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NO. 68767-1-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

TINA RICH,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE LAURA GENE MIDDAUGH
THE HONORABLE CATHERINE SHAFFER

BRIEF OF RESPONDENT

DANIEL T. SATTERBERG
King County Prosecuting Attorney

TOMÁS A. GAHAN
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 296-9650

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A. ISSUES PRESENTED

1. An oral advisement from a sentencing court is not appealable as a matter of right unless it affects the courts. Here, the court told Rich to be careful to stay away from guns or people possessing guns. Where this remark did not affect the final judgment, should Rich be proscribed from appealing as a matter of right?

2. Review of an oral advisement at sentencing can only be granted pursuant to discretionary review. Discretionary review may be merited where the trial court commits probable error and the decision substantially alters the status quo or substantially limits the freedom of a party to act. When a defendant is convicted of an offense that renders him ineligible to possess a firearm, the trial court is required to provide notice of this prohibition, both orally and in writing. Here, in addition to providing oral and written notice, the court warned Rich to be careful to stay away from guns or people possessing guns. Was the court's admonishment to Rich proper, and is discretionary review thus prohibited?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On March 2, 2012, Tina Rich pled guilty to 13 felony theft charges, with aggravators for committing crimes against a vulnerable adult. CP 31-41. Her standard range on the most serious charges was 43-57 months, but the aggravator allowed for an exceptional sentence. CP 31-41. One month later, she was sentenced to a 68-month exceptional sentence. CP 61.

2. FACTS REGARDING FIREARM ADMONISHMENTS.

During her plea entry, Rich was advised regarding her loss of rights to possess firearms in paragraph (w) of the plea form:

This plea of guilty will result in the revocation of my right to possess, own or have in my control any firearm unless my right to do so is restored by a superior court in Washington State, and by a federal court if required. I must immediately surrender any concealed pistol license. RCW 9.41.040.

CP 38-39. This paragraph was also read aloud to Rich by the prosecutor taking the plea, and Rich indicated on the record that she understood. RP 11.¹ Rich initialed the paragraph and signed the plea form. CP 39, 41.

¹ This brief will refer to the Verbatim Report of Recorded Proceedings for March 2, 2012 and April 13, 2012, as RP.

At her sentencing, Rich signed a form entitled "Notice of Ineligibility to Possess Firearm and Loss of Right to Vote," which read, in relevant part:

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

CP 68.

After Rich received her copy of the notice, the court orally admonished her:

I don't think that you're a person who carries a gun. But, you need to be alert that from here forward in Washington you're not allowed to have any kind of firearm because you could be convicted of a felony from everybody's point of view. That means that if you have a gun that's yours or if you are in a position to control or possess somebody's gun, okay, and the State can prove that beyond a reasonable doubt, you're subject to being charged for being a felon in possession, which would put you back in prison because your offender score is really high. At this point it's not going to go down. Be really careful to stay away from guns. I think you will be eligible in the future to have your right to carry a firearm –

[interrupted by Rich saying "I don't want a gun"].

I know. But it's safer, frankly, to get back your right if you can. So, you'll be eligible in the future to petition to have that right restored. But, until that day comes and you have an order saying you can have a gun, be

really careful to stay away from guns or people that you know are in possession of them.

RP 52-53.

C. ARGUMENT

1. THE COURT'S REMARKS EXPLAINING THE FIREARMS PROHIBITION ARE NOT APPEALABLE AS A MATTER OF RIGHT.

Rich, while relying on State v. Lee to advance his argument that the court's admonishment was erroneous, disputes Lee's holding that "an oral advisement" like the court's admonishment here is "not appealable as a matter of right under RAP 2.2(a)(1)," and requests relief both under the discretionary review standard and "as a matter of right." 158 Wn. App. 513, 516, 243 P.3d 929 (2010); Brief of Appellant at 6. But the court's admonishment was merely explanatory, having no effect on the final judgment, rendering the argument that Rich may appeal as a matter of right baseless.

