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No. 63434-8-I

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

STATE OF WASHINGTON,

Respondent,

v.

DARIN JEROME GATSON,

Appellant.

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

The Honorable Larry E. McKeeman

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The doctrine of collateral estoppel barred the trial court from ruling Mr. Gatson's prior New York conviction was comparable to a Washington felony offense and including it in his offender score.

2. The trial court erred in determining Mr. Gatson's prior New York conviction for Third Degree Robbery was comparable to Second Degree Robbery.

3. The trial court erred by including Mr. Gatson's prior New York conviction in his offender score and sentencing him accordingly.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Collateral estoppel bars relitigation of an issue which has previously been determined by a court where the parties and the issue are the same as in the prior proceeding. In 2006, during sentencing in a previous conviction in Snohomish County Superior Court, the court ruled Mr. Gatson's prior New York third degree robbery conviction did not count in his offender score. Did collateral estoppel bar the State from relitigating the comparability of Mr. Gaston's New York prior conviction in his present

sentencing, thus entitling him to reversal of his sentence remand for resentencing without the New York prior conviction?

2. A prior out-of-state conviction may be used in a defendant's offender score where a trial court finds it comparable to a corresponding Washington felony offense. Where the prior foreign conviction is not comparable, it cannot be used in calculating the defendant's offender score. Mr. Gaston has a prior New York conviction for third degree robbery which the trial court found to be comparable to the Washington offense of second degree robbery, and included it in Mr. Gatson's offender score. Was the trial court's finding regarding comparability erroneous entitling Mr. Gatson to reversal of his sentence and remand for resentencing?

C. STATEMENT OF THE CASE

On March 19, 2009, Darin Gatson pleaded guilty to one count of Possession of a Stolen Vehicle. CP 75-94; 11/14/08RP 11-13. At sentencing, Mr. Gatson disputed the State's calculation of his offender score, which included a 1992 New York conviction for third degree robbery. Mr. Gatson contended the New York prior conviction was not comparable to a Washington offense and should not be included in his offender score. CP 138-40. Mr. Gatson also

contended in 2006 when he was sentenced in Snohomish County Superior Court for a conviction for second degree theft and third degree assault, Judge Thorpe refused to include the New York prior conviction because the court found it was not comparable to a Washington felony offense. CP 64- 67; 3/19/09RP 10-11, 4/7/09RP 1-2, 6-7.

The trial court agreed with the State's calculation, found the New York conviction comparable to the Washington felony offense of second degree robbery, and calculated Mr. Gatson's offender score as a "7." 4/7/09RP 4-5, Mr. Gatson's standard range was calculated at 22 – 29 months, and the trial court imposed a sentence of 26 months. CP 9, 12; 4/7/09RP 11.

D. ARGUMENT

1. THE DOCTRINE OF COLLATERAL ESTOPPEL BARRED THE TRIAL COURT FROM DETERMINING MR. GATSON'S NEW YORK CONVICTION WAS COMPARABLE TO A WASHINGTON FELONY OFFENSE

At sentencing, Mr. Gatson contended in 2006, Judge Thorpe of the Snohomish County Superior Court had determined the New York prior conviction was not comparable and refused to include it in Mr. Gatson's offender score at that time. 3/19/09RP 10-11, 4/7/09RP 1-2, 6-7. The State proffered a Judgment and Sentence

from the 2006 conviction which showed the New York prior conviction lined out and further indicating the court did not include that prior conviction in his offender score. CP 64-67.

The State contended here that the prior court did not include the New York conviction only because the State did not have the paperwork to prove the prior. 4/7/09RP 1-26-7. The State provided nothing to support this bald contention, only the prosecutor's unsupported argument.

It is the State's burden to prove an out-of-state conviction is comparable to a Washington crime by a preponderance of the evidence. *State v. Ford*, 137 Wash.2d 472, 479-80, 973 P.2d 452 (1999). Here, absent some evidence that the prior sentencing court was not required to rule on the comparability of the New York conviction, the State was collaterally stopped from again attempting to include the New York conviction in Mr. Gatson's offender score.

The doctrine of collateral estoppel establishes that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *State v. Mullin-Coston*, 152 Wn.2d 107, 113, 95 P.3d 321 (2004), quoting *Ashe v. Swenson*, 397 U.S. 436, 443, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970).

