

63332-5

63332-5

NO. 63332-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDR SNETKOV,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

BRIEF OF RESPONDENT

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COURT OF APPEALS
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A. ISSUE

1. When a defendant is convicted of an offense that renders him or her ineligible to possess a firearm, the trial court is statutorily required to provide notice of this prohibition, orally and in writing. The notice must also inform the defendant that any concealed pistol license must be surrendered and that the prohibition remains in effect unless a court of record restores the defendant's right to possess a firearm. Here, the court correctly told Snetkov that he was not allowed to possess a firearm or "be around people that possess firearms." The remark was not incorporated into the judgment and sentence or Snetkov's written notice of his ineligibility to possess a firearm. Has Snetkov failed to establish that the court misadvised him regarding the firearm prohibition and that he has been prejudiced as a result?

B. STATEMENT OF FACTS

Alexandr Snetkov was convicted by a jury of Attempting to Elude a Pursuing Police Vehicle and Possession of a Stolen Vehicle. CP 35-36, 37, 59.¹ The jury also found that during the

¹ The Verbatim Report of Proceedings consists of nine volumes. The State adopts the appellant's reference system as set forth on page one of his opening brief.

commission of the attempt to elude, Snetkov's actions threatened one or more persons other than him and the pursuing law enforcement officers. CP 38. The court imposed the high end of the standard range on each count: 57 months' confinement for possessing a stolen vehicle, and 14 months plus the 12 month sentence enhancement for endangering others during the attempt to elude, for a total of 26 months' confinement. CP 61-68; 9RP 19-20. All counts were to be served concurrently. CP 64; 9RP 19-20.

After the court imposed the sentence and confirmed that defense counsel would discuss with Snetkov his rights on appeal, the court stated to Snetkov:

[M]r. Snetkov, you have signed the Notice of Ineligibility to Possess Firearms, and Loss of Right to Vote. As a result of this conviction, you may not possess any type of firearm at all, or be around people that possess firearms.

9RP 22. When asked by the court, Snetkov stated that he understood this prohibition. 9RP 22. The court also signed a written Notice of Ineligibility to Possess a Firearm and Loss of Right to Vote form, notifying Snetkov of these restrictions. The notice stated, in pertinent part:

Pursuant to RCW 9.41.047, **you are not permitted to possess a firearm** until your right to do so is restored by a court of record. You are further notified that you must immediately surrender any concealed pistol license....

CP 214 (emphasis in original).

C. ARGUMENT

1. THE COURT'S ADVISEMENT TO SNETKOV REGARDING HIS INELIGIBILITY TO POSSESS A FIREARM WAS NOT IMPROPER AND NOT PART OF THE JUDGMENT AND SENTENCE.

Snetkov asserts, for the first time on appeal, that the sentencing court affirmatively misadvised him by telling him that he could not “possess any type of firearm...or be around people that possess firearms” because it was an incorrect statement of the law. Snetkov further asserts that he was prejudiced by the alleged misinformation because it imposed the unnecessary hardship of impairing his freedom of association. This argument should be rejected for several reasons. First, the court’s oral advisement regarding Snetkov’s ineligibility to possess a firearm is not alone, nor a part of, a final judgment from which Snetkov may appeal. Second, Snetkov did not preserve his claim of error because he failed to object at the time that the alleged error occurred. Third,

the claimed error does not affect a constitutional right. Fourth, even assuming, arguendo, that the alleged error affected a constitutional right, Snetkov cannot show actual prejudice and therefore, the claimed error is not manifest. Finally, the court's advisement was a correct statement of the law as to the statutory firearm prohibition.

**a. The Court's Advisory Remarks Do Not
Constitute A Final Judgment From Which
Snetkov Can Appeal Under RAP 2.2.**

RAP 2.2(a) lists several types of superior court proceedings from which a party may appeal, including a final judgment. A final judgment is one that settles all the issues in a case. In re Detention of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). In a criminal proceeding, a final judgment ends the litigation, leaving nothing for the court to do but execute the judgment. In re Det. of Petersen, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999); see also State v. Siglea, 196 Wash. 283, 285, 82 P.2d 583 (1938) ("As a prerequisite to an appeal in a criminal case, there must be a final judgment terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination."). Failure to mention a particular order or proceeding in RAP 2.2(a) indicates an intent that the matter be

reviewable only under the guidelines for discretionary review. See Department of Social & Health Servs. v. Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989).

