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COA NO. 66979-6-1

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

REC'D

SEP 30 2011

King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

DANTE MARQUIS HAYNES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Julie Spector, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The information is defective because it omits an element of the harassment offense.

2. The court erred in imposing a no contact order as part of appellant's sentence that exceeds the statutory maximum.

3. The court erred in imposing a treatment requirement as part of appellant's probation.

4. The court erred by misadvising appellant regarding the breadth of the restriction on his right to possess a firearm.

Issues Pertaining to Assignments of Error

1. Is reversal of the harassment conviction required where the State failed to allege the "true threat" element of the crime of harassment in the information?

2. The statutory maximum for a suspended sentence imposed under RCW 9.95.210 is two years. Did the trial court lack statutory authority to impose a no contact order as part of appellant's suspended sentence that exceeds two years?

3. The court imposed a treatment requirement in appellant's child custody case as part of appellant's suspended sentence. Did the court abuse its discretion in imposing this requirement because the facts do not

show this unspecified form of treatment related to victim reparations or the prevention of future crimes?

4. Appellant was convicted of a crime that rendered him ineligible to possess firearms. The sentencing court advised appellant that this meant he could not even be around a firearm, including inside a car that contained a firearm. Was this advisement, which is inconsistent with Washington law, improper and unnecessarily restrictive of appellant's rights?

B. STATEMENT OF THE CASE

The State charged Dante Haynes with third degree assault against J.B. (born 4/08) in count I; felony harassment against Seantaila Spears in count II, and fourth degree assault against Spears in count III. CP 1-2; 1RP¹ 4-5; 4RP 116. A jury acquitted Haynes of third degree assault and the lesser crime of fourth degree assault on count I, found him guilty of the lesser crime of misdemeanor harassment on count II, and found him guilty of fourth degree assault under count III. CP 77-80, 90; 8RP 56-57.

¹ The verbatim report of proceedings is referenced as follows: 1RP - 2/23/11; 2RP - 2/24/11; 3RP - 3/1/11; 4RP - 3/2/11; 5RP - 3/3/11 (received by Court of Appeals on 9/23/11); 6RP - 3/7/11; 7RP - 3/8/11; 8RP - 3/9/11 & 3/10/11; 9RP - 3/21/11. The "March 3, 2011" transcript received in the Court of Appeals on 8/22/11 should be disregarded because it is mislabeled — its content duplicates the 3/2/11 morning session.

As the basis for the fourth degree assault on count III, evidence showed Haynes punched Spears following an argument during which both exited their vehicles on the street. 4RP 89-94, 134-40, 143, 147-48; 5RP 51, 63-72, 76-77, 109; 6RP 17-20, 32-33. Evidence also showed Haynes threatened Spears during this incident, which formed the basis for the harassment conviction on count II. 4RP 143, 148-49, 153-54; 5RP 52, 72, 74-75; 7RP 20-21, 25.² Two children, D. (born 8/03) and J.B., were present when these offenses took place. 4RP 116-17, 139; 5RP 66. D. is the son of Haynes and Spears. 4RP 117. Haynes and Spears have not been together for a number of years, but there is a parenting plan in place. 4RP 118. J.B. is not Haynes's child. 5RP 93-94.

The convictions for fourth degree assault and harassment constituted gross misdemeanors. RCW 9A.46.020(2)(a); RCW 9A.36.041(2). The court entered concurrent, suspended sentences of 12 months on each conviction and imposed a total of two years probation. CP 90-92. The court also imposed no contact orders with an expiration date beyond the two year term of probation. 9RP 18; CP 91; Supp CP ___ (sub no. 92, Order Prohibiting Contact Conditions of Sentence, 3/25/11).

² The jury acquitted Haynes of assaulting D. on count I, in relation to which witnesses testified Haynes threw a cup at the back windshield of the car while J.B. was in the backseat, breaking the glass. 4RP 140-44; 5RP 51-52, 72-73, 76, 79, 84-86; 6RP 22; 7RP 44-45.

As part of the suspended sentence, the court required Haynes to comply with treatment ordered in a child custody case. CP 91; 9RP 16-18.

