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NO. 65014-9

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

STATE OF WASHINGTON

Plaintiff / Respondent,

VS.

GEORGE ARNOLD POWELL, JR.,

Defendant / Appellant.

APPELLANT'S BRIEF

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ORIGINAL

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II. ASSIGNMENTS OF ERROR

2.1 Trial Court Errors

- 2.1.1 The trial court erred in denying George Powell's Motion to Dismiss. CP 38-40
- 2.1.2 The trial court erred in entering Finding of Fact No. 13: "the court finds that knowledge of the firearm revocation is not an element of the crime, and that the defendant was not affirmatively misled by any government representative." CP 70.
- 2.1.3 The trial court erred in entering Conclusion of Law No. 2 (b): "The defendant had been previously convicted in Seattle Municipal Court of Violation of a No Contact Order – Domestic Violence." CP 71.
- 2.1.4 The trial court erred in entering Conclusion of Law No. 3: "The defendant is guilty of the crime of Unlawful Possession of a Firearm in the Second Degree as charged in the Amended Information." CP 71.
- 2.1.5 The trial court erred in entering judgment. CP 71.

2.2 Issues Pertaining to the Assignments of Error

2.2.1 Whether, under Washington law requiring dismissal of a charge of unlawful possession of a firearm where the predicate offense court affirmatively misled the defendant, the trial court erred in denying George Powell's Motion to Dismiss when:

- i. The predicate offense court asked Mr. Powell during its plea colloquy if he understood that a written order would be entered in the future prohibiting him from possessing a firearm for the remainder of his life, but did not thereafter enter such an order;
- ii. Following the foregoing pre-plea colloquy, no further mention was made of the firearms prohibition;
- iii. A provision in the guilty plea statement explaining RCW 9.41.040's firearms prohibition was circled, but was neither check-marked nor initialed by Mr. Powell, as explicitly required on the form;
- iv. None of the written documents provided to Mr. Powell stated that he was prohibited from possessing a firearm for the rest of his life pursuant to the judgment and order as entered by the predicate offense court;
- v. The predicate offense Judgment and Sentence Order and the No-Contact Order, both entered on November 18, 2003, indicated that Mr. Powell was to possess no weapons for 24 months; and

- vi. Mr. Powell believed that he was only prohibited from possessing weapons during the 24-month probation period.
(Assignments of Error 1, 2, 3, 4, and 5.)

III. STATEMENT OF THE CASE

3.1 Statement of Facts

On November 18, 2003, the Appellant, George Powell, pled guilty in Seattle Municipal Court to Violation of a No Contact Order, which restrained him from contacting a household member, Michelle Ray. CP 69. At the time of the plea, the Honorable Michael Hurtado was presiding and Mr. Powell was represented by counsel. CP 69.

During the plea colloquy conducted prior to Judge Hurtado's acceptance of Mr. Powell's guilty plea, the following exchange between Judge Hurtado and Mr. Powell took place:

JUDGE: Do you understand the maximum sentence that *could be* imposed upon conviction is one year in custody and/or a \$5,000 fine?

POWELL: Yes, sir.

JUDGE: Do you further understand that there *will be* a written order prohibiting you from possessing a firearm for the remainder of your

life or until a court of competent jurisdiction reinstates that right?

POWELL: Yes, sir.

CP 134-35 (emphasis added). Judge Hurtado did not mention the firearms prohibition again. CP 69-70. Judge Hurtado never entered a written order prohibiting Mr. Powell from Possing a firearm for the remainder of Mr. Powell's life, nor did he ever verbally state that he had done so. CP 69-70.

In the course of submitting his guilty plea, Mr. Powell signed and received two documents: (1) Statement of Defendant on Plea of Guilty; and (2) No Contact Order—Domestic Violence. CP 61, 69-70, 147-50. The first document, a standard pre-printed plea form, contained several paragraphs with corresponding check-boxes listing the potential consequences to a defendant of pleading guilty to certain crimes. CP 148-49. These paragraphs were preceded by the heading:

*NOTIFICATION RELATING TO SPECIFIC
CRIMES: IF ANY OF THE FOLLOWING
PARAGRAPHS APPLY, THE BOX SHOULD BE
CHECKED AND THE PARAGRAPH INITIALED
BY THE DEFENDANT.*

CP 148. Under this heading, paragraph (j) stated:

I understand that I may not possess, own, or have under my control any firearm unless my right to do so is restored by a court of record and that I must immediately surrender any concealed pistol license. RCW 9.41.040.

