

65014-9

65014-9

NO. 65014-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

GEORGE ARNOLD POWELL, JR.,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HELEN HALPERT

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. If an appellant challenges a finding of fact by the trial court, he or she must include all relevant evidence in the record on appeal. Testimony relevant to a challenged finding of fact has not been transcribed for this appeal. Should Powell's challenge to that finding of fact be rejected because he has presented an inadequate record for review?

2. Assignments of error must be supported by argument and citation to authority. Powell's assignment of error 2.1.3 is not supported by any argument or authority. Has Powell waived this claim of error?

3. A convicting court must provide statutorily prescribed notice if the defendant has lost his or her right to possess a firearm by virtue of the conviction. If the court affirmatively misleads a defendant to believe that he or she has a right to possess a firearm, the defendant cannot be convicted of unlawful possession of a firearm based on that predicate conviction. When Powell was convicted of a domestic violence offense he was informed three times that his right to possess a firearm was lost for life. Did the trial court properly conclude that Powell was not affirmatively misled

as to the length of that prohibition and properly enter a conviction for unlawful possession of a firearm?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

George Arnold Powell Jr. was charged by amended information with one count of felony harassment occurring on April 14, 2009, and one count of unlawful possession of a firearm in the second degree, occurring on April 17, 2009. CP 103-04. Powell moved to dismiss the charge of unlawful possession of a firearm. CP 20-26. That motion was denied after a contested hearing. Supp. CP __ (sub. #42A, 9-24-09 Order Denying Defendant's Motion To Dismiss). Powell waived his right to a jury trial and agreed to a bench trial on the charge of unlawful possession of a firearm, based on stipulated facts. CP 67, 76-77. He was found guilty as charged. CP 68-72. Powell pled guilty to felony harassment. CP 83-102. At sentencing on both charges, the court granted the defendant a first time offender waiver of a standard range sentence, imposing a jail term of 6 days and 54 days of community restitution. CP 108.

2. SUBSTANTIVE FACTS

For purposes of this appeal, Powell admits that he in fact possessed firearms on April 17, 2009. App. Br. at 6 n.1. He also admits that by operation of law, he was not permitted to possess firearms at that time. App. Br. at 6 n.1.

On April 14, 2009, Powell threatened to kill Hassan Warsame and Warsame reasonably believed that the threat would be carried out. CP 92 (Powell's statement on plea of guilty). This confrontation occurred outside Powell's home. CP 3.¹ Warsame saw Powell brandish what appeared to be a handgun. CP 3.

Powell spoke to responding police officers, denying that he had pointed a gun at Warsame and claiming that he did not own a gun. CP 3. Police conducted a protective sweep of Powell's home and found a 9mm Ruger handgun underneath a bed. CP 3-4. They left the home and asked Powell for consent to search the home. CP 3. Powell refused, so police obtained a search warrant, then seized the 9mm Ruger handgun during the resulting search.

¹ The remainder of the facts are taken primarily from the Certification for Determination of Probable Cause, filed when the case was charged. CP 3-4. That Certification was incorporated in the Statement of Facts in the State's trial brief and Powell agreed that those facts could be considered real and material for purposes of sentencing on the felony harassment charge. CP 97, 131-32. Because the pretrial testimony and the documents that were the basis of the stipulated trial have not been provided in this appeal, no other source is available.

CP 3-4. Powell was the registered owner of the 9mm Ruger. CP 4. Although police saw two additional handguns and a collection of long guns under a staircase when they executed that search warrant, the guns were not seized at the time because they did not match the description Warsame provided of the gun used. CP 3-4.

After police discovered that Powell had a prior conviction for domestic violence - violation of a no contact order, they obtained a second search warrant and on April 17, 2009, and seized an additional 10 guns from inside Powell's home. CP 70, 115. One of the guns seized on April 17 was a .38 caliber Taurus revolver. CP 70.

