felony in which a firearm was used or displayed of his firearms rights and made him subject to the law of Unlawful Possession of a Firearm; and defined "serious offense" to

⁴² *Id.*, at § (2)(a).

⁴³ Laws of 1992, ch. 205, § 118.

⁴⁴ *Id.*

⁴⁵ Laws of 1994, ch. 7, § 402 (Sp. Sess.).

include any crime of violence, Second Degree Child Molestation, Controlled Substances Homicide, Incest, Indecent Liberties, Leading Organized Crime, Promoting Prostitution, Vehicular Assault and Homicide, any felony with a deadly weapon verdict, or any class B felony with a sexual motivation finding.⁴⁶

Within another year the State again changed the law to essentially its current form which terminates the right to bear, keep, own, or possess firearms of everyone adjudicated or convicted of any felony; and makes such persons subject to the Unlawful Possession of a Firearm law.⁴⁷ Within one more year, however, the State again amended the law to include adjudications or convictions for gross misdemeanor domestic violence offenses among the predicates for termination of the right to bear, keep, own, or possess firearms, and for charging, adjudication or conviction, and punishment for Unlawful Possession of a Firearm.⁴⁸

**Motion to Vacate Order of Disposition
and Withdraw Plea of Guilty**

A court may grant relief from an Order for a variety of reasons.⁴⁹ Whether to vacate an Order pursuant to CrR 7.8(b)(5) is a matter within the trial court's sound discretion.⁵⁰

⁴⁶ *Id.*, at §§ 401(12) & 402(1).

⁴⁷ Laws of 1995, ch. 129, § 16.

⁴⁸ Laws of 1996, ch. 295, § 2.

⁴⁹ **RELIEF FROM JUDGMENT OR ORDER**

....

A respondent may withdraw his plea of guilty.⁵¹ A court must allow respondents to withdraw their pleas of guilty to correct manifest injustices.⁵² “Manifest injustice is proved by showing that the plea is involuntary.”⁵³ “A ”manifest injustice” is “an injustice that is obvious, direct, overt, not obscure”⁵⁴ Four non-exclusive examples of manifest injustice are ineffective assistance of counsel, the respondent's not authorizing or ratifying the plea, the prosecution's not keeping the plea

(b)...On motion and upon such terms as are just, the court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

....

(4) The judgment is void; or

(5) Any other reason justifying relief from the operation of the judgment.

CrR 7.8.

⁵⁰ *State v. Aguirre*, 73 Wn.App. 682, 686, *rev.den.*, 124 Wn.2d 1028 (1994).

⁵¹ **Withdrawal of Plea.** The court shall allow a defendant to withdraw the defendant's plea of guilty whenever it appears that the withdrawal is necessary to correct a manifest injustice. If the defendant pleads guilty pursuant to a plea agreement and the court determines under RCW 9.94A.090 that the agreement is not consistent with (1) the interests of justice or (2) the prosecuting standards set forth in RCW 9.94A.430-460, the court shall inform the defendant that the guilty plea may be withdrawn and a plea of not guilty entered. If the motion for withdrawal is made after judgment, it shall be governed by CrR 7.8.

CrR 4.2(f).

⁵² *State v. Moors*, 108 Wn.App. 59, 62 (2001) (citing *State v. Walsh*, 143 Wn.2d 1, 6 (2001)). *Accord State v. Hunt*, 107 Wn.App. 816, 829 (2001) (citing CrR 4.2(b); and *State v. Ross*, 129 Wn.2d 279, 283 (1996)).

⁵³ *Hunt*, *supra* n. 52 (citing *State v. Saas*, 118 Wn.2d 37, 42 (1991); and *State v. Taylor*, 83 Wn.2d 594, 597 (1974)); and *Personal Restraint of Mayer*, 128 Wn.App. 694, 704 (2005) (citing *Taylor*, *ante* at 598; and *State v. McDermond*, 112 Wn.App. 239, 243 (2002)).

