

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

JOAQUIN DAVID GARCIA,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE TIMOTHY A. BRADSHAW

REPLY BRIEF

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A. ARGUMENTS IN REPLY

The trial court in this case erred by dismissing Garcia's charge of first-degree unlawful possession of a firearm by concluding as a matter of law that the State had failed to prove that Garcia received notice of his firearm prohibition in court in 1994 when he was convicted of the predicate offense. Garcia responds that this was not error.

His arguments fail because they are built on two false premises: (1) that a trial court may dismiss a prosecution pretrial by deciding as a matter of law that an affirmative defense has been established because the State failed to disprove it; and (2) that State v. Breitung¹ announced a per se rule requiring the State to prove that firearm-prohibition notice was given at the time of the predicate conviction, regardless of the defendant's actual knowledge. This court should reject Garcia's arguments and reverse the trial court's pretrial dismissal of the gun charge.

1. A TRIAL COURT MAY NOT DISMISS A CRIMINAL PROSECUTION PRETRIAL BY DECIDING AN AFFIRMATIVE DEFENSE HAS BEEN ESTABLISHED AS A MATTER OF LAW.

Garcia's first false premise is that a trial court in a criminal case may rule as a matter of law that an affirmative defense has

¹ 173 Wn.2d 393, 267 P.3d 1012 (2011).

been established — in this case because the State failed to disprove it — and then dismiss the charge pretrial pursuant to a Knapstad² motion under CrR 8.3(c). This argument has no basis in the law.

“Ignorance of the law is generally not a defense, and a convicted felon’s knowledge that his right to firearm ownership is prohibited is not an element of the crime of unlawful possession of a firearm.” Breitung, 173 Wn.2d at 402. Lack of firearm-prohibition notice is an affirmative defense, which a defendant must establish by a preponderance of the evidence. Id. at 403. The burden is on the defendant to prove that he “was not notified of his firearm prohibitions” at the time of the predicate conviction, “and did not otherwise have notice of the prohibition against possession of firearms” or actual knowledge. Id. at 404.

“An affirmative defense places a burden of proof on the defendant, thus shaping the defense by introducing elements it must prove.” State v. Cristine, 177 Wn.2d 370, 378, 300 P.3d 400 (2013). “An affirmative defense admits the defendant committed a criminal act but pleads an excuse for doing so.” State v. Fry, 168

² State v. Knapstad, 107 Wn.2d 346, 729 P.2d 48 (1986).

Wn.2d 1, 7, 228 P.3d 1 (2010). “An affirmative defense does not negate any elements of the charged crime.” Id.

To plead an affirmative defense, the defendant must meet a burden of production, i.e., he must present “evidence to support that theory.” State v. Fisher, ___ Wn.2d ___, 374 P.3d 1185, 1192 (2016). This evidence may come from whatever source that tends to show that the defendant is entitled to the instruction, including the State’s evidence. Id. at 1192-93. “A *defendant may not, however, point to the State’s absence of evidence in order to satisfy her burden.*” Id. at 1193 (emphasis added). “*Allowing a defendant to point to what essentially amounts to the absence of rebuttal evidence to an affirmative defense adds additional elements to the crime the State must prove.*” Id. If the burden of production is met, the defendant must then meet the additional burden of persuading the factfinder by a preponderance of the evidence that the elements of the affirmative defense are met. Id. at 1192.

A Knapstad motion, delineated by CrR 8.3(c), is a separate criminal procedure in which a trial court may dismiss a criminal case when the *agreed upon* facts show the prosecution’s case is missing an element necessary to prove the charged offense. Knapstad, 107 Wn.2d at 356-57. In a Knapstad motion, a

defendant alleges by sworn affidavit that there are no material disputed facts and that the undisputed facts do not establish a prima facie case of guilt. Knapstad, 107 Wn.2d at 356. If material factual allegations in the motion are denied or disputed, denial of the motion to dismiss is mandatory. Id. at 356. If not, the trial court considers the evidence and reasonable inferences therefrom in the light most favorable to the State. State v. Jackson, 82 Wn. App. 594, 608, 918 P.2d 945 (1996). Since the court is not to rule on factual questions, no findings of fact should be entered. Knapstad, 107 Wn.2d at 357.