The court further entered a written order notifying Haynes that he was "not permitted to possess a firearm until your right to do so is restored by a court of record." Supp CP __ (sub no. 88, Notice of Ineligibility, 3/21/11). At the sentencing hearing, the court advised Haynes as follows:

Because this was a domestic violence crime, the Assault 4 involving her, you will lose your right to use or possess a firearm. I want to make sure you understand that. Okay? I will give you a copy of it right here. I just signed it. Let's have you acknowledge receipt of it.

It is important that you not be around guns. You might hang out with people who have guns. I say this to everybody. Ms. Samuel can confirm this. You might be in a car with a friend who happens to have a gun. If you have access to that gun, you are in violation. That is a serious, serious charge. That is Unlawful Possession of a Firearm Act violation, UPFA. That is a very serious charge.

You have two things to worry about -- you have a lot of things to worry about. You have children to worry about. You have Ms. Spears to worry about. And you have this issue about being around guns. You have to be careful. Otherwise, you will look at a lot more serious charge than what you just faced here, because you will be the one that the police will look at. They will say, "Look, he has a DV. He is not supposed to be around a gun. The gun was under the seat. He had access to that gun," whoops, you are the one that gets charged. That is a big whoops. I want to make sure you understand that.

9RP 16-17.

Haynes appeals. CP 93-94.

C. ARGUMENT

1. THE INFORMATION WAS DEFECTIVE BECAUSE IT OMITTED AN ELEMENT OF THE CRIME OF HARASSMENT.

Haynes's harassment conviction must be reversed because the charging document does not set forth the "true threat" element of the crime. U.S. Const. Amend. VI; Wash. Const. Art. I, § 22; State v. Vangerpen, 125 Wn.2d 782, 787, 888 P.2d 1177 (1995).

A charging document is constitutionally defective if it fails to include all "essential elements" of the crime. Vangerpen, 125 Wn.2d at 787. Where, as here, the adequacy of an information is challenged for the first time on appeal, the court undertakes a two-pronged inquiry: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" State v. Kjorsvik, 117 Wn.2d 93, 105-06, 812 P.2d 86 (1991). If the necessary elements are neither found nor fairly implied in the charging document, the court presumes prejudice and reverses without further inquiry. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000).

"While laws may proscribe 'all sorts of conduct' the same is not true of speech." State v. Kilburn, 151 Wn.2d 36, 42, 84 P.3d 1215 (2004).

Speech protected by the First Amendment may not be criminalized. Kilburn, 151 Wn.2d at 42. RCW 9A.46.020, the statute defining the crime of harassment, criminalizes pure speech if read literally. Id. at 41. To avoid unconstitutional infringement on protected speech, the harassment statute and the threat-to-kill provision of RCW 9A.46.020 must therefore be read to prohibit only "true threats." State v. Schaler, 169 Wn.2d 274, 284, 236 P.3d 858 (2010).

"A true threat is a statement made in a context or under such circumstances wherein a reasonable person would foresee that the statement would be interpreted . . . as a serious expression of intention to inflict bodily harm upon or to take the life of another person." Schaler, 169 Wn.2d at 283 (quoting Kilburn, 151 Wn.2d at 43) (internal quotation marks omitted). The true threat standard "requires the defendant to have some mens rea as to the result of the hearer's fear: simple negligence." Schaler, 169 Wn.2d at 287.

The information accused Haynes of committing the crime of felony harassment, as follows: "That the defendant Dante Marquis Haynes in King County, Washington, on or about August 28, 2010, knowingly and without lawful authority, did threaten to cause bodily injury immediately or in the future to Seantaila Spears, by threatening to kill Seantaila Spears, and the words or conduct did place said person in reasonable fear that the

threat would be carried out; Contrary to RCW 9A.46.020(1), (2), and against the peace and dignity of the State of Washington." CP 1-2.³

The information fails to allege Haynes made a "true threat." This Court has held the "true threat" allegation need not be included in the charging document because it is merely definitional rather than an essential element. State v. Tellez, 141 Wn. App. 479, 484, 170 P.3d 75 (2007) (telephone harassment under RCW 9.61.230(2)(b)); State v. Atkins, 156 Wn. App. 799, 802, 236 P.3d 897 (2010) (felony harassment under RCW 9A.46.020); State v. Allen, 161 Wn. App. 727, 753-56, 255 P.3d 784 (2011) (same).⁴

Those decisions cannot be reconciled with the Supreme Court's decision in Schaler and established precedent. The Supreme Court in Schaler pointedly declined to determine whether Tellez was correctly decided because the issue of whether a true threat was an element of harassment was not before it. Schaler, 169 Wn.2d at 289 n.6. The Court, however, stated, "It suffices to say that, to convict, the State must prove that a reasonable person in the defendant's position would foresee that a

³ This is the language from the original information. An amended information added a count of assault against Haynes but was not filed. 1RP 4-5. The amended information contains identical charging language in relation to the harassment count. It will be designated for review after it is filed in the superior court.

