141 Wn.2d 357, STATE v. ANDERSON
[No. 67826-0. En Banc.]

Argued March 9, 2000. Decided August 10, 2000.

THE STATE OF WASHINGTON, Respondent, v. THADDIUS X. ANDERSON, Petitioner.

Kira McCrae; and Michael L. Mittlestat (of Washington Appellate Project), for petitioner.

Norm Maleng, Prosecuting Attorney, and Ann M. Summers, Deputy, for respondent.

ALEXANDER, J. - The sole issue before us is whether "knowing possession" is an element of the crime of second degree unlawful possession of a firearm. We hold that "knowledge" is an element of the offense and, therefore, reverse the decision of the Court of Appeals, Division One, which affirmed the trial court's determination that second degree unlawful possession of a firearm is a strict liability offense.

A vehicle driven by Thaddius X. Anderson was stopped by Seattle police officers for a traffic violation. During the traffic stop the officers learned that there was an outstanding warrant for Anderson's arrest. Consequently, the officers arrested Anderson and searched the vehicle incident to his arrest. During the search the officers found a handgun under the driver's seat of the car. Because Anderson had a prior felony conviction he was charged with second degree unlawful possession of a firearm.

At trial, Anderson contended that the handgun, as well as the vehicle, belonged to his cousin. Anderson said that he was unaware of the existence of the handgun until he was pulled over by the police officers. At the close of the presentation of evidence, the trial court instructed the jury that knowledge of the existence of the handgun was not an

element of the offense, but that Anderson was entitled to an instruction that unwitting possession is a defense on which he had the burden of proof. The jury found Anderson guilty of the offense charged.

Anderson appealed his conviction to the Court of Appeals, Division One, which affirmed. State v. Anderson, 94 Wn. App. 151, 971 P.2d 585, review granted, 138 Wn.2d 1007, 989 P.2d 1138 (1999). We thereafter granted Anderson's petition for review.

II

A person commits the crime of second degree unlawful possession of a firearm if he or she "owns, has in his or her possession, or has in his or her control any firearm" and the person has previously been convicted of any felony, other than a "serious offense," or certain specified gross misdemeanors. RCW 9.41.040(l)(a), (b), and (b)(i). Anderson asserts here, as he did at the trial court and at the Court of Appeals, that an implicit element of this crime is knowledge of the possession or presence of the firearm. He does not assert "that the State must prove 'guilty knowledge' " at on his part, but only that he had " 'general intent' " at to commit the crime, i.e. that he " 'knew facts that would make his conduct illegal.' "Appellant's Opening Br. at 15 (quoting Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793, 1797, 128 L. Ed. 2d 608 (1994)). The Court of Appeals disagreed with Anderson's argument holding that the crime is a strict liability offense and that, as a consequence, the State did not have to show that he knew the car he was driving contained a gun. It went on to say that any danger that "entirely innocent conduct" may be encompassed by the statute is eliminated by virtue of fact that a person who claims lack of knowledge may assert and prove the defense of unwitting possession. Anderson, 94 Wn. App. at 157-58.

The question before us-whether second degree unlawful possession of a firearm is a strict liability offense-is one of first impression in this court. The appellate decision from

this state that has come closest to addressing this question, prior to the Court of Appeals' decision here, is State v. Semakula, 88 Wn. App. 719, 946 P.2d 795 (1997), review denied, 134 Wn.2d 1022, 958 P.2d 317 (1998). In that case, which also emanated from Division One of the Court of Appeals, the court concluded that knowledge that the possession is unlawful is not an element of the offense. Semakula, 88 Wn. App. at 726; see also State v. Reed, 84 Wn. App. 379, 383, 928 P.2d 469 (1997) (citing approvingly a decision of the federal court. United States v. Smith, 940 F.2d 710, 714 (1st Cir. 1991), that said a similar statute did not require the government to prove the defendant knew his possession was illegal, but only that he "knew he possessed the firearms"). The Semakula court went on to say that while unwitting possession is a defense to the crime, the State had to "prove that the defendant knew the facts that constitute the criminal conduct." Semakula, 88 Wn. App. at 726.