Thus, a trial court may not dismiss a criminal case under CrR 8.3(c) based on an affirmative defense because under the Knapstad procedure, (1) it must not resolve disputed facts and (2) it must view all the evidence in the State's favor, which means wholly discounting affirmative defenses. An affirmative defense does not vitiate a prima facie case because, by definition, the defense concedes all the elements of the offense but claims a legal excuse. Fry, 168 Wn.2d at 7. Though the trial court here labeled its decision a question of law, its erroneous procedure amounted to a finding of fact that Garcia had proven an affirmative defense through the absence of the State's evidence.

The proper way to consider an affirmative defense in Garcia's case would be this: First, Garcia would give notice of his intention to plead such a defense (he has not yet done so). Then Garcia would have to concede to the jury that in King County, Washington, on November 5, 2014, he possessed a firearm after having been previously convicted of the crime of child rape in the first degree, a serious offense as defined in RCW 9.41.010. He would have the burden to present some affirmative evidence to the trier of fact that he did not know that his right to firearm ownership was prohibited. If he does so, the jury would be instructed on the affirmative defense. Then Garcia would have to persuade the jury by a preponderance of the evidence that he proved he lacked notice and knowledge. The State could rebut the defense with evidence of actual notice and knowledge.

Garcia argues that a criminal defendant may "advance an affirmative defense as a matter of law" in a Knapstad motion. Brief of Respondent (BOR) at 7. His sole authority for that proposition is a single clause in a single sentence in a 46-year-old civil case that addressed whether a pedestrian who doesn't look both ways before crossing the street has only himself to blame when he gets hit by a

car. Cakowski v. Oleson, 1 Wn. App. 780, 781, 463 P.2d 673 (1970) (“When an affirmative defense is urged as a matter of law, the question must be determined in light of the evidence most favorable to the plaintiff.”). There is no such procedure in criminal law.³ An affirmative defense is by definition a question for a factfinder. Garcia’s claim that a lack of evidence of in-court notice permits the trial court to rule “that Garcia had established the affirmative defense as a matter of law” and dismiss the charge is entirely erroneous.

Secondly, Garcia incorrectly claims that that there were no disputed facts, the threshold requirement of a Knapstad motion. Garcia argues, illogically, that “there is nothing in the record to suggest he was given oral notice ... [s]o Garcia did not receive oral and written notice.” But the record is clear that the State was eager to present rebuttal evidence of notice and actual knowledge through Garcia’s own admissions and behavior and his subsequent

³ And even the Cakowski court rejected the argument that a judge should have found contributory negligence as a matter of law in that case, saying “the burden of proof is on the defendant, and the court is seldom justified in removing the issue from the jury.” 1 Wn. App. at 781. Cakowski has been cited only five times in Washington appellate courts — and never for Garcia’s proposition. The last time a court of record cited Cakowski, in 1975, it was to point out that its “persuasiveness is mooted” by a supreme court opinion. See Johnson v. Strutzel, 14 Wn. App. 620, 622, 544 P.2d 47 (1975).

convictions,⁴ and the State disagreed with the trial court that the issue should be decided as a matter of law. RP 35-38.

In fact, the State never even agreed that Garcia was not given notice in court in 1994. It merely agreed that the written record did not show notice and the audio record was missing. Those are not the same, despite Garcia's fallacious argument to the contrary.⁵ Whether Garcia had notice or actual knowledge of his firearm prohibition was very much in dispute, making a Knapstad motion improper. Yet the trial court nevertheless decided that factual question as a matter of law. It erred.

Additionally, Garcia goes to great lengths to distinguish his case from State v. Mitchell⁶ because the State cited to Mitchell for a single point of law — that Breitung did not shift the burden to the State to prove notice. That point of law does not depend on the

⁴ Garcia correctly notes that in his 1998 guilty plea to unlawful firearm possession, the guilty plea appears to be based on having a gun while underage. CP 229. That does not change the relevance of his "paragraph 11" statement of facts in support of the conviction that "I was also convicted of a felony in 1994." That statement, made in the context of pleading guilty to unlawful gun possession, demonstrates his knowledge at least as early as 1998 that the 1994 rape conviction affected his gun rights. CP 233. That is only one piece of the State's evidence to prove Garcia's notice and knowledge of a firearm prohibition.