Collateral estoppel applies in criminal cases and precludes the same parties from relitigating issues actually raised and resolved by a former verdict and judgment. *State v. Harrison*, 148 Wn.2d 550, 560-561, 61 P.3d 1104 (2003); *State v. Williams*, 132 Wn.2d 248, 253-54, 937 P.2d 1052 (1997).

The policy behind collateral estoppel is to “prevent[] relitigation of an issue after the party against whom the doctrine is applied has had a full and fair opportunity to litigate his or her case.” *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 262, 956 P.2d 312 (1998). For collateral estoppel to apply to preclude the relitigation of an issue, all of the following requirements must be met: (1) the issue in the prior adjudication must be identical to the issue currently presented for review; (2) the prior adjudication must be a final judgment on the merits; (3) the party against whom the doctrine is asserted must have been a party to or in privity with a party to the prior adjudication; and (4) barring the relitigation of the issue must not work an injustice on the party against whom the doctrine is applied. *Harrison*, 148 Wn.2d at 561; *Nielson*, 135 Wn.2d at 262-63.

In Mr. Gatson’s sentencing, the parties were identical to the 2006 sentencing, the issue of comparability was precisely the

same, and the issue, the comparability of the New York prior conviction, was determined against the State. Under the doctrine of collateral estoppel, the State was barred from relitigating the comparability of the New York prior conviction in Mr. Gatson's current sentencing. As a consequence, the court erred in including the New York prior conviction in Mr. Gatson's offender score. Mr. Gatson is entitled to reversal of his sentence and remand for resentencing with an offender score of "6."

2. THE TRIAL COURT ERRED IN RULING THAT MR. GATSON'S 1992 NEW YORK CONVICTION FOR THIRD DEGREE ROBBERY WAS COMPARABLE TO SECOND DEGREE ROBBERY IN WASHINGTON

a. 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. *Ford*, 137 Wn.2d at 479. "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 convictions, the SRA requires classification "according to the comparable offense definitions and sentences provided by Washington law." 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 out-of-state conviction is not included in the offender score. 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.” *Id.* In addition, “[a]ny attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic.” *Lavery*, 154 Wn.2d at 258.

This Court reviews the sentencing court's calculation of the offender score *de novo*. *State v. Wilson*, 113 Wn.App. 122, 136, 52 P.3d 545 (2002).

b. The prior New York third degree robbery conviction was not comparable to the Washington offense of robbery in the second degree.

i. Third degree robbery in New York is not legally comparable to the Washington offense off second degree robbery. Mr. Gatson pleaded guilty in New York to third degree robbery.

A person is guilty of robbery in the third degree when he forcibly steals property.

Robbery in the third degree is a class D felony.

N.Y. Penal Law § 160.05 (McKinney 2009).

Robbery in New York is defined as:

Robbery is forcible stealing. A person forcibly steals property and commits robbery when, in the course of committing a larceny, he uses or threatens the immediate use of physical force upon another person for the purpose of:

1. Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or

2. Compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

N.Y. Penal Law § 160.00 (McKinney 2009).

The court in Mr. Gaston's sentencing ruled third degree robbery in New York is comparable to second degree robbery in Washington. In Washington, second degree robbery is defined as:

- (1) A person is guilty of robbery in the second degree if he commits robbery.
- (2) Robbery in the second degree is a class B felony.

RCW 9A.56.210.

Washington defines robbery as:

A person commits robbery when he unlawfully takes personal property from the person of another or in his presence against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone. Such force or fear must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial. Such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear.

RCW 9A.56.190.