Here, the only final judgment was Snetkov's judgment and sentence, of which the form providing notice to Snetkov of his ineligibility to possess a firearm was not a part. CP 61-67, 214. The written and oral notices were not orders and did not themselves trigger the firearm prohibition. Rather, the ineligibility of felons to possess firearms follows, as a matter of law, from their *status* as convicted felons, regardless of whether the statutorily required notice is provided at the time of conviction, as discussed below.² Moreover, the fact that the court provided Snetkov with the oral and written notices at the sentencing hearing did not convert the statutorily required notices into appendices to the judgment and sentence.

Snetkov's argument essentially characterizes the sentencing court's oral notice and advisory remark to him as an order or final judgment from which he can appeal under RAP 2.2(a), when, in

² See RCW 9.41.047(1).

fact, Snetkov's firearm restriction as to this case, took effect when he was found guilty by the jury as a consequence of his status as a convicted felon.³ RCW 9.41.047(1). And, because the court has taken no subsequent action based on Snetkov's behavior (i.e., unlawfully possessing a firearm), Snetkov is in effect asking this Court to render an advisory opinion as to the veracity of the sentencing court's remark. See State v. Roberts, 77 Wn. App. 678, 683, 894 P.2d 1340 (1995).

It is well established that Washington appellate courts do not render advisory opinions or decide purely theoretical controversies. State ex rel. O'Connell v. Kramer, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) (refusing to render an opinion on the constitutionality of a proposed initiative measure filed with the Secretary of State but not yet enacted by the people); see Nat'l Elec. Contractors Ass'n v. Seattle Sch. Dist. No. 1, 66 Wn.2d 14, 17-18, 400 P.2d 778 (1965). "The power to render such opinions should of course be exercised with great reluctance and only when there are urgent and convincing reasons for doing so." In re Elliott, 74 Wn.2d 600, 616, 446 P.2d 347 (1968); see also State v. Norby, 122 Wn.2d 258, 269,

³ Snetkov had six prior felony convictions, each of which made him ineligible to possess a firearm before the events took place that resulted in his convictions here. CP 67.

858 P.2d 210 (1993) (Washington courts give advisory opinions in very rare instances). In the instant case, there is no such urgent or compelling reason to render an advisory opinion.

Furthermore, because the court's advisement to Snetkov about his ineligibility to possess a firearm was not part of the written judgment and sentence or the written notification form as to the firearm prohibition, there is no alleged error in the judgment and sentence to be corrected and nothing to re-sentence Snetkov for. Thus, Snetkov's proposed remedy of re-sentencing is not applicable and he is not entitled to relief.

b. Snetkov's Claimed Error Is Not A Manifest Error Affecting A Constitutional Right And May Not Be Raised For The First Time On Appeal.

Generally, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 332, 332-33, 899 P.2d 1251 (1995). A claim of error may be raised for the first time on appeal only if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001). The exception under RAP 2.5(a)(3) is "a narrow one, affording review only of 'certain

constitutional questions.” State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988). To obtain review, the defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights in the trial court. McFarland, 127 Wn.2d at 333. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences to his case. State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999). It is this showing of actual prejudice that makes the error “manifest,” allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688.

A trial court, at the time of conviction for an offense making the person ineligible to possess a firearm, has a statutory obligation to inform him or her, “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.” RCW 9.41.047(1). This restriction follows from one’s status as a convicted person, as a matter of law, and, as discussed above, is not part of the judgment and sentence. The failure of a trial court to inform a defendant of his or her ineligibility to possess a firearm is not a question of constitutional magnitude because the notice requirement is statutory and the

prohibition against firearm possession is a collateral consequence of a conviction, not a direct consequence. In re Pers. Restraint of Ness, 70 Wn. App. 817, 822-24, 855 P.2d 1191 (1993), rev. denied, 123 Wn.2d 1009 (1994); see State v. Jamison, 105 Wn. App. 572, 591-92, 20 P.3d 1010, rev. denied, 144 Wn.2d 1018 (2001) (collateral consequences of a conviction are not constitutional in nature). Accordingly, any alleged error in a trial court's oral advisement to a defendant regarding his or her ineligibility to possess a firearm is not of constitutional magnitude and cannot be raised for the first time on appeal.