⁴ The Supreme Court has granted review of the issue in Allen (No. 86119-6).

listener would interpret the threat as serious." Id. That statement is in complete accord with Kilburn, where the Court held a harassment conviction must be reversed if the State fails to prove a "true threat." Kilburn, 151 Wn.2d at 54.

The elements of a crime are commonly defined as "[t]he constituent parts of a crime — [usually] consisting of the actus reus, mens rea, and causation — that the prosecution must prove to sustain a conviction." State v. Peterson, 168 Wn.2d 763, 772, 230 P.3d 588 (2010) (quoting State v. Fisher, 165 Wn.2d 727, 754, 202 P.3d 937 (2009)). "An 'essential element is one whose specification is necessary to establish the very illegality of the behavior' charged." State v. Feeser, 138 Wn. App. 737, 743, 158 P.3d 616 (2007) (quoting State v. Johnson, 119 Wn.2d 143, 147, 829 P.2d 1078 (1992)). As Schaler and Kilburn make clear, the State cannot convict someone of harassment unless it proves the existence of a true threat. Schaler, 169 Wn.2d at 286-87, 289 n.6; Kilburn, 151 Wn.2d at 54. Schaler establishes a "true threat" is necessary to prove the mens rea of the crime of felony harassment. Schaler, 169 Wn.2d at 286-87, 289 n.6.

Following Schaler and Kilburn, a "true threat" must be deemed an element of felony harassment. The State's information is deficient because it lacks this element. "If the document cannot be construed to give notice of or to contain in some manner the essential elements of a crime, the most

liberal reading cannot cure it." State v. Campbell, 125 Wn.2d 797, 802, 888 P.2d 1185 (1995). Because the necessary element of "true threat" is neither found nor fairly implied in the charging document, this Court must presume prejudice and reverse. McCarty, 140 Wn.2d at 425.

2. THE LENGTH OF THE NO CONTACT ORDER IMPOSED AS PART OF THE SUSPENDED SENTENCE EXCEEDS THE STATUTORY MAXIMUM.

The trial court erred in setting an expiration date for the no-contact orders that exceed the two year statutory maximum. This Court should vacate the orders and remand for entry of a lawful expiration date.

The court entered a suspended sentence on both counts and imposed two years of probation under RCW 9.95.200 and RCW 9.95.210. CP 90-92. As a condition of Haynes's suspended sentence, the court ordered "no contact with Seantaila Spears and [J.B.] (no violation of NCO for purposes of child exchange with [D.])" CP 91. The court signed a no contact order with an expiration date of March 21, 2016 "as a condition of sentence in this matter." Supp CP __ (sub no. 92, supra). The court subsequently modified the no-contact orders to specify an expiration date of "March 21, 2015." Supp CP __ (sub no. 98, Motion Hearing, 5/5/11); Supp CP __, (sub no. 99, Domestic Violence No-Contact Order, 5/5/11); Supp CP __ (sub no. 100, Domestic Violence No-Contact Order, 5/5/11).

A court may impose only a sentence that is authorized by statute. State v. Barnett, 139 Wn.2d 462, 464, 987 P.2d 626 (1999); see also State v. Phelps, 113 Wn. App. 347, 355, 57 P.3d 624 (2002) (defendant cannot extend the trial court's sentencing authority by agreeing to a punishment in excess of statute). Courts have no inherent authority pertaining to suspended sentences or probation. State ex rel. Schock v. Barnett, 42 Wn.2d 929, 931, 259 P.2d 404 (1953). The terms of the statutes granting courts power to suspend sentences and impose probation are mandatory and the action of the court is void when the statutory provisions are not followed. Barnett, 42 Wn.2d at 931; State v. Hall, 35 Wn. App. 302, 305, 666 P.2d 930 (1983). Erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). When a sentence has been imposed for which there is no authority in law, appellate courts have the power and the duty to correct the erroneous sentence upon its discovery. In re Pers. Restraint of Carle, 93 Wn.2d 31, 33-34, 604 P.2d 1293 (1980).

