

68643-7

68643-7

NO. 68643-7-I

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

STATE OF WASHINGTON,

Respondent,

v.

LEONARD C. WOODY,

Appellant.

FILED
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COURT OF APPEALS
DIVISION ONE
SEATTLE, WA

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

The Honorable George N. Bowden, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The court erred in including appellant's 1993 Ohio convictions for drug trafficking in its calculation of appellant's offender score, as they are not comparable to a Washington State felony.

Issue Pertaining to Assignment of Error

Did the state fail to prove the comparability of the Ohio drug trafficking offenses, where Washington's delivery statute required *delivery* of a controlled substance, whereas Ohio required merely *an offer to sell*?

B. STATEMENT OF THE CASE¹

Leonard Woody is appealing from the judgment and sentence entered following his conviction for burglary. CP 1-12. According to the state's theory, Woody was an accomplice to the burglary of a closed Marysville espresso stand, during the early morning hours of May 18, 2010. 2RP 81-82. The principal to the burglary, Keith Riley, reportedly broke into the espresso stand and took a bank bag containing approximately \$74.00 in change. 2RP 77, 82.

¹ The transcripts on appeal consist of: 1RP – volume I of jury trial on 1/23/12; 2RP – volume II of jury trial on 1/24/12; and RP – sentencing on April 12, 2012.

At sentencing, the state alleged Woody's offender score was six points based on the following: 2 points for two 1993 Ohio convictions for aggravated trafficking in drugs (cocaine); 3 points for three 1993 Ohio convictions for trafficking in drugs (marijuana); and 1 point for a 2006 Snohomish County conviction for possessing methamphetamine. Supp. CP ___ (sub. no. 42, State's Sentencing Memorandum).

As proof of the Ohio drug trafficking convictions, the state submitted 4 documents. First, the state offered a 6 count indictment, filed under Stark County Cause Number 1993 CR 3051, dated January 15, 1993, alleging the following:

That Leonard Clarence Woody, Jr., late of said County on or about the 14th day of April in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly, sell or offer to sell a controlled substance, to-wit: Cocaine, a Schedule II substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT TWO

And the Jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Leonard Clarence Woody, Jr., late of said County on or about the 22nd day of June in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly sell or offer to sell a

controlled substance, to-wit: Cocaine, a Schedule II substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT THREE

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Leonard Clarence Woody, Jr., late of said County on or about the 13th day of August in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly, sell or offer to sell a controlled substance, to-wit: Cocaine, a Schedule II substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT FOUR

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Leonard Clarence Woody, Jr., late of said County on or about the 13th day of April in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly, sell or offer to sell a controlled substance, to-wit: Marijuana, a Schedule I substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT FIVE

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Leonard Clarence

Woody, Jr., late of said County on or about the 14th day of April in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly, sell or offer to sell a controlled substance, to-wit: Marijuana, a Schedule I substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

COUNT SIX

And the jurors aforesaid, by their oaths aforesaid, and by virtue of the authority aforesaid, do further find and present that Leonard Clarence Woody, Jr., late of said County on or about the 17th day of April in the year of our Lord one thousand nine hundred and ninety-two, at the County of Stark, aforesaid, did, knowingly, sell or offer to sell a controlled substance, to-wit: Marijuana, a Schedule I substance, in violation of Ohio Revised Code 2925.03(A)(1), contrary to the statute in such cause made and provided, and against the peace and dignity of the State of Ohio.

Supp. CP __ (sub. no. 42, State's Sentencing Memorandum, 3/13/12), exhibit 2.

Second, the state offered a "Judgment Entry" filed May 28, 1993, which allowed the state to amend the charging date for count I to April 17, 1992. Third, the state offered a "Nolle Prosequi" filed June 14, 1993, reflecting a voluntary dismissal of count 3 of the indictment. Supp. CP __ (sub. no. 42, State's Sentencing Memorandum, 3/13/12), exhibit 2.

