IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ALI E. DIVSAR, aka ALI AY, b.d. 07/19/92, Appellant.	)	No. 66373-9-I DIVISION ONE UNPUBLISHED OPINION FILED: February 21, 2012

Becker, J. — Convicted of "Assault in the Fourth Degree – Domestic Violence," appellant Ali Divsar is now prohibited by statute from possessing a firearm. Divsar contends he is not ineligible to possess a firearm because the information filed against him did not provide factual or legal support for the domestic violence designation. The firearm prohibition, however, is not punishment and the domestic violence designation is not an essential element of the crime. We conclude the information was sufficient and deny Divsar's request for relief.

FACTS

According to unchallenged findings of fact entered by the trial court in support of the conviction, on the evening of March 22, 2010, Eraj Divsar and his

9-year-old son returned home after dining out. Shortly after they entered the house, Eraj heard his 17-year-old stepson Ali Divsar shouting swear words. Concerned that his young son was hearing this, Eraj approached Ali's closed bedroom door. He knocked on the door and told Ali to calm down. Ali opened the door and immediately pushed and punched Eraj in the torso. Eraj retreated to the living room and called 911. Two police officers arrived and arrested Ali. The State charged him with assault in the fourth degree with a domestic violence designation.

At the bench trial in juvenile court, Divsar did not challenge the domestic violence designation and did not argue it was factually unfounded. The court found Divsar guilty as charged and imposed a disposition within the standard range.

Normally, ineligibility to possess a firearm is not a consequence of a conviction for fourth degree assault. But that status is a consequence for a person convicted of fourth degree assault when the crime is one of domestic violence—that is, committed by one family or household member against another. RCW 9.41.040(2)(a)(i), .010(5); RCW 10.99.020(5)(d). The meaning of "family or household members" includes "legal parent-child relationship, including stepparents and stepchildren." RCW 10.99.020(3).

The court informed Divsar at sentencing that as a result of the conviction, he lost the right to possess a firearm and it would be a felony for him to possess a firearm until his rights were restored. Also at sentencing, the court gave

Divsar a "Notice of Ineligibility to Possess Firearm," informing him in writing of the prohibition: "Pursuant to RCW 9.41.047 and RCW 9.41.040, **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."

On appeal, Divsar does not challenge the assault conviction. He contends the firearm prohibition was "imposed as punishment" and asks this court to "vacate" it.

THE ESSENTIAL ELEMENTS RULE

Divsar begins by arguing that the State violated the essential elements rule by failing to include in the information the legal and factual foundation for subjecting him to enhanced punishment.

In every prosecution, the defendant must be informed of the nature and cause of the accusation. U.S. Const., amend. VI; Wash. Const. art. I, § 22; see also CrR 2.1(a)(1). The charging document must contain all essential elements of an alleged crime, including both statutory and nonstatutory elements. State v. Kjorsvik, 117 Wn.2d 93, 101-02, 812 P.2d 86 (1991). An element is essential if its specification is necessary to establish the very illegality of the behavior. State v. Yates, 161 Wn.2d 714, 757, 168 P.3d 359 (2007), cert. denied, 554 U.S. 922 (2008). The primary goal of the "essential elements" rule is to give notice to an accused of the nature of the crime that he or she must be prepared to defend against. Kjorsvik, 117 Wn.2d at 101.

The information accused Divsar of "Assault in the Fourth Degree – Domestic Violence."

> I, Daniel T Satterberg, Prosecuting Attorney for King County in the name and by the authority of the State of Washington, do accuse ALI E DIVSAR AKA ALI AY of the crime of **Assault in the Fourth Degree – Domestic Violence**, committed as follows
>
> That the respondent, ALI E DIVSAR AKA ALI AY, In King County, Washington on or about March 22, 2010, did intentionally assault Eraj Divsar,
>
> Contrary to RCW 9A.36.041 and against the peace and dignity of the State of Washington.

Divsar contends the bare mention of "domestic violence" in the information was insufficient notice because the information did not allege that the victim was a household or family member and it did not cite the firearms prohibition statute, RCW 9.41.040. Divsar argues domestic violence is an essential element because it "punishes" him by making him subject to the firearm prohibition law.

