# IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

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| In re the Personal Restraint of:<br><br>RYAN WAYNE ALLEN,<br><br>Petitioner. | No. 41345-1-II<br><br>UNPUBLISHED OPINION |

Penoyar, J. — Ryan Wayne Allen filed a personal restraint petition (PRP), arguing that his two first degree unlawful possession of a firearm convictions should be reversed because the predicate offense court failed to notify him of the prohibition as RCW 9.41.047 (1) requires. He also contends that the predicate offense court's failure to notify him of the prohibition violated his right to due process. Holding that the trial court's failure to notify Allen of the firearm prohibition violated his due process rights, we grant the petition and reverse the convictions.

FACTS

In 1994, Allen pleaded guilty to one count of residential burglary in the Thurston County Juvenile Court. The court's disposition order did not inform Allen that he could lose his right to possess firearms as a result of the juvenile conviction. Neither the court nor the probation officer orally informed Allen of the firearm prohibition.

Regarding the underlying unlawful possession convictions, we restate the facts from our opinion in Allen's direct appeal:

> Sometime past midnight on December 21, 2007, a Thurston County sheriff's deputy responded to a noise complaint. The deputy arrived at Allen's mobile home, located in an isolated area, from which the deputy heard music playing.

> The music blared from Allen's mobile home so loudly that all the home's windows shook and the deputy could not hear his dispatch radio even when turned up to its maximum volume. The deputy also noticed two cars parked in front of the home and a sign on the home that read, "No trespassing, violators will be shot and survivors will be prosecuted." Clerk's Papers (CP) at 30.
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> He knocked on the door twice before Allen answered. Allen aggressively opened the door while holding an assault rifle in his right hand. The deputy, who had come alone, stood face to face with Allen. The deputy later testified that it would have taken 10 to 20 minutes for assistance to arrive if he had called for backup.
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> The deputy ordered Allen to put down the weapon and Allen complied. The deputy pulled Allen out of the doorway and handcuffed him. The deputy asked Allen if any other persons presently occupied the home and if he had any other guns nearby. Allen answered that no one else was present and that he had a loaded .22 caliber rifle on his bed. The deputy entered the home, went into the bedroom, and secured the .22 caliber rifle.
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> The deputy radioed headquarters and learned that Allen had a previous felony conviction. As a result, Washington law forbade Allen from owning a gun. RCW 9.41.040(1)(a). The deputy arrested Allen. The State charged Allen with two counts of first degree unlawful possession of a firearm: one count for the assault rifle, the other count for the .22 caliber rifle.

*State v. Allen*, noted at 151 Wn. App. 1041, 2009 WL 2437229, at *1, *review denied*, 168 Wn.2d 1012, 227 P.3d 852 (2010). Allen was subsequently convicted of two counts of first degree unlawful possession of a firearm and one count of bail jumping. *Allen*, 2009 WL 2437229, at *1-2.

Allen appealed the current convictions to this court. *Allen*, 2009 WL 2437229, at *2. We affirmed the two firearm convictions but reversed and dismissed the bail jumping conviction. *Allen*, 2009 WL 2437229, at *4. Our Supreme Court denied review. *State v. Allen*, 168 Wn.2d 1012, 227 P.3d 852 (2010). Allen served his sentence and is no longer in custody.

Allen filed a PRP. The chief judge referred the matter to a panel for determination on the

merits.

ANALYSIS

I. PRP Standards

A petitioner may request relief through a PRP when he is under unlawful restraint.[1] RAP 16.4(a)-(c). A personal restraint petitioner must prove either a (1) constitutional error that results in actual and substantial prejudice or (2) nonconstitutional error that "'constitutes a fundamental defect which inherently results in a complete miscarriage of justice.'" *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 672, 101 P.3d 1 (2004) (quoting *In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990)). The petitioner must prove the error by a preponderance of the evidence. *In re Pers. Restraint of Lord*, 152 Wn.2d 182, 188, 94 P.3d 952 (2004).

We may consider additional evidence when evaluating the claims raised in Allen's PRP. Allen must support the petition with facts or evidence and may not rely solely on conclusory allegations. RAP 16.7(a)(2)(i); *Cook*, 114 Wn.2d at 813-14; *see also In re Pers. Restraint of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). For allegations "based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief." *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). "If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their

[1] RAP 16.4(b) defines "Restraint":

> A petitioner is under a "restraint" if the petitioner has limited freedom because of a court decision in a civil or criminal proceeding, the petitioner is confined, the petitioner is subject to imminent confinement, or the petitioner is under some other disability resulting from a judgment or sentence in a criminal case.

affidavits or other corroborative evidence. The affidavits . . . must contain matters to which the affiants may competently testify." *Rice*, 118 Wn.2d at 886. The petitioner must show that the "factual allegations are based on more than speculation, conjecture, or inadmissible hearsay." *Rice*, 118 Wn.2d at 886.