The Legislature may create strict liability crimes. State v. Rivas, 126 Wn.2d 443, 452, 896 P.2d 57 (1995). Our task is to determine if the Legislature did so in enacting RCW 9.41.040(l)(b). Any such inquiry must begin with a review of the language of the statute and any legislative history. State v. Bash, 130 Wn.2d 594, 605, 925 P.2d 978 (1996). The statute, unfortunately, is silent on

the mental intent element. Its failure to be explicit regarding a mental element is not, however, dispositive of legislative intent.

The Court of Appeals concluded that the legislative history weighed in favor of a holding that the offense of second degree unlawful possession of a firearm is a strict liability offense. In doing so, it observed that the Legislature took note of the health and safety hazards associated with increasing violence in society and determined that efforts to reduce violence must include inhibiting the unlawful use of and access to firearms and implementation of " 'many of the same approaches that public health programs have used to control other problems such as infectious disease, tobacco use, and traffic fatalities.' " Anderson, 94

Wn. App. at 157 (quoting Laws of 1994, 1st Spec. Sess., ch. 7, § 101). This is indicative, the court concluded, of the Legislature's intent to characterize the offense as a "public welfare offense," which can be regulated merely because it creates "danger or probability of it." Anderson, 94 Wn. App. at 157 (quoting Morissette v. United States, 342 U.S. 246, 255-56, 72 S. Ct. 240, 96 L. Ed. 288 (1952)).

Anderson suggests that the legislative history favors his position. He points out that the Legislature did not employ the measures it could easily have used to evidence an intent to make the offense a strict liability crime. He notes, for instance, that it did not, in passing the statute, remove an existing intent element. See State v. Cleppe, 96 Wn.2d 373, 378-79, 635 P.2d 435 (1981) (prior drug possession statute contained an intent element and its removal indicates strict liability intended). Anderson also observes that the statute did not establish any affirmative defenses or expressly state that lack of knowledge is not a defense. See State v. Dana, 84 Wn. App. 166, 176-77, 926 P.2d 344 (1996) (including affirmative defense indicates strict liability crime), review denied, 133 Wn.2d 1021, 948 P.2d 389 (1997); State v. Graham, 68 Wn. App. 878, 880, 846 P.2d 578 (explicitly eliminating lack of knowledge defense indicates strict liability intended), review denied, 121 Wn.2d 1031, 856 P.2d 382 (1993), abrogated by State v. Silva-Baltazar, 125 Wn.2d 472, 886 P.2d 138 (1994).

[1, 2] Although we are of the view that the legislative history is not conclusive on the issue of the Legislature's intent, we believe it tends to favor Anderson's argument. While we agree with the State that the Legislature revealed its intention to address the problem of increasing violence in our society, it did not indicate that the problem should be addressed by sweeping entirely innocent conduct within this statute relating to the possession and control of firearms. Its failure to do so is significant, we believe, because the Legislature has on many occasions shown an ability to make knowledge an

element of an offense. Its additional failure to provide in the statute for the affirmative defense

of unwitting conduct or to expressly eliminate lack of knowledge as a defense are, in our view, other indicators of its intent to make knowledge an element of the offense.«1»

In its effort to glean the intent of the Legislature, the Court of Appeals correctly took note of other relevant factors that this court identified in Bash as aids in determining whether the Legislature has created a strict liability crime. They are as follows:

(1) ... the statute must be construed in light of the background rules of the common law, and its conventional mens rea element; (2) whether the crime can be characterized as a "public welfare offense" created by the Legislature; (3) the extent to which a strict liability reading of the statute would encompass seemingly entirely innocent conduct; (4) ... the harshness of the penalty[;] ... (5) the seriousness of the harm to the public; (6) the ease or difficulty of the defendant ascertaining the true facts; (7) relieving the prosecution of difficult and time-consuming proof of fault where the Legislature thinks it important to stamp out harmful conduct at all costs, "even at the cost of convicting innocent-minded and blameless people";

and (8) the number of prosecutions to be expected.