⁵⁴ *State v. Zumwalt*, 79 Wn.App. 124, 128 (1995) (quoting *Saas*, *supra* n. 53).

agreement, and an involuntary plea.⁵⁵ Whether a plea was made voluntarily requires a respondent to make his plea voluntarily, competently, and with an understanding of the charges and consequences of the plea.⁵⁶

“Due process requires that a guilty plea be knowing, voluntary, and intelligent.”⁵⁷ “A plea is not knowing, voluntary, or intelligent unless the [respondent] correctly understands its direct sentencing consequences.”⁵⁸ “A sentencing consequence is 'indirect' or 'collateral' if it 'flows not from the guilty plea itself but from additional proceedings.’”⁵⁹ “A sentencing consequence is 'direct' if it will have 'a definite, immediate and largely automatic effect on the range of the [respondent's] punishment.’”⁶⁰ A respondent's mistake about a direct consequence of his disposition renders his plea not knowing, intelligent, and voluntary, entitling him to withdraw his plea.⁶¹ The prosecution, defense, and court sharing a mistake strengthens the basis for allowing a respondent to withdraw his plea of guilty.⁶²

⁵⁵ *Zumwalt*, *supra* n. 54 (citing *Saas*, *supra* n. 53).

⁵⁶ *Zumwalt*, *supra* n. 54 (citing CrR 4.2(d)).

⁵⁷ *Mayer*, *supra* n. 53, at 703 (2005) (citing *Boykin v. Alabama*, 395 U.S. 238, 242, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969)).

⁵⁸ *State v. Kissee*, 88 Wn.App. 817, 821 (1997) (citing *Ross*, *supra* n. 52, at 284; *State v. Ward*, 123 Wn.2d 488, 512 (1994); *State v. Miller*, 110 Wn.2d 528, 531 (1988); *Wood v. Morris*, 87 Wn.2d 501, 513-14 (1976); and *State v. Moore*, 75 Wn.App. 166, 172-73 (1994)).

⁵⁹ *Kissee*, *supra* n. 58, at 822 (citing *Ross*, *supra* n. 52, at 285; *Ward*, *supra* n. 58, at 513; and *State v. Barton*, 93 Wn.2d 301, 305 (1980)).

⁶⁰ *Kissee*, *supra* n. 58, at 821-22 (citing *Ross*, *supra* n. 52, at 284; *Ward*, *supra* n. 58, at 512-13; and *State v. Olivas*, 122 Wn.2d 73, 96 (1993)).

⁶¹ *Kissee*, *supra* n. 58, at 822.

⁶² *Id.*

The State's own actions belie the appellant's reliance on *State v. Ness* for the proposition that the termination of one's firearms rights is only a collateral consequence of being adjudicated or convicted of a qualifying predicate offense. *Ness* was decided in 1993.⁶³ The State apparently disagreed with this holding of *Ness*; for the very next year it mandated that whenever one was adjudicated or convicted of a qualifying predicate offense the sentencing court explicitly notify him orally and in writing that he had just lost his right to bear, keep, own, or possess firearms and those rights would remain terminated unless or until a court of record had restored them.⁶⁴ Failure to provide this required warning prevents subsequent prosecution, adjudication or conviction, or punishment.⁶⁵ The remedies for violating this notice requirement are strict: subsequent prosecutions or adjudications or convictions for Unlawful Possession of a Firearm must be reversed or dismissed.⁶⁶

⁶³ *State v. Ness*, 70 Wn.App. 817 (1993), *rev.den.*, 123 Wn.2d 1009 (1994).

⁶⁴ At the time a person is convicted or found not guilty by reason of insanity of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.320, *71.34.090, or chapter 10.77 RCW for mental health treatment, the convicting or committing court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity.

The convicting or committing court also shall forward a copy of the person's driver's license or identicard, or comparable information, to the department of licensing, along with the date of conviction or commitment. Laws of 1994, ch. 7, § 404 (Sp.Sess.) (codified at RCW 9.41.047).