RAP 2.2(a) lists several types of appealable superior court proceedings, including a final judgment. A final judgment is one that settles all the issues in a case. In re Detention of Turay, 139 Wn.2d 379, 392, 986 P.2d 790 (1999). In a criminal proceeding, a

final judgment ends the litigation, leaving nothing for the court to do but execute the judgment. In re Detention of Petersen, 138 Wn.2d 70, 88, 980 P.2d 1204 (1999); see also State v. Siglea, 196 Wash. 283, 285, 82 P.2d 583 (1938) (“As a prerequisite to an appeal in a criminal case, there must be a final judgment terminating the prosecution of the accused and disposing of all matters submitted to the court for its consideration and determination.”). The failure to mention a particular order or proceeding in RAP 2.2(a) indicates an intent that the matter be reviewable only under the guidelines for discretionary review. See Department of Social & Health Servs. v. Chubb, 112 Wn.2d 719, 721, 773 P.2d 851 (1989).

While Rich concedes that the court’s admonishments were not “final judgments,” she cites to State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010) to argue that a court’s oral rulings can be appealable as a matter of right. Brief of Appellant at 6. In Turner, the Washington Supreme Court addressed the sentencing courts’ remarks made in two separate cases, State v. Faagata, 147 Wn. App. 236, 193 P.3d 1132 (2008) and State v. Turner, 144 Wn. App. 279, 182 P.3d 478 (2010). Turner was convicted by a jury of first degree robbery and assault for shoplifting from a store and stabbing the store security guard; the crimes constituted the

same criminal conduct. Turner, 169 Wn.2d at 453. The sentencing court issued a written order vacating the assault conviction, but made an oral ruling that the charge was “nevertheless a valid conviction” for which Turner could be sentenced should his remaining robbery conviction not survive on appeal. Id. The court subsequently sentenced Turner only for the robbery.

In Faagata, the defendant was convicted of both first degree murder and second degree felony murder for the same crime. Id. To address double jeopardy concerns, the trial court conditionally dismissed the second degree murder conviction, sentencing him only for first degree murder. The court gave an oral ruling explaining the conditional dismissal, saying that should the “[first degree murder] be reversed ... it can be reinstated...” Id. Both rulings were affirmed by the Court of Appeals.

The Washington Supreme Court reversed, holding that “double jeopardy prohibits courts from explicitly holding vacated lesser convictions alive for reinstatement.” Id. at 465. While appealability was never at issue in Turner, Rich argues that by holding that the sentencing court’s oral remarks “conditionally vacated a lesser conviction,” the Turner court “implicitly and necessarily rejected the notion” established in Lee that a

“sentencing court’s oral remarks cannot in and of themselves constitute an appealable legal error.” Brief of Appellant at 7.

But the sentencing court’s erroneous oral admonishment in Lee has little in common with the courts’ oral rulings at sentencing that were reversed in Turner. Where the court in Lee was merely attempting to explain, albeit erroneously, an aspect of the final judgment captured in the Judgment and Sentence, the sentencing courts in Turner were explicitly modifying the final judgment by their oral rulings, bringing those rulings fully within the scope of RAP 2.2 and warranting an appeal as a matter of right. Conditionally vacating a conviction where double jeopardy applies intrinsically affects the final judgment, whether the ruling be oral or in writing. This cannot be compared to a sentencing court’s sua sponte remarks clarifying a condition of the sentence, where those remarks have no actual bearing on the final judgment.

Here, the sentencing court was merely being cautious in admonishing Rich to be careful in adhering to the conditions of the final judgment concerning firearms, but in no way did the court actually affect the judgment itself. This is made manifest in a hypothetical: If Rich were arrested after her release from custody and accused of unlawful possession of a firearm, the court’s

admonishment would play no role in the constructive possession analysis of her current charge. For the defendants in Turner, however, had the charges been reversed on appeal, the sentencing court's remarks would have resurrected the vacated sentences, directly affecting the final judgments against them. The cases then, are altogether inapposite; the court's admonishment here is not appealable as a matter of right.

2. THE COURT PROPERLY ADVISED RICH REGARDING THE PROHIBITION AGAINST POSSESSING FIREARMS, SO NO PROBABLE ERROR WAS COMMITTED WARRANTING DISCRETIONARY REVIEW.

Rich argues that the court's admonishment to be "careful to stay away from guns or people that [she knows] are in possession of them" was erroneous, and should be stricken after discretionary review. Brief of Appellant, 5-6. Because the court's statement was a proper admonishment, there was no probable error permitting discretionary review in the first place.