"Once the petitioner makes this threshold showing, the court will then examine the State's response," which must "answer the allegations of the petition and identify all material disputed questions of fact." *Rice*, 118 Wn.2d at 886. "[T]o define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence" and only after "the parties' materials establish the existence of material disputed issues of fact" will we direct the trial court "to hold a reference hearing in order to resolve the factual questions." *Rice*, 118 Wn.2d at 886-87.

> When reviewing a PRP, we have three options:
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> > 1. If a petitioner fails to meet the threshold burden of showing actual prejudice arising from constitutional error, the petition must be dismissed;
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> > 2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand the petition for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12; [or]
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> > 3. If the court is convinced a petitioner has proven actual prejudicial error, the court should grant the [PRP] without remanding the cause for further hearing.

*In re Pers. Restraint of Hews*, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

II. The Statute and Relevant Case Law

RCW 9.41.047(1)[2] requires that when a person is convicted of a crime making that person no longer eligible to possess a firearm, the convicting or committing court must notify that person of the prohibition.[3] The statute does not provide a remedy when the court fails to do so. Case law holds that a defendant's due process rights are violated when a governmental entity affirmatively misleads the defendant to believing that he may possess a firearm.

In *State v. Leavitt*, we first addressed the remedy where a convicting court failed to provide the notice RCW 9.41.047(1) requires. 107 Wn. App. 361, 362, 26 P.3d 622 (2001). We reasoned that while generally ignorance of the law was not a defense, a narrow exception existed where a governmental entity provided affirmative, misleading information. *Leavitt*, 107 Wn. App. at 370 n.13. In *Leavitt*, the predicate offense court did not require Leavitt to relinquish his concealed weapons permit or firearms; did not advise him that the firearms prohibition applied and extended beyond a one-year probationary period; and in the conditions, requirements, and

[2] RCW 9.41.047(1)(a) currently states:

> At the time a person is convicted or found not guilty by reason of insanity of an offense making the person ineligible to possess a firearm, or at the time a person is committed by court order under RCW 71.05.240, 71.05.320, 71.34.740, 71.34.750, or chapter 10.77 RCW for mental health treatment, the convicting or committing 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. For purposes of this section a convicting court includes a court in which a person has been found not guilty by reason of insanity.

[3] Allen's statement of juvenile offender on plea of guilty and disposition order were filed on July 11, 1994. The amendment to the statute requiring notice came into effect just one month earlier. *See* former RCW 9.41.047(1) (1994); Laws of 1994, 1st Spec. Sess. ch. 7, § 404 (effective June 13, 1994).

instructions from the Department of Corrections, left blank the box next to the paragraph explaining the firearms prohibition. 107 Wn. App. at 372. We reversed the later firearm convictions, concluding that such combined actions and inactions deprived Leavitt of due process because they misled him to reasonably understand the prohibition to be limited to one year. *Leavitt*, 107 Wn. App. at 363, 372. We have subsequently applied this rule in later cases. *See, e.g., State v. Carter*, 127 Wn. App. 713, 720-21, 112 P.3d 561 (2005) (refusing to reverse Carter's conviction because Carter was not affirmatively misled); *State v. Moore*, 121 Wn. App. 889, 895, 91 P.3d 133 (2004), (adopting the rule from *Leavitt* and recognizing a due process claim "under the circumstances where the court has misled the defendant into believing that his conduct was not prohibited").

Our Supreme Court followed *Leavitt* in *State v. Minor*, 162 Wn.2d 796, 174 P.3d 1162 (2008). The *Minor* Court reversed Minor's unlawful possession of firearms conviction based on the predicate offense court's failure to give oral or written notice. *Minor*, 162 Wn.2d at 797. The order included the required written notice but the "box" next to that notice was left "unchecked," suggesting that the prohibition did not apply. *Minor*, 162 Wn.2d at 797-98. Our Supreme Court held that the predicate offense court's failure to check the box "affirmatively misled" Minor. *Minor*, 162 Wn.2d at 804 n.7.

III. Allen's Claims are Not Procedurally Barred

At the outset, the State contends that we should deny Allen's PRP on the ground that he previously raised the issue of lack of notice in his statement of additional grounds (SAG) on direct appeal and also in a petition for review to our Supreme Court. We hold that Allen's claims are not procedurally barred because no court has decided the merits of his argument.

When we originally considered his direct appeal, Allen made the following argument in his SAG:

> 7. State v. Ryan Allen Cause No. [94-8-00455-6] clearly marked "middle offence [sic]" not serious offence [sic]. Nowhere on this document is marked or stated no possession of firearms.

