33911-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

CHRISTOPHER JOHN BLAIR, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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WASHINGTON CASES

STATUTES

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred in including Blair's prior conviction for theft of a motor vehicle in his offender score.

II. ISSUES PRESENTED

1. Whether a defendant who has stipulated to his offender score but requested a downward departure from a standard range sentence based on an argument that prior convictions are "facially invalid" is then barred on appeal from attacking the use of those prior convictions at sentencing on appeal?

2. Whether a snowmobile is a motor vehicle within the meaning of RCW 9A.56.065 and RCW 46.04.320, where it falls squarely within the definition that includes "every vehicle that is self-propelled"?

III. STATEMENT OF THE CASE

The defendant, Christopher Blair, was charged in Spokane County Superior Court with one count of theft of a motor vehicle occurring on or about October 28, 2011. CP 4. The defendant entered into a drug court agreement, in which he agreed to abide by certain conditions in exchange for the State's agreement to dismiss the charge upon his successful completion of the program. CP 17-22. In entering the drug court agreement, the defendant agreed to a stipulated facts trial based on the

police reports in the event of his termination from the drug court program. CP 19, 21-22.

The defendant ultimately failed the drug court program, and was terminated from the program on September 8, 2015. CP 36. Specifically, the court found the defendant committed numerous violations of the program conditions, to include failing to complete treatment as ordered. CP 35-36.

Before sentencing, the defendant filed a motion for an exceptional sentence downward. CP 37-57. The defendant conceded that he had been previously convicted of two counts of theft of a motor vehicle from an incident on July 23, 2011. CP 37-38, 63-64; RP 24.[1] Although defendant agreed that he had been convicted of two counts of theft of a motor vehicle from the 2011 incident, he argued that the sentencing court should impose a sentence below the standard range of 43 to 57 months because he believed those convictions were "facially invalid plea[s] in that snowmobiles do not meet the definition of motor vehicle under statutes." RP 24-25.

[1] At sentencing, the state indicated that it believed Mr. Blair had an offender score of 9 points. Mr. Blair's attorney indicated in response, "[a]s to initial offender score, we are in agreement at this time." RP 24. Additionally, the court asked the defense attorney whether he was in agreement with the offender score and the standard range as outlined by the State, and the defense attorney indicated, "yes." RP 24-25.

Defense counsel further indicated to the court:

> We're not asking the court to act as an appellate court from the prior Judgment and Sentence, Your Honor. We're just saying on its face the plea is invalid as to a motor vehicle. We're not saying that Chris is not guilty of stealing those motor vehicles. He entered a plea. We're just saying that the way they're counted is not correct and that they should be counted as one point instead of three; therefore, the correct range would be 22 to 29 months.

RP 28.

The State argued that no facial invalidity existed in the prior pleas, and that it would be inappropriate to consider defendant's argument for purposes of imposing an exceptional sentence downward. CP 58-62; RP 29.

The sentencing court rejected defendant's argument, stating that the defendant's argument "may be an excellent argument for a personal restraint petition or some other venue, but I don't think it supports my going forward with an exceptional sentence today. I'm going to deny the motion for an exceptional sentence. We'll proceed with sentencing under the standard range." RP 31.

The parties agreed that the defendant would be sentenced under the Drug Offender Sentencing Alternative, and the court followed the parties' recommendation. RP 31, 36-37; CP 69. This appeal followed.

IV. ARGUMENT

A. DEFENDANT'S ARGUMENT ON APPEAL REQUESTS THIS COURT TO ENGAGE IN REVIEW OF HIS CRIMINAL HISTORY WHICH HE EXPRESSLY REQUSTED THE TRIAL COURT NOT TO DO; THE ALLEGED ERROR IS NOT PRESERVED AS DEFENDANT STIPULATED TO HIS CRIMINAL HISTORY.

A sentence that is imposed within the standard range for an offense as provided by the Sentencing Reform Act shall not be appealed. RCW 9.94A.585. A defendant may request the court for an exceptional sentence outside of the standard range if there are substantial and compelling reasons justifying such a departure. RCW 9.94A.535. While a defendant may challenge an erroneous or illegal sentence for the first time on appeal, *State v. Ford*, 137 Wn.2d 472, 454, 973 P.2d 472 (1999), where a defendant knowingly and affirmatively agrees to an offender score, despite apparent misgivings, he waives the right to appeal the offender score calculation. *State v. Hickman*, 112 Wn. App. 187, 190-192; 48 P.3d 383 (2002).