3. FACTS RELATING TO PREDICATE DOMESTIC VIOLENCE CONVICTION

In Seattle Municipal Court on November 18, 2003, Powell pled guilty to the gross misdemeanor crime of domestic violence violation of a no contact order. CP 69. The guilty plea form, signed by Powell, included a marked paragraph stating:

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 69, 149. The letter corresponding to that paragraph was circled, indicating that it applied. CP 69, 149. Powell orally affirmed to that court that he had gone over each page of the guilty plea form with his attorney, in detail. CP 136.

During the plea colloquy in municipal court, the following exchange occurred:

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.

Judge: Do you still wish to plead guilty?

Powell: Yes, sir.

CP 69, 136-37.

The judge imposed a two-year suspended sentence, sentencing Powell to 365 days, suspending 364 days and imposing a number of conditions of sentence. CP 152, 154. The conditions of sentence are listed on the second page of the judgment and sentence, under the heading, "Conditions Of Deferred Or Suspended Sentence." CP 154. Included in the conditions of sentence, the following term is marked: "Possess no weapons."

CP 154. The optional term "Forfeit weapons by ____" is not marked. CP 154. There is no other reference on that form to weapons or to firearms. CP 152, 154.

Powell also received a copy of a domestic violence no contact order entered that day. CP 69. That form included the following provision:

If you are convicted of a crime of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. Title 18, United States Code, 922(g)(9); RCW 9.41.040.

CP 69-70.

No record of Powell's testimony at the pretrial hearing on the motion to dismiss has been provided on this appeal, however, the trial court in the case at bar entered a factual finding that Powell believed that after the two year period of the municipal court sentence, he was "eligible to possess weapons, including firearms."

CP 70.

The trial court in the case at bar found "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. The court also concluded that Powell's right to possess a firearm had not been reinstated by a court of record. CP 70.

C. **ARGUMENT**

1. **THE TRIAL COURT'S FINDINGS OF FACT SHOULD BE TREATED AS VERITIES BECAUSE THE TRIAL COURT RECORD HAS NOT BEEN PROVIDED.**

Powell assigns error to the trial court's finding of fact No. 13, that knowledge of the firearm revocation is not an element of the crime and that Powell was not affirmatively misled by any government representative. App. Br. at 1. He has not provided an adequate record for review of that finding, as required by RAP 9.2(b). Therefore, this Court should decline review of that claim.

RAP 9.2(b) provides in relevant part:

(b) Content. A party should arrange for the transcription of all those portions of the verbatim report of proceedings necessary to present the issues raised on review. . . . If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding. . . .

RAP 9.2(b). If an inadequate record is provided, the appellate court must either decline to consider the claimed error or order

supplementation of the record. State v. Wade, 138 Wn.2d 460, 465-66, 979 P.2d 850 (1999).

The trial court heard testimony from Powell on the issue of whether Powell was affirmatively misled as to his loss of the right to possess firearms, evidenced by the court's reference to that testimony in her findings of fact. CP 69-71. That testimony has not been transcribed for this appeal.

In her findings, the trial court also specifically "incorporates the facts as they were presented at the pretrial hearing, including the defendant's testimony, as well as its oral findings." CP 71. The oral findings of the court also have not been transcribed for this appeal.

Moreover, in his "Statement Of Intent To Rely On Trial Court's Findings Of Facts And Conclusions Of Law," filed in this Court on March 30, 2010, Powell represents that instead of providing a report of proceedings below, he "instead will rely upon the trial court's findings of fact and conclusions of law." Appendix 1. Having declared his intention to rely on the trial court's findings of fact to avoid preparation of a report of the proceedings below, he cannot also challenge those findings.

The lack of a report of proceedings does not preclude review of the trial court's conclusions of law, which the State concedes includes the conclusion (designated a finding of fact) that knowledge of the firearm revocation is not an element of the crime.² However, Powell's testimony and the trial court's oral findings are central to the factual question of whether Powell was affirmatively misled as to his loss of the right to possess firearms and this Court should decline to consider the question without that record.

The failure to provide a verbatim report of proceedings results in the findings of fact being treated as verities on appeal, binding on this Court. Morris v. Woodside, 101 Wn.2d 812, 815, 682 P.2d 905 (1984). On that basis, the assignment of error to the trial court's finding of fact (labeled 2.1.2) should be rejected.