CP 149. Although this paragraph was apparently circled at some point in time, the paragraph was not checked and Mr. Powell did not initial the paragraph to indicate that he had read it and understood that it applied to him. CP. 69, 149. Mr. Powell does not remember personally circling this paragraph and the trial court in the present case specifically found that Mr. Powell's testimony on this issue was credible. CP 69. The trial court made no findings as to when the box was circled, and for all that is known, it was circled years after the documents were archived.

The second document received by Mr. Powell was a No-Contact Order issued November 18, 2003 ordering Mr. Powell to have no contact with Michelle Ray, the complaining witness, for two years—the order was set to terminate on November 11, 2005. CP 61. Under the heading “Warnings to Defendant,” the order stated “[i]f you are convicted of an offense of domestic

violence, you *will be* forbidden for life from possessing a firearm or ammunition.” CP 61 (emphasis added). Mr. Powell was also instructed not to possess a firearm “as long as this protection order is in effect”—i.e. 24 months. CP 61. No where in the protection order was Mr. Powell explicitly informed that he was, in fact, prohibited from possessing a firearm for the rest of his life pursuant to the judgment and order as entered by the court that day.¹ CP 61.

Following the court’s acceptance of Mr. Powell’s guilty plea, Mr. Powell received a copy of the Judgment and Sentence Order imposing a suspended 24-month sentence. CP 152-54. On the second page of the judgment and order, entitled “Conditions of Deferred or Suspended Sentence,” was a list of potential conditions that could be imposed by the court by checking a corresponding box. CP 154. Several boxes were checked, thereby indicating that for 24 months Mr. Powell was to abide by the following conditions: (1) commit no criminal

¹ Mr. Powell acknowledges for the purpose of this appeal that at the time of the charge under appeal, he in fact possessed firearms. He further acknowledges that by operation of law, he was not permitted to do so. Rather, Mr. Powell sought an exception from criminal liability based on the predicate offense sentencing court’s failure to warn him of the firearm prohibition that attached to conviction for the municipal court offense to which he plead in 2003.

violations of law; (2) enter and successfully complete Certified Domestic Violence Treatment; (3) have no contact with Michelle Ray, the complaining witness; and (4) possess no weapons. CP 70, 154. Importantly, next to the condition for “[p]ossess no weapons” was a related condition and check-box permitting the court to order Mr. Powell to forfeit any weapons by a certain date—this box was left unchecked and the forfeit-by date was left blank. CP 154. In addition, the form indicated that “[t]he above conditions [were] to be monitored by *The Probation Services Division*.” CP 154 (emphasis added). Filled out in this manner, the order notified Mr. Powell that, as a condition of his probation and suspended sentence, he was to “[p]ossess no weapons” only during his 24-month probation, that the Probation Services Division would monitor this condition, and that he would not be required to forfeit his firearms. CP 70, 154.

In compliance with the conditions of the judgment and order, Mr. Powell transferred possession of his firearms to another person during the 24-month probation period. CP 70. At the expiration of this two-year period, Mr. Powell believed that he was eligible to possess weapons again, including

firearms; the trial court in the present case found Mr. Powell's testimony in this regard to be credible. CP 70.

On April 17, 2009, King County Sheriff's Deputies conducted a warrantless search of Mr. Powell's residence following a 911 call by a neighbor who had a verbal dispute with Mr. Powell. After locating a firearm under Mr. Powell's bed, the responding deputies then obtained a search warrant, and executed it on Mr. Powell's residence. CP 70. Inside Mr. Powell's house, the deputies located a revolver. CP 70. Mr. Powell is a gun collector and knew the gun was in his home. CP 70. As a result of the deputies' search, Mr. Powell was charged with Unlawful Possession of a Firearm in the Second Degree. CP 71. The predicate offense upon which this charge rests is Mr. Powell's 2003 conviction for Violation of a No Contact Order. CP 71.

