Court of Appeals No. 43179-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

LORENZO WEBB,

Defendant/Appellant.

BRIEF OF APPELLANT

Appeal from the Superior Court of Pierce County,
Cause No. 10-1-02833-3
The Honorable Edmund Murphy, Presiding Judge

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1. The trial court erred in finding Mr. Webb was a persistent offender.

2. The trial court erred in finding that Mr. Webb's 1982 and 1992 convictions for assault were strike offenses.

3. The trial court erred in finding that Mr. Webb's 1992 conviction for assault in the second degree was constitutionally valid.

II. ISSUES PRESENTED

1. Is Mr. Webb a persistent offender where neither of his two prior second degree assault convictions meet the definition of a strike offense? (Assignments of Error Nos. 1, 2, and 3)

2. Did the trial court err in finding that Mr. Webb's 1982 and 1992 convictions for second degree assault were comparable to the current offense of second degree assault? (Assignment of Error No. 2)

3. Did the trial court err in finding that Mr. Webb's 1992 conviction for second degree assault was constitutionally valid? (Assignment of Error No. 3)

III. STATEMENT OF THE CASE

Factual and Procedural Background

On July 6, 2010, Lorenzo Webb was charged with one count of assault in the second degree with a deadly weapon and also with deadly weapon and domestic violence aggravators. CP 1-2. The victim of the crime was Ms. Georgia Phelps. CP 3-4.

On May 18, 2011, the charge against Mr. Webb was amended to assault in the second degree with a deadly weapon and with deadly weapon and domestic violence aggravators, and in the alternative assault in the second degree through intentional and reckless infliction of substantial bodily harm with deadly weapon and domestic violence aggravators. CP 12-13.

The jury found Mr. Webb guilty of assault in the second degree, found that Mr. Webb and Ms. Phelps were members of the same household, and found that Mr. Webb intentionally assaulted Ms. Phelps and thereby recklessly inflicted substantial bodily harm. CP 132, 133, 135.

In his sentencing Memorandum, Mr. Webb argued that the court should not find that he is a persistent offender because his 1982 and 1992 convictions for assault in the second degree were not comparable to strike offenses and that the 1992 assault conviction was constitutionally invalid since the amended information recited the language of the 1988 statute which was no longer in effect in 1992. CP 145-153.

Mr. Webb also filed a Motion for Arrest of Judgment, New Trial And/Or Relief From Judgment. CP 154-158. Mr. Webb argued that the case of *State v. McKague*, 172 Wn.2d 802, 262 P.3d 1225 (2011), decided

after the verdict in Mr. Webb's case, represented a significant change in the law which warranted a new trial for Mr. Webb. CP 154-158.

At Mr. Webb's sentencing hearing, the trial court expressed concern about whether or not Mr. Webb's 1992 conviction for second degree assault was valid where the statutory language he pled guilty to violating was from the 1988 version of the assault statute and had been superseded. RP 426-427.

Mr. Webb filed a supplemental sentencing memorandum discussing the validity of the 1992 conviction. CP 226-230.

The trial court found that Mr. Webb's 1992 conviction was valid and found that both his prior assault convictions counted as strike offenses. RP 444-453. The trial court found Mr. Webb was a persistent offender and sentenced Mr. Webb to life imprisonment with no possibility of parole. RP 453, 455; CP 240-253.

Notice of appeal was filed on March 9, 2012. CP 279-281.

IV. ARGUMENT

An offender convicted of a "most serious offense" must be sentenced to life imprisonment without early release if he has at least two prior convictions for most serious offenses and those prior convictions would be included in his current offender score under RCW 9.94A.525. RCW 9.94A.030(37)(a)(i)-(ii); RCW 9.94A.570. A "most serious

offense" includes "[a]ny felony offense in effect at any time prior to December 2, 1993, that is comparable to a most serious offense." RCW 9.94A.030(32)(a), (o), (u). RCW 9.94A.030(32)(b) classifies assault in the second degree as a "most serious offense." RCW 9.94A.030(t) includes any felony conviction with a deadly weapon verdict under RCW 9.94A.825 in the definition of "most serious offense." Offenses to be included in the offender score under RCW 9.94A.525 include class A felonies and some class B and class C felonies. RCW 9.94A.525(2)(a)-(c).

Here, the trial court found that Mr. Webb was a persistent offender based on his 1982 and 1992 convictions for second degree assault. RP 444-453. As will be discussed below, the trial court's decision was in error.

1. The trial court erred in finding that Mr. Webb's 1982 conviction for second degree assault was comparable to a "most serious offense" and, therefore, was a strike offense.

The trial court's decision whether to consider a prior conviction a first strike for the purposes of POAA is reviewed de novo. *State v. Carpenter*, 117 Wn.App. 673, 679, 72 P.3d 784 (2003).