2. POWELL'S ASSIGNMENT OF ERROR 2.1.3 IS UNSUPPORTED BY ANY ARGUMENT AND SHOULD BE REJECTED ON THAT BASIS.

Powell assigns error to the trial court's conclusion of law 2(b), which provides: "The defendant had been previously convicted in Seattle Municipal Court of Violation of a No Contact

² That conclusion of law has not been challenged in this appeal.

Order – Domestic Violence." App. Br. at 1. Powell provides no authority, analysis, or argument in support of that assignment of error, and the claim should be rejected on that basis.

RAP 10.3(a)(6) requires the appellant's brief contain argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. "Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face." State v. Kroll, 87 Wn.2d 829, 838, 558 P.2d 173 (1976). There is no obvious error in the trial court's conclusion that Powell had a prior conviction; Powell appears to concede that conviction in his briefing. App. Br. at 3-7.

This Court should conclude that Powell has waived this assignment of error and not consider it further. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554, rev. denied, 164 Wn.2d 1015 (2008).

3. **POWELL WAS INFORMED THAT HE IS PROHIBITED FROM POSSESSING A FIREARM AND HIS CONVICTION FOR VIOLATING THAT PROHIBITION DID NOT VIOLATE DUE PROCESS.**

Three times in the course of proceedings in Seattle Municipal Court, once orally and twice in writing, the court informed Powell that as a result of his conviction for an offense of domestic violence, he did not have a right to possess a firearm, for his lifetime. Powell's claim that he was affirmatively misled as to the length of that prohibition because it also was a condition of his two-year probation should be rejected. Powell's remaining claims, including that the notice in his guilty plea form was ineffective because it was circled instead of checked, and that another written notice was insufficient because it was only one sentence in a form with many other provisions, all are frivolous.

When a person is convicted of an offense that makes that person ineligible to possess a firearm under Washington law, the convicting court must notify the person, both orally and in writing, that he or she 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). The notice statute does not require a separate form that provides only that written notice. Id.

Knowledge of the illegality of possession of a firearm is not an element of the offense of unlawful possession of a firearm State v. Minor, 162 Wn.2d 796, 802, 174 P.3d 1162 (2008). The Supreme Court has held that if a convicting court affirmatively represents to a defendant that the firearm prohibition does not apply to him, that conviction cannot be the predicate for a conviction for unlawful possession of a firearm. Id. at 803-04. At the time of the predicate conviction in Minor, the convicting court gave neither oral nor written notice of the firearm prohibition. Id. at 800. The basis for the Supreme Court's conclusion that Minor was affirmatively misled as to the prohibition was that there was a paragraph describing the prohibition printed on the order entered for the predicate offense and that paragraph was not checked. Id. at 800-01, 803-04.

The Court in Minor followed a line of Washington cases originating with State v. Leavitt, 107 Wn. App. 361, 27 P.3d 622 (2001). In Leavitt, the court convicting on the predicate offense imposed a one-year suspended sentence, including a condition that Leavitt possess no firearms, and specifying that the termination date for the conditions of sentence was one year after the sentencing date. 107 Wn. App. at 363. The court did not at any

point inform Leavitt that he was prohibited from possessing firearms beyond that one-year term. Id. After that term had expired, Leavitt took possession of firearms and when he had contact with police, volunteered that there were guns in his car. Id. at 364. The court of appeals held that under those "unique circumstances," because Leavitt was affirmatively led to believe that the term of the firearm prohibition was one year, and because he detrimentally relied upon that information (as shown by his "guileless" volunteering of incriminating information), it was a violation of due process to hold him criminally responsible. Id. at 372.

In State v. Carter, the court of appeals concluded that where no notice at all was provided at the time of the predicate offense, the defendant was not affirmatively misled, and the conviction for unlawful possession of a firearm was affirmed. 127 Wn. App. 713, 720-21, 112 P.3d 561 (2005).

