No. 42396-1-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS LEE FLOYD,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 10-1-00019-6
The Honorable John McCarthy, Judge

REPLY BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

OTHER AUTHORITIES

I. ISSUES PERTAINING TO RESPONDENT'S ASSIGNMENTS OF ERROR ON CROSS APPEAL

1. Are charging documents and jury instructions part of the "conviction" for the purposes of determining whether or not a conviction is "invalid on its face," when the constitutional infirmity is apparent from the face of those documents?

2. Did the trial court correctly rule that Thomas Floyd's 1972 robbery conviction was not a strike offense, where the conviction is constitutionally invalid on its face and is not comparable to a current most serious offense?

3. Did the trial court correctly rule that Thomas Floyd's 1972 assault conviction was not a strike offense, where the conviction is not comparable to a current most serious offense?

II. ARGUMENT & AUTHORITIES IN REPLY TO STATE'S BRIEF

A. THE TRIAL COURT CORRECTLY RULED THAT FLOYD IS NOT A PERISISTENT OFFENDER AND THAT HIS 1972 ROBBERY CONVICTION IS NOT A STRIKE OFFENSE, BECAUSE IT IS CONSTITUTIONALLY INVALID ON ITS FACE AND BECAUSE IT IS NOT COMPARABLE TO A CURRENT MOST SERIOUS OFFENSE.

In its cross-appeal, the State contends that the trial court erred when it considered Floyd's challenge to the constitutionality of his 1972 robbery conviction. (Brief of Respondent at 21-26) Although the State does not have the burden of proving the constitutional validity of prior convictions, a sentencing court cannot consider a prior conviction that is constitutionally invalid on its face. State v. Ammons, 105 Wn.2d 175, 187-88, 713 P.2d 719 (1986).

"Constitutionally invalid on its face" means a conviction which without further elaboration evidences infirmities of a constitutional magnitude. Ammons, 105 Wn.2d at 188; State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430 (2001); In re Pers. Restr. of Hemenway, 147 Wn.2d 529, 532, 55 P.3d 615 (2002).

The State argues that if one must look to the Information and jury instructions to find the constitutional infirmity, as the trial court did here, then the conviction is not "invalid on its face." (Brief of Resp. at 22-23). The State construes the terms "conviction" and "on its face" too narrowly.

First, the requirement is that the asserted error appear on the face of the "conviction," not the face of the "judgment and sentence." *See* Ammons, 105 Wn.2d at 187-88. Thus, a sentencing court may review the judgment and sentence, but also any other document that qualifies as the "face of the conviction." *See* Gimarelli, 105 Wn. App. at 370. For example, the face of the conviction has been interpreted to include documents signed as part of a plea agreement. In re Pers. Restr. of Thompson, 141 Wn.2d 712, 718, 10 P.3d 380 (2000); State v. Phillips, 94 Wn. App. 313, 317, 972 P.2d 932 (1999).

In Thompson, the Court reviewed the plea documents, which

included the Information, and saw that the date of the offense as listed in the documents showed that the offense occurred nearly two years before Thompson's acts became a crime. 141 Wn.2d at 716. Based on this, the Court found that Thompson's conviction was invalid on its face. 141 Wn.2d at 719.

In In re Pers. Restr. of Stoudmire, the judgment and sentence listed the charges and the dates of the crimes, while the charging document filed as part of the plea agreement set forth the date the charges were filed. 141 Wn.2d 342, 354, 5 P.3d 1240 (2000). Together, these documents demonstrated that Stoudmire was charged beyond the time allowed by the statute of limitations, and thus the conviction was invalid on its face. 141 Wn.2d at 354.

And in State v. Herzog, the documents of a prior West German conviction affirmatively established, on their face, that Herzog had been convicted by a two-person jury. 48 Wn. App. 831, 834, 740 P.2d 380 (1987). Because this was an infirmity of constitutional dimensions, the conviction was facially invalid. 48 Wn. App. at 834.

What Thompson, Stoudmire and Herzog establish is that in order for a conviction to be invalid on its face, the documents considered must *affirmatively* demonstrate an error of constitutional

dimensions. Those cases can be distinguished from other cases in which the asserted error could not be discerned from the face of the documents alone. In Ammons, for instance, one of the appellants argued a prior conviction to which he pled guilty was constitutionally invalid because the guilty plea form failed to inform him of his right to remain silent, failed to set forth the elements of the crime or the consequences of pleading guilty, and failed to include a sufficient factual basis for the plea. 105 Wn.2d at 189. But because the plea form did not *affirmatively* show that appellant was not provided this information, the conviction was not invalid on its face. 105 Wn.2d at 189.

Furthermore, in all three cases the appellate courts approved of the trial court's consideration of documents other than just the Judgment and Sentence. And in Thompson and Stoudmire, the courts specifically reviewed the charging documents.