The maximum statutory term of imprisonment for a gross misdemeanor is "not more than one year." Former RCW 9A.20.021(2).⁵ Under RCW 9.945.200 and 9.95.210, the Court imposed concurrent 12

⁵ Laws of 2003, ch. 288 § 7 (eff. July 27, 2003). This was the law in effect at the time of Haynes's offenses.

month terms of confinement on each count and then suspended the sentence for a two year term of probation upon "the following terms and conditions." CP 90. One of those conditions is that Haynes have no contact with Spears and J.B. CP 91. That sentencing condition was recorded in a no contact order specifying a March 21, 2016 expiration date. Supp CP ___, (sub no. 92, supra).

RCW 9.95.210(1) provides "In granting probation, the superior court may suspend the imposition or the execution of the sentence and may direct that the suspension may continue *upon such conditions and for such time as it shall designate, not exceeding the maximum term of sentence or two years, whichever is longer.*" (emphasis added).

Under the plain language of RCW 9.95.210(1), the maximum term of the no contact order is two years because compliance with the order is a condition of the suspended sentence. When the meaning of a statute is clear on its face, the appellate court assumes the legislature means exactly what it says, giving criminal statutes literal and strict interpretation. State v. Delgado, 148 Wn.2d 723, 727-28, 63 P.3d 792 (2003). The plain language of RCW 9.95.210(1) limits the probationary term, and any conditions included within that term, to a maximum of two years. The court lacked statutory authority to order the no contact orders to remain in place until March 21, 2016. CP 91; Supp CP ___, (sub no. 92, supra).

The court's later modification of the no contact orders specifying a March 21, 2015 expiration date does not cure the error because the modified expiration date remains erroneous. Supp CP __, (sub no. 99, supra); Supp CP __ (sub no. 100, supra). The length of the no contact orders still exceeds the two year statutory maximum.

The court issued the no contact orders under the authority of RCW 10.99.050. Supp CP __, (sub no. 92, supra); Supp CP __, (sub no. 99, supra); Supp CP __ (sub no. 100, supra). RCW 10.99.050(1) provides "When a defendant is found guilty of a crime and a condition of the sentence restricts the defendant's ability to have contact with the victim, such condition shall be recorded and a written certified copy of that order shall be provided to the victim." RCW 10.99.050 does not address the maximum length of a no contact order.

RCW 9.95.210(1) provides the statutory maximum for the no contact orders. The length of the no contact orders exceeds the two-year statutory maximum under RCW 9.95.210(1). The orders are therefore void. This Court should remand for imposition of no contact orders that do not exceed the two year statutory maximum.

3. IN THE ABSENCE OF AN ADEQUATE FACTUAL BASIS, THE COURT ERRED IN IMPOSING A TREATMENT CONDITION AS PART OF PROBATION.

The treatment condition of probation must be stricken because the court did not have a tenable reason for imposing it.

As a condition of probation, the court ordered Haynes to "comply with treatment in 09-3-03175 5 SEA parenting plan." CP 91. This condition was discussed at the sentencing hearing. The court noted there was a parenting plan ordered in the child custody case involving D. and stated, "You were ordered into Family Court Services as far as treatment goes. What I will have in this judgment and sentence is that it should comply -- all your treatment should comply with the 09-3-03171-5 SEA parenting plan. There was supposed to be an evaluation. This was entered -- I don't see a signature here." 9RP 16.

The court continued:

Here is the deal. You will need to get this evaluation done through Family Court Services. I don't know if you ever did it, but you need to do it. That is part of what the order was, from what I can tell here.

Do you see that on page 6 of 10 under Section 3.13, the parenting plan says, "May 17, 2010, *Family Court Services recommendations as to father: Participate in treatment are adopted as attached.*"

I don't have them attached. But it is really important that you follow through on this, because this pertains to your parenting of this child. I don't want to ever see you back here in a criminal context, but you may have some difficulties in the parenting of [D.] That is so

important, because that is really the person who will pay the price, is your child. He doesn't get a say in this. It is just left up to the courts. So you might have an idea of what is good for him. She may have an idea what is in his best interests. But, really, it will be up to a judge to determine if there is follow-through on this on your part and her part. You know what you are up against. I want to make sure you understand.

9RP 17-18 (emphasis added).