In State v. Breitung, the court of appeals concluded that the defendant could not be convicted of unlawful possession of a firearm where the predicate conviction court provided absolutely no notice regarding the firearm prohibition and the defendant established prejudicial reliance on that defect because when questioned, he volunteered incriminating information to the police.

155 Wn. App. 606, 623, 230 P.3d 614 (2010). But see State v. Krzeszowski, 106 Wn. App. 638, 646, 24 P.3d 485 (2001) (due process is implicated only when the government actively misleads the defendant). Powell has not established detrimental reliance of that nature, as he lied to police, telling them that he did not own any guns and refused to consent to a search of his home, where his guns were located. CP 3-4.

The case at bar is distinguishable from every case in which a conviction for a firearm offense was held to be a violation of due process because in each of those cases, no notice of the lifetime prohibition was provided. In the case at bar, Powell was notified not just once, but was notified three times of the lifetime prohibition. CP 69-70, 136-37, 149.

The trial court found that Powell was not affirmatively misled by any government representative as to his lifetime firearm prohibition. CP 70. That finding of fact is reviewed on appeal only to determine whether it is supported by substantial evidence. State v. Wright, 155 Wn. App. 537, 556, 230 P.3d 1063 (2010). That review is hampered in this case because of the inadequate record provided on appeal, but the facts appearing in the record that is

provided constitute overwhelming evidence in support of the court's conclusion.

- a. Powell's Claim That He Was Misled Each Time He Was Provided Notice Of His Lifetime Prohibition Of Possession Of Firearms Is Frivolous.

The municipal court provided Powell the written notice required by RCW 9.41.047(1), in the guilty plea form. CP 149. That paragraph of the form "was not initialed but was circled, indicating that it applied." CP 69, 149. Powell orally affirmed to the municipal court judge that he had reviewed the guilty plea form in detail with his attorney and that he was aware of the specific provision regarding the loss of firearm rights for life. CP 136-37.

Powell apparently concedes that this written notice in the plea form contains the notification required by RCW 9.41.047. App. Br. at 16. He argues that this written notice was misleading because, although it was circled, the paragraph was not checked and initialed by the defendant, as the form itself directs. It cannot be seriously argued that a paragraph that is circled has not been identified as applying. Moreover, the municipal court directed Powell's attention to that provision and specifically asked him if he understood the lifetime firearm prohibition – Powell responded that

he understood. CP 69. The use of a circle instead of a checkmark did not affirmatively mislead Powell.

Not only did Powell agree during the plea colloquy that he had reviewed the plea form in detail with his lawyer, Powell affirmed that he had a copy of the plea form in front of him during the plea colloquy.³ CP 136. Powell agreed that he had signed the plea form on page four, above the printed word "defendant." CP 136. The defense lawyer's signature appears beneath the declaration: "I have read and discussed this statement with the defendant and believe that the defendant is competent and fully understands the statement." CP 150. The plea form establishes that at the time of the plea Powell was 44 years old and had completed high school. CP 147. Thus, the record establishes that Powell was provided the required notice and affirmatively stated that he understood it.

Powell also argues that the written notice of the firearm prohibition that was part of the plea form was insufficient because it was "not a document that applied after the plea was accepted." App. Br. at 17. He provides no authority or analysis that supports a

³ Without the record of his testimony in the case at bar, this Court cannot know whether Powell was provided a personal copy of the plea form, before or after the hearing.

conclusion that written notice in a plea form is misleading or otherwise insufficient.

When the municipal court judge confirmed that Powell was aware of the firearm prohibition provision during the plea colloquy, the court at the same time provided the required oral notice of the firearm prohibition. CP 69, 137. The court stated, "there will be a written order prohibiting you from possessing a firearm for the remainder of you life or until a court of competent jurisdiction reinstates that right." CP 69, 137.

Despite this statement on the record by the trial judge, Powell asserts, "There was no oral notice." App. Br. at 14. He argues that the statement was an "allusion" to a "potentiality" because it came shortly after the court informing Powell of the maximum sentence that "could be" imposed. Id. That comparison disproves his argument, however, as with respect to the firearm prohibition, the court used the word "will", not "could." Further, Powell cannot explain how the reference to a written order affirmatively misled him as to the term of the firearm prohibition. The court did not indicate that it might not enter a written order or that a written order was required for the prohibition to take effect.

