NO. 46858-1-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

STEVEN PINK,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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TABLE

I. COUNTERSTATEMENT OF THE CASE

The State agrees that the appellant's statement of facts and prior proceedings is accurate.

II. ARGUMENT

Was the appellant's offender score properly calculated by the trial court?

Yes. The appellant cannot show that his convictions are facially invalid.

The circumstances under which an appellant may disqualify a prior conviction from inclusion in his offender score are very limited. This issue was settled by Washington Supreme Court shortly after the enactment of the Sentencing Reform Act. *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

In *Ammons*, the court held that the State does not have the affirmative burden of proving the constitutionality of a prior conviction before it can be used in sentencing. *Ammons*, 105 Wn.2d at 187. The court in *Ammons* expressly rejected previous cases involving prosecutions for Habitual Criminals and Unlawful Possession of a Firearm which required the State to prove the constitutional validity of the predicate convictions. *See Ammons* at 187; *see also State v.*

Chervenell, 99 Wn.2d 309, 662 P.2d 836 (1983); *State v. Swindell*, 93 Wn.2d 309, 662 P.2d 836 (1983).

Only a conviction which has been previously determined to have been unconstitutionally obtained (for instance by Personal Restrain Petition previously granted) or a conviction which is constitutionally invalid on its face may be excluded. This means that the conviction, on its face, without further elaboration, must evidence infirmities of constitutional magnitude. *Ammons*, 105 Wn.2d at p. 188.

The court in *Ammons*, addressed the challenges of specific appellants. Co-appellant Garrett, for instance, alleged that his guilty plea form failed to show that he was made aware of his right to remain silent, failed to set forth the elements of the crime, failed to set forth the consequences of pleading guilty and failed to include a sufficient factual basis for the plea. The court in *Ammons* held that, nevertheless, the conviction was valid on its face and that it was up to the appellant to pursue whatever channels he may have for collateral relief. *Ammons* at 189.

Another co-appellant in *Ammons*, Barton, challenged the use of his prior guilty plea because it did not reflect that the constitutional

safeguards were provided. The court held that the plea on its face did not show that the constitutional safeguards were not provided. Accordingly, appellant Barton could not challenge the inclusion of his prior conviction in his criminal history. *Id.* at 189.

Likewise, the court in *Ammons* held that the appellant could not collaterally attack a prior jury trial conviction in the sentencing proceeding by alleging, for instance, in proper jury instructions. *Id.*

The courts have provided other examples. For instance, a Judgment and Sentence which misstates the maximum term is not facially invalid. *In Re Coats*, 173 Wn.2d 123, 133, 267 P.3d 324 (2011). A judgment is invalid on its face only where it appears on the Judgment and Sentence that the court has, in fact, exceeded its statutory authority in entering the Judgment or Sentence. *Coats*, 173 Wn.2d at 135. Thus, for example, a Judgment may be facially invalid if it purports to convict the appellant of a non-existent crime. *In Re Hinton*, 152 Wn.2d 853, 100 P.3d 801 (2004). See also, *In Re McKiearnan*, 165 Wn.2d 777, 203 P.3d 375 (2009). Similarly, misinformation in the Plea Agreement regarding community placement or community supervision does not otherwise render the

conviction invalid on its face. *In Re Clark*, 168 Wn.2d 581, 230 P.3d 156 (2010).

Oregon conviction for Robbery in the Second Degree.

This conviction is not invalid on its face. The State has provided a copy of the charging documents and the Judgment and Sentence which reflect that the appellant was represented by counsel. The State is not required to prove that the Oregon conviction is constitutionally valid. See *Ammons* at 189:

> Garrett argued that the guilty plea form failed to show that he was aware of his right to remain silent, failed to set forth the elements of the crime of Burglary, failed to set forth the consequences of pleading guilty and failed to include a sufficient factual basis for the plea. A determination as to the validity of these issues cannot be made from the face of the guilty plea form. Garrett must pursue the usual channels for relief.

In short, there need not be a guilty plea form in support of the Oregon conviction. The plea forms, if they can be located, are only relevant to help determine if the Judgment and Sentence itself is facially invalid. *McKiearnan*, 165 Wn.2d at 782. The record that does exist reflects that the appellant was advised of his rights. This is

sufficient to uphold the validity of the Oregon conviction for purposes of sentencing.

Grays Harbor County cause number 94-1-384- 7, Violation of the Uniform Controlled Substances Act – Delivery of Methamphetamine.

The appellant pled guilty to Violation of the Uniform Controlled Substances Act – Delivery of Methamphetamine in this cause on January 31, 1995. The offense occurred on November 16, 1994. The appellant was sentenced to serve 43 months in prison and ordered to serve 12 months community placement. The Judgment and Sentence listed the offense as a Class C felony. He alleges that the judgment is invalid because it states an incorrect maximum sentence.

At that time of the appellant's plea of guilty, RCW 69.50.401 provided as follows.

> Section 69.50.401, chapter 308, Laws of 1971 ex. Sess. As last emended by section 4, chapter 458, Laws of 1987 and RCW 69.50.401 are each amended to read as follows:
>
> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
> (1) Any person who violates this subsection with respect to:
> (i) a controlled substance classified in Schedule I or II which is a narcotic

> drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years, or (A) fined not more the twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;
> (ii) **any other controlled substance classified in Schedule I, II, or III, is guilty of a crime and upon convictions may be imprisoned for not more than <u>five years</u>, fined not more than ten thousand dollars, or both**; Washington Laws of 1989 Chapter 271 § 104. (emphasis added)

It was not until 1996 that the legislature increased the punishment for Delivery of Methamphetamine. Laws of 1996, Chapter 205:

> RCW 69.50.41 and 1989 c 271 s 104 are each amended to read as follows:
> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver a controlled substance.
> (1) Any person who violates this subsection with respect to:
> (i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not

> more than ten years, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;
> (ii) methamphetamine, is guilty of a crime and upon convictions may be **imprisoned for not more than ten years**, or (A) fined not more than twenty-five thousand dollars if the crime involved less than two kilograms of the drug, or both such imprisonment and fine; or (B) if the crime involved two or more kilograms of the drug, then fined not more than one hundred thousand dollars for the first two kilograms and not more than fifty dollars for each gram in excess of two kilograms, or both such imprisonment and fine;

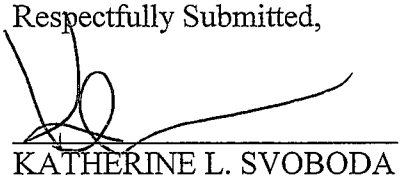
In short, contrary to the assertion of the appellant, the information contained in the statement of appellant on plea of guilty and the sentence information reflected on the Judgment and Sentence are correct. At the time of his offense, Delivery of Methamphetamine was a Class C felony. The appellant has no basis to challenge this conviction. The judgment is valid on its face.

III. CONCLUSION

The appellant has not shown that his prior convictions are facially invalid. Therefore, the sentence imposed by the trial court is appropriate and should be affirmed.

DATED this 14th day of July, 2015.

Respectfully Submitted,



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July 20, 2015 - 9:43 AM

Transmittal Letter

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- ○ Cost Bill
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