Bash, 130 Wn.2d at 605-06.«2» All of these factors are to be read in light of the principle that offenses with no mental element are generally disfavored. Id. at 606.

«1» Andersen also observes that the unlawful possession statute is based on the uniform firearms act, and that some other states that have adopted that act have said that knowledge is an element. See, e.g., People v. Snyder, 32 Cal. 3d 590, 652 P.2d 42, 44, 186 Cal. Rptr. 485 (1982); Creamer v. State, 605 So. 2d 541, 542 (Fla. App. 1992); State v. Pinero, 70 Haw. 509, 778 P.2d 704, 715 (1989); State v. Stratton, 132 N.H. 451, 567 A.2d 986, 990 (1989). These decisions do so hold, but not all of them are persuasive with respect to Washington law. In Hawaii, for instance, statutes provide that all felonies must have some mental element unless the Legislature clearly provides that an

offense is one of absolute liability. Pinero, 778 P.2d at 715. And in New Hampshire, a statute similarly says that one may not be convicted of a felony without some culpable mental state, and another statute specifically defines "possession" as "knowingly" possessing an item. Stratton, 567 A.2d at 990. Nonetheless, while the State notes the weaknesses in Anderson's reliance on out-of-state decisions, it points to no case that holds that a statute similar to Washington's defines a strict liability offense.

«2» We adopted these factors in Bash, 130 Wn.2d at 605-06. Factors (1)-(4) are from the United States Supreme Court decision in Staples, 511 U.S. at 615-19. Factors (5)-(8) are from 1 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW § 3.8, at 341-44 (1986).

As we noted above, the Court of Appeals determined that second degree unlawful possession of a firearm is a "public welfare" or "regulatory" offense that is frequently categorized as merely "malum prohibitum." Anderson, 94 Wn. App. at 157. Despite what it conceded was the common law preference for mental elements in crime, the court was persuaded that the seriousness of the harm to the public that this statute was designed to address suggested that the Legislature meant it to be a strict liability crime.

[3] While we do not disagree with the Court of Appeals' determination that firearms are potentially dangerous items, we are mindful that a statute will not be deemed to be one of strict liability where such construction would criminalize a broad range of apparently innocent behavior. Thus, in Staples v. United States, 511 U.S. 600, 114 S. Ct. 1793,128 L. Ed. 2d 608 (1994), the Court held that a person could not be convicted of unlawful possession of an unregistered machine gun unless the government proved that the defendant knew that the gun fell within the statutory definition of machine gun, since such items can be owned and possessed perfectly innocently. It seems clear to us that if the State is not required to prove knowing possession of a firearm there is a distinct possibility that entirely innocent behavior would fall within the sweep of this statue. In a free society we should be slow to conclude that such a result is intended by legislators.

[4] Although the Court of Appeals made passing reference here to the harshness of the penalty for second degree unlawful possession of a firearm, it concluded that this factor was of little moment in light of its characterization of the offense as a public welfare offense. In our view, the Court of Appeals placed

too little emphasis on the principle that" 'the greater the possible punishment, the more likely some fault is required.' " Bash, 130 Wn.2d at 608-09 (quoting 1 LAFAVE & SCOTT § 3.8, at 343). The offense of second degree unlawful possession of a firearm is after all a class C felony. RCW 9.41.040(2)(b). While we have not always adhered to the suggestion from the United States