The written notice in the plea form, which Powell reviewed with his attorney, made clear that the prohibition was automatic.

Further, the no contact order that was imposed at the time of the municipal court sentencing again specified that the lifetime firearm prohibition was automatic. It provided "If you are convicted of a crime of domestic violence, you will be forbidden for life from possessing a firearm or ammunition. Title 18, United States Code, 922(g)(9); RCW 9.41.040." CP 61, 69-70. Powell had just pled guilty to a crime of domestic violence and he must have been aware of that, as the judge had just concluded on the record that Powell knowingly, voluntarily and intelligently pled guilty to a violation of a domestic violence no contact order. CP 138. Powell has made no assertion on appeal that he was unaware that the predicate crime was a crime of domestic violence and the State cannot determine whether he made that assertion below, because the record of his testimony has not been provided. Given this record, the court must assume that there was no such claim.

Powell suggests that the notice in the no contact order is inadequate because it is "buried" in a single-spaced paragraph. App. Br. at 17. However, the notice is not hidden. The notice is in

a section of the form entitled, in bold, capital letters: "WARNINGS TO THE DEFENDANT." CP 61. Further, the order bears a signature labeled the defendant's signature, and Powell apparently⁴ signed the declaration indicating that he had read the order and a copy was provided to him. CP 61.

Powell argues that the provision in the no contact order is insufficient notice because it indicated only that his firearm rights could be lost. App. Br. at 18. To the contrary, it plainly states that upon conviction, "you will be forbidden for life from possessing a firearm." CP 61, 70. As Powell had just been convicted, the application of the prohibition could hardly be clearer. Powell does not argue on appeal that he did not understand the word "convicted" or that the word is ambiguous or, most relevant to the issue on appeal, that it is affirmatively misleading. Without a record of his testimony below, and in the absence of a trial court finding addressing that issue, the court should conclude that he did not make that assertion there.

⁴ The findings of the trial court in the case at bar do not address whether Powell admitted that the signature on the order was his, although the court did find that Powell received a copy of the order. CP 69-70. Absent a record of Powell's testimony or any other contradiction, this Court should conclude that the signature is Powell's.

Powell also argues that the notice provision in the no contact order conflicts with a provision prohibiting firearms or ammunition as long as the protection order is in effect. App. Br. at 18. While Powell describes the limited prohibition as being "just above" the notice of the lifetime prohibition on firearms, there are other intervening sentences. CP 61. In any event, the critical language in the lifetime firearm prohibition notice that makes it clear that the lifetime prohibition applies only in certain cases, including Powell's, is "If you are convicted of an offense of domestic violence...." CP 61. There has been no argument that Powell was affirmatively misled about whether he had been convicted or whether the offense was a crime of domestic violence. Powell does not even argue that he did not understand that he had been convicted or did not know that the crime was a crime of domestic violence. The notice of the lifetime firearm prohibition clearly applied to him.

With respect to each of the three forms of notice provided to Powell, Powell has asserted some defect that he claims infects the notice with ambiguity. All of these claims are frivolous. Each notice explicitly provides that upon his conviction, a lifetime firearm prohibition will take effect. Further, both of the written notices cite

to the applicable prohibition, RCW 9.41.040, which has no time limit. Powell has cited no case in which the format of the notice given was found to affirmatively mislead the defendant when notice of the firearm prohibition was specifically provided and the notice specified that the firearm prohibition was for life. Powell has not established that he was affirmatively misled by the form of the three notices given.

- b. Including A Weapons Prohibition As A Condition Of Probation Does Not Affirmatively Mislead A Defendant Who Is Notified That The Firearm Prohibition Is In Effect For Life.

Powell argues that when the municipal court judge included a prohibition of weapons as a condition of the suspended sentence, it affirmatively represented that any firearm prohibition was limited to two years. In effect, he argues that any time the court imposes a weapons prohibition as a condition of sentence, fatal ambiguity exists and due process precludes any conviction for unlawful possession of a firearm for a crime that occurs after the condition of the sentence has expired. This argument should be rejected.

