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STATE OF WASHINGTON
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NO. 96117-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

KEVIN JAMES HILL,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF RESPONDENT

The State of Washington asks this Court to deny review of the Court of Appeals decision affirming Kevin Hill's convictions.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), Hill seeks review of the Court of Appeals' unpublished decision in State v. Kevin James Hill, No. 76942-1-I (June 18, 2018).

C. ISSUES PRESENTED

1. It is the State's burden to prove a defendant's prior convictions by a preponderance of the evidence. Should this Court deny review of Hill's challenge to his offender score when the State made no effort to prove the existence of his purported Arizona conviction, and thus did not undertake this burden?

2. Should this Court deny review where no significant question of law exists?

D. STATEMENT OF THE CASE

The State charged Hill with seven counts of burglary in the second degree, two counts of vehicle prowling in the second degree, and a single count of malicious mischief in the second degree. CP 1-3. Hill

successfully moved to proceed *pro se*. CP 23; RP 31. Hill eventually pled guilty as charged. CP 51-65, 95-103.

The State's understanding of Hill's criminal history, Appendix B, was attached to the plea documents. CP 89-91. The Appendix B contains no felony convictions outside of Washington State. CP 89-91. The trial court accepted Hill's guilty pleas on all counts. RP 202-07.

Several weeks later, Hill moved to withdraw his guilty pleas. RP 238. Hill argued, among other things, that he was scored incorrectly due to an alleged Arizona conviction that was not included. RP 239-40. The motions court disagreed because the State had presented no evidence of the Arizona offense, and thus there was no basis for it to change his offender score. RP 251. The court denied Hill's motion and sentenced him within the standard range. RP 250; CP 166-70. Hill appealed.

The Court of Appeals affirmed, holding that Hill was correctly advised of his offender score because the Arizona conviction was never proven.

E. LEGAL ARGUMENT

1. THE EVIDENCE PRESENTED BY THE STATE DID NOT SUPPORT THE INCLUSION OF ANY FOREIGN CONVICTIONS IN HILL'S OFFENDER SCORE.

It is the State's sole burden to prove the existence of prior felony convictions by a preponderance of the evidence. State v. Arndt, 179 Wn. App. 373, 378, 320 P.3d 104 (2014). It is also the State's burden to prove that a foreign offense is comparable to a Washington crime by a preponderance of the evidence. State v. Latham, 183 Wn. App. 390, 398, 335 P.3d 960 (2014). The existence of a prior conviction is a question of fact. Arndt, 179 Wn. App. at 378.

Before denying Hill's motion, the plea court inquired of the State whether it was attempting to prove the Arizona conviction. RP 248. The State confirmed that it was not. RP 248. The court then acknowledged that the effect of the State's inaction was that the conviction essentially did not exist for sentencing purposes. RP 251. Because the existence of a prior conviction is a question of fact the trial court must find by a preponderance of the evidence, the court properly determined that the necessary facts had not been proven.

The Court of Appeals relied on this principle to reach its decision, noting:

But it was *the State's* burden to prove Hill's criminal history, and the prosecutor told the sentencing court unequivocally that the State could not prove, and Hill's evidence did not prove, the existence of the Arizona conviction. The State points out on appeal, and Hill does not dispute, that the Arizona judgment and sentence Hill submitted below was neither certified nor authenticated.

State v. Hill, No. 76942-1-I at 5. Hill does not contest the basic controlling legal principle: that it is the State's burden of proof to establish an offender score. With this rule intact, this Court would be doing little more than reviewing the trial court's factual determination for abuse of discretion. The Court of Appeals reviewed the factual record and noted that it appeared insufficient to justify inclusion of the conviction. Id. at 5.

Hill asserts that the trial court acknowledged his offender score was incorrect. This is simply not the case. The trial court plainly stated that Hill was scored as 68 because the State was not proving the additional felony point. RP 251. The court also opined that it would not matter either way.

Hill was properly scored at 68 on his sentencing date, and his score remains 68 today. It would have been error for the sentencing court to have included a conviction in Hill's score without the State meeting its burden of proof. Hill's unsolicited submission of his own prior criminal history was little more than a transparent attempt to sabotage a guilty plea that he regretted.

2. EVEN IF THE ARIZONA CONVICTION WERE PROVEN AND COMPARABLE, IT WOULD NOT HAVE AFFECTED HILL'S OFFENDER SCORE.

The State assumes that solicitation to commit forgery in Arizona is legally comparable to the same offense in Washington. However, solicitation to commit forgery is a gross misdemeanor in Washington, and thus was properly excluded from Hill's offender score.

Forgery is categorized as a Class C felony. *Id.* In Washington, "[a] person is guilty of criminal solicitation when, with intent to promote or facilitate the commission of a crime, he or she offers to give or gives money or other thing of value to another to engage in specific conduct which would constitute such crime or which would establish complicity of such other person in its commission or attempted commission had such crime been attempted or committed." RCW 9A.28.030(1). Under Washington law, solicitation to commit a Class C felony is a gross misdemeanor. RCW 9A.28.030(2); RCW 9A.28.020(3)(e).

a. An Arizona Conviction For Solicitation To Commit Forgery Is Not Comparable To A Washington Felony.

"[A] crime's elements, not its maximum punishment, determine whether a crime is comparable." *State v. Wiley*, 124 Wn.2d 679, 684, 880 P.2d 983 (1994). Because the determinative inquiry is the elements of the

crime rather than its classification, a foreign misdemeanor can be scored as a felony and vice versa. See State v. DeVincentis, 112 Wn. App. 152, 163-64, 47 P.3d 606 (2002).

Solicitation to commit forgery is a gross misdemeanor offense in Washington, and thus the Arizona conviction, even if comparable, would not score. It is irrelevant that it is a felony under Arizona law. What matters is that if the elements were comparable to solicitation to commit forgery in Washington, Hill would have been guilty only of a gross misdemeanor. Subject to some exceptions not relevant here, misdemeanors do not count in an offender score. Wiley, 124 Wn.2d at 683; RCW 9.94A.525. Thus, even if there was sufficient proof of the conviction, and even if it was comparable, Hill's claim still fails because the comparable offense would not be counted in his offender score.

Hill's appeal presents peculiar facts, and no significant question of law.

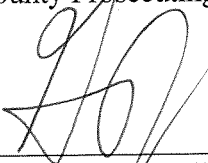
F. CONCLUSION

The State respectfully requests this Court deny Hill's petition for review.

DATED this 1 day of August, 2018.

Respectfully submitted,

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