In 1982, Mr. Webb pled guilty to one count of second degree assault in violation of former RCW 9A.36.020(1)(b). In 1982, a person committed assault in the second degree under RCW 9A.36.020(1)(b)

when that person "knowingly inflict[ed] grievous bodily harm upon another with or without a weapon." CP 193.

"Grievous bodily harm" was defined as "a hurt or injury calculated to interfere with the health or comfort of the person injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature." *State v. Salinas*, 87 Wn.2d 112, 121, 549 P.2d 712 (1976).

In his statement on his plea if guilty to the 1982 assault charge, Mr. Webb characterized the assault as follows: "[I] hit Mr. Ritter in the face causing injury." RP 448; CP 187. Thus, it is clear that the 1982 assault did not involve a deadly weapon. Accordingly, in order for Mr. Webb's 1982 second degree assault conviction to meet the definition of a "most serious offense" and therefore count as a "strike offense," the conviction would have to comparable to a second degree assault conviction under the version of RCW 9A.36.021 in effect on July 2, 2010, the date Mr. Webb assaulted Ms. Phelps. CP 1-2; RCW 9.94A.345; *State v. Varga*, 151 Wn.2d 179, 191, 86 P.3d 139 (2004) ("We have repeatedly held that sentencing courts must "look to the statute in effect at the time [the defendant] committed the [current] crimes" when determining defendants' sentences.").

The version of RCW 9A.36.021 in effect on July 2, 2010, read as follows:

> (1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
>
> (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
>
> (b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
>
> (c) Assaults another with a deadly weapon; or
>
> (d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison or any other destructive or noxious substance; or
>
> (e) With intent to commit a felony, assaults another; or
>
> (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture; or
>
> (g) Assaults another by strangulation.
>
> (2)(a) Except as provided in (b) of this subsection, assault in the second degree is a class B felony.
>
> (b) Assault in the second degree with a finding of sexual motivation under RCW 9.94A.835 or 13.40.135 is a class A felony.

The means of committing second degree assault that most closely matches the facts of the 1982 assault is intentionally assaulting another

and thereby recklessly inflicting substantial bodily harm under RCW 9A.36.021(1)(a). However, for the reasons stated below, Mr. Webb's 1982 second degree assault conviction is not comparable to a conviction under RCW 9A.36.021(1)(a). Rather, Mr. Webb's 1982 assault conviction is most comparable to assault in the third degree under RCW 9A.36.031(d) or (f).

a. The mens rea elements of the 1982 assault statute and the current RCW 9A.36.021(1)(a) are not comparable.

Mr. Webb was convicted in 1982 of "*knowingly* inflicting grievous bodily harm." RCW 9A.36.021(1)(a) penalizes *intentionally* assaulting another.

RCW 9A.08.010 defines four levels of culpability applicable to the Washington criminal code: intentionally, knowingly, recklessly, and criminally negligent. RCW 9A.08.010(1)(a). A person acts with knowledge when he is aware of a fact, facts, or circumstances or result described by a statute defining an offense, or he has information which would lead a reasonable person in the same situation to believe that facts exist which facts are described by a statute defining an offense. RCW 9A.08.010(1)(b)(i) and (ii). A person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime. RCW 9A.08.010.

In *City of Spokane v. White*, 102 Wn.App. 955, 10 P.3d 1095 (2000), *review denied* 143 Wn.2d 1011, 21 P.3d 291 (2001), the court explicitly held that the mental state of performing an act "willfully equates with knowingly...[and] knowingly is a less serious form of mental culpability than intent." *White*, 102 Wn.App. at 961, 10 P.3d 1095. *See also* RCW 9A.08.010(2) (when acting knowingly suffices to establish an element of a statute, such element also is established if a person acts intentionally, ***but not vice versa***).

Thus, as a matter of law, performing an act knowingly is not comparable to performing an act intentionally. Accordingly, Mr. Webb's 1982 conviction for *knowingly* inflicting grievous bodily harm was punishment for a less culpable act than *intentionally* assaulting another and the 182 conviction is not comparable to a conviction under current RCW 9A.36.021(1)(a).

b. The requisite harm to be inflicted upon the victim is not comparable between the 1982 and 2010 versions of the assault statute.

Mr. Webb was convicted in 1982 of "knowingly inflicting *grievous bodily harm*." RCW 9A.36.021(1)(a) penalizes intentionally assaulting another and thereby recklessly inflicting *substantial bodily harm*. As stated above, "grievous bodily harm" was defined as "a hurt or injury calculated to interfere with the health or comfort of the person

injured; it need not necessarily be an injury of a permanent character. By 'grievous' is meant atrocious, aggravating, harmful, painful, hard to bear, serious in nature." *Salinas*, 87 Wn.2d at 121, 549 P.2d 712.

