93995-1

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 33911-4-III

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER JOHN BLAIR, Petitioner.

PETITION FOR REVIEW

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AUTHORITIES CITED

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I. IDENTITY OF PETITIONER

Christopher John Blair requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on December 1, 2016. A copy of the Court of Appeals' unpublished opinion is attached hereto.

III. ISSUES PRESENTED FOR REVIEW

Does the criminal prohibition against theft of a motor vehicle apply to a snowmobile, which is not intended to be or capable of being driven on a public highway?

Is a prior conviction for theft of a motor vehicle facially invalid when the charging document identifies only a snowmobile as the vehicle taken?

Is a conviction precluded from being found facially invalid when its validity turns on the interpretation of statutory term "motor vehicle"?

IV. STATEMENT OF THE CASE

Christopher Blair was sentenced on charges of taking a motor vehicle without possession and theft of a motor vehicle after failing to complete a drug court program. CP 35-36, 65. Before sentencing, Blair's counsel contended that his prior guilty pleas to two counts of theft of a motor vehicle were facially invalid, when those charges alleged unauthorized control over two snowmobiles. CP 38-39. The trial court rejected Blair's argument and imposed a 50 month prison-based DOSA sentence. RP 31, CP 69.

On review, the Court of Appeals held that Blair failed to show that his prior convictions were facially invalid because determining their invalidity would require statutory interpretation. *Opinion*, at 5-6. Blair now seeks discretionary review of the appellate court's holdings that (1) it may not interpret a statute to determine whether a prior conviction is facially invalid, and (2) that Blair failed to demonstrate that the convictions were facially invalid because the charged conduct did not constitute a crime.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Conviction of a nonexistent crime is a fundamental constitutional error that renders the judgment and sentence invalid on its face. *In re*

Hinton, 152 Wn.2d 853, 858, 860, 100 P.3d 801 (2004). In *Hinton*, this Court overturned felony murder convictions that were predicated on assaults, after interpreting the felony murder statute in *In re Andress*, 147 Wn.2d 602, 56 P.3d 981 (2002), concluding that assault could not serve as the predicate felony offense. The *Andress* Court held that because felony murder could not be predicated upon an assault, Andress's conviction for felony murder with assault as the predicate felony was "a fundamental defect which inherently results in a complete miscarriage of justice." *Id.* at 605. Due to that defect, his sentence was improper and had to be vacated. *Id.* at 616. Applying this interpretation, the *Hinton* Court recognized that a conviction for felony murder based upon a predicate assault "is not a conviction of a crime at all." 152 Wn.2d at 857.

The rule that a judgment and sentence resulting from conviction of a nonexistent crime is invalid on its face has been repeatedly applied by Washington courts. *See, e.g., In re Wheeler*, 188 Wn. App. 613, 354 P.3d 950 (2015) (holding that conviction for failing to register as a sex offender was facially invalid due to legislative changes); *In re Thompson*, 141 Wn.2d 712, 10 P.3d 380 (2000) (holding that conviction under statute for conduct occurring before the statute's effective date is facially invalid). Unlike the present case, the fact that determining whether the conduct supporting the conviction comprises an actual crime requires interpretation

of the governing statute has not presented a bar to relief. In *Wheeler*, the Court of Appeals interpreted the plain language of the statute defining a sex offense and considered the legislative action in determining which crimes were intended to support a failure to register conviction. 188 Wn. App. at 620-21.

Here, Blair raises the same issue presented in *Hinton*, *Wheeler*, and *Thompson* – whether his prior convictions for theft of a motor vehicle premised upon taking snowmobiles were for nonexistent crimes. The Court of Appeals declined to consider his challenge on the grounds that statutory interpretation would exceed the limits of review for facial invalidity established in *State v. Ammons*, 105 Wn.2d 175, 718 P.2d 796 (1986). *Opinion*, at 5-6. But the Court of Appeals simultaneously recognized that the facial invalidity jurisprudence under *Ammons* is the same jurisprudence that courts have applied in the personal restraint context. *Opinion*, at 4, n. 2. As such, the Court of Appeals' decision here is in conflict with the decision of another division of the Court in *Wheeler*, which plainly did not perceive the need for statutory interpretation as a limit on determining the facial invalidity of a conviction.

Contrary to the Court of Appeals' ruling here that review of the statute at issue would require the court to look beyond the judgment and

sentence to determine its invalidity, the determination of facial invalidity is a determination that the court has exceeded its statutory authority in entering the judgment and sentence, which often requires review of governing statutes and even entire statutory schemes. *See In re Yates*, 180 Wn.2d 33, 38-39, 321 P.3d 1195 (2014) (*citing In re Coats*, 173 Wn.2d 123, 135, 267 P.3d 324 (2011)). That the court must look beyond the face of the judgment and sentence to determine facial invalidity on occasion was expressly recognized in *Coats*, so long as the documents considered tend to show that the "judgment and sentence is invalid on its face because of legal error." 173 Wn.2d at 138-39. While it is true that no court has expressly held that determining facial invalidity does not preclude review and interpretation of the applicable statutes, it is clear both from the nature of the inquiry into the court's authority and the historical practice in making the determination that statutory interpretation is not only a permissible, but often a necessary, part of the inquiry.