The municipal court advised Powell three times that he was prohibited from possessing a firearm for life, twice specifying that the prohibition was for life unless a court of record restored that

right. CP 69-70, 136-37, 149. Both written notices provided to Powell cited RCW 9.41.040, which prohibits possession of a firearm by a person with such a domestic violence conviction. CP 69-70, 149. Including a condition of sentence barring possession of weapons cannot reasonably be considered affirmative advice that the lifetime firearm prohibition is abrogated as a result.

Powell's argument that the municipal court misled him by failing to check the provision in the sentence requiring forfeiture of weapons also is without merit. RCW 9.41.047 does not require notice that firearms must be forfeited, nor has Powell established that forfeiture is required. In fact, the trial court in the case at bar directed that the guns that were seized from Powell be returned to Powell's nephew. CP 109. Failure to check the box for forfeiture has no significance in the due process analysis, and affirmatively misrepresents nothing.

Powell's reliance on Leavitt, supra, is misplaced. In Leavitt the convicting court on the predicate offense only mentioned a firearm prohibition in the context of its conditions of sentence, which were limited to one year. 107 Wn. App. at 363. The municipal court in the case at bar provided explicit notice of the lifetime firearm prohibition, three times. Due process does not bar

prosecution for unlawful possession of a firearm simply because a defendant may have been confused by provisions in prior court orders; due process is violated only if the defendant was affirmatively misled.

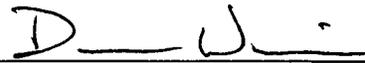
D. CONCLUSION

For the foregoing reasons, Powell's claims of error should be rejected. The State respectfully asks this Court to affirm Powell's conviction and sentence.

DATED this 12th day of August, 2010.

Respectfully submitted,

DANIEL T. SATTERBERG
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By: 

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WSBA Office #91002

Appendix 1

Appendix 1

OPPOSING COUNSEL

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

GEORGE POWELL, JR.,
Appellant/Defendant below,
vs.
WASHINGTON STATE,
Respondent/Plaintiff below.

No.: 650149

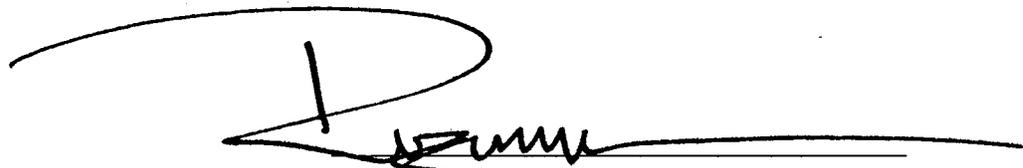
STATEMENT OF INTENT TO RELY
ON TRIAL COURT'S FINDINGS OF
FACT AND CONCLUSIONS OF LAW

[Rule 9.2(a)]

I, David Ruzumna, attorney for Appellant, George Powell, Jr., state that the appellant does not intend to order a verbatim or partial report of the trial court proceedings, but instead will rely upon the trial court's findings of fact and conclusions of law on appeal.

DATED this 29th day of March 2010.

LAW OFFICE OF DAVID RUZUMNA, PLLC:

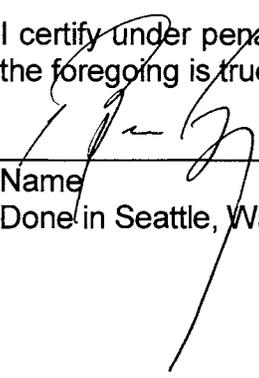


David Ruzumna, WSBA #27094
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Attorneys for the Appellant

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 David Ruzumna, the attorney for the appellant, at Law Office of David Ruzumna, 1411 Fourth Avenue, Suite 1510, Seattle, WA 98101-2247, containing a copy of the Brief of Respondent, in STATE V. GEORGE ARNOLD POWELL, JR., Cause No. 65014-9-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
Done in Seattle, Washington

08/12/10

Date

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FILED
COURT OF APPEALS DIVISION I