Robbery in New York requires the forcible taking of property, while Washington does not. New York requires the taking be from the person while Washington requires taking from the person "*or in his presence.*" RCW 9A.56.190. Further, New York requires the

force be used against a person while Washington allows the force to be directed at either the person or the property. See *State v. Tvedt*, 153 Wn.2d 705, 711-12, 107 P.3d 728 (2005) (robbery statute provides that the force must be directed at a person but it also provides that the use or threat of force, violence, or fear of injury may be directed to property). Finally, in New York one commits robbery when he compels “the owner of property or another person to deliver the property or to engage in any other conduct which aids in the commission of larceny.” N.Y. Penal Law § 160.00. Washington robbery has no comparable provision. As a result, the two statutes are not legally comparable.

ii. Mr. Gatson’s New York prior conviction was not factually comparable to the Washington offense of second degree robbery. Mr. Gatson pleaded guilty to taking shoes from a store, admitting he had committed a theft. CP 56. In his statement on plea of guilty, Mr. Gatson admitted:

My name is Darin J. Gatson[.] I am 27 years old and I live at 173 Anthony Street with my step sister Trina Howard. I got fired from my job at McDonalds on Lyell Ave. yesterday morning.

On September 15, 1992 at about 8:00 am I was at Josephine’s house on Genesee Street near Bronson Avenue. I don’t know Josephine’s last name or the exact address. Josephine is a friend of mine and I

stayed the night. I left Josephine's house and got breakfast at Critic's Restaurant. I went to McDonald's after that, and cleaned out my locker. From McDonald's I went to Mt. Read Plaza and went inside the shoe store at the Plaza. I saw several pairs of sneakers that I wanted but I only had 1.00 dollar on me. There was a guy with a red face standing behind the counter. When the dude wasn't looking I took the sneakers out of the box and put them in my tote bag that I was carrying. Just then a lady with a red face came into the store and the dude told her to check on me. The lady came over to where I was and saw an empty box here. I went to the front of the store and she followed me. She said that the sneakers were in my bag, I saw [sic] yeah and she moved in front of the door to block the door. I went up to her and pushed her out of the way. I ran out of the store with the tote bag and the dude who was behind the counter came after me with a gun. Another old man chased me with a car and cut in front of me. Thats [sic] when I stopped and the dude with the gun came up to me. I gave him the tote bag and we went back to the store. Shortly afterwards the police came and handcuffed me and put me in the police car.

CP 56.

Second degree robbery in Washington requires the use of force to obtain or retain possession of the property of another. RCW 9A.56.190. While it is true that "any force or threat, no matter how slight, which induces an owner to part with his property is sufficient to sustain a robbery conviction, *State v. Ammlung*, 31 Wn.App. 696, 704, 644 P.2d 717 (1982), in Mr. Gaston's admission it is clear he used force to push the woman at the door out of the

way, which was an attempt to escape, which is insufficient to support the use of force necessary for robbery. See *State v. Johnson*, 155 Wn.2d 609, 610, 121 P.3d 91 (2005) (robbery conviction reversed where force used was not to retain property but to escape). The New York prior conviction was not factually comparable to robbery in Washington.

c. Mr. Gatson is entitled to remand for resentencing without the prior New York conviction. 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).

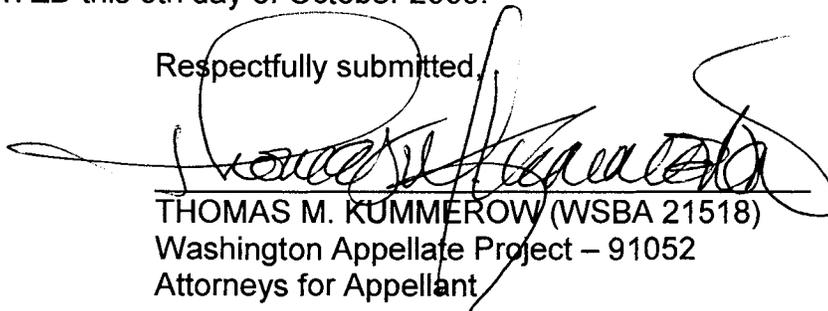
Here, Mr. Gatson objected to the State's proffered evidence on the comparability of the prior New York conviction and the State failed to fulfill its burden of proving comparability. Mr. Gatson is entitled to resentencing without the prior New York conviction counting in his offender score.

E. CONCLUSION

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

DATED this 8th day of October 2009.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Thomas M. Kummerow', is written over a horizontal line. The signature is stylized and cursive.

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DIVISION ONE**

STATE OF WASHINGTON,)	
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Respondent,)	NO. 63434-8-I
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)	
DARIN GATSON,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 8TH DAY OF OCTOBER, 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:

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