Consequently, the Court of Appeals' interpretation of Blair's challenge to the use of his prior convictions to calculate his sentence conflicts with the facial invalidity jurisprudence of this Court as well as the Court of Appeals. Review should be granted under RAP 13.4(b)(1) and (2) to resolve the question whether facial invalidity review permits the

court to interpret the governing statute to determine whether the defendant has been convicted of a nonexistent crime.

Moreover, the Court of Appeals recently issued a separate published decision in *State v. Barnes*, 196 Wn. App. 261, 382 P.3d 729 (2016), interpreting the same theft of a motor vehicle statute and holding that a riding lawnmower did not constitute a motor vehicle. Recognizing that a literal reading of the statute would lead to absurd results, including such items as a Roomba vacuum or a remote control toy as "motor vehicles," the *Barnes* court considered the legislative findings and purposes and concluded that the statute was "only intended to encompass automobiles, or at least transportation designed for public roads." *Id.* at 271. The court pointed out that the lawnmower is not built for public highway use, does not require a license to operate, need not be registered as a vehicle, and is generally towed from site to site. *Id.* at 272. All of these considerations apply with equal force to the snowmobiles that were the subjects of Blair's prior convictions.

In *Hinton*, the Court did not need to interpret the felony murder statute because it had already done so in *Andress*. Determining the facial invalidity of Hinton's conviction required only application of its prior interpretation. The present case presents the same scenario. While the

present decision is therefore not directly in conflict with *Barnes* because of the different procedural posture, it rejects as impermissible the approach the *Hinton* Court followed. To the extent the Court of Appeals declined to apply *Barnes* because of its interpretation of the facial invalidity jurisprudence, its interpretation is squarely in conflict with the precedent established in *Hinton.*

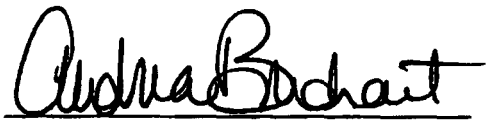
For the foregoing reasons, review is appropriate and should be granted under RAP 13.4(b)(1) and (2). Furthermore, the permissible scope of review of a claim of facial invalidity and whether such review can include interpretation of the governing statutes is a matter of substantial public interest, affecting both offender score calculations under *Ammons* as well as personal restraint petitions under RCW 10.73.090. Review is therefore additional appropriate under RAP 13.4(b)(4).

VI. CONCLUSION

Blair respectfully requests that the Court GRANT the petition for review, REVERSE the Court of Appeals' holding that it cannot engage in statutory interpretation to determine whether his prior convictions were facially invalid, and either REMAND the case to the Court of Appeals to consider Blair's facial invalidity claim on the merits or REVERSE the

judgment and sentence on the grounds that Blair's prior convictions were for a nonexistent crime for the reasons set forth in *Barnes*.

RESPECTFULLY SUBMITTED this 29 day of December, 2016.



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

DECLARATION OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Christopher J. Blair, DOC #353118
Brownstone Work Release
223 S. Browne
Spokane, WA 99201

And, pursuant to prior agreement of the parties, by e-mail to:

Brian O'Brien, Deputy Prosecuting Attorney
SCPAAppeals@spokanecounty.org

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 29th day of December, 2016 in Walla Walla, Washington.

Breanna Eng

APPENDIX

FILED
DECEMBER 1, 2016
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. CHRISTOPHER JOHN BLAIR, Appellant. RAWNE LEE CLINGER Defendant.	)	No. 33911-4-III UNPUBLISHED OPINION

KORSMO, J. — Christopher Blair challenges the use of two prior convictions in calculating his offender score, arguing that they are facially invalid. We disagree with that argument and affirm.

FACTS

Mr. Blair was charged with taking a motor vehicle (TMV) resulting from the theft of a truck from a dealership lot in 2011. He entered into a drug court program, but absconded from treatment, was terminated from the program, and then was convicted of the TMV charge at a stipulated bench trial after he was recaptured in 2015. The matter then proceeded to sentencing.

Although the parties agreed in writing that defendant's prior convictions existed and counted in the offender score calculation, the defense made inconsistent arguments

concerning the offender score. The defense did agree that the prior offenses counted at least 7 points, and also agreed with the State's calculation that the offender score was 9.[1] The defense, nonetheless, argued that two prior 2011 TMV convictions, which all parties agreed were to be treated as same criminal conduct with each other and an accompanying second degree burglary conviction, were facially invalid because the stolen vehicles had been snowmobiles. On that basis, the defense sought an exceptional sentence that would fall within the range for an offender score of 7 (17-22 months). The defense did not ask the court to find that the offender score actually was 7 or argue that the range of 17-22 months applied to this sentencing.