RAP 2.3(b)(2) permits discretionary review when the 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." A person can be found guilty of unlawful

possession of a firearm if she possesses a firearm after being convicted of a felony. RCW 9.41.040(2)(a)(i). Following conviction for such an offense, the trial court must notify a defendant, orally and in writing, that she may not possess a firearm until her right has been restored. RCW 9.41.047(1)(a).

Possession of a firearm can be actual or constructive. Actual possession occurs when the firearm is in the actual physical custody of the defendant. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969); WPIC 133.52. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the firearm or the premises where the firearm is found. State v. Echeverria, 85 Wn. App. 777, 783, 934 P.2d 1214 (1997). Mere proximity is insufficient to establish dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991). However, proximity coupled with other circumstances linking a defendant to an item is sufficient to establish constructive possession. See State v. Mathews, 4 Wn. App. 653, 658, 484 P.2d 942 (1971) (regarding constructive possession of a controlled substance).

Relying on State v. Lee, 158 Wn. App. 513, 243 P.3d 929 (2010), Rich argues that the trial court incorrectly stated the law of

constructive possession. In Lee, the trial court admonished the defendant as follows:

This is your notice of ineligibility to possess a firearm and loss of your right to vote. When we say, "possess a firearm," we don't just mean own a firearm, we mean be anywhere near a firearm. So you cannot be in the same house or the same car with a firearm. This lasts forever...

Id. at 515. Holding that the trial court's overly-broad advisement misstated the law, this Court granted discretionary review and struck the trial court's oral advisement, while declining Lee's request to remand for resentencing.² Id. at 517.

But the court's admonishment in Lee is distinguishable from the warning here. While the Lee court explicitly told the defendant that he was forever prohibited from being in a home or a car with a firearm (substantially limiting Lee's "freedom to act" under RAP 2.3(b)(2)), the court here merely warned Rich to be "really careful to stay away from guns or people" that she knew were "in possession of them." RP 52. A warning to "be careful" retained

² In Lee, this Court found that the oral advisement was not appealable as a matter of right under RAP 2.2(a)(1), but that discretionary review was warranted under RAP 2.3(b)(2). 158 Wn. App. at 516. Given this Court's opinion in Lee, the State acknowledges that if the trial court erred, discretionary review is appropriate under RAP 2.3(b)(2).

the status quo of the final judgment and did not substantially limit Rich's "freedom to act," so discretionary review is not triggered.

Further, the court's admonishment was preceded by an accurate statement of the law of constructive possession, where the court explained to Rich that the prohibition barred her from possessing her own gun or from being "in a position to control or possess" somebody else's gun and further explained that the State would still have to "prove that beyond a reasonable doubt."

RP 51-52.³

Far from the overbroad and apparently perpetual banishment from houses and cars containing guns ordered by the trial court in Lee, the sentencing court here gave a narrow warning to Rich that she should be careful to avoid people with guns. RP 52. Particularly in the context of the court's prior statement describing constructive possession and the accurate admonishments in the guilty plea form and colloquy and the Notice

³ These warnings are consistent with case law on constructive possession. See State v. Jeffrey, 77 Wn. App. 222, 889 P.2d 956 (1995) (constructive possession when defendant knew a firearm was under the couch in his home); State v. Reid, 40 Wn. App. 319, 698 P.2d 588 (1985) (possession proved when defendant admitted having a firearm in front seat of automobile, but said he moved it to the back so it would not be seen by the police); State v. Howell, 119 Wn. App. 644, 649-50, 79 P.3d 451 (2003) (no requirement that the firearm be immediately accessible at the time of possession, distinguishing firearm possession offenses from firearm enhancements).

of Ineligibility to Possess Firearms, the court's warning should not be construed as "probable error" warranting discretionary review.

Finally, even if the trial court misadvised Rich, the remedy is for this Court to strike the oral advisement. Lee, 158 Wn. App. at 517.

D. CONCLUSION

For the foregoing reasons, the defendant's convictions should be affirmed.

DATED this 30 day of November, 2012.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: 
TOMAS A. GAHAN, WSBA #32779
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the BRIEF OF RESPONDENT, in STATE V. TINA RICH, Cause No. 68767-1 -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.

Dated this 3 day of December, 2012



Name
Done in Seattle, Washington