⁵ The fallacy of arguing that something is true because it has not been proven false is referred to as the *Argumentum ad Ignoratum* (argument from ignorance). William L. Reese, *Dictionary of Philosophy and Religion* 168 (1980).

⁶ 190 Wn. App. 919, 929, 361 P.3d 205 (2015) ("Neither Minor nor Breitung shifted the burden of establishing oral notice to the State") (citing State v. Minor, 162 Wn.2d 796, 174 P.3d 1162 (2008)).

particular facts of Mitchell. See Breitung, 173 Wn.2d at 403 (lack of notice is affirmative defense “which Breitung must establish by a preponderance of the evidence” and “Breitung affirmatively established” lack of in-court notice).

Nonetheless, Mitchell does not help Garcia here. In Mitchell, the court of appeals roundly rejected Mitchell’s argument that the State had the burden “to affirmatively establish evidence” of oral notice. Id. at 929. Garcia falsely avers that the Mitchell court “rejected Mitchell’s claim that the affirmative defense applied as a matter of law.” BOR at 11. The issue in Mitchell was whether any reasonable *factfinder* could have rejected his affirmative defense. Id. at 930. The court held that the State did not need to present any evidence for a jury “to conclude that Mitchell failed to prove the affirmative defense by a preponderance of the evidence.” Id. The burden of proof did not depend on the nature of the State’s rebuttal evidence.

The trial court here should not have ruled as a matter of law that Garcia had established an affirmative defense. Its dismissal of Garcia’s gun charge should be reversed.

2. GARCIA'S INSISTENCE ON A PER SE RULE IGNORES THE KEY FACTORS OF THE BREITUNG HOLDING.

The second false premise in Garcia's argument is his insistence that Breitung established a per se rule that requires that the State prove in-court notice or " 'otherwise' knowledge or notice" that is "contemporaneous to, or at least roughly contemporaneous to, the predicate conviction," or the charge must be dismissed. That interpretation should be rejected because it ignores most of our supreme court's holding in Breitung.

It bears repeating here that the entire holding of our high court in Breitung was this:

The State did not establish that Breitung otherwise had knowledge of the law or notice of the firearm prohibition. On the contrary, the record evidences a lack of actual knowledge on Breitung's part. Based on this record, we conclude Breitung was not notified of his firearm prohibition as required under RCW 9.41.047(1) and did not otherwise have notice of the prohibition against possession of firearms. Absent that notice, he is entitled to reversal of the unlawful possession of firearms conviction.

State v. Breitung, 173 Wn.2d at 404 (emphasis added).

Yet Garcia summarizes the holding this way: "Lack of evidence of written notification plus silent record as to oral notification establishes the affirmative defense." BOR at 12. In addition to improperly permitting a lack of evidence to support an

affirmative defense, Garcia's interpretation ignores these key factors of the Breitung holding:

- A lack of showing that Breitung "had knowledge of the law or notice of the firearm prohibition." 173 Wn.2d at 404.
- An affirmative record that "evidences a lack of actual knowledge on Breitung's part." Id.
- A conclusion that in addition to lack of in-court notice under RCW 9.41.047(1), Breitung "did not otherwise have notice of the prohibition against possession of firearms." Id.

If our supreme court had intended the per se holding that Garcia urges — and the trial court here followed — then this is all the supreme court would have held:

We conclude the State did not prove that Breitung was notified of his firearm prohibition as required under RCW 9.41.047(1). Absent that notice, he is entitled to reversal of the unlawful possession of firearms conviction.