⁶⁵ *State v. Minor*, 162 Wn.2d 796, 804 (2008).

⁶⁶ *Id.*

Furthermore, this statute shows that the loss of firearms rights for adjudication or conviction of a qualifying predicate offense is punishment. The statute reads that conviction of a qualifying predicate offense makes the convicted person ineligible to possess firearms,⁶⁷ and goes on to forbid the convicted person from possessing a firearm unless a court of record restores the right,⁶⁸ clearly showing that conviction of a qualifying predicate offense terminates the convicted person's firearms rights. Termination is a punishment, shows punishment, and is the language of punishment. The specific use of "right" is significant; for deprivation of a right must be punishment, and a right can only be restored if first lost as punishment.

A consequence is collateral when another entity is responsible for imposing the consequence, and direct when it is the sentence of the court that is responsible for imposing the consequence.⁶⁹ A consequence which may result from a proceeding or is not part of or enmeshed in the proceeding is collateral.⁷⁰ The respondent lost his firearms rights and became subject to the Unlawful Possession of a Firearm law solely because of this adjudication. Nothing else, no one else, or no other entity had to do, or did, a thing for that to happen. The loss of his firearms rights can not be collateral; therefore, this loss must be direct. RCW 9.

⁶⁷ RCW 9.41.047(1).

⁶⁸ *Id.*

⁶⁹ *State v. Martinez-Lazo*, 100 Wn.App. 869, 877 (citing *Personal Restraint of Peters*, 50 Wn.App. 702, 704 (1988)), *rev.den.*, 142 Wn.2d 1003 (2000)).

⁷⁰ *Martinez-Lazo*, *supra* n. 69 (citing *United States v. George*, 869 F.2d 333, 337 (7th Cir. 1989)).

41.047's enactment in 1994 did not make the loss of firearms rights a direct consequence, it recognized that fact contrary to *Ness* and to remedy *Ness*.

One reason for not warning the respondent this adjudication would terminate his firearms rights and make him subject to the Unlawful Possession of a Firearm law was that the requirement for such a warning did not come into existence until three years later. A better reason is that this disposition did not affect his firearms rights or make him subject to the Unlawful Possession of a Firearm law. The State's amending the Unlawful Possession of a Firearm law after disposition caused this adjudication to terminate his firearms rights and subjected the respondent to the Unlawful Possession of a Firearm law. Amending this law increased the punishment and the standard of punishment, emphasizing the directness of this consequence.

Neither the Guilty Plea Statement nor the Order of Disposition makes any mention of firearms, let alone that this conviction would affect or terminate the respondent's rights to bear, keep, or possess firearms. The respondent was never told or warned that being convicted of this charge would affect or terminate his right to bear, keep, or possess firearms.⁷¹

The Plea was involuntary because it was made without knowledge that a consequence would be that his right to bear, keep, or possess firearms would be terminated. Vacating the Order was necessary to cor-

⁷¹ CP 43-44.

ect a mistake under which all parties to this case were operating; inadvertence at not warning the respondent that accepting this plea bargain would terminate his right to bear, keep, or possess firearms; surprise at learning only after eighteen years and official contacts with the State of Washington that his firearms rights had been terminated; neglect at not seeking to vacate this Order sooner which neglect was excusable because until the respondent was charged in cause 09-1-143-9 he did not know that this conviction had terminated his right to bear, keep, or possess firearms; and irregularity in obtaining a conviction and disposition based on a plea which was involuntary because it was made in the belief that it would not affect the respondent's firearms rights.

Dispositions based on involuntary guilty pleas are void, and violate respondents' rights to due process of law.⁷² "...[W]ithout an accurate understanding of the relation of the facts to the law a [respondent] is unable to evaluate the strength of the State's case and thereby enter a knowing and intelligent guilty plea."⁷³ "An involuntary plea produces a manifest injustice."⁷⁴ Vacating this Order is necessary to correct a void judgment and a manifest injustice, and prevent a manifest injustice enforcement of this Order would cause because holding the respondent

⁷² *State v. Olivera-Avila*, 89 Wn.App. 313, 317-18 (1997) (citing *State v. Boyd*, 21 Wn.App. 465, 478 (1978), vacated in *State v. Holsworth*, 93 Wn.2d 148 (1980)); and *Mayer*, supra n. 53, at 703 (citing *Boykin*, supra n. 57).