3.2 Procedural History

On April 17, 2009, King County Sheriff's Deputies executed a search warrant on George Powell's residence and located a revolver inside the house. CP 70. By Amended Information, Mr. Powell was charged with one count of Felony

Harassment, RCW 9A.46.020(1), (2), and one count of Unlawful Possession of a Firearm in the Second Degree, RCW 9.41.040(2)(a)(i). CP 103-104. The charge for Unlawful Possession was based on the predicate offense of Violation of a No Contact Order against a family or household member committed on or after July 1, 1993. CP 104.

On September 23, 2009, Mr. Powell brought a Motion to Dismiss the charge of Unlawful Possession of a Firearm in the Second Degree on the grounds that the predicate offense court affirmatively represented that the firearms prohibition did not apply to him. CP 38-40. The trial court denied Mr. Powell's motion, finding that Mr. Powell was given notice on the issue of the revocation of his gun rights and that he had not been affirmatively misled. CP 38-40. Mr. Powell then submitted a Motion to Reconsider Denial of Defendant's Motion to Dismiss; this was also denied. CP 57-61, 66.

On February 19, 2010, Mr. Powell pled guilty to Felony Harassment. CP 83-102. On the charge of Unlawful Possession, Mr. Powell submitted the matter to the trial court for a stipulated facts trial. CP 67, 76-77. The trial court entered its

Findings of Fact and Conclusions of Law on February 19, 2010. CP 68-72. The trial court found Mr. Powell guilty of the crime of Unlawful Possession of a Firearm in the Second Degree, identifying his November 18, 2003 conviction for Violation of a No-Contact Order as the disqualifying predicate offense. CP 71. Mr. Powell filed a timely Notice of Appeal in this court on March 1, 2010.

IV. SUMMARY OF ARGUMENT

The trial court erred in denying Mr. Powell's Motion to Dismiss the charges of Unlawful Possession of a Firearm in the Second Degree, because the predicate offense court's failure to provide notice pursuant to RCW 9.41.047(1) and its affirmative misrepresentations to Mr. Powell preclude use of his 2003 conviction as the charge's predicate offense.

First, the predicate offense court failed to give Mr. Powell either oral or written notice that his firearms rights had been deprived for life, thereby violating RCW 9.41.047(1). Second, the predicate offense court affirmatively misled Mr. Powell into believing that he was only prohibited from possessing weapons during his 24-month probation. Finally, Mr. Powell suffered

actual prejudice as a result of the predicate offense court's misleading representations—most clearly evidenced by his repossession of firearms following the termination of his probation in 2005 and the current criminal prosecution for unlawful possession of a firearm. In sum, under *State v. Minor*, 162 Wn.2d 796, 804, 174 P.3d 1162 (2008), Mr. Powell's 2003 conviction cannot serve as the basis for a charge of unlawful possession. Accordingly, Mr. Powell's Motion to Dismiss should have been granted and the charge dismissed. The trial court erred in refusing to do so.

V. ARGUMENT

5.1 Mr. Powell's conviction for Unlawful Possession of a Firearm must be reversed, because the predicate offense court not only failed to provide notice pursuant to RCW 9.41.047(1), but also affirmatively misled Mr. Powell

A defendant's right to due process has been violated when he is affirmatively misled by a sentencing court as to the constraints on his ability to possess a firearm arising from the conviction. *See State v. Minor*, 162 Wn.2d 796, 804, 174 P.3d 1162 (2008); *State v. Leavitt*, 107 Wn. App. 361, 372, 27 P.3d 622 (2001). Such a violation of due process precludes use of the conviction as a predicate offense in bringing a subsequent charge of unlawful possession of a firearm. *See Minor*, 162 Wn.2d at 804; *Leavitt* 107 Wn. App. at 373.

At the time a person is convicted of an offense disqualifying him from possessing a firearm, Washington statute requires the convicting court to notify the person, orally and in writing, that he may not possess a firearm unless his right to do so is restored by a court of record. RCW 9.41.047(1). requirement is "unequivocal in its mandate"—there must be

both oral and written notice—and its inclusion in the statute “shows the legislature regarded such notice of deprivation of firearms rights as substantial.” *Minor*, 162 Wn.2d at 804.