A trial court's decision imposing conditions of probation is reviewed for abuse of discretion. State v. Williams, 97 Wn. App. 257, 263, 983 P.2d 687 (1999), review denied, 140 Wn.2d 1006 (2000). "A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons." In re Marriage of Littlefield, 133 Wn.2d 39, 46, 940 P.2d 1362 (1997).

Probationary conditions must be reasonable. State v. Langford, 12 Wn. App. 228, 230, 529 P.2d 839 (1974). The court may only impose conditions on probation that (1) bear a relationship to the duty to make reparations to the victim or (2) would tend to prevent the future commission of crimes. State v. Summers, 60 Wn.2d 702, 707, 375 P.2d 143 (1962) (addressing RCW 9.92.060(1), which grants the trial court discretion in suspending sentences conditionally "upon such terms as the

superior court may determine.").⁶ A trial court abuses its discretion if it imposes a condition that has no bearing on either of these two matters. Summers, 60 Wn.2d at 707-08.

"A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard." Littlefield, 133 Wn.2d at 46.

The court here imposed a probationary condition in the absence of a factual basis showing that such a condition would tend to prevent the commission of future crimes or was related to reparation. The requirement that Haynes "comply with treatment in 09-3-03175 5 SEA parenting plan" is untenable because it is based on facts that do not meet the requirements of the correct legal standard. Littlefield, 133 Wn.2d at 47.

⁶ There are two statutory schemes under which a trial court may impose a suspended sentence: (1) RCW 9.92.060-.064, the Suspended Sentence Act, and (2) RCW 9.95.210, the Probation Act. State v. Monday, 85 Wn.2d 906, 907, 540 P.2d 416 (1975) (citing State v. Davis, 56 Wn.2d 729, 355 P.2d 344 (1960)). The test for determining the propriety of a probation condition is the same under RCW 9.92.060(1) and RCW 9.95.210. See State v. Eilts, 23 Wn. App. 39, 43-44, 596 P.2d 1050 (1979), aff'd, 94 Wn.2d 489, 617 P.2d 993 (1980) (applying same standard to RCW 9.95.210).

The correct legal standard is that the probation condition bears a relationship to the duty to make reparations to the victim or would tend to prevent the future commission of crimes. Summers, 60 Wn.2d at 707 (trial court abused its discretion in requiring offender to support own children because that condition was a moral rather than legal obligation and had no bearing on restitution or future crimes). The facts do not show court-ordered treatment in the child custody case tends to prevent the commission of future crimes or is related to reparation because the court did not know, and the record does not show, what that treatment was. 9RP 16-18. Treatment may have been geared towards addressing some aspect of Haynes's parenting. But that does not mean such treatment is justified as a condition of probation in a criminal case.

The court's discretion to impose probationary conditions is not unfettered. There must be a tenable reason for it. The court here did not know what the parenting plan treatment was. 9RP 17-18. In the absence of such knowledge, the court did not and could not articulate a reasonable connection between the treatment and whether that treatment would tend to prevent Haynes from criminally reoffending. The court therefore abused its discretion because the facts do not meet the requisite legal standard for imposing the condition in this criminal case. The treatment requirement should be stricken from the judgment and sentence.

4. THE COURT MISADVISED HAYNES REGARDING THE CONSEQUENCES OF HAVING ACCESS TO OR BEING IN THE VICINITY OF A FIREARM.

Haynes was subject to the prohibition on possessing firearms because he was convicted of fourth degree assault against a "family member." RCW 9.41.040(2)(a)(i); RCW 9.41.047(1)(a). In this regard, the sentencing court advised Haynes it was important that he not be "around" guns and that simply having "access" to a gun, such as being in the same car with one, would be a violation of the prohibition on possessing firearms. 9RP 16-17. This was an incorrect statement of the law on constructive possession and what conduct exposes Haynes to further punishment. The Court's misadvisement should be stricken. State v. Lee, 158 Wn. App. 513, 517, 243 P.3d 929 (2010).

a. The Court's Advisement Incorrectly Stated the Law.

A person is guilty of unlawful possession of a firearm if he or she possesses a firearm after being convicted of fourth degree assault against a "family member." RCW 9.41.040(2)(a)(i); see RCW 9.41.010(5) (defining family member with reference to RCW 10.99.020); RCW 10.99.020(3) ("Family or household members' means spouses, former spouses, persons who have a child in common regardless of whether they have been married or have lived together at any time[.]").

