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No. 62866-6-1

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

STATE OF WASHINGTON,
Respondent,
v.
GEORGE EARL VERKLER,
Appellant.

2009 JUL 31 PM 4:51
STATE OF WASHINGTON
COURT OF APPEALS
DIVISION ONE

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

The Honorable Paris K. Kallas

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in determining Mr. Verkler's two prior federal convictions for False Means of Identification were comparable to Class B Washington felonies.

2. The trial court erred by including Mr. Verkler's two prior federal convictions in his offender score and sentencing him accordingly.

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

A prior federal conviction may be used in a defendant's offender score depending on whether it is comparable to a corresponding Washington felony offense. Where the prior federal conviction is not comparable, it is classified as a class C Washington felony. Mr. Verkler had two prior federal convictions for Using False Means of Identification. The trial court found the prior convictions were not legally comparable to the Washington offense of Identity Theft but made no finding regarding factual comparability. The court included the prior convictions in Mr. Verkler's offender score. Was the trial court's lack of a finding regarding factual comparability an implicit finding that the offenses were not factually comparable entitling Mr. Verkler to reversal of his conviction and remand for resentencing?

C. STATEMENT OF THE CASE

On November 14, 2008, George Verkler pleaded guilty to one count of Assault in the Second Degree. CP 75-94; 11/14/08RP 11-13.. Mr. Verkler disputed the State's calculation of his offender score, which included four 2001 federal convictions. Mr. Verkler submitted his convictions for mail fraud, making a false statement, and two counts of false means of identification were not comparable to a Washington offense, thus they would be scored as Class C felonies, would then wash out, and would not be included in his offender score making his offender score a "0." CP 138-40. The State conceded the mail fraud and making a false statement prior convictions were not comparable, constituted Class C felonies, and washed out. CP 144- 48. The State did submit the two convictions for false means of identification were comparable to first degree identity theft in Washington, Class B felonies, thus Mr. Verkler's offender score was "2." CP 144-48.

The trial court agreed with the State's calculation, found the two federal convictions for false means of identification were comparable to first degree identity theft, and calculated Mr. Verkler's offender score as a "2."

I agree with the state's characterization that when the foreign statute is broader and the Washington statute is more narrow, the Court may look to the conduct and to the document filed. I think that the value issue makes the Washington statute more narrow and the federal statute more broad.

For that reason, I find that it is akin to Identity Theft in the 1st Degree, a Class B felony, and therefore the state has carried its burden of proving it would be included in the offender's score and not a wash. The offender score would be two, with a resulting standard range of 12 to 14 months.

12/12/08RP 16.

D. ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT MR. VERKLER'S TWO 2001 FEDERAL CONVICTIONS FOR FALSE MEANS OF IDENTIFICATION WERE COMPARABLE TO FIRST DEGREE IDENTITY THEFT

1. The State is required to prove the prior federal conviction was comparable to a current felony offense. To properly calculate a defendant's offender score, the SRA requires that sentencing courts determine a defendant's criminal history based on his prior convictions and level of seriousness of the current offense. *State v. Ross*, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004). The criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). "The offender score measures a defendant's

criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses." *Id.*

When a defendant's criminal history includes out-of-state or federal convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3). With respect to prior federal convictions, "[i]f there is no clearly comparable offense under Washington law or the offense is one that is usually considered subject to exclusive federal jurisdiction, the offense shall be scored as a class C felony equivalent if it was a felony under the relevant federal statute." RCW 9.94A.525(3). The State must prove the existence and comparability of a defendant's prior out-of-state conviction by a preponderance of the evidence. *Ross*, 152 Wn.2d at 230. This Court reviews de novo the classification of an out-of-state or federal conviction. *State v. Jackson*, 129 Wn.App. 95, 106, 117 P.3d 1182 (2005), *review denied*, 156 Wn.2d 1029 (2006).

Generally, the sentencing court must compare the elements of the prior offense with the elements of the potentially comparable current Washington offenses. *In re the Personal Restraint of Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Morley*, 134 Wn.2d 588, 605-06, 952 P.2d 167 (1998). If the crimes are

comparable, a sentencing court must treat a defendant's out-of-state conviction the same as a Washington conviction. *Lavery*, 154 Wn.2d at 254. If, on the other hand, the comparison reveals that the prior offense did not contain one or more elements of the current crime as of the date of the offense (legal comparability), it also reveals that the prior court did not necessarily find each fact essential to liability for the proposed Washington counterpart crime; without more then, the federal conviction counts as a Class C Washington crime. RCW 9.94A.525(3); *Ford*, 137 Wn.2d at 479-80.

If the comparison reveals that the out-of-state crime contained all elements of the proposed Washington counterpart crime, but that one or more of those elements might not have been proved because the out-of-state crime also contained alternative elements or the comparison did not reveal whether the out-of-state court found each fact necessary to liability for the Washington crime, it is then necessary to determine from the out-of-state record whether the out-of-state court found each fact necessary to liability for the Washington crime (factual comparability). *Morley*, 134 Wn.2d at 605-06. But, "the elements of the charged crime remain the cornerstone of the comparison because if facts or allegations in

the record are not directly related to the charged crime's elements, they may not have been sufficiently proven at trial." *Morley*, 134 Wn.2d at 606, 952 P.2d 167.