⁷³ *Mayer*, supra n. 53 at 705 (citing *State v. Chervenell*, 99 Wn.2d 309, 319 (1983); and *State v. DeRosia*, 124 Wn.App. 138, 150 (2004)).

⁷⁴ *Personal Restraint of Matthews*, 128 Wn.App. 267, 270 (2005) (citing *Personal Restraint of Isadore*, 151 Wn.2d 294, 298 (2004)); and *Personal Restraint of Fonseca*, 132 Wn.App. 464, 468 (2006) (citing *Isadore*, ante).

criminally liable for Unlawful Possession of a Firearm when he had no notice that his right to bear, keep, or possess firearms had been terminated would be an injustice obvious, directly observable, overt, or not obscure.⁷⁵

The appellant's reliance on *State v. Schmidt* is misplaced. *Schmidt's* issue was whether the convictions in the instant case, Unlawful Possession of a Firearm, should be dismissed for violating the constitutional prohibitions against *ex post facto* laws.⁷⁶ The validity of the petitioners' predicate convictions were not in issue. *Schmidt* contains nothing to indicate the petitioners challenged those convictions, that those predicate convictions were based on pleas instead of trials, or that the petitioners ever moved to withdraw their pleas if they existed.⁷⁷ *Schmidt's* issue was the constitutionality of the convictions for Unlawful Possession of a Firearm.⁷⁸ *Schmidt* never held that loss of the right to bear, keep, own, or possess firearms is not punishment.⁷⁹ Reading *Schmidt* to even suggest that the consequence of losing one's firearms rights is not punishment is ludicrous. Deprivation of a right must be punishment even if deprivation also serves other purposes, especially when that right is Constitutionally enumerated and fundamental.⁸⁰

⁷⁵ *Zumwalt, supra* n. 54.

⁷⁶ *State v. Schmidt*, 143 Wn.2d 658, 671 (2001).

⁷⁷ *Schmidt, supra* n. 76, 143 Wn.2d 658.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *District of Columbia v. Heller*, 554 U.S. ___, 128 S.Ct. ___, 171 L.Ed.2d 637, 657 (2008). *See also Heller, ante*, 171 L.Ed.2d at 683.

The Supreme Court of the United States in *District of Columbia v. Heller* held only recently that the right to keep and bear arms enshrined in the Second Amendment was a personal right and that the termination of that right is punishment, noting that among the *penalties* Roman Catholics suffered for not attending services in the Church of England was being forbidden to “keep arms in their houses.”⁸¹ By noting this penalty, *Heller* acknowledges, if not holds, that termination of the right to bear, keep, own, or possess firearms is punishment because a penalty is punishment. Furthermore, all of the cases on which the State relies were decided before *Heller*; therefore, their continuing validity for the propositions on which the State relies is questionable at best because they were not decided in light of *Heller*.

The State also misled the respondent to believe that his firearms rights were intact despite the adjudication in this case. After this adjudication, the respondent applied to purchase a rifle and a hunting license and deer tag and was subsequently contacted by a law enforcement officer while he was in possession of a firearm. Despite this adjudication, he was allowed to complete his purchase of the gun, license, and tag; and the wildlife officer took no enforcement action against him. These contacts gave him every reason to believe his firearms rights were intact. Even the State as well the respondent believed his firearms rights had not

⁸¹ *Heller*, *supra* n. 80, 171 L.Ed.2d at 652 (citing Blackstone, 4 *Commentaries on the Laws of England* 55 (1769) (emphasis added)).

been terminated. Affirmative misleading governmental information excuses ignorance of the law.⁸²