Here, defendant argued below that the use of a "facially invalid plea" as a prior conviction for purposes of determining the defendant's offender score is erroneous and constitutes a "substantial and compelling reason justifying a **downward departure** of the standard range." CP 40 (emphasis added). He requested that the court *treat* the prior theft of

motor vehicle convictions as if they were not "motor vehicle theft convictions, which would result in a standard range of 17-22 months." CP 40. Further, he indicated that he was not requesting the trial court to act as an appellate court, RP 28, and thus, did not request the sentencing court to address the issue he now raises on appeal. Defendant's motion for a downward departure from a standard range sentence was a clear attempt to bypass collaterally attacking the prior convictions by personal restraint petition or other method.

Additionally, counsel for defendant affirmatively informed the trial court that he agreed with the State's calculation that the defendant had an offender score of 9. CP 37-38, 63-64; RP 24. The defendant and his attorney signed the state's understanding of criminal history, without noting any objections on the face of the document to the use of the theft of a motor vehicle charges. CP 63-64. That document states:

> Defendant affirmatively agrees that the State has proven by a preponderance of the evidence, defendant's prior convictions and stipulates without objection by his/her signature below, unless a specific objection is otherwise stated in writing within this document – UNDERSTANDING OF DEFENDANT'S CRIMINAL HISTORY, each of the listed criminal convictions contained within this document count in the computation of the offender score and sentencing range . . . The defendant further stipulates and agrees that he/she has read or has had the contents of the document read to him/her and he/she

> understands and agrees with the entirely of the contents of this document.

CP 64.

Because the defendant agreed to his criminal history, as did his attorney, despite their reservations, the State was relieved of its burden to prove its existence. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009); *Hickman*, 112 Wn. App. at 190. In *State v. Mendoza*, the court held that a defendant must affirmatively acknowledge the "*facts and information*" the State introduces at sentencing before the State is relieved of its duty to prove criminal history by a preponderance of the evidence. *Mendoza*, 165 Wn.2d at 928–29. When counsel affirmatively acknowledges a defendant's criminal history, the State is entitled to rely on such acknowledgement. *State v. Bergstrom*, 162 Wn.2d 87, 96–98, 169 P.3d 816 (2007).

By signing the state's understanding of defendant's criminal history without reservation, the defendant thereby waived his objection to the use of that history.[2] The defendant's request for an exceptional

[2] The state agrees, however, that if the court were to find that the convictions for theft of a motor vehicle are "facially invalid," then the defendant would be entitled to relief as to the incorrect calculation of his offender score on this charge. However, the proper manner to attack the validity of those prior convictions is by personal restraint petition. *See In Re Coats*, 173 Wn.2d 123, 267 P.3d 324 (2011); *In Re Goodwin*, 146 Wn.2d 861, 866, 50 P.3d 618 (2002)

sentence downward did not preserve any objection defendant may have had to the use of those convictions in the calculation of his offender score.

B. A SNOWMOBILE IS A MOTOR VEHICLE WITHIN THE MEANING OF RCW 9A.56.065 AND RCW 46.04.320 BECAUSE IT IS A VEHICLE THAT IS SELF-PROPELLED.

The defendant belatedly argues on appeal that the court erred in counting his convictions for theft of a motor vehicle in 2011 as prior convictions for purposes of determining his offender score on the instant case. He argues that those prior convictions are facially invalid because a snowmobile is not a motor vehicle.

The crime of theft of a motor vehicle is codified at 9A.56.065. That specific statute does not include a definition of "motor vehicle." However, RCW 9A.04.110(29) defines a "vehicle" as a "motor vehicle" as defined in the vehicle and traffic laws, any aircraft, or any vessel equipped for propulsion by mechanical means or by sail.

The vehicle and traffic laws, codified in Title 46 of the Revised Code of Washington, define a "vehicle" as "**every** device **capable** of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles." RCW 46.04.670 (emphasis added). The definitional statute excludes certain types of "vehicles" such as golf carts,

motorized wheelchairs, and bicycles from certain regulations found in Title 46.

A "motor vehicle" is defined in RCW 46.04.320 as:

> **every vehicle** that is **self-propelled** and every vehicle that is propelled by electric power obtained from overhead trolley wires, but not operated upon rails. "Motor vehicle" includes a neighborhood electric vehicle as defined in RCW 46.04.357. "Motor vehicle" includes a medium-speed electric vehicle as defined in RCW 46.04.295. An electric personal assistive mobility device is not considered a motor vehicle. A power wheelchair is not considered a motor vehicle. A golf cart is not considered a motor vehicle, except for the purposes of chapter 46.61 RCW.