Here, the trial court found the federal offense to be broader than the comparable Washington offense, hence Mr. Verkler's two prior convictions were not legally comparable. 12/12/08RP 16. Thus, the issue is whether the trial court erred in finding the federal prior convictions comparable and including them in Mr. Verkler's offender score. Mr. Verkler contends the prior convictions were not comparable and the convictions should have been classified as Class C Washington felonies which would have resulted in the prior federal convictions washing out.

2. The prior federal convictions for false means of identification were not comparable to the Washington offense of identity theft in the first degree. Mr. Verkler pleaded guilty to 18 U.S.C. § 1028(a)(7), which states in relevant part:

(a) Whoever, in a circumstance described in subsection (c) of this section--

...
(7) knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that

constitutes a felony under any applicable State or local law; . . .

. . . shall be punished as provided in subsection (b) of this section.

The Washington felony offense of identity theft in the first degree is defined as:

1) No person may knowingly obtain, possess, use, or transfer a means of identification or financial information of another person, living or dead, with the intent to commit, or to aid or abet, any crime.

(2) Violation of this section when the accused or an accomplice violates subsection (1) of this section and obtains credit, money, goods, services, or anything else of value in excess of one thousand five hundred dollars in value shall constitute identity theft in the first degree. Identity theft in the first degree is a class B felony punishable according to chapter 9A.20 RCW.

RCW 9.35.020.

In the plea agreement attached to the federal conviction, Mr.

Verkler admitted:

VERKLER specifically admits to filing each of the fraudulent tax returns listed in Counts 3 and 4 of the Superseding Information; that on the returns he falsely and without authority used the names and Social Security Numbers of the alleged filers; that he received in the United States Mail in the Western District of Washington the corresponding tax return checks; and that during each of the years 1999 and 2000 the sum of the checks well exceeded \$1000.00.

CP 178.

The court's finding in the record regarding factual comparability is non-existent. It appears from the record that the trial court ruled the prior federal convictions were comparable solely on the basis that they were not legally comparable without more. The court found the Washington statute was narrower than the federal statute and that "[f]or that reason, I find that it is akin to Identity Theft in the 1st Degree, a Class B felony . . ." 12/12/08RP 16. "The lack of a finding on an issue is presumptively a negative finding against the person with the burden of proof." *Taplett v. Khela*, 60 Wn.App. 751, 760, 807 P.2d 885 (1991). Here, the State bore the burden of proving the factual comparability of the prior federal convictions. The absence of a finding by the trial court on factual comparability was presumptively a finding the State failed to carry its burden of proving factual comparability. See *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge the presumption that the party with the burden of proof failed to sustain their burden on this issue."). Thus, the court's subsequent conclusion that the federal prior convictions were comparable was an erroneous conclusion and Mr. Verkler is entitled to reversal and resentencing.

3. Mr. Verkler is entitled to remand for resentencing without the prior federal convictions. Remand without another opportunity to prove the classification of a prior offense is the appropriate remedy if the defendant objects to the State's evidence and the State then fails to satisfy its burden. *State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997), *aff'd*, 137 Wn.2d 490, 973 P.2d 461 (1999).

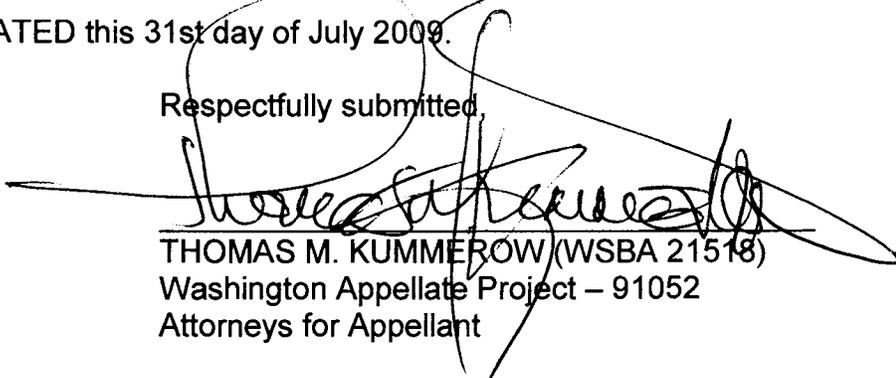
Here, Mr. Verkler objected to the State's evidence proffered on the comparability of the prior federal convictions. The trial court implicitly found the State failed to carry its burden of proving factual comparability. Mr. Verkler is entitled to resentencing with the two prior federal convictions counted as class C felonies which would cause them to "wash out" and not be counted in the offender score.

E. CONCLUSION

For the reasons stated, Mr. Verkler submits this Court must reverse his sentence and remand for resentencing.

DATED this 31st day of July 2009.

Respectfully submitted,



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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 62866-6-I
v.)	
)	
GEORGE VERKLER,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 31ST DAY OF JULY, 2009, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS - DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

<input checked="" type="checkbox"/> KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) () ()	U.S. MAIL HAND DELIVERY _____
<input checked="" type="checkbox"/> GEORGE VERKLER 326231 STAFFORD CREEK CORRECTIONS CENTER 191 CONSTANTINE WAY ABERDEEN, WA 98520	(X) () ()	U.S. MAIL HAND DELIVERY _____

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CLERK OF COURT
STATE OF WASHINGTON

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF JULY, 2009.

X _____
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