Of course, that is not what our supreme court held. Actual notice and knowledge were critical to reversing Breitung's gun conviction, and our supreme court explicitly said so. Garcia's strained reasoning requires a wholesale revision of the holding. Similarly, if the supreme court had intended to limit the word

“otherwise” to mean some other lawyer in court at the time of “or at least roughly contemporaneous to” the predicate conviction, it would have said so. Instead, the high court chose to use the phrases “had knowledge,” “have notice,” and “actual knowledge,” instead of “received notice.” Garcia’s arguments are based on wishful thinking, without any actual support in Breitung.

Garcia downplays the inevitable effects of his interpretation as a “parade of horrors.”⁷ But in practice, what happened here would be the normal procedure: In every case of unlawful possession of a firearm, the State would have to produce, as a prerequisite to trial, the detailed written documents and verbatim oral records of the proceedings of any predicate conviction,⁸ however old or far away it was. If those records were not available for whatever reason, or did not happen to address firearm notice adequately, then the case would be dismissed, no matter how strong the evidence that the defendant knew that having a gun was a crime.

⁷ BOR at 17.

⁸ Or finding of not guilty by reason of insanity, or civil commitment order for mental health treatment. RCW 9.41.047(1); RCW 9.41.040.

Garcia appeals to the Second Amendment, but his interpretation would not protect those whom the legislature had in mind when it passed RCW 9.41.047(1) — responsible gun owners who are truly unaware of a prohibition — any more than Breitung's focus on actual notice does. The only real beneficiaries of a per se rule are felons such as Garcia⁹ who know they cannot have guns. At the very least, they would enjoy another costly procedural hurdle for the State to clear. And with luck, they might even become immune to prosecution thanks to a missing or incomplete archive.

This Court should reject such an interpretation and reverse the trial court's dismissal of Garcia's gun charge.

3. THIS COURT SHOULD NOT PRECLUDE THE STATE'S ABILITY TO SUBMIT A COST BILL LATER.

Garcia asks that this Court preclude the State from submitting a cost bill for this appeal, should it prevail, because Garcia has not been convicted. See RCW 10.73.160 (appellate costs limited to those incurred in prosecuting or defending appeal "from a criminal conviction"). However, RAP 14.4 anticipates situations such as this, and prescribes that a cost bill may be

⁹ Or misdemeanor domestic-violence offenders and people with dangerous mental illness. RCW 9.41.047(1); RCW 9.41.040.

submitted after the final determination of the trial court. RAP 14.4(b), (c). If there is no appeal from the final determination, the State has 30 days to submit a bill. RAP 14.4(b). If there is an appeal to this court from the final determination, i.e., a “second review,” a bill for the “costs of the earlier review” may be submitted at the same time as the bill for costs of the second review. RAP 14.4(c). This court should not rule out a cost bill at this stage because the issue is not ripe.

Additionally, no facts have been (properly) litigated to provide this Court with any relevant information, besides the defendant’s present indigency, upon which to base a ruling on appellate costs. It is a defendant’s future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). Because the record contains no information from which this Court could reasonably conclude that Garcia has no likely future ability to

pay, this Court should not at this stage forbid the State from seeking appellate costs later.

Garcia's present status as an indigent defendant is not sufficient to conclude he has no future ability to pay costs. This Court has no information about employment history, potential for future employment, or likely future income, nor has the trial court made any findings regarding Garcia's likely future ability to pay financial obligations. And, obviously, this Court does not know whether Garcia will be incarcerated, or for how long.

Should this Court reverse the trial court here, and should Garcia be convicted, and should his conviction be affirmed on appeal, then the issue will be ripe to address. For now, this Court should not preclude the State from seeking a cost bill later pursuant to RAP 14.4.

B. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to reverse the trial court's order excluding Garcia's 1994 first-degree child rape conviction as a predicate offense to a charge of unlawful possession of a firearm in the first degree and dismissing

Count One in his case, and not to preclude a cost bill after the final determination of the trial court.

DATED this 20th day of September, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jennifer Winkler, the attorney for the respondent, at Winklerj@nwattorney.net, containing a copy of the REPLY BRIEF in State v. Joaquin David Garcia, Cause No. 74779-7, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of September, 2016.

U Brame

Name:

Done in Seattle, Washington