Subsequent ownership, possession, or control of a firearm by a person who has been deprived of his firearms rights is punishable as first or second degree unlawful possession of a firearm. RCW 9.41.040(1). Although a person’s knowledge of the illegality of his firearm possession is not an element of the crime, the Washington Supreme Court has recognized a narrow exception where a government entity has provided the defendant with affirmative, misleading information upon which the defendant relied to his detriment. *Minor*, 162 Wn.2d at 802; *see also State v. Breitung*, ____ Wn. App. ____ (No. 38869-3-II, April 20, 2010); *State v. Leavitt*, 107 Wn. App. 361, 371, 27 P.3d 622 (2001). Accordingly, a subsequent conviction for unlawful possession of a firearm is invalid and must be reversed upon proof from the defendant (1) that a predicate offense court violated RCW 9.41.047(1) by affirmatively representing to the defendant that the lifetime firearms prohibition did not apply to him, and (2) that the defendant suffered actual prejudice as a

result of his reasonable reliance on the representations of the court. *Minor*, 162 Wn.2d at 804.

5.1.1 The predicate offense court failed to provide oral and written notice as required by RCW 9.41.047(1)

Failure by a sentencing court to provide both oral and written notice of a defendant's deprivation of his firearms rights violates RCW 9.41.047(1). *Minor*, 162 Wn.2d at 804.

i. There was no oral notice

During the plea colloquy and before the predicate offense court's acceptance of Mr. Powell's guilty plea, the court alluded to an order being entered sometime in the future, which would prohibit Mr. Powell from firearms possession. CP 134-35. This allusion followed closely on the heels of the court's informing the defendant of what *could be* the maximum sentence for his conviction (e.g., one year in jail). CP 134-35. The court's statements regarding both Mr. Powell's ability to possess firearms and his potential maximum sentence were framed in terms of potentialities and what *could* happen—not what actually existed or was being imposed upon Mr. Powell at that time. Aside from this one allusion, the court did not mention the

firearms prohibition again. CP 69-70. Accordingly, Mr. Powell reasonably believed that, like the potential sentence of one year in jail that was not actually imposed, he had not been deprived of his firearms rights by the judgment and order as it was actually entered by the court. CP 70.

At no time during Mr. Powell's sentencing on November 18, 2003, did the predicate offense court tell Mr. Powell that he was, in fact, prohibited from possessing firearms for the rest of his life under the judgment and order as entered by the court. CP 69-70. Thus, the court did not provide oral notice as mandated by RCW 9.41.047(1). The court orally alluded to something that would be entered in writing if the plea were accepted, but did not thereafter enter such a written order.

ii. There was no written notice

The rule of lenity dictates that ambiguities in court orders are resolved in favor of the criminal defendant, and the adopted construction should render no word superfluous. *City of Seattle v. Edwards*, 87 Wn. App. 305, 309, 941 P.2d 697 (1997) (*overruled on other grounds in State v. Miller*, 156 Wn.2d 23, 123 P.3d 827 (2005)). A statute, regulation or order with which

a citizen is mandated to comply is ambiguous when it contains language that is susceptible to more than one reasonable interpretation. *See, e.g., State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). In addition, commands by the State that are vague, contradictory, or actively misleading that may subject a citizen to criminal prosecution are not permitted under the Due Process clause. *Raley vs. State of Ohio*, 360 U.S. 423, 438-9, 79 S.Ct. 1257 (1959).

Mr. Powell received three different written documents following his plea of guilty on November 18, 2003: (1) his plea statement; (2) a no-contact order; and (3) the judgment and sentence order. CP 61, 147-50, 152-154. None of these documents explicitly informed Mr. Powell that he was, in fact, prohibited from possessing a firearm for the rest of his life under the judgment and order as entered by the court that day. CP 61, 147-50, 152-154.