Motion for Reconsideration

Although there is a deadline of thirty (30) days from the entry of the decision for which review is sought,⁸³ the appellant could, and should, have waited until the Reconsideration had been filed and decided before filing the Notice of Appeal. The appellant could have appealed a denial of the Reconsideration which necessarily would have brought the granting of the Motion before the Court of Appeals. More importantly, motions for reconsideration are outside of the thirty (30) day deadline for filing notices of appeal.⁸⁴

Had the appellant filed a notice of appeal after denial of the Reconsideration instead of pursuing this unusual procedure; the Juvenile Court would not have had to entertain the respondent's Statement for Appeal at Public Expense, Motion to Pursue Appeal at Public Expense,

⁸² *Minor, supra* n. 65, at 802 (citing *State v. Leavitt*, 107 Wn.App. 361, 371 n. 13 (2001)).

⁸³ Notice of Appeal. Except as provided in rules 3.2(e) and 5.2(d) and (f), a notice of appeal must be filed in the trial court within the longer of (1) 30 days after the entry of the decision of the trial court which the party filing the notice wants reviewed, or (2) the time provided in section (e).

RAP 5.2(a).

⁸⁴ Effect of Certain Motions Decided After Entry of Appealable Order. A notice of appeal of orders deciding certain timely motions designated in this section must be filed in the trial court within (1) 30 days after the entry of the order, or (2) if a statute provides that a notice of appeal, a petition for extraordinary writ, or a notice for discretionary review must be filed within a time period other than 30 days after entry of the decision to which the motion is directed, the number of days after the entry of the order deciding the motion established by the statute for initiating review. The motions to which this rule applies are...a motion for reconsideration...

Id., at (e).

and Order of Indigency; the Office of Public Defense would not have had to consider the respondent's request for appointed counsel or appoint him counsel; this Court would not have had to initiate this appeal; the Clerk's Office would not have had to prepare Clerk's Papers or forward those papers or other pleadings to this Court; and a transcript of the September 23 and 30 hearings would not have had to have been ordered or prepared. Filing the Notice of Appeal made it possible that granting the Reconsideration would have been a useless act because granting the relief sought in the Reconsideration would have altered, in fact terminated, a decision under review by the Court of Appeals. The Juvenile Court would have had to grant the Reconsideration; and then this Court would have had to allow such a granting to be entered.⁸⁵ The respondent could have sought appellate review should the Juvenile Court have granted the Reconsideration.⁸⁶

The Reconsideration was properly denied because the appellant had ample time to present its authorities prior to the Juvenile Court's deciding the respondent's Motion because two months elapsed between the filing of the Motion and the filing of the Notice of Appeal and the Reconsideration

⁸⁵ Postjudgment Motions and Actions To Modify Decision. The trial court has authority to hear and determine (1) postjudgment motions authorized by...the criminal rules...The postjudgment motion or action shall first be heard by the trial court, which shall decide the matter. If the trial court determination will change a decision then being reviewed by the appellate court, the permission of the appellate court must be obtained prior to the formal entry of the trial court decision...

RAP 7.2(e).

⁸⁶ "...The decision granting or denying a postjudgment motion may be subject to review..." *Id.*

did not raise any consideration of authorities that could and should not have been raised before the Juvenile Court decided the Motion. Allowing the appellant to have proceeded in that fashion would have only rewarded the appellant for its own neglect.

The respondent was convicted of Indecent Liberties based on acts occurring in April 1986 for having sexual contact with someone less than fourteen (14) years of age even though the respondent was less than twelve (12) years of age at the time the crime occurred.⁸⁷ That crime, or that definition of Indecent Liberties, not only no longer exists;⁸⁸ the actions alleged have not constituted a crime since June 9, 1988.⁸⁹ Not until 2001 did any version of Indecent Liberties constitute a class A felony.⁹⁰

As argued above, not until 1935 were those those convicted of a crime of violence prohibited from owning or possessing pistols, leaving intact their right to own or possess rifles.⁹¹ “Crime of violence” meant Murder, Manslaughter, Rape, Mayhem, Robbery, Burglary, or Kidnapping; or an attempt to commit any of those felonies.⁹² “Crime of violence” also meant First, but not any other, degree Assault or an attempt.⁹³ “Crime of

⁸⁷ CP 59, 87-90.