Clearly then, an Information or charging document can and should be considered part of a "conviction." An Information or charging document is absolutely essential to any conviction. It is the document that initiates a criminal case, and sets forth the charges to which a defendant must answer. No additional

information is required to understand what the words and text on the face of a charging document do or do not mean.

In Ammons, one appellant relied on an apparently invalid jury instruction to argue that a prior conviction was facially unconstitutional. 105 Wn.2d at 189. The Court rejected the argument because "the validity [of the conviction] cannot be determined facially." 105 Wn.2d at 189. But contrary to the State's assertion, neither the Ammons Court nor the subsequent Thompson Court specifically held that jury instructions can never be considered. (Brief of Resp. at 22-23) Rather, those Courts simply determined that because the one would have had to go beyond the forms submitted to the sentencing courts in those cases in order to determine the constitutionality of the convictions, that the appellants had not established that the convictions were invalid on their face. Ammons, 105 Wn.2d at 189; Thompson, 141 Wn.2d at 719.

As argued in detail in Floyd's Opening Brief of Appellant (at 16-17), both the 1972 Information charging Floyd with robbery and the jury instruction on which his guilty verdict is based misstate the elements of robbery. (CP 272) And a defect in the Information or jury instructions renders a subsequent conviction constitutionally invalid. See State v. McCarty, 140 Wn.2d 420, 998 P.2d 296

(2000). Therefore, these documents *affirmatively* show that Floyd's 1972 robbery conviction is constitutionally infirm, and the trial court did not need to go beyond the documents to make that determination. The trial court therefore correctly held that this conviction is constitutionally invalid and could not count as a "strike" offense. (SRP 107-08)

However, even if this Court were to find that the 1972 robbery conviction is not facially invalid, the conviction is not comparable to a current most serious offense. RCW 9.94A.030(32)(u) defines a "most serious offense" in part as any felony offense in effect prior to December 2, 1993, that is comparable to a current most serious offense.

The State wrongly asserts that Floyd's 1972 robbery conviction is comparable to a current second degree robbery conviction, which is a most serious offense. (Brief of Respondent at 25-26) The State relies on State v. Failey, 165 Wn.2d 673, 201 P.3d 328 (2009). In that case, the Washington Supreme Court noted that the 1974 second degree robbery statute was comparable to the current second degree robbery statute. 165 Wn.2d at 678. But the Failey court was primarily concerned with *how* to conduct a comparability analysis, and only engaged in a

very cursory analysis of whether the former and current second degree robbery statutes were comparable. 165 Wn.2d at 677-78.

In its brief analysis, the Failey Court recited the language used to charge Failey in 1974:

> Failey unlawfully and feloniously "[took] personal property from the person or in the presence of Jack Dean Pruitt, against his will or by means of force or violence or fear of immediate injury to his person.

165 Wn.2d at 677-78. This language resembles that used to charge Floyd in 1972:

> [That Floyd] unlawfully and feloniously, ~~while armed with a pistol,~~ [did] take personal property from the person or in the presence of John Edward Noland, the owner thereof, against his will or by means of force or violence or fear of immediate injury to his person.

(CP 272) No challenge was apparently made in Failey to the broader language used in the charging document, and the Court spent no time analyzing whether the charging language would also fall under the umbrella of a current second degree robbery. Instead, the Court found that Failey's 1974 conviction washed out, and could not be used in his offender score for that reason. 165 Wn.2d at 678.

Therefore, the Failey Court's determination that the statutory language of the 1974 second degree robbery statute and the

current robbery statute are comparable should not control this Court's determination of whether Floyd's 1972 robbery conviction, as charged in the Information, is comparable to a current second degree robbery.

Rather, if this court looks at the elements of the crime as actually charged in Floyd's 1972 case, it is not comparable to a second degree robbery because Floyd could have been convicted merely for taking property against Noland's will. (CP 272) Although force was charged as an alternative means, it was not an essential element. But robbery is defined in RCW 9A.56.190 as follows:

> A person commits robbery when he or she unlawfully takes personal property from the person of another or in his or her presence against his or her will by the use or threatened use of immediate force, violence, or fear of injury to that person or his or her property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

Under this statutory definition, force or threat of force is an essential element. The Washington Supreme Court has repeatedly

reiterated that force is what distinguishes robbery from theft or larceny. *See e.g.*, State v. Handburg, 119 Wn.2d 284, 293-94, 830 P.2d 641 (1992) (trial court correctly found the defendant's threats and physical violence supplied the element of force or intimidation necessary to make the offense a robbery).

Instead, the elements of Floyd's 1972 conviction are comparable to theft because, without the necessary element of force, one is left with a mere taking. Theft is defined, in part, by RCW 9A.56.020(a) as:

> To wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services[.]