(Emphasis added.)

A "snowmobile" is defined in RCW 46.04.546 as:

> a **self-propelled vehicle** that is capable of traveling over snow or ice that (1) utilizes as its means of propulsion an endless belt tread or cleats, or any combination of these or other similar means of contact with the surface upon which it is operated, (2) is steered wholly or in part by skis or sled type runners, and (3) is not otherwise registered as, or subject to, the motor vehicle excise tax in the state of Washington.

(Emphasis added.)

A snowmobile, by its very definition is a "self-propelled vehicle." RCW 46.04.546. As stated, *supra*, a "vehicle" is every device capable of being moved on a public highway, with limited exceptions, none of which includes snowmobiles. RCW 46.04.670.

Defendant asserts that a snowmobile is not a motor vehicle within the meaning of Title 46 because it is "not capable of being moved on a public highway; it is capable only of traveling over snow and ice." Appellant's Br. at 7. This argument fails because by its very definition it is capable of being moved on a public highway.

Additionally, the statutes pertaining to the operation of snowmobiles indicate that, under certain circumstances, it is lawful to operate a motor vehicle upon a public roadway. RCW 46.10.460 - .470. For instance, it is legal to cross public roadways at a ninety degree angle, where no obstruction prevents safe and quick crossing, where the snowmobile is brought to a complete stop before entering the public roadway, where the operator of the snowmobile yields the right-of-way to other motor vehicles using the roadway, and the crossing is made at a place which is greater than 150 feet from any intersection. RCW 46.10.460. Additionally, it is "lawful to operate a snowmobile upon a public roadway or highway" where (1) the road is completely covered with snow or ice and has been closed by the responsible governing authority during the winter months, (2) when the responsible governing authority gives notice that the roadway is open to snowmobile use, (3) in an emergency where the roadway is impassible to travel by automobile, or (4) when travelling along a designated snowmobile trail. RCW 46.10.470.

Thus, the statutes governing the operation of snowmobiles in Washington State contemplate that snowmobiles "are capable of being operated on a highway"; therefore, a snowmobile is a "vehicle" within the meaning of RCW 46.04.670. Because a snowmobile is a "vehicle" and because it is self-propelled, *see* RCW 46.04.320, it is therefore, a "motor vehicle" within the meaning of Title 46.

Defendant argues that the legislative history supports his conclusion that the motor vehicle theft statute was promulgated only to protect family cars from theft, so as to prevent disruption to our everyday lives. Appellant's Br. at 8. However, in construing the meaning of a statute, if the statutory language is plain and unambiguous, the court's inquiry must end and it may not look at legislative intent, for a statute's meaning must be derived from the wording of the statute itself. *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011); *State v. Von Thiele*, 47 Wn. App. 558, 562, 736 P.2d 297, *review denied*, 108 Wn.2d 1029 (1987). Here, the statutes are clear. A snowmobile is a motor vehicle. Resort to the legislative history of the theft of a motor vehicle statute is inappropriate.

The defendant was properly convicted in 2011 of theft of two motor vehicles, snowmobiles. Thus, the convictions for those offenses

properly counted toward his offender score on the present case. Defendant's arguments to the contrary fail.

V. CONCLUSION

The defendant's prior convictions for stealing snowmobiles fall squarely within the ambit of the theft of a motor vehicle statute. Snowmobiles are unambiguously motor vehicles for both the traffic laws of this state and for purposes of RCW 9A.56.065.

Finally, the manner in which the defendant attempted to collaterally attack those convictions for purposes of sentencing on the instant case was improper. The defendant did not preserve the issue for appeal by stipulating to his criminal history, but then asking the sentencing court for a downward departure from the standard sentence. The defendant was, therefore, correctly sentenced on the instant case, and the State respectfully requests that his sentence be affirmed.

Dated this 28 day of April, 2016.

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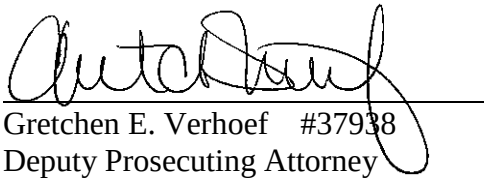

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER JOHN BLAIR, Appellant,	NO. 33911-4-III CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on April 28, 2016, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@burkhartandburkhart.com

4/28/2016	Spokane, WA	Kim Cornelius
(Date)	**(Place)**	**(Signature)**