PRP, App. H., SAG at 1. He also cited RCW 9.41.047(1) and *Minor* in his SAG, but he provided no argument on those legal authorities. Finally, he referenced the following:

> 10. A letter from Dana Gartner, probation officer for cause no. [94-8-00455-6] stating ". . . I can say with total certainty that he was at no time informed by our courts or myself of a firearm [prohibition]."

PRP, App. H., SAG at 2 (alteration in original).

In addressing these contentions, we stated:

> Next, Allen argues that he could not be convicted of unlawful possession of a firearm because the State did not notify him upon his prior release from prison that law forbade him from owning a gun. The statute under which he was convicted, however, does not require that the State to do so. RCW 9.41.040(1)(a). This argument fails.

*Allen*, 2009 WL 2437229 at *4.[4]

In his petition for review, Allen again raised the issue, arguing that the sentencing court did not notify him of the firearm prohibition as RCW 9.41.047(1) requires. He cited the key cases raised in his PRP, *Leavitt*, 107 Wn. App. 361, and *Minor*, 162 Wn.2d 796. He argued that he was affirmatively misled by the fact that his sentencing documents did not contain any firearm

[4] RCW 9.41.040(1)(a) states:

> A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, has in his or her possession, or has in his or her control any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

restrictions, that his probation officer did not mention it to him, and that the Thurston County Sheriff's Department released a firearm at issue to Allen after allegedly confirming that he was eligible to possess a firearm.

A personal restraint petitioner may not renew an issue that he raised and an appellate court rejected on the merits in a direct appeal unless the interests of justice require relitigation of that issue. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 688, 717 P.2d 755 (1986); *State v. Pierce*, 155 Wn. App. 701, 712-13, 230 P.3d 237 (2010). In order to bar a PRP, "the prior denial must have rested on an adjudication of the merits of the ground presented in the subsequent application." *Taylor*, 105 Wn.2d at 688 (citing *Sanders v. United States*, 373 U.S. 1, 16, 83 S. Ct. 1068, 10 L. Ed. 2d 148 (1963)); *see also Taylor*, 105 Wn.2d at 688 ("[W]e hold the mere fact that an issue was raised on appeal does not automatically bar review in a PRP. Rather, a court should dismiss a PRP only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP.").

Our prior opinion did not address the impact of RCW 9.41.047 or *Minor* on the issue despite Allen's citation to those authorities in his SAG. PRP, App. H., SAG at 2. We evaluated only whether RCW 9.41.040 required such notice and determined that it did not. *Allen*, 2009 WL 2437229 at *4. We did not address the core concern and legal authority of Allen's SAG arguments, so our opinion cannot be considered a prior adjudication on the merits of this claim.

Allen additionally argues that our Supreme Court's denial of the petition for review does not constitute an adjudication on the merits of the claim. We agree because the denial of a petition for review does not constitute a decision on the merits of the petitioner's claims. *See, e.g.*, *Matia Contractors, Inc. v. City of Bellingham*, 144 Wn. App. 445, 452, 183 P.3d 1082

(2008) (noting that "the Supreme Court's denial of review has never been taken as an expression of the court's implicit acceptance of an appellate court's decision"); *State v. Rudolph*, 141 Wn. App. 59, 67, 168 P.3d 430 (2007) ("[T]he Supreme Court's denial of review is not an expression of their implicit acceptance of our decision.").

Allen has not yet had a decision on the merits. We therefore consider his petition.

## IV. Allen's Convictions Violated Due Process Because The Predicate Offense Court Affirmatively Misled Him to Believe That He Could Lawfully Possess Firearms

Allen challenges his unlawful possession conviction on both statutory and constitutional due process grounds. While we normally would address Allen's statutory claims first, before reaching any constitutional issues, Allen's statutory claims raise complex preservation issues in the context of unsettled law. *See Cook*, 114 Wn.2d 802; RAP 2.5(a)(3). We first address Allen's constitutional claim and, finding it dispositive, leave the preservation issues for another day.

### A. The Convictions Violated Allen's Right to Due Process

As discussed above, in order for a petitioner to show a due process violation, the petitioner must show that a governmental entity has provided affirmative, misleading information. *See, e.g.*, *Minor*, 162 Wn.2d at 802. In order for Allen to succeed on his due process claim, he must show that he was affirmatively misled by law enforcement in order to obtain relief.

Allen argues the following facts to support his claim that he was affirmatively misled into believing he was entitled to possess firearms:

The predicate offence court did not notify Allen, either orally or in writing, that he would be prohibited from possessing firearms. Allen's probation officer did not inform him of the prohibition.

