

No. 46858-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Steven Pink,

Appellant.

Grays Harbor County Superior Court Cause No. 99-1-00060-1

The Honorable Judge David Edwards

Appellant's Corrected Opening Brief

Corrected Copy

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ISSUE AND ASSIGNMENTS OF ERROR

1. The sentencing court miscalculated Mr. Pink's offender score.
2. The court erred by including Mr. Pink's 1995 conviction for delivery of methamphetamine in his criminal history and offender score.
3. Mr. Pink's delivery conviction was unconstitutional on its face because both the plea form and the judgment and sentence reflect the parties' misunderstanding of the statutory maximum.
4. The sentencing court erred by sentencing Mr. Pink with an offender score of eight.

ISSUE: A prior conviction may not be considered at sentencing where it is unconstitutional on its face. Should the trial court have excluded Mr. Pink's delivery conviction from his offender score since the paperwork unequivocally demonstrates that Mr. Pink pled guilty without a correct understanding of the maximum sentence authorized for the offense?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Steven Pink pled guilty to assault one. CP 7-15.

The state alleged that he had eight points. CP 21-89. Mr. Pink made clear that he wished to hold the state to their burden of proof regarding any priors. RP (9/2/14) 3, 7-9.

One of the disputed alleged points related to a 1995 conviction for delivery of methamphetamine. CP 97-101. Mr. Pink's plea form indicated that the maximum punishment for the offense was five years in jail and a \$10,000 fine. CP 97. Likewise, the Judgment and Sentence for that offense indicated a maximum punishment of five years and \$10,000. CP 102.

The state filed certified copies of both documents for the court's consideration. CP 97-107. The Judgment and Sentence indicated that, at the time of sentencing in 1995, Mr. Pink had a prior conviction for a felony marijuana offense. CP 102.

The court found that Mr. Pink had eight points, including the prior methamphetamine delivery conviction. RP (10/10/14) 19; CP 121-130. Mr. Pink timely appealed. CP 131.

ARGUMENT

MR. PINK'S PRIOR CONVICTION FOR DELIVERY OF METHAMPHETAMINE IS FACIALLY INVALID AND SHOULD HAVE BEEN EXCLUDED FROM HIS CRIMINAL HISTORY AND OFFENDER SCORE.

When Mr. Pink pled guilty to delivery of methamphetamine, the parties and the court misunderstood the direct consequences of his plea. Mr. Pink's written statement on plea of guilty and the judgment and sentence both contained the same error. Each document reflected a maximum sentence of five years in prison and a \$10,000 fine. CP 97, 102.

In fact, the statutory maximum doubled, because Mr. Pink had a prior drug conviction. Former RCW 69.50.408(a) (1994). His prior conviction for felony possession of marijuana is reflected on the judgment and sentence.¹ CP 102.

Mr. Pink's prior drug conviction allowed imprisonment on the 1994 offense "for a term up to twice the term otherwise authorized." Former RCW 69.50.408(a) (1994). It also allowed a fine "up to twice that otherwise authorized." Former RCW 69.50.408(a).

A guilty plea entered without a correct understanding of direct consequences is involuntary.² *State v. Mendoza*, 157 Wn.2d 582, 592, 141

¹ It is also listed on numerous other documents in the clerk's papers. CP 3, 17, 24.

² Due process requires that a guilty plea be knowing, intelligent, and voluntary. U.S. Const. Amend. XIV; *Boykin v. Alabama*, 395 U.S. 238, 23 L.Ed.2d 274, 89 S.Ct. 1709 (1969); *In re Isadore*, 151 Wn.2d 294, 88 P.3d 390 (2004).

P.3d 49 (2006). Mr. Pink entered his 1995 guilty plea to delivery of methamphetamine without a correct understanding of its direct consequences. He mistakenly believed that he faced a statutory maximum of only five years in prison and a \$10,000 fine. In fact, his maximum was twice that. CP 97, 102; former RCW 69.50.408(a).

A sentencing court may not consider a prior conviction that is constitutionally invalid on its face. *State v. Webb*, 183 Wn. App. 242, 250, 333 P.3d 470 (2014) *review denied*, 182 Wn. 2d 1005, 342 P.3d 327 (2015). Mr. Pink's 1995 delivery conviction was constitutionally invalid on its face.

A prior conviction is constitutionally invalid on its face if, “without further elaboration [it] evidences infirmities of a constitutional magnitude.” *State v. Ammons*, 105 Wn.2d 175, 188, 713 P.2d 719 *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986). Such is the case here.

When determining facial invalidity, courts may examine “the judgment and sentence and documents signed as part of a plea bargain.” *Webb*, 183 Wn. App. at 250. In this case, the plea document and the judgment and sentence show that Mr. Pink was misinformed as to the direct consequences of conviction. CP 97, 102. He pled guilty without a correct understanding of the direct consequences of conviction.

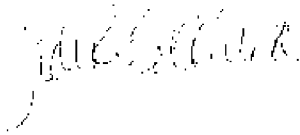
Because Mr. Pink's 1995 drug conviction is facially invalid, it should not have contributed to his offender score. *Webb*, 183 Wn. App. at 250. The sentence must be vacated, and the case remanded for resentencing with an offender score of seven. *Id.*

CONCLUSION

Mr. Pink's sentence must be vacated. The trial judge should not have considered a facially unconstitutional prior conviction when calculating the offender score. The case must be remanded for resentencing with a corrected offender score of seven.

Respectfully submitted on April 24, 2015,

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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Corrected Opening Brief- Corrected Copy, postage prepaid, to:

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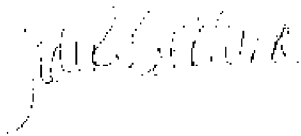
And to:

Grays Harbor County Prosecuting Attorney
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I filed the Appellant's Corrected Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on April 24, 2015.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

April 24, 2015 - 9:50 AM

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