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JUL 31 2012

King County Prosecutor
Appellate Unit

COURT OF APPEALS NO. 68115-0-1

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

STATE OF WASHINGTON

v.

LARRY MOSLEY,

Appellant.

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

The Honorable Laura Gene Middaugh, Judge

FILED
COURT OF APPEALS
STATE OF WASHINGTON
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OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in including appellant's 1997 Minnesota conviction for burglary in his offender score, as it is not comparable to a Washington State felony.

Issue Pertaining to Assignment of Error

Did the court err in including a prior 1997 Minnesota burglary conviction in appellant's offender score where, at the time of the offense, Minnesota did not require the crime intended to be committed to be one against person or property, whereas Washington did?

B. STATEMENT OF THE CASE¹

On June 16, 2011, the King County prosecutor charged appellant Larry Mosley with one count of first degree robbery while armed with a deadly weapon, and one count of second degree assault, allegedly committed on May 31, 2011. CP 1-6. According to the certification for determination of probable cause, Mosley and a co-defendant stole cocaine from a drug dealer who agreed to meet and sell them cocaine. CP 4. The complainant drug dealer alleged that while they were all driving, Mosley – who was sitting

¹ "RP" refers to the sentencing hearing on December 16, 2011.

behind her in the rear passenger seat – choked her from behind while the driver poked her with a knife. CP 4.

Pursuant to a plea agreement, Mosley pled guilty to amended charges of first degree theft and third degree assault. CP 20-38. Mosley disputed the state's calculation of his offender score, particularly the comparability of certain prior Minnesota convictions, as part of the plea agreement. CP 23-24, 36.

By the time of sentencing, the state sought to include only one prior foreign conviction – a 1997 Minnesota conviction for attempted third degree burglary. CP 39-45. According to the state, it was comparable to second degree or alternatively, residential burglary in Washington. RP 3, 7. While the defense disputed its comparability (CP 200-202; RP 8, 13), the court sided with the state and included the offense in Mosley's offender score. CP 204; RP 13. As a result, Mosley's offender score was calculated as 6 instead of 5 points, yielding a standard range of 22-29 months for the third degree assault, as opposed to 17-22 months. CP 204; RCW 9.94A.510, RCW 9.94A.515.

Significantly, the calculation rendered Mosley ineligible for a residential treatment drug offender sentencing alternative (DOSA).

RCW 9.94A.660(3).² The court therefore imposed a prison-based DOSA, although it stated it would have imposed residential treatment if it could. RP 16-18. Mosley timely appeals. CP 39-45.

C. ARGUMENT

THE COURT ERRED BY INCLUDING THE PRIOR MINNESOTA BURGLARY IN MOSLEY'S OFFENDER SCORE AS IT IS NOT COMPARABLE TO A WASHINGTON STATE FELONY.

The court miscalculated Mosley's offender score when it included the 1997 Minnesota conviction for burglary. It therefore mistakenly held Mosley was not eligible for a residential DOSA. This Court should remand for resentencing.

Under the Sentencing Reform Act of 1981 (SRA), a defendant's offender score establishes the range a sentencing court may use in determining a sentence. RCW 9.94A.712(3); RCW 9.94A.530. Regarding prior out-of-state convictions, RCW 9.94A.525(3) provides:

Out-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law. Federal convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington

² To qualify for a residential DOSA, the midpoint of the offender's standard range sentence must be 24 months or less. RCW 9.94A.660(3). With the attempted burglary included in Mosley's offender score, the midpoint of the standard range for third degree assault was 25.5 months. RCW 9.94A.510, RCW 9.94A.515.

law. If 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.

The goal is to ensure that defendants with prior convictions are treated similarly, regardless of where the prior convictions occurred. State v. Morley, 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

The State bears the burden of proving both the existence and the comparability of an out-of-state conviction. State v. Ford, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). A defendant may raise an objection to the inclusion of such a conviction for the first time on appeal. Ford, 137 Wn.2d at 477; see also State v. McCorkle, 137 Wn.2d 490, 495, 973 P.2d 461 (1999).

Here, however, Mosley clearly challenged the inclusion of the Minnesota conviction at sentencing. Accordingly, on remand, the state is limited to the record it made the first time around. State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002) (state did not meet its initial burden of proof on the predicate offenses and could not get a “second bite of the apple” on remand).

The Supreme Court has adopted a two-part test for determining whether an out-of-state conviction is comparable to a Washington crime which, with one exception, must rise to the level of a felony to be included in a defendant's offender score under the SRA.³ First, a sentencing court compares the legal elements of the out-of-state crime with the comparable Washington crime and, if comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. Morley, 134 Wn.2d 588; Ford, 137 Wn.2d 472.

If the elements of the out-of-state crime are different, then the court must examine the undisputed facts from the record in order to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington felony. Morley, 134 Wn.2d at 606.

In 1997, Minnesota's third degree burglary statute provided:

Subd. 3. Burglary in the third degree. Whoever enters a building without consent and with intent to steal or commit any felony or gross misdemeanor while in the building, or enters without consent and steals or commits a felony or gross misdemeanor while in the building commits burglary in the third degree[.]

³ Where the current conviction is for a felony traffic offense, under the SRA, a sentencing court may include serious misdemeanor traffic offenses in the offender score. RCW 9.94A.525(11).

Former Minn. St. § 609.582; Laws of 1988, c 712, § 11.⁴

Minnesota defined "attempt" as:

Whoever, with intent to commit a crime, does an act which is a substantial step toward, and more than preparation for, the commission of the crime is guilty of an attempt to commit that crime, and may be punished as provided in subdivision 4.