The court declined to impose an exceptional sentence. It also declined to address the facial validity argument, concluding that the defense was asking it to not just look at the prior TMV plea documents, but to make a legal determination that one of the elements of those offenses was missing. However, the court did accede to the joint request of the parties that a drug offender sentencing alternative (DOSA) be imposed and ordered a DOSA sentence of 25 months.

Mr. Blair then appealed to this court.

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[1] The difference between the two calculations turned on whether the 2011 TMV convictions were valid or not. Because prior TMV convictions count as three points when sentencing a current TMV conviction, one of the TMV counts would add three points to the offender score, while the burglary count would add only one point.

ANALYSIS

The sole issue presented by this appeal is a contention that the two prior 2011 TMV convictions for stealing snowmobiles were facially invalid, requiring that Mr. Blair be resentenced with an offender score of 7. We agree with the trial court that those convictions were not, on their face, invalid.

This case sits in an extremely peculiar procedural posture. Mr. Blair agreed with and did not directly challenge the offender score calculation, but instead sought an exceptional sentence based on an alleged error in calculating the offender score. A trial court's denial of an exceptional sentence cannot be challenged on appeal unless the trial court failed to follow a mandatory process. *State v. Mail*, 121 Wn.2d 707, 712, 854 P.2d 1042 (1993). Viewed as an unsuccessful exceptional sentence request, Mr. Blair's appeal would necessarily fail. Similarly, his counsel expressly argued the two offenses were facially invalid, acknowledged that would result in an offender score of 7 with a range of 17-22 months, but did not ask for sentencing within that range for that reason, even though that is the request he is making now. In light of the strictures of RAP 2.5, which acknowledges that arguments not presented to the trial court generally will not be considered on appeal, it is arguable that the defense has waived this argument. Against that stricture is the common law "sentencing error" exception to RAP 2.5(a) recognized in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), and *State v. Ford*, 137 Wn.2d

472, 973 P.2d 452 (1999). While the contours of that exception are rather vague, it might apply to this circumstance.

In light of the fact that the defendant made the specific argument to the trial court that he makes here, albeit in the form of requesting an exceptional sentence, we conclude that we can consider the argument in this appeal. Nonetheless, we conclude that his claim does not establish facial invalidity.

The seminal case upholding the Sentencing Reform Act and its use of prior convictions to establish sentencing ranges is *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986). The *Ammons* court expressly declared that the State had no affirmative burden of proving that prior convictions were constitutionally valid. *Id.* at 187. "However, a prior conviction which has been previously determined to have been unconstitutionally obtained or which is constitutionally invalid on its face may not be considered." *Id.* at 187-188. The court then elaborated on the meaning of "invalid on its face" by addressing challenges presented by the defendants.[2] One defendant challenged a prior guilty plea by arguing that the plea statement form suffered from various deficiencies. The court determined that the validity of the issues could not be made from the face of the guilty plea form. *Id.* at 189. Another defendant challenged jury

[2] The court has also had to determine the meaning of a judgment "valid on its face" in the context of interpreting RCW 10.73.090(1). *E.g.*, *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 353-354, 5 P.3d 1240 (2000).

instructions used in a prior trial. The court again declared that the claim "cannot be determined facially" because it would require the trial court "to go behind the verdict and sentence and judgment to make such a determination." *Id.*

Ammons indicates that documents associated with a guilty plea can be considered in determining facial validity. Although Mr. Blair has submitted the information filed against him in the 2011 TMV cases, he has not provided a plea statement form, so we do not know what facts were established in that proceeding. Assuming, however, that the guilty plea was to the offense as charged in that information and that Mr. Blair was convicted of TMV for taking two snowmobiles, he still has not established that those convictions are invalid on their face.

As the trial court observed, whether the TMV statute applies to snowmobiles would require more than a simple look at the judgment and sentence and associated documents. It would require construing a statute; no prior case law has been cited to us suggesting that the statute does or does not apply to snowmobiles.[3] The prior conviction does not, "on its face," display constitutional infirmity. Determining whether the

[3] A recent decision from this court holds that the TMV statute does not apply to riding lawn mowers, even though they fall within the definition of "motor vehicle" used in this state. *State v. Barnes*, No. 33811-8-III (Wash. Ct. App. Oct. 6, 2016), http://www.courts.wa.gov/opinions/pdf/338118_pub.pdf. We do not opine whether or not a snowmobile would be similarly treated since the issue is not actually presented in this action.

conviction is constitutionally invalid would require a more significant "elaboration" than permitted by *Ammons*.

Appellant did not establish that his two prior TMV convictions were invalid on their face.

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Siddoway, J.

Lawrence-Berrey, A.C.J.