Snetkov relies on State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001) to support his argument that he was affirmatively misinformed about the law. Leavitt is distinguishable. In Leavitt, the defendant was convicted of violating a protection order, which disqualified him from possessing or owning any firearms. Id. at 363. The court imposed a one-year suspended sentence with conditions, including that Leavitt not possess any firearms. Id. The court failed to provide Leavitt with the statutorily required written notice that his firearm restrictions would last longer than one year, issued an order that seemed to imply that the ban would last only one year, and allowed the defendant to retain his

concealed weapons permit. Id. Upon receiving a letter that confirmed completion of his year of probation, Leavitt believed that he could legally possess firearms again, and retrieved his guns from his brother. Id. at 363-64. Leavitt was later convicted of unlawfully possessing multiple firearms after he openly admitted to having the guns in his car. Id. at 364. The court held that Leavitt's subsequent unlawful possession convictions violated due process because Leavitt had detrimentally relied on, and was therefore actually prejudiced by, the previous sentencing court's failure to inform Leavitt that he remained ineligible to possess firearms beyond the probationary term.⁴ Id. at 372-73.

Here, in accordance with the statutory requirement, and in contrast to Leavitt, the trial court informed Snetkov that he could not possess a firearm and that the restriction remained in effect until restored by a court of record. CP 214; 9RP 22. The court told Snetkov that he could not "possess any type of firearm at all, or be around people that possess firearms," which, like the written notice, correctly indicated that there was the potential for additional criminal consequences for violating the firearm prohibition. 9RP 22.

⁴ The Leavitt court specifically declined to address whether a failure to follow RCW 9.41.047, absent prejudice to the defendant, would warrant reversal. Id. at 373 n.19.

Also unlike Leavitt, Snetkov has not been subsequently charged with unlawfully possessing a firearm that he believed, based on a previous court's misinformation, that he could legally possess. Rather, the trial court's comment properly notified Snetkov of his ineligibility to possess a firearm. Furthermore, the court's advisory remark did not impose any greater restriction on Snetkov's freedom of association than is already inherent in the statutory prohibition.

Snetkov also relies on three surveys that he asserts establish the prevalence of guns in Washington State and the United States. App. Br. at 6.⁵ Two of the surveys, the Washington State 2000 Behavioral Risk Factor Surveillance System,⁶ and Philip J. Cook and Jens Ludwig's Guns in America: National Survey on Private Gun Ownership and Use of Firearms,⁷ limited the sample populations to households with adults that had a residential

⁵ Snetkov cites Philip J. Cook & Jens Ludwig, Guns in America: Results of a National Comprehensive Survey On Firearms Ownership and Use (1996) and notes that similar figures are available in a subsequent publication available on the Internet. For simplicity, the State has opted to cite only the latter.

⁶ http://www.doh.wa.gov/ehsphi/CHS/CHS-Data/brfss/brfss_keypoints.htm.

⁷ Phillip J. Cook & Jens Ludwig, Guns in America: National Survey on Private Ownership and Use of Firearms, United States Department of Justice, National Institute of Justice Research in Brief, May 1997, available at <http://www.ncjrs.gov/pdffiles/165476.pdf>.

telephone line and that were fluent enough in either English or Spanish to conduct a telephonic interview. The data collected by the surveys was also inherently biased by the fact that the information came from self-reporting. Hence, the statistics quoted from the surveys about the percentage of households in the state and nationwide that contain firearms excluded a significant portion of the population and are of questionable reliability.

Even if the surveys are statistically significant, they are inapposite because Snetkov is ineligible to possess a firearm regardless of the number of guns in the country, state, city or neighborhood in which Snetkov lives, works, or passes through. The right to possess a firearm is not unfettered. On the contrary, the restriction of felons' ability to possess firearms is long-standing and has been upheld despite constitutional challenges. See State v. Krzeszowski, 106 Wn. App. 638, 641, 24 P.3d 485 (2001) (permanent restrictions on felons' rights to possess firearms constitute acceptable regulation of the right to bear arms under both the federal and state constitutions); District of Columbia v. Heller, ___ U.S. ___, 128 S. Ct. 2783, 2816-17, 171 L. Ed. 2d 637 (2008); United States v. Emerson, 270 F.3d 203, 261 (5th Cir. 2001).