This court has already rejected an argument that fourth degree assault – domestic violence is a distinct crime. State v. O.P., 103 Wn. App. 889, 13 P.3d 1111 (2000). When the legislature enacted the domestic violence act, chapter 10.99 RCW, the legislature did not create new crimes. The legislature was focused on implementing procedural requirements designed to enhance enforcement of existing laws. O.P., 103 Wn. App. at 892. Thus, a domestic violence designation "does not alter the elements of the underlying offense; rather, it signals the court that the law is to be equitably and vigorously enforced." O.P., 103 Wn. App at 892; State v. Goodman, 108 Wn. App. 355,

359, 30 P.2d 516 (2001), review denied, 145 Wn.2d 1036 (2002).

O.P. and Goodman were decided before both Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and State v. Recuenco, 163 Wn.2d 428, 180 P.3d 1276 (2008). Divsar contends that Blakely and Recuenco compel the relief he seeks.

In Recuenco, our Supreme Court held that the defendant was erroneously sentenced with a firearm enhancement that was not alleged or submitted to the jury and that this type of error is not harmless. Recuenco, 163 Wn.2d at 442. Because the enhancement was the basis for a sentence greater than the maximum authorized statutory sentence, it became the equivalent of an element of a greater offense than the one covered by the jury's guilty verdict. Recuenco, 163 Wn.2d at 434, citing Apprendi v. New Jersey, 530 U.S. 466, 490, 494, n.19, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). Such enhancements must be properly included in an information. Recuenco, 163 Wn.2d at 434. Divsar argues the State must likewise allege facts and law supporting the "element" of domestic violence because of the "enhanced punishment" that results from such a conviction.

This court rejected a similar argument in State v. Felix, 125 Wn. App. 575, 105 P.3d 427, review denied, 155 Wn.2d 1003 (2005). The defendant in Felix was convicted of fourth degree assault, and the court found the crime was one of domestic violence. Felix argued this finding expanded his punishment because it resulted in the deprivation of his right to carry a firearm. We held that Blakely

does not require the domestic violence designation to be proved to the trier of fact because the designation does not increase a defendant's punishment. Felix, 125 Wn. App. at 579-80.

In Felix, we relied on State v. Schmidt, 143 Wn.2d 658, 23 P.3d 462 (2001). In Schmidt, the appellant argued that amendments to the firearm laws expanding the effects of previous convictions violated constitutional ex post facto prohibitions. Our Supreme Court rejected this argument. The court reasoned that the firearm prohibition did not constitute punishment:

> Although the prohibitions of the firearms statute impose a disability and present a threat of criminal punishment if violated, the prohibitions do not amount to punishment for a prior conviction, nor do they "alter the standard of punishment" applicable to those crimes.

Schmidt, 143 Wn.2d at 676. The court observed that firearms have always been subject to government regulation for safety purposes. Schmidt, 143 Wn.2d at 676.

Felix found Schmidt dispositive because there was no principled reason to distinguish punishment for Blakely purposes from punishment for ex post facto purposes. Divsar contends Felix must be reconsidered in light of District of Columbia v. Heller, 554 U.S. 570, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and State v. Sieyes, 168 Wn.2d 276, 291, 225 P.3d 995 (2010). According to Divsar, these newer cases show that Felix and Schmidt were incorrect in regarding firearm prohibitions as regulatory rather than punitive.

In Heller, the United States Supreme Court clarified that the Second

Amendment[1] confers an individual right to keep and bear arms. Heller, 554 U.S. at 595. The Court found a violation of the Second Amendment in the District of Columbia's total handgun ban in the home and its prohibition against making any lawful firearm in the home operable for the purpose of immediate self-defense. Heller, 554 U.S. at 635. The Second Amendment is fully applicable to the States. McDonald v. Chicago, __ U.S. __, 130 S. Ct. 3020, 3027, 177 L. Ed. 2d 894 (2010); Sieyes, 168 Wn.2d at 291. Our state constitutional analog to the Second Amendment, article I, section 24,[2] also plainly guarantees an individual right to bear arms. Sieyes, 168 Wn.2d at 292.