First, paragraph (j) of the plea statement, containing notification of the firearms prohibition in RCW 9.41.040, which was supposed to be check-marked and initialed by Mr. Powell if it applied to him, was merely circled. CP 69, 149. It is unclear

who circled the box next to the paragraph or when this occurred; Mr. Powell does not remember personally circling this paragraph and the trial court found that he was credible in this regard. CP 69. Because Mr. Powell did not check and initial this provision, and the provision was merely circled—an action entirely inconsistent with the preceding instructions for how to indicate when a provision applies to a defendant—Mr. Powell reasonably believed that paragraph (j) did not apply to him. CP 69, 70. Thus, the provision’s applicability to Mr. Powell was ambiguous. Under the rule of lenity this ambiguity must be resolved in favor of Mr. Powell. *City of Seattle v. Edwards*, 87 Wn. App. at 309. Consequently, paragraph (j) of the plea statement did not provide Mr. Powell written notice of the deprivation of his firearms rights. In any event, the guilty plea form was part of *plea* process; this was not a document that applied after the plea was accepted and the court moved to the sentencing phase.

Second, buried in a single-spaced printed paragraph in the middle of the no-contact order was a one line “warning” stating: “*If* you are convicted of an offense of domestic violence, you *will*

be forbidden for life from possessing a firearm or ammunition.” CP 61, 70 (emphasis added). This “warning” to Mr. Powell did not purport to inform him of the actual deprivation of his firearms rights, or the actual effect of the judgment and sentence order entered by the court that day—it merely indicated that upon the occurrence of a conviction of domestic violence, Mr. Powell *could* have his firearms rights taken away. Furthermore, an interpretation that this warning was, in actuality, an implied notification of the deprivation of Mr. Powell’s firearms rights conflicts with a provision situated just above, which explicitly stated: “Effective immediately, and continuing *as long as* this protection order is in effect, you may not possess a firearm or ammunition.” CP 61 (emphasis added). Taking these two provisions together, Mr. Powell reasonably understood the explicit provision to be the controlling instruction as to the constraint on his firearms rights—i.e. that he could not possess a firearm during the two-year lifetime of the no-contact order. As such, the no-contact order did not provide the written notice mandated by RCW 9.41.047(1).

Finally, nowhere in the judgment and sentence order was Mr. Powell notified that he was prohibited from possessing firearms for life. CP 70, 152-54. The trial court on the present charge specifically found that the judgment and sentence order only prohibited Mr. Powell from possessing firearms during his two-year probation period. CP 70.

5.1.2 The predicate offense court affirmatively represented to Mr. Powell that he was only prohibited from possessing firearms during his 24-month probation

Washington courts have found that a trial court's failure to check a box on a pre-printed form, which contains notification of a firearms prohibition for life, constitutes an affirmative representation by the court that the firearms prohibition does not apply to the defendant. *See Minor*, 162 Wn.2d at 804; *Leavitt*, 107 Wn. App. at 372. Where a predicate offense court affirmatively misleads a defendant, the prior conviction cannot serve as the basis for a subsequent conviction for unlawful possession of a firearm. *See Minor*, 162 Wn.2d at 804; *Leavitt*, 107 Wn. App. at 372.

Two well-recognized Washington cases, in which affirmative misrepresentations by the predicate offense courts

warranted reversal of the defendants' convictions, are directly analogous to Mr. Powell's case. In the first case, *State v. Minor*, the defendant received an order that contained an unchecked paragraph indicating that, if checked, the defendant was prohibited from using or possessing a firearm unless his right was restored by a court of record. *Minor*, 162 Wn.2d at 797-98. The Washington Supreme Court held that the predicate offense court not only had failed to provide the defendant with written notice as required by RCW 9.41.047(1), but also had affirmatively represented to the defendant that the firearms prohibition did not apply to him. *Minor*, 162 Wn.2d at 804. Since the defendant had reasonably relied on the representations of the court to his detriment, believing that the firearm prohibitions did not, in fact, apply, the *Minor* court held that his conviction for unlawful possession must be reversed. *Id.* at 804.