Since Snetkov did not preserve the alleged error for appeal and cannot show actual prejudice by making a plausible showing that the claimed error had any practical and identifiable consequences in his sentencing, his claim is not manifest and he is not entitled to relief on appeal.

c. The Court's Oral Advisement Was A Correct Statement Of The Law.

As discussed above, a trial court has an affirmative duty to notify defendants, orally and in writing, of their ineligibility to possess a firearm. RCW 9.41.047(1). Some courts, as here, fulfill this obligation by simply informing defendants that they cannot possess a firearm or be near others who do, thereby conveying that potential criminal consequences exist if a defendant were to violate the firearm prohibition.

Under Washington law, a person is guilty of Unlawful Possession of a Firearm in the Second Degree if he or she owns, has in his or her possession, or has in his or her control a firearm after having been convicted of a felony.⁸ RCW 9.41.040.

⁸ A person is also guilty of second degree unlawful possession of a firearm if he or she has previously been involuntarily committed for mental health treatment, but that provision is not applicable here.

Knowledge of the illegality of firearm possession is not an element of the crime, but the State must prove that the defendant knew that he possessed the firearm. State v. Semakula, 88 Wn. App. 719, 721, 726-27, 946 P.2d 795 (1997), review denied, 134 Wn.2d 1022 (1998).

Possession of a firearm can be actual or constructive. Actual possession occurs when the firearm is in the actual physical custody of the defendant. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); WPIC⁹ 133.52. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the firearm or the premises where the firearm is found. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Proximity alone or a fleeting possession is insufficient to establish constructive possession, but dominion and control need not be exclusive. Callahan, 77 Wn.2d at 29; State v. Hagen, 55 Wn. App. 494, 499, 781 P.2d 892 (1989).

Here, the court provided Snetkov with a written order notifying him of his ineligibility to possess a firearm, and implicitly told Snetkov that he could potentially face additional criminal penalties if he were to possess a firearm, including being in

proximity to another person who had a firearm. CP 214; 9RP 22.

The court was trying to convey to Snetkov that to avoid even the *possibility* of additional criminal penalties, Snetkov should not allow himself to be in the vicinity of a firearm. Moreover, the court's remark accurately indicated to Snetkov the potential for criminal consequences if he were in a situation where the State could conclude that he possessed a firearm in violation of the law. See State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995) (constructive possession when defendant knew a firearm was under the couch in his home); State v. Reid, 40 Wn. App. 319, 698 P.2d 588 (1985) (possession proved when defendant admitted having a firearm in front seat of automobile, but said he moved it to the back so it would not be seen by the police); State v. Howell, 119 Wn. App. 644, 649–50, 79 P.3d 451 (2003) (no requirement that the firearm be immediately accessible at the time of possession, distinguishing firearm possession offenses from firearm enhancements). Further, as discussed above, there is no remedy available to Snetkov because there is no error in a final judgment from which relief can be granted.

⁹ Washington Pattern Jury Instruction—Criminal.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that the Court affirm Snetkov's convictions and sentence.

DATED this 18th day of December, 2009.

Respectfully submitted,

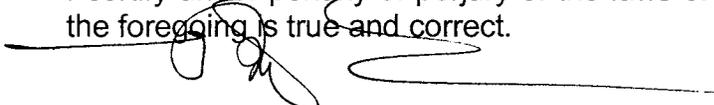
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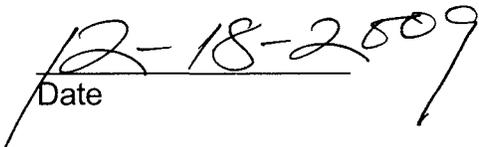
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. ALEXANDR SNETKOV, Cause No. 63332-5-I, 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.



Name Wynne Brame
Done in Seattle, Washington



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