Theft in any degree is not included in the list of "most serious offenses." RCW 9.94A.030(32); RCW 9A.56.030-.050.

The trial court correctly ruled that Floyd's 1972 robbery conviction was constitutionally invalid for the purposes of the persistent offender statute, and the conviction is also not comparable to a current "most serious offense." The trial court therefore correctly refused to count the conviction as a "strike" offense. Furthermore, as argued in the Opening Brief of Appellant, the conviction also should not have been included in Floyd's

offender score calculation.

B. FLOYD'S 1972 ASSAULT CONVICTION IS NOT COMPARABLE TO A MOST SERIOUS OFFENSE.

The State also incorrectly asserts that Floyd's 1972 second degree assault conviction is a most serious offense. (Brief of Resp. at 27-31). The Second Amended Information filed against Floyd in 1972 alleged that he "did willfully inflict grievous bodily harm upon the person of Richard Dean Strain." (CP 256) The current version of the second degree assault statute states that a "person is guilty of assault in the second degree if he or she . . . Intentionally assaults another and thereby recklessly inflicts substantial bodily harm[.]" RCW 9A.36.021(2)(a).

The elements of the diverge in two distinct ways. First, Floyd was charged with committing a willful assault, whereby the current statute requires an intentional assault. Next, Floyd was only required to have inflicted grievous bodily harm, whereas the current second degree assault statute requires the infliction of substantial bodily harm.

In City of Spokane v. White, the court specifically held that willful is the same mental state as knowingly, and that "knowingly is a less serious form or mental culpability than intent." 102 Wn. App.

955, 961, 10 P.3d 1095 (2000). With this lower mental state, the 1972 second degree assault conviction cannot be compared to a current second degree assault.

In addition, grievous bodily harm and substantial bodily harm are not the same. Grievous bodily harm was defined as:

> (1) "a hurt or injury calculated to interfere with the health of comfort of the person injured"; and (2) "atrocious, aggravating, harmful, painful, hard to bear, and serious in nature."

State v. Hovig, 149 Wn. App. 1, 11, 202 P.3d 318 (2009) (*quoting* State v. Salinas, 87 Wn. 2d 112, 121, 549 P.2d 712 (1976); *citing* Former RCW 9.11.020). The definition of substantial bodily harm, as contained in the pattern jury instructions, is:

> Bodily injury that involves a temporary but substantial disfigurement, or that causes a temporary but substantial loss or impairment of the function of any bodily part of organ, or that causes a fracture of any bodily part.

WPIC 2.03.01.

In comparing the prior definition of grievous bodily harm to the definition of substantial bodily harm, the Hovig court pointed out that pain was not longer an element of the offense. 149 Wn. App. at 11. And in State v. Brown, the court noted that grievous bodily harm and substantial bodily harm are not interchangeable

definitions. 17 Wn. App. 587, 564 P.2d 342 (1977).

Rather, the grievous bodily harm definition is more comparable to assault in the third degree, which is established when, "with criminal negligence," a person "causes bodily harm accompanied by substantial pain that extends for a period sufficient to cause considerable suffering[.]" RCW 9A.36.031(1)(f).

Accordingly, Floyd's 1972 assault conviction is more comparable to a current third degree assault, which is not a most serious offense. *See* RCW 9.94A.030(32); RCW 9A.56.030-.050. The trial court did not err when it ruled that this conviction is not a strike offense and when it ruled that Floyd is not a persistent offender.

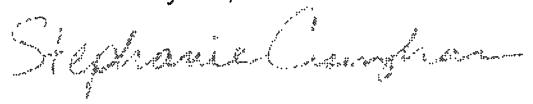
///

///

V. CONCLUSION

For the reasons argued in Floyd's Opening Brief of Appellant and argued above, this Court should affirm the trial court's decision that Floyd is not a persistent offender, but remand for resentencing using an offender score that does not include the constitutionally invalid 1972 robbery conviction.

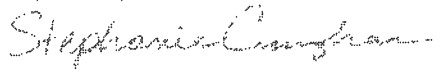
DATED: May 24, 2012



STEPHANIE C. CUNNINGHAM
WSB #26436
Attorney for Thomas L. Floyd

CERTIFICATE OF MAILING

I certify that on 05/24/2012, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Thomas L. Floyd, DOC# 234038Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

May 24, 2012 - 1:35 PM

Transmittal Letter

Document Uploaded: 423961-Response Brief.pdf

Case Name: State v. Thomas L. Floyd

Court of Appeals Case Number: 42396-1

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Response__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Other: _____

Sender Name: S C Cunningham - Email: **sccattorney@yahoo.com**

A copy of this document has been emailed to the following addresses:

pcpatcecf@co.pierce.wa.us