These cases do not undermine Felix or Schmidt. Heller simply recognized that the right to bear arms is an individual right and that this right may be infringed when the State limits firearm possession inside one's home. And Sieyes's recognition that article I, section 24 secures an individual right to possess a firearm is not new. See, e.g., State v. Gohl, 46 Wash. 408, 410, 90 P. 259 (1907).

The State contends Divsar is improperly using a direct appeal to challenge a "collateral consequence" of his conviction. Seizing upon this phrase, Divsar contends any distinction between direct and collateral

[1] The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[2] Article I, section 24 of the Washington Constitution declares: "Right To Bear Arms. The right of the individual citizen to bear arms in defense of himself, or the state, shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men."

consequences of a conviction has been obliterated by Padilla v. Kentucky, __ U.S. __, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010). Padilla establishes that the Sixth Amendment right to effective assistance of counsel includes the right to advice about immigration consequences of a criminal conviction, specifically deportation. Padilla, 130 S. Ct. at 1482. Kentucky's high court had ruled that deportation was a "collateral" matter not within the sentencing authority of the trial court. Padilla, 130 S. Ct. at 1481. Rejecting this view, the Supreme Court reasoned that characterizing deportation as a "collateral" consequence was not necessarily dispositive on the issue of what advice must be given by counsel:

> We, however, have never applied a distinction between direct and collateral consequences to define the scope of constitutionally "reasonable professional assistance" required under Strickland [v. Washington], 466 U.S. [688], 689, 104 S. Ct. 2052[, 80 L. Ed.2d 674 (1984)]. Whether that distinction is appropriate is a question we need not consider in this case because of the unique nature of deportation.

Padilla, 130 S. Ct. at 1481.

Divsar does not make a compelling argument for applying Padilla in this case. Padilla was not decided under Blakely. The Second Amendment was also not involved. The court referred to the "unique" nature of deportation. In addition, Schmidt and Felix stated other reasons to conclude the firearm prohibition is regulatory rather than punitive that have nothing to do with characterizing it as a collateral consequence. Possession of firearms has always been subject to government regulation for safety purposes. Schmidt, 143 Wn.2d at 676. Restricting the firearm rights of a person who commits a domestic

violence misdemeanor clearly is an attempt to increase the safety of potential future domestic violence victims by decreasing such a defendant's access to lethal force. Felix, 125 Wn. App. at 581.

In summary, neither Padilla nor the more recent right to bear arms case law justifies a different conclusion than the one this court reached in Felix. It is not punishment to forbid a misdemeanant convicted of a domestic violence assault from possessing firearms. Following Felix, we conclude Divsar was not subjected to additional punishment, the domestic violence designation was not an element, the essential elements rule has no application, and the information was not deficient.

Firearm ineligibility—a status, not a court order

Divsar also contends the court lacked authority to prohibit him from possessing a firearm because the conclusions of law entered by the trial court did not establish that the State proved domestic violence.

He starts from a false premise. The court did not prohibit Divsar from possessing a firearm. The court simply notified him that he had lost his right to possess firearms. That prohibition is imposed by statute. Divsar's status as a misdemeanant convicted of a domestic violence is what makes him, like a convicted felon, now subject to charge and punishment for unlawful ownership, possession or control of any firearm. See Schmidt, 143 Wn.2d at 676. The court was not required to conclude that the State proved domestic violence because, as discussed above, domestic violence was not an element.

The statute that makes Divsar ineligible to possess firearms is RCW 9.41.040(2)(a)(ii). Divsar contends the statute violates both the Second Amendment and article I, section 24. Even though he did not make this argument below, he contends the argument is properly before this court under the rule that illegal or erroneous sentences may be challenged for the first time on appeal. State v. Bahl, 164 Wn.2d 739, 744, 193 P.3d 678 (2008).

The notice given to Divsar by the court was not part of his sentence. It was not even a court order. See State v. Hunter, 147 Wn. App. 177, 186, 195 P.3d 556 (2008) (reasoning firearm notification was not a ruling by the trial court), reversed on other grounds, State v. R.P.H., 173 Wn.2d 199, 265 P.3d 890 (2011). Because there is no court ruling or sentence to which Divsar has assigned error, his appeal is not a suitable vehicle for a constitutional challenge to the statute.

Affirmed.

Becker, J.

WE CONCUR:

Dwyer, C. J.

Ellington, J.