Accordingly, RCW 9.41.047(1)(a) provides "At the time a person is convicted . . . of an offense making the person ineligible to possess a firearm, . . . the convicting . . . court shall notify the person, orally and in writing, that the person must immediately surrender any concealed pistol license and that the person may not possess a firearm unless his or her right to do so is restored by a court of record."

In Lee, the sentencing court orally advised the defendant that he could not be "anywhere near a firearm" or "in the same house or the same car with a firearm." Lee, 158 Wn. App. at 515. Because the trial judge's remarks misstated the law on constructive possession, this Court struck the oral advisement in favor of the written statutory advisement. Id. at 515, 517.

The judge here admonished Haynes not to be "around" guns, stating "You might be in a car with a friend who happens to have a gun. If you have access to that gun, you are in violation." 9RP 16-17. This advisement is comparable to the erroneous advisement in Lee and may be raised for the first time on appeal. Lee, 158 Wn. App. at 516 n.3 (citing State v. Armstrong, 91 Wn. App. 635, 638–39, 959 P.2d 1128 (1998) (no waiver of right to review legality of sentencing condition by failing to object below)).

In any prosecution for unlawful possession of a firearm, the State must prove knowing possession of the firearm. Lee, 158 Wn. App. at 517 (citing State v. Anderson, 141 Wn.2d 357, 359, 366, 5 P.3d 1247 (2000)). Possession may be actual or constructive. State v. George, 146 Wn. App. 906, 919, 193 P.3d 693 (2008); State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

Here, the judge's comments incorrectly stated the law of constructive possession. 9RP 16-17. Being around guns or having access to guns by being in the same car with a person who has one does not establish constructive possession.

Constructive possession is established by showing the defendant had dominion and control over the firearm or over the premises where the firearm was found. Lee, 158 Wn. App. at 517. Proximity alone is insufficient to establish constructive possession. Id. (citing State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000) (citing State v. Spruell, 57 Wn. App. 383, 388–89, 788 P.2d 21 (1990))). An automobile passenger does not exercise dominion and control over a car just because he is inside it. See George, 146 Wn. App. at 920 (constructive possession of a glass pipe in a car could not be imputed by the mere fact of being a passenger in the car); United States v. Soto, 779 F.2d 558, 560-61 (9th Cir. 1986) ("The mere proximity of a weapon to a passenger in a car goes only

to its accessibility, not to the dominion or control which must be proved to establish possession."), cert. denied, 484 U.S. 833, 108 S. Ct. 110, 98 L. Ed. 2d 70 (1987).

Proximity and the ability to reduce contraband to actual possession do not establish constructive possession. George, 146 Wn. App. at 923. Even handling an item may not establish possession: "possession entails actual control, not a passing control which is only a momentary handling." Id. at 920 (quoting Callahan, 77 Wn.2d at 29). Thus, a person with a prior qualifying conviction does not violate the law simply by being near a firearm in the absence of exercising dominion or control over the weapon or premises where the weapon is found. Lee, 158 Wn. App. at 517. Because the judge affirmatively misrepresented the law to Haynes, this Court should strike the improper advisement. Id.

b. Review Is Warranted Either As A Matter Of Right Or Through Discretionary Review.

In Lee, this Court determined relief from the trial court's oral advisement was not a final judgment appealable as a matter of right under RAP 2.2(a)(1) but that relief may be granted through discretionary review. Lee, 158 Wn. App. at 516. Haynes disagrees that the court's oral advisement is not appealable as a matter of right. A sentencing court's

oral remarks, even if not reduced to final judgment, may still be appealable as a matter of right.

In State v. Faagata, the defendant appealed as a matter of right from a trial court's oral remarks that conditionally vacated a lesser offense conviction that was not reduced to judgment and sentence. State v. Faagata, 147 Wn. App. 236, 242, 193 P.3d 1132 (2008), rev'd sub nom., State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010). The Court of Appeals held there was no double jeopardy violation, accepting the State's argument that the trial court's oral ruling was irrelevant because the judgment and sentence was silent regarding the lesser conviction. Faagata, 147 Wn. App. at 245-48.