Minn. St. § 609.17; Laws 1963, c. 753. Amended by Laws 1986, c. 444, § 1.

In 1997, Washington's second degree burglary statute provided:

A person is guilty of burglary in the second degree if, with intent to commit a crime against person or property therein, he enters or remains unlawfully in a building other than a vehicle or dwelling.

RCW 9A.52.030; Laws of 1989, 2nd ex. S. c 1 § 2; 1989 c 412 § 2.

Washington defined attempt as:

A person is guilty of an attempt to commit crime if, with intent to commit a specific crime, he does any act which is a substantial step toward the commission of that crime.

RCW 9A.28.020.

There appears to be no discernable difference between attempts in Minnesota and attempts in Washington. Both require

⁴ The offense qualified as second degree burglary if the building was a dwelling. Minn. St. § 609.582, Subd. 2.

the intent to commit the crime plus a substantial step towards its commission. However, there are differences between the Minnesota and Washington burglary statutes.

First, as the parties and court focused on at sentencing (RP 6-13), Washington's second degree burglary statute excludes "dwellings" from its operation, whereas the comparable Minnesota statute does not. In that regard, Minnesota's third degree burglary statute may be more comparable to Washington's residential burglary, which is defined as:

A person is guilty of residential burglary if, with intent to commit a crime against a person or property therein, the person enters or remains unlawfully in a dwelling other than a vehicle.

RCW 9A.52.025(1). Because residential burglary is classified as a class C felony, an *attempted* residential burglary would still qualify as a felony offense in Washington. Accordingly, whether the Minnesota offense occurred in a dwelling as opposed to a building does not foreclose its inclusion in Mosley's offender score.

The real issue regarding comparability is that Washington requires the intent to commit a crime against *person or property*, whereas Minnesota does not. Cf. RCW 9A.52.030, RCW 9A.52.025(1) and Minn. St. § 609.582. Accordingly, a person intending to commit a drug crime could be guilty of

burglary in Minnesota but not Washington. Accordingly, the elements of the offenses are not legally comparable. See e.g. State v. Larkins, 147 Wn. App. 858, 863-64, 199 P.3d 441 (2008) (“When Washington recodified its criminal code in 1976, the final legislative report acknowledged the existence of different types of crimes: crimes against persons, crimes against property, victimless crimes and miscellaneous crimes. Thus, crimes exist that do not fit within the definitions for committing a burglary in Washington.”) (footnote omitted).

Because the elements are not legally comparable, the next step is to examine the undisputed facts from the record in order to determine whether the Minnesota conviction was for conduct that would satisfy the elements of the comparable Washington felony. Morley, 134 Wn.2d at 606.

The amended complaint proffered by the state here alleged:

That on or about the 25th day of August, 1997, in Ramsey County, Minnesota, defendant Larry Steele Mosley did wrongfully and unlawfully attempt to enter a building located at 680 Virginia without consent of the lawful possessor, Thomas Carrey, and with intent to steal while in the building.

CP 48. Certain crimes of theft are considered crimes against person or property in Washington, although not all. RCW 9.94A.411(2) (a).

More problematic for the state, however, is that its documentation for the Minnesota offense did not include a Statement of Defendant on Plea of Guilty or other document indicating exactly what Mosley admitted to. CP 47-65. A charging document is merely an allegation.

Accordingly, to justify its inclusion in Mosley's offender score, the court would have to presume that Mosley pled guilty to the offense as charged in the amended complaint. But that is precisely the type of judicial fact-finding this Court held to be unauthorized in State v. Larkins, 147 Wn. App. 858 (2008).

At issue there was Larkins' 1992 Ohio conviction for burglary. The Ohio burglary conviction rested on Larkins' intent to commit a misdemeanor. Because the misdemeanor category included crimes other than those against a person or property, the Ohio conviction was not legally equivalent to burglary in Washington. Larkins, 147 Wn. App. at 861.

Nonetheless, the sentencing court included the conviction in Larkins' offender score, reasoning that because Larkins was charged with burglary of the home of Unnie B. Lipscomb, as well as assault of Unnie B. Lipscomb, in the same indictment, he must have assaulted Lipscomb in his home. Larkins, 147 Wn. App. at

865. This Court held the inference violated Larkins' right to a jury trial and proof beyond a reasonable doubt. Larkins, 147 Wn. App. at 855-56 (citing In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005); Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); Blakely v. Washington, 542 U.S. 296, 303, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004)).

As in Larkins, the complaint offered by the state here does not provide a factual basis for the court to determine the foreign offense is comparable to a Washington state felony. The court therefore erred in including it in Mosley's offender score.

D. CONCLUSION

Because the court miscalculated Mosley's offender score and as a result, held he was not eligible for a residential treatment DOSA, this Court should reverse and remand for resentencing.

Dated this 31st day of July, 2012

Respectfully submitted

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

STATE OF WASHINGTON,)	
)	
Appellant,)	
)	
vs.)	COA NO. 68115-0-1
)	
LARRY MOSLEY,)	
)	
Respondent.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 31ST DAY OF JULY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] LARRY MOSLEY
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2012 JUL 31 PM 4:30
COURT OF APPEALS DIV 1
STATE OF WASHINGTON

SIGNED IN SEATTLE WASHINGTON, THIS 31ST DAY OF JULY, 2012.

x *Patrick Mayovsky*