In contrast, "substantial bodily harm means 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 or organ, or that causes a fracture of any bodily part." RCW 9A.04.110(4)(b).

In *State v. Hovig*, 149 Wn.App. 1, 202 P.3d 318, *review denied* 166 Wn.2d 1020, 217 P.3d 335 (2009), this court recognized that pain is no longer an element of the crime of second degree assault, thus differentiating the 1982 crime from the 2010 crime. *Hovig*, 149 Wn.App. at 11, 202 P.3d 318. Indeed, when the legislature characterized an assault that causes "substantial pain that extends for a period sufficient to cause considerable suffering" as assault in the third degree in RCW 9A.36.031(1)(f), it is clear that it intended to modify how harshly assaults that only caused pain would be punished.

Given the broadness of the universe of acts which could potentially constitute second degree assault in 1982, and given the legislature's intentional removal of pain as an element of assault in the second degree and definition of assault in the third degree, it is clear that the legislature

sought to punish minor assaults, such as Mr. Webb's act of punching a man in the face, less harshly than a second degree assault. The 1982 version of the second degree assault statute encompassed a broader range of assaultive behavior than does the 2010 second degree assault statute. Thus, the crimes defined by the statutes are not comparable.

c. Mr. Webb's conduct leading to his 1982 conviction is more comparable to the current offense of assault in the third degree.

While counsel for Mr. Webb was unable to find any case discussing the standards to be applied when comparing pre-1993 felony convictions to post-1993 statutes, when comparing the elements of crimes of foreign jurisdictions to Washington crimes, if the foreign offense is broader than the Washington offense, courts must consider whether the foreign offense was factually comparable "by determining whether the defendant's conduct would have violated a Washington statute." *State v. Jordan*, 158 Wn.App. 297, 300, 241 P.3d 464 (2010).

The facts of Mr. Webb's 1982 assault, simply punching a man in the face, make clear that Mr. Webb's assaultive behavior is fairly de minimis when compared to the realm of potentially assaultive behavior. The record below reveals only that Mr. Webb punched a man in the face, causing injury. RP 448; CP 187. The record does not reveal the extent or seriousness of the injury. However, given that the 1982 statute equated

merely "painful" to "grievous," it is entirely likely that Mr. Webb's conduct was comparably innocuous.

Punching someone in the face and causing injury is far more comparable to the current crime of assault in the third degree as defined in RCW 9A.36.031(1)(f): "A person is guilty of assault in the third degree if he or she...with criminal negligence, causes bodily harm accompanied by pain that extends for a period sufficient to cause considerable suffering."

d. Mr. Webb's 1982 offense is not a strike offense.

As discussed above, Mr. Webb's 1982 conviction is more comparable to the current crime of assault in the third degree that it is comparable to the current crime of assault in the second degree. Accordingly, Mr. Webb's 1982 conviction is not a most serious offense and cannot, therefore, constitute a strike offense.

2. Mr. Webb's 1992 conviction for second degree assault is also not comparable to the 2010 version of second degree assault.

In 1992, Mr. Webb pled guilty to the crime of second degree assault. However, the charging document under which Mr. Webb pled guilty listed the elements of second degree assault as they existed prior to July 1, 1988, not as they existed in 1992. CP 145-153, 226-230. Specifically, Mr. Webb pled guilty to committing second degree assault

by "knowingly inflict[ing] grievous bodily harm" upon the victim. CP 150.

For the same reasons as discussed above regarding Mr. Webb's 1982 assault conviction, Mr. Webb's 1992 conviction is not comparable to the 2010 crime of second degree assault.

3. The trial court erred in considering Mr. Webb's 1992 conviction when determining Mr. Webb's sentencing where the 1992 conviction is unconstitutional on its face.

A prior conviction which is invalid on its face may not be considered in a sentencing proceeding. *State v. Ammons*, 105 Wn.2d 175, 187-188, 713 P.2d 719, *cert. denied Ammons v. Washington*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (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, 713 P.2d 719.

A judgment and sentence is clearly invalid on its face if it is for a crime that did not exist at the time. *In re Personal Restraint of Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000).

The 1989 version of RCW 9A.36.020 clearly indicates that the statutory language criminalizing "knowingly inflicting grievous bodily harm" is effective until July 1, 1988.[1] In 1988 RCW 9A.36.020 was

[1] A copy of the 1989 version of RCW 9A.36.020 is attached in the appendix to this brief.

repealed and RCW 9A.36.021 was enacted.[2] As discussed above, these two statutes had different statutory language and different elements. RCW 9A.36.021 was not simply a recodification of RCW 9A.36.020.