In the second case, *State v. Leavitt*, the defendant pled guilty to one count of violation of a protective order against a family or household member. *Leavitt*, 107 Wn. App. at 363. The court imposed a one-year suspended sentence conditioned, in

relevant part, upon (1) no hostile contact with the victims; (2) no possession of firearms; and (3) no violation of criminal law. *Id.* The document also provided that the “Termination date is to be 1 year(s) after date of sentence.” *Id.* In addition, the defendant received a “Conditions, Requirements, and Instructions” form that contained an unchecked paragraph explaining RCW 9.41.040’s firearms prohibition. *Id.* At no time was the defendant required to relinquish his weapons. *Id.*

The *Leavitt* court found that given the actions and inactions of the predicate offense court, the defendant, like Mr. Powell, reasonably believed that he was only prohibited from possessing weapons during his one-year probation. *Id.* at 363-64. In reversing his conviction for unlawful possession of a firearm, the *Leavitt* court held that the defendant had been affirmatively misled and prejudiced, and accordingly, the prior conviction could not serve as the basis for convicting him of the current charge. *Id.* at 372, 373.

Similar to the facts of both *Leavitt* and *Minor*, the paragraph in Mr. Powell’s plea statement, which could have notified Mr. Powell of the firearms prohibition, and the box on

the judgment and sentence order form, which could have required Mr. Powell to forfeit his weapons, were left unchecked. CP 69, 149, 154. In addition, similar to the order in *Leavitt*, both the judgment and sentence order and the no-contact order indicated that Mr. Powell was prohibited from possessing firearms only during his two-year probation period. CP 61, 70. And like the defendant in *Leavitt*, Mr. Powell reasonably believed that he was disqualified from firearms possession only during his probation. CP 70. Given the predicate offense court's failure to check the appropriate boxes and explicit instructions that Mr. Powell was ineligible to possess weapons only during his two-year probation, the court affirmatively represented to Mr. Powell that the lifetime firearms prohibition did not apply to him. As such, Mr. Powell's 2003 conviction cannot serve as the predicate offense for the current charge of unlawful possession of a firearm.

5.2 Mr. Powell suffered actual prejudice as a result of his reasonable reliance upon the predicate offense court's representations

The *Leavitt* court, in holding that the defendant had been “clearly and substantially prejudiced” by the predicate offense court’s violation of the statute, emphasized several key facts: (1) the defendant relinquished his weapons during his probation to a relative, but retained his concealed weapons permit; (2) after his probation terminated, the defendant retrieved his weapons; and (3) he spontaneously volunteered information to police that he possessed firearms. *Leavitt*, 107 Wn. App. 367-68. The court described his actions as “guileless.” *Id.* Likewise, Mr. Powell relinquished his weapons during his 24-month probation, retrieved his weapons following its termination, and acted without guile in collecting and possessing firearms. And like the defendant in *Leavitt*, Mr. Powell now faces criminal prosecution for possessing firearms and engaging in conduct that he believed was lawful under the instructions of the predicate offense court. Under these circumstances, Mr. Powell has suffered, and

continues to suffer, actual prejudice as result of the predicate offense court's violation of RCW 9.41.047(1). Notably, Mr. Powell was never asked to forfeit his concealed weapons permit, and he retained a copy of it following the guilty plea and it remained valid.

VI. CONCLUSION

For the foregoing reasons, Mr. Powell respectfully requests that this Court reverse his conviction for Unlawful Possession of a Firearm in the Second Degree and remand the case for further proceedings.

DATED this Thursday, May 13, 2010.

LAW OFFICE OF DAVID RUZUMNA, PLLC:

A large, stylized handwritten signature in black ink, appearing to read 'Ruzumna', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I swear under penalty of perjury under the laws of the state of Washington that on the date and in the manner stated below, I served the following individuals or entities with the Brief of Appellant to which this Certificate is subjoined:

SERVED UPON	VIA
Angela J. Kaake King County Prosecutors Office W-554 King County Courthouse 516 - 3 rd Avenue Seattle, WA 98104-2390 Angela.kaake@kingcounty.gov	<input type="checkbox"/> U.S. Mail
	<input checked="" type="checkbox"/> Legal Messenger
	<input type="checkbox"/> Facsimile
	<input checked="" type="checkbox"/> E-Mail
	<input type="checkbox"/> Other

DATED at Seattle, Washington, this Thursday, May 13, 2010.



David Ruzumna

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