⁸⁸ “A person is guilty of indecent liberties when he knowingly causes another person who is not his spouse to have sexual contact with him or another...(b) when the other person is less than fourteen years of age...” Laws of 1975, ch. 260, §9A. 88.100 (1st ex.sess.).

⁸⁹ Laws of 1988, ch 145, § 10; Laws of 1988, ch. 146, § 2; and Laws of 1988, at ii.

⁹⁰ Laws of 2001, ch. 359, § 12 (2d Sp.Sess.).

⁹¹ Laws of 1935, ch. 172, § 4.

⁹² *Id.*, at § 1.

⁹³ *Id.*

violence did not include Indecent Liberties.⁹⁴ Violating this statute was apparently a gross misdemeanor or class B felony at the court's discretion.⁹⁵ There was no provision for re-instating a defendant's right to possess pistols.⁹⁶

It was not until 1983 that the State amended this law to add Indecent Liberties to the list of offenses convictions of which terminated one's right to possess short firearms' or pistols, leaving intact such persons' right to possess rifles.⁹⁷ This statute made it impossible for one convicted of Indecent Liberties to ever possess a short firearm or pistol but left unaffected his right to possess rifles.⁹⁸ This statute for the first time created a mechanism for those convicted of qualifying offenses to re-instate their right to possess short firearms.⁹⁹ This statute forbid those convicted of Indecent Liberties from ever reinstating their right to possess short firearms, but did not apply to the respondent because it was not until at least 1992, after the respondent changed his plea and was adjudicated, that the law was amended to include juvenile adjudications within the offenses disqualifying one from possessing firearms, short or otherwise.¹⁰⁰ To include juvenile offenses in those disqualifying one from firearm possession, the State amended subsections one, three, and four to add "adjudicated",

⁹⁴ *Id.*

⁹⁵ *Id.*, at § 16.

⁹⁶ Laws of 1935, ch. 172; and Laws of 1961, ch. 124.

⁹⁷ Laws of 1983, ch. 232, § 2(1) & (5).

⁹⁸ *Id.*

⁹⁹ *Id.*, at (5).

¹⁰⁰ Laws of 1992, ch. 205, § 118(1) & (5).

“disposition”, and “fact-finding”.¹⁰¹ These terms are the language of the Juvenile Justice Act.

Conspicuously absent from this statute was any amendment to subsection five which is the operative subsection because that is the subsection which includes Indecent Liberties among the offenses which prevent firearms rights from ever being restored.¹⁰² This absence shows that the State intended juvenile adjudications not to create a life-time ban on the possession of short firearms because “fundamental fairness requires that a penal statute be literally and strictly construed in favor of the accused although a possible but strained interpretation in favor of the State might be found.”¹⁰³ The 1994 amendment corroborates this because it was that amendment which made it a crime for “an adult or juvenile”, to possess a firearm after having been “convicted” of a predicate offense.¹⁰⁴

The 1992 and 1994 amendments occurred after the respondent changed his plea, was adjudicated, and the disposition was entered in the Indecent Liberties case. As before, the respondent was never advised that changing his plea or being adjudicated in the Indecent Liberties case would affect his firearms rights, let alone that it would permanently terminate those rights.

The restrictions on re-instatement of firearms rights which require compliance with the “wash-out” rules of the Sentencing Reform Act did

¹⁰¹ *Id.*, at (1), (3), and (4).

¹⁰² *Id.*, at (5).

¹⁰³ *State v. Wilbur*, 110 Wn.2d 16, 19 (1988) (quoting *State v. Hornaday*, 105 Wn.2d 120, 127 (1986)).