In *Thompson*, the defendant pled guilty to a crime which did not come into existence until almost two years after the conduct occurred. *Thompson*, 141 Wn.2d at 719, 10 P.3d 380. The Supreme Court vacated Thompson's convictions and found that the judgment and sentence was invalid on its face. *Thompson*, 141 Wn.2d at 719, 730, 10 P.3d 380. In so holding, the Supreme Court rejected the State's argument that Thompson should be treated as if he had pled guilty to another crime which did exist at the time of the conduct. *Thompson*, 141 Wn.2d at 721-722, 10 P.3d 380.

While *Thompson* dealt with a situation where a defendant pled guilty to a crime that did not exist at the time the offense was committed, Mr. Webb's 1992 conviction is a situation where Mr. Webb pled guilty to a crime that had *ceased* to exist *prior* to the offense being committed. However, the same logic applies -- Mr. Webb pled guilty to a crime that did not exist at the time of the offense, therefore the judgment and sentence is invalid on its face and cannot be used by a subsequent court at sentencing.

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[2] A copy of the 1989 version of RCW 9A.36.021 is attached in the appendix to this brief.

Because Mr. Webb pled guilty to a crime that did not exist at the time of his criminal conduct, the judgment and sentence relating to that conviction is invalid on its face. The trial court erred in considering Mr. Webb's 1992 conviction at sentencing where the judgment and sentence for that crime was invalid on its face.

VI. CONCLUSION

For the reasons stated above, this court should vacate Mr. Webb's sentence and remand for resentencing without consideration of the constitutionally invalid 1992 conviction and with consideration of the 1982 conviction as being comparable to assault in the third degree.

DATED this 10th day of August, 2012.

Respectfully submitted,

/s/
Sheri Arnold, WSBA No. 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on August 10, 2012, she delivered via email pcpatcecf@co.pierce.wa.us to Pierce County Prosecutor's Office, Tacoma, Washington 98402, and by United States Mail to appellant, Lorenzo Webb, DOC # 286857, Washington State Penitentiary, 1313 North 13th Avenue, Walla Walla, Washington 99362, true and correct copies of this Brief.. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on August 10, 2012..

/s/
Norma Kinter

APPENDIX

RCW 9A.36.020 (1989)

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
COPR. (c) WEST 1989 No Claim to Orig. Govt. Works
TITLE 9A. WASHINGTON CRIMINAL CODE
(SEE ALSO CRIMES AND PUNISHMENTS, TITLE 9 RCWA)
CHAPTER 9A.36—ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

Repealed

9A.36.020. Repealed by Laws 1986, ch. 257, § 9, eff. July 1, 1988

HISTORICAL NOTES

1988 Main Volume Historical Notes

Main Volume Text

9A.36.020. Assault in the second degree

<Text effective until July 1, 1988>

(1) Every person who, under circumstances not amounting to assault in the first degree shall be guilty of assault in the second degree when he:

(a) With intent to injure, shall unlawfully administer to or cause to be taken by another, poison or any other destructive or noxious thing, or any drug or medicine the use of which is dangerous to life or health; or

(b) Shall knowingly inflict grievous bodily harm upon another with or without a weapon; or

(c) Shall knowingly assault another with a weapon or other instrument or thing likely to produce bodily harm; or

(d) Shall knowingly assault another with intent to commit a felony.

(2) Assault in the second degree is a class B felony.

Enacted by Laws 1975, 1st Ex.Sess., ch. 260, § 9A.36.020. Amended by Laws 1975-76, 2nd Ex.Sess., ch. 38, § 5; Laws 1979, Ex.Sess., ch. 244, § 9, eff. July 1, 1979.

<For text effective July 1, 1988, see § **9A.36.021**, post>

RCW 9A.36.021 (1989)

WEST'S REVISED CODE OF WASHINGTON ANNOTATED
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TITLE 9A. WASHINGTON CRIMINAL CODE
(SEE ALSO CRIMES AND PUNISHMENTS, TITLE 9 RCWA)
CHAPTER 9A.36—ASSAULT AND OTHER CRIMES INVOLVING PHYSICAL HARM

9A. 36. 021. Assault in the second degree

(1) A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree:
(a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; or
(b) Intentionally and unlawfully causes substantial bodily harm to an unborn quick child by intentionally and unlawfully inflicting any injury upon the mother of such child; or
(c) Assaults another with a deadly weapon; or
(d) With intent to inflict bodily harm, administers to or causes to be taken by another, poison, the human immunodeficiency virus as defined in chapter 70.24 RCW, or any other destructive or noxious substance; or
(e) With intent to inflict bodily harm, exposes or transmits human immunodeficiency virus as defined in chapter 70.24 RCW; or
(f) With intent to commit a felony, assaults another; or
(g) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture.
(2) Assault in the second degree is a class B felony.

Enacted by Laws 1986, ch. 257, § 5, eff. July 1, 1988.[1MV] Amended by Laws 1987, ch. 324, § 2, eff. July 1, 1988.

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