Supreme Court in Staples, 511 U.S. at 618, that a mental element should be required in statutes defining felony offenses (see State v. Lindberg, 125 Wash. 51, 215 P. 41 (1923)), the fact that the offense carries with it a maximum term of five years' imprisonment (see RCW 9A.20.021) is clearly a factor that weighs in favor of a holding that this offense is not one of strict liability. It is worth noting in this regard that the elements of the greater degree offense of first degree unlawful possession of a firearm are almost identical to those of the offense with which Anderson was charged. The only difference is that an element of the higher degree is that the defendant must have a "serious offense" in his past. RCW 9.41.040(l)(a). First degree unlawful possession of a firearm is a class B felony, and it is punishable by a maximum sentence that is twice that of the offense charged here. RCW 9.41.040(2)(a); RCW 9A.20.021. We can only assume that the State would make the same argument it makes here if the question before us were whether or not the greater offense was a strict liability crime.

The factor of seriousness of harm to the public also weighs in favor of Anderson. While one can easily argue that there is danger to the society if persons who have been convicted of certain crimes knowingly possess firearms, we fail to see how their unwitting possession of a firearm poses a significant danger to the public. Neither does the punishment of such persons further a goal of deterrence.

Some of the other factors we identified in Bash are not very helpful to us. LaFave and Scott tell us that while generally the fewer expected prosecutions, the more likely intent is required, the record tells us nothing about the number of persons who are prosecuted for the offense. 1 LAFAVE & SCOTT § 3.8, at 344. Furthermore, while we recognize that the State would find it helpful to be relieved of difficulties attendant to any criminal prosecution, we are reluctant to conclude that the State would generally find it burdensome to convince a jury that a person found in possession of a firearm was not aware of its presence.

Contributing to our skepticism about the difficulties the State might face in such cases is the fact that since the statute in question was passed in 1935, no reported case has dealt with the issue of knowing possession. Indeed, if the State had charged Anderson with knowingly possessing the firearm,«3» it probably would have encountered few problems in showing that the vehicle Anderson was driving belonged to him, rather than his cousin, and that, in any case, he was aware of the fact that the gun was in the car. We reach that conclusion because one of the arresting officers testified that Anderson initially stated that the handgun was his. Furthermore, another witness testified for the State that Anderson usually went by a name very similar to that which Anderson attributed to his cousin. Finally, there was testimony from one of the police officers that Anderson was twice seen reaching under the driver's seat.

[5, 6] After considering all of the factors that are to assist us in determining if the Legislature intended to place the burden on the State to prove a culpable mental state, we conclude that it did. Our decision is influenced greatly by the harshness of the statutory penalty, the legislative history, and the absence of a showing of sufficient danger to the public to overcome the general rule favoring a mental element in felony statutes. Most compelling, though, is the fact that entirely innocent conduct may fall within the net cast by the statute in question. The danger of this is not, in our view, mitigated by the existence of an affirmative defense of unwitting conduct that the Court of Appeals has recognized. The burden of proof to establish such a defense resides with the defendant thus relieving the State of its traditional burden to prove each element of the crime by evidence which is convincing beyond a reasonable doubt.

In sum, if we were to conclude that the offense is a strict liability crime, we would be flying in the face of the strongly

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«3» The State originally charged Anderson with "knowingly" possessing the firearm. For some reason it moved to amend the information on the first day of trial to delete the "knowingly" element. Its motion was granted.

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rooted notion that strict liability crimes are disfavored. In that regard, no less authority than the United States Supreme Court has expressed this view with which we agree:

"The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil."

Staples, 511 U.S. at 605 (quoting Morissette, 342 U.S. at 250); Bash, 130 Wn.2d at 606 (quoting Morissette, 342 U.S. at 250). We are loath, in short, to conclude that the Legislature intended to jettison the normal requirement that mens rea be proved.

[7] In sum, we hold that the trial court's jury instruction omitted an essential element of the offense charged. The Court of Appeals is, therefore, reversed and the case is remanded to the trial court for proceedings consistent with this opinion.

GUY, C.J., and JOHNSON, MADSEN, and SANDERS, JJ., concur.