¹⁰⁴ Laws of 1994, ch. 7, § 402 (Sp. Sess.).

not become effective until well after the respondent was convicted in this cause or of the Indecent Liberties. There is no showing that at the time respondent would have been able to re-instate his firearms rights, had he know he had any need to, he would not have been able to; therefore, this does not provide any basis for the Court to grant reconsideration.

The record does not support the plaintiff's contention that the Motion was untimely. "The time limit of RCW 10.73.090(1) is conditioned on compliance with RCW 10.73.110, requiring notice of its terms."¹⁰⁵ The juvenile court must advise the respondent at the time an order of disposition is entered of the time limit for filing collateral attacks.¹⁰⁶ Generally procedural rules which conflict with the right to challenge a manifest error affecting constitutional rights are not given dispositive effect,¹⁰⁷ including restrictions on the right to collateral review.¹⁰⁸ Because there is nothing in the record to show that the respondent was advised of the time limit on seeking collateral review, RCW 10.73.090 does not bar his Motion.¹⁰⁹

The Motion was brought under Criminal Rule 7.8(b)(1), (4), and (5) which provide that such motions must be brought within a reasonable time.¹¹⁰ *State v. Golden* held that eight and one-half years after entry of

¹⁰⁵ *State v. Golden*, 112 Wn.App. 68, 78 (2002) (citing *Personal Restraint of Vega*, 118 Wn.2d 449, 451 (1992)), *rev.den.*, 148 Wn.2d 1005 (2003).

¹⁰⁶ *Golden*, *supra* n. 105 (citing RCW 10.73.090 and 10.73.110).

¹⁰⁷ *Golden*, *supra* n. 105 (citing RAP 2.5).

¹⁰⁸ *Golden*, *supra* n. 105, at 78-79 (citing *State v. Brand*, 120 Wn.2d 365, 369 (1992)).

¹⁰⁹ *See Golden*, *supra* n. 105, at 78-79.

¹¹⁰ *Golden*, *supra* n. 105, at 79 (citing CrR 7.8(b)).

disposition was not an unreasonable time to bring a motion to withdraw a plea of guilty.¹¹¹

Here the respondent was never advised when he changed his plea or the dispositional order was entered that his ability to collaterally attack this adjudication was subject to strict time limitations. During the eighteen-year interval between the disposition and the filing of the charges in the matter pending in the superior court, the respondent had two official contacts with the State involving his possessing firearms. In each of those cases, the State gave no indication that there was any problem with his possessing a firearm, and actually approved his possession in one instance. It was not until the pending charges were filed that he was on notice that there was any problem with his possessing firearms. The Motion was filed within four (4) months of his being arrested and charged in the pending matter. Four months is not an unreasonable time; therefore, the Motion was not untimely.¹¹²

The crime of Indecent Liberties with which the respondent was charged, to which he pled guilty, and for which he was adjudicated no longer exists. More importantly, the act giving rise to that charge is no longer a crime, and has not been since 1988. Although Indecent Liberties was included in the offenses giving rise to terminating firearms rights when the respondent was adjudicated of that offense, that prohibition did not apply to him because when he was adjudicated juvenile offenses did affect

¹¹¹ *Id.*

¹¹² *See Golden, supra* n. 105, at 79.

firearms rights. It was not until 1994, eight years after the respondent was adjudicated for Indecent Liberties, that his firearms rights were terminated despite never receiving notice of that fact. After 1994, the State further conditioned re-instatement on compliance with the S.R.A.'s "wash-out" rules. There has been no showing that the respondent would not have been able to re-instate his firearms had he been aware of any need on his part to do so before compliance with the "wash-out" rules became a criterion for re-instatement. Finally, the respondent was never advised of the time limitations on collateral attacks; thus, the Motion was neither time-barred under RCW 10.73.090, nor made in an untimely fashion under CrR 7.8(b).

The respondent offered evidence, authorities, and arguments why the Juvenile Court should grant his Motion. The Court gave a detailed decision of its reasons for granting the Motion. Only one of the reasons was that it believed the respondent would have sought re-instatement as soon as possible had he known there was any need for such re-instatement.