The Supreme Court reversed, holding a sentencing court's oral remarks conditionally vacating a lesser conviction, even though not reduced to judgment and sentence, violated double jeopardy. State v. Turner, 169 Wn.2d 448, 453, 465, 238 P.3d 461 (2010). In so doing, the Supreme Court implicitly and necessarily rejected the notion that a sentencing court's oral remarks cannot in and of themselves constitute an appealable legal error.

Furthermore, appellate courts routinely look to a trial court's oral remarks to clarify ambiguity in a written order, in effect importing the oral remarks into the written order. See, e.g., State v. Iniguez, 143 Wn. App.

845, 859-60, 180 P.3d 855 (2008) (ambiguity in sentence clarified by court's oral ruling), rev. on other grounds, 167 Wn.2d 273, 217 P.3d 768 (2009); State v. Smith, 82 Wn. App. 153, 159, 916 P.2d 960 (1996) (court's written decision may be clarified by resort to the court's oral opinion); State v. Parada, 75 Wn. App. 224, 234-35, 877 P.2d 231 (1994) ("when the trial court's interlineations and its oral opinion are considered in conjunction with the written findings of fact and conclusions of law, the court's findings support its conclusions.").

The court's oral remarks here regarding firearm possession may be treated in the same manner. The court was attempting to clarify what it meant to "possess" a firearm as per the written notice of ineligibility. The court's oral remarks and the written notice go hand in hand. A defendant faced with both the oral and written advisement is unlikely to draw any meaningful distinction between the two, especially where, as here, the sentencing court's oral remarks on the matter constitutes an interpretation of the written notice.

If the matter is not appealable as of right, appeal from the court's oral advisement may be treated as a motion for discretionary review in the interest of judicial economy. See Warner v. Design & Build Homes, Inc., 128 Wn. App. 34, 38 n.2, 114 P.3d 664 (2005) (in case where matter was not appealable as of right, notice of appeal treated as motion for

discretionary review in the interests of judicial economy); Glass v. Stahl Specialty Co., 97 Wn.2d 880, 882-83, 652 P.2d 948 (1982) (where matter below was not final and therefore not appealable as of right, appellate court could consider the matter as one for discretionary review); RAP 1.2(c) ("The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice").

RAP 2.3(b)(2) allows for discretionary review when "[t]he superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act." Although brought as a direct appeal as of right, this Court in Lee granted discretionary review of the trial court's remarks on firearm possession because they involved probable error implicating constitutional freedoms. Lee, 158 Wn. App. at 516.

There is no sound reason why the same should not be done here. In light of Lee, the sentencing court here committed not just probable error but definite error. And Haynes, like Lee, has the constitutional right to travel and associate with others. U.S. Const. Amend. I; U.S. Const. Amend. XIV; Aptheker v. Sec'y of State, 378 U.S. 500, 505, 507, 517, 84 S. Ct. 1659, 12 L. Ed. 2d 992 (1964) (right of travel is a fundamental one protected by due process clause and "freedom of association is itself guaranteed in the First Amendment"); Dawson v. Delaware, 503 U.S. 159,

163, 112 S. Ct. 1093, 117 L. Ed. 2d 309 (1992) ("We have held that the First Amendment protects an individual's right to join groups and associate with others holding similar beliefs.").

The court's misadvisement regarding what constitutes possession of a firearm curtails those freedoms. The issue thus involves probable error by the sentencing court that substantially alters the status quo by limiting Hayne's constitutional freedoms to associate with others and to travel.

It is also noteworthy that the trial judge gives the same misadvisement to all defendants before her, notwithstanding this Court's decision in Lee: "I say this to everybody." 9RP 16. Granting discretionary review will likely put an end to the practice. This Court should therefore grant discretionary review and strike the erroneous oral advisement regarding firearm possession. Lee, 158 Wn. App. at 517.

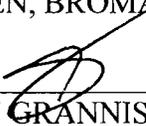
D. CONCLUSION

Haynes requests that this Court (1) reverse the harassment conviction; (2) remand for entry of a lawful term for the no contact order; (3) strike the treatment requirement imposed as part of the judgment and sentence; and (4) strike the sentencing court's incorrect advisement regarding the loss of Haynes's firearms rights.

DATED this 30th day of September 2011.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 66979-6-1
)	
DANTE HAYNES,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER, 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] DANTE HAYNES
9414 RENTON AVENUE SOUTH
SEATTLE, WA 98118

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER, 2011.

x 