In 2005, officers arrested Allen's girl friend after a suicide attempt at Allen's residence. The officers also seized the firearm involved in the incident, which belonged to Allen. The prosecutor released the firearm to Allen after conclusion of the case against Allen's girl friend. When he picked up his firearm, Allen signed for and received his firearm from the Thurston County Sheriff's Office. At that time, Allen signed a form certifying that he was entitled to hold a firearm. In that form, Allen certified that he had never been convicted of a crime punishable for a term exceeding a year and that he had never been convicted of "any crime of violence, (i.e. murder, manslaughter, rape, riot, mayhem, first-degree assault, second-degree assault, robbery, burglary, kidnapping)." PRP, App. F (Firearm Release Form). The form also stated, "I certify that I am not prohibited by the provisions of Chapter 44 Title 18, United States Code or Title VII of Omnibus Crime Control and Safe Streets Act of 1968 (Public Law 90-351, as amended, 18 USC Appendix) from receiving a firearm in interstate or foreign commerce." PRP, App. F (Firearm Release Form).

Additionally, Allen received a letter from the Thurston County Sheriff's legal assistant dated December 2, 2009. PRP App. F (Russell letter). That letter stated:

> Regarding procedure in relinquishing a firearm in this type of situation, the process is that once the Thurston County evidence department is notified that release is authorized by the prosecutor's office, a criminal history check (NCIC) is run. The owner of the gun is then notified that he or she may pick it up. When the owner arrives to pick up their item, their identification is checked and the owner then signs in the "Received by" section of the Evidence/Property form.

PRP, App. F (Russell letter).

Allen submitted a declaration with his PRP stating that he believed that he had the right to possess firearms. In his declaration, he stated that he was not informed of the prohibition. He

also stated that he relied on paragraph 10 of his juvenile guilty plea to believe that he would no longer have a felony record after the age of 23. Paragraph 10 of the plea form stated:

> I know that my plea of guilty and the Court's acceptance of my plea will become part of my criminal history, and that if the offense is a felony and I was 15 or older when the offense was committed, the plea will remain part of my criminal history if I commit another crime before my 23rd birthday.

PRP, App. D (Juvenile Statement on Plea of Guilty). He declared that in reliance on this paragraph, he waited until he was 23 years old to purchase a firearm. Allen finally declared that because his particular crime was not listed on the firearm release form, he believed that he was eligible to possess a firearm and that when the Thurston County Sheriff's Office returned his firearm, this reinforced his belief that he could possess firearms.

Allen argues that he believed from paragraph 10 of his guilty plea that he would be able to possess firearms after the age of 23. Division Three of this court considered a similar argument in *Moore*, 121 Wn. App. at 897. In that case, the juvenile defendant had signed a plea form containing a nearly identical paragraph to paragraph 10 here. *Moore*, 121 Wn. App. at 892. Moore was similarly not advised of the prohibition against the possession of firearms. *Moore*, 121 Wn. App. at 896. The court held that the lack of notice, combined with the suggestion that Moore could "put the ordeal behind him if he stayed out of trouble" and the trial court's extensive explanation of Moore's legal obligations and loss of other privileges, affirmatively misled Moore as to his right to possess firearms. *Moore*, 121 Wn. App. at 896-97.

Here, Allen was similarly affirmatively misled by the representation that the juvenile convictions would no longer be part of his criminal record after his 23rd birthday. The statement of juvenile offender of plea of guilty and the disposition order listed Allen's legal obligations and consequences. Allen apparently relied on this representation and waited to purchase a firearm until his 23rd birthday. We hold that Allen was affirmatively misled as to whether he was entitled to possess firearms and that a conviction for unlawful possession of firearms without notice violated his right to due process.

The State argues that *Moore* is distinguishable because "unlike the predicate offense court in *Moore*, the juvenile court did not fail to advise [Allen] of the firearm prohibition on several occasions." Response at 7. We reject this argument. The documents clearly show that the court thoroughly advised Allen of other prohibitions and restrictions but that it omitted the firearm prohibition. The fact that the court apparently went through the prohibitions and restrictions only once is not significant.

Since we hold that Allen's plea statement affirmatively misled him, we need not consider Allen's other arguments that law enforcement affirmatively misled him.

B. The due process violation caused actual and substantial prejudice

Next, to obtain relief via a PRP for a constitutional error, Allen must show that the constitutional error caused actual and substantial prejudice. *Davis*, 152 Wn.2d at 672. Here, Allen has met that standard. Had Allen raised the issue at hand, the trial outcome could only have been an acquittal. Allen was actually and substantially prejudiced by the due process violation.

We grant Allen's PRP and reverse his two convictions for unlawful possession of a firearm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Armstrong, J.

Johanson, A.C.J.