CONCLUSION

Granting the Reconsideration because the respondent was convicted of a crime which has not been a crime for more than twenty (20) years for acts which have not been criminal for just as long would not have been just. Granting the Reconsideration because the "wash-out" rules might indicate the respondent was not eligible for re-instatement when those rules were not included in the criteria for re-instatement until well after this adjudication for Indecent Liberties was made to retroactively terminate the

respondent's firearms rights would not have been just. It would not have been just to grant the Reconsideration for an Indecent Liberties adjudication which did not affect the respondent's firearm's rights until eight (8) years later, especially when the respondent was never notified that his firearm's rights had been retroactively terminated. Granting the Reconsideration because the Motion was untimely would not have been just when the respondent was never advised of any time limit on his right to collateral attack and he brought his Motion within four (4) months of having actual notice that unbeknownst to him his eighteen (18) year old juvenile burglary conviction had retroactively and without notice terminated his firearms rights. Granting the reconsideration would also have been unjust where the State's own actions misled the respondent into believing his firearms rights were intact delaying his discovery that his firearms rights had been terminated, which necessarily delayed the filing of the Motion until he had actual notice that he had lost his firearms rights. For all these reasons, the Juvenile Court properly denied the Reconsideration which denial this Court should affirm.

The right to bear, keep, or possess firearms is very important to the respondent, and was so during the pendency of this case. The respondent considered this case weak; so he never would have accepted this plea agreement or entered this plea had he been warned or notified that accepting this settlement would terminate or even affect his right to bear, keep, or possess firearms.¹¹³ The failure to warn the respondent

¹¹³ CP 43-44.

that his firearms rights would be terminated rendered this plea involuntary, unintelligent, and unknowing; therefore, the respondent's Motion should have been granted. The respondent did not do anything until now about this case's terminating his right to bear, keep, or possess firearms because it was only the case pending in Superior Court that notified him his right to bear, keep, or possess firearms had been terminated.

The respondent changed his plea and was adjudicated in the not only reasonable but absolutely true belief his firearms rights would be unaffected. The State's subsequent legislative action upset that belief. The change of the respondent's plea could not have been voluntary because one can not knowingly and intelligently change his plea to guilty when new direct consequences are retroactively imposed. "An involuntary plea independently establishes a manifest injustice that warrants plea withdrawal."¹¹⁴ "A [respondent] may withdraw his guilty plea if it was invalidly entered or if its enforcement would result in a manifest injustice."¹¹⁵

The Court may grant relief from a judgment or order on such terms as are just.¹¹⁶ A motion to withdraw a plea of guilty is addressed to the trial court's sound discretion which should be exercised liberally in favor of life and liberty.¹¹⁷ Granting of the respondent's Motion was not errone-

¹¹⁴ *Mayer, supra* n. 53 at 704 (citing *Taylor, supra* n. 53, at 598; and *McDermond, supra* n. 53, at 243).

¹¹⁵ *Matthews, supra* n. 74 (citing CrR 4.2(f); and *Isadore, supra* n.74).

¹¹⁶ CrR 7.8.

¹¹⁷ *State v. Hensley*, 20 Wn.2d 95, 101 (1944) (citing *State v. Cimini*, 53 Wash. 268 (1909); *State v. Wilmot*, 95 Wash. 326 (1917); *State v. Lindskog*, 127 Wash. 647 (1923); *State v. Roberts*, 136 Wash. 359 (1925); *State v. Danhof*, 176 Wash.

ous under all the facts and circumstances of this case. More importantly, granting the Motion was just. For all these reasons, the appellant has not carried its burden of proving the Juvenile Court abused its discretion; therefore, this Court should affirm the Juvenile Court's decisions.

DATED this Sixteenth day of March, 2010.


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573 (1934); *State v. McKeen*, 186 Wash. 127 (1936); *State v. McDowall*, 197 Wash. 323 (1938); and *State v. Wood*, 200 Wash. 37 (1939)).

