

Armed and Dangerous - or Just “Armed?”

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The Washington State Constitution guarantees its citizens the right to bear arms: “The right of the individual citizen to bear arms in defense of himself, or the State, shall not be impaired....” Wash. Const. art. I, § 24. Washington law also permits “enhanced” punishment for offenders who are “armed” during the commission of a crime based on the belief that the existence of a firearm can turn a nonviolent crime into a violent one. State v. Gurske, 155 Wn.2d 134, 138-39, 118 P.3d 333 (2005). This can lead to situations where a person in legal possession of a firearm who is also involved in criminal activity will face an enhanced sentence for the underlying crime despite the Article I § 24 guarantee. In these situations, Washington Courts have struggled to harmonize the law so as to protect the public without criminalizing otherwise legal gun ownership. Because the firearm enhancement laws apply to offenders who are “armed with a deadly weapon while engaged in criminal activity,” the question for the Court is often: What exactly does it mean to be “armed?”

Currently, a person involved in the commission of a crime is “armed” when “a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” State v. Schelin, 147 Wn.2d 562, 567, 55 P.3d 632 (2002) (quoting State v. Valdobinos, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). Additionally, there must be “a nexus between the defendant, the crime, and the weapon.” State v. Brown, 162 Wn.2d 422, 431, 173 P.3d 245, 249 (2007) (holding that a burglar who moved a rifle from a closet and placed it on the bed of the victim’s home was not armed because the gun was “loot” and thus, no nexus existed); see also State v. Easterlin, 159 Wn.2d 203, 208-209, 149 P.3d 366 (2006); Gurske, 155 Wn.2d at 140-41, 142; State v. Willis, 153 Wn.2d 366, 373, 103 P.3d 1213 (2005); Schelin, 147 Wn.2d at 567-70, 575. Proper application of the nexus requires analysis of “the nature of the crime, the type of weapon, and the circumstances under which the weapon is found.” *Id.* at 570. “There must be some proof actually linking the gun to the [underlying crime], more than just by mere presence and the defendant’s constructive

In Valdobinos, the defendant was arrested in his home after offering to sell drugs to an undercover agent. Valdobinos, 122 Wn.2d at 273. During a search of the defendant’s house, cocaine was found, and a rifle was discovered in the bedroom under the bed. *Id.* at 274. Because there was no evidence that the rifle had been used or was readily available for use, the Court concluded that the defendant was not “armed” in the sense of having a weapon accessible and readily available for offensive or defensive purposes. *Id.* at 282.

In Gurske, the defendant was pulled over for a traffic infraction. Gurske, at 136. Upon realizing that the defendant's license was suspended, Mr. Gurske was arrested by police and his car was searched. *Id.* The search revealed a backpack located directly behind the driver's seat, however, "the back pack was not removable by the driver without first either exiting the vehicle or moving into the passenger seat location." *Id.* Inside the backpack was a pistol. *Id.* Citing Valdobinos for the requirement that there be a nexus between the defendant and the weapon, the Supreme Court ruled that, because there was no evidence giving rise "to the inference that Gurske could reach over or around the driver's seat and access the weapon from the driver's seat," the defendant was not sufficiently "armed" and the firearm enhancement could not be applied. *Id.* at 143.

Recently, and in a seeming departure from the 2005 decision in Gurske, the Supreme Court in State v. Neff, 163 Wash.2d 453, 181 P.3d 819 (2008), held that a defendant operating a methamphetamine lab where guns were stored was sufficiently "armed" to face a deadly weapon enhancement *even though the defendant was not in the lab when he was arrested*. In Neff, the defendant was operating a methamphetamine lab from his detached garage and had set up security cameras outside the house that were connected to video monitors inside the garage seemingly to alert Neff of raids or other threats to his drug enterprise. *Id.* at 457. It was this evidence that persuaded the Court that a nexus between the guns in the garage and the crime of manufacturing drugs existed. *Id.* at 464. The Court stated:

Neff correctly points out "there must be some proof actually linking the gun to the crime of manufacturing, more than just by mere presence and the defendant's constructive possession." Pet'r Suppl. Br. at 11. Additional proof here is provided by the security cameras and video monitor. As in O'Neal, the trial judge was allowed to infer from the additional equipment the police scanner in O'Neal and the security cameras here that Neff used the guns to protect his drug operation. 159 Wash.2d at 503, 150 P.3d 1121.

Neff, 163 Wash.2d at 464.

These cases are difficult to distinguish, and it is obvious that the definition of "armed" will continue to evolve. Perhaps the most that can be concluded is this: One engaged in criminal activity may be able to legally arm himself with a gun, but if he also arms himself with a video camera and a police scanner, he may be "armed *and* dangerous."