Finally, the state offered a second "Judgment Entry" filed June 14, 1993, indicating the following 5 trafficking convictions and corresponding sentences:

This day, June 8, 1993, this cause, having been regularly assigned for Trial, came on for hearing before the Jury, the same being duly impaneled and sworn, upon the Indictment for the crimes of Aggravated Trafficking, 2 Cts. [R.C. 2925.03(A)(1)] and Trafficking, 3 Cts. [R.C. 2925.03(A)(1)], as charged in the Indictment, and the Plea of Not Guilty heretofore entered by the defendant, upon the evidence produced on behalf of the State of Ohio and on behalf of the defendant.

The Jury, having been duly charged as to the law of the State of Ohio, and after due deliberation on June 9, 1993, agreed upon their verdict, whereupon they were conducted in Open Court in the presence of the defendant and his Attorney, and the verdict, signed by all members of the Jury, was read to the defendant, and the verdict given, being such as the Court may receive it, was immediately entered in full upon the minutes. It was the unanimous verdict of the Jury that the defendant is guilty of the crimes of Aggravated Trafficking, 2 Cts. [R.C. 2925.03(A)(1)] and Trafficking, 3 Cts. [R.C. 2925.03(A)(1)] as charged in the Indictment. Thereupon the Prosecuting Attorney moved that sentence be pronounced against said defendant.

Whereupon the Court was duly informed in the premises on the part of the State of Ohio, by the Prosecuting Attorney, and on the part of the defendant, by the defendant and his Counsel, and thereafter the court asked the defendant whether he had anything to say as to why judgment should not be pronounced against him, and the defendant, after consulting with his Counsel, said that he had nothing further to say except that which he had already said, and showing no good and sufficient reason why

sentence should not be pronounced, the Court thereupon pronounced sentence.

It is therefore ordered, adjudged and decreed that the defendant be committed to the Lorain Correctional Institution in Grafton, Ohio, for a determinate term of two (2) years, or until otherwise pardoned, paroled or released according to law, on each count of Aggravated Trafficking, 2 Cts. [R.C. 2925(A)(1)], and

It is further ordered, adjudged and decreed that the defendant be committed to the Lorain Correctional Institution in Grafton, Ohio, for a determinate term of one (1) year, or until otherwise pardoned, paroled or released according to law, on each count of Trafficking, 3 Cts. [R.C. 2925.03(A)(1)], and

It is further ordered, adjudged and decreed that the defendant shall serve these sentences consecutively, and

It is further ordered, adjudged and decreed that the defendant's fine shall be waived, and

It is further ordered, adjudged and decreed that the defendant pay the costs of this prosecution for which execution is hereby awarded.

It is further ordered, adjudged and decreed that the Judge explained to the defendant his rights to appeal according to Criminal Rule 32.

Supp. CP __ (sub. no. 42), exhibit 2.

Based on an offender score of 6, the state asserted the standard range was 22-29 months. Supp. CP __ (sub. no. 42). Considering the lack of any aggravating circumstances, the state recommended a mid-range sentence. Id.

Regarding the sentencing range, defense counsel stated merely: "I know basically the sentence is based upon his prior

record. We are tied with the SRA guidelines.” RP 3. “[B]ased on the length of time between convictions,” and the “evidence that was presented to the jury suggesting minimal participation, defense counsel asked for the low end of the range, 22 months. RP 3. The imposed 24 months of incarceration. CP 5; RP 5.

C. ARGUMENT

BECAUSE THE STATE FAILED TO PROVE THE COMPARABILITY OF THE OHIO CONVICTIONS, THE COURT ERRED IN INCLUDING THEM IN WOODY’S OFFENDER SCORE.

Woody is entitled to have his sentence vacated because the court did not require the state to prove the comparability of the 5 prior Ohio convictions, before using those convictions to increase his offender score. This Court reviews de novo the sentencing court’s calculation of the offender score. State v. Rivers, 130 Wn.App. 689, 699, 128 P.3d 608 (2005), review denied, 158 Wn.2d 1008 (2006), cert. denied, 549 U.S. 1308 (2007).

Out-of-state convictions must be classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3); State v. Wiley, 124 Wn.2d 679, 683, 880 P.2d 983 (1994). Classification based on

comparability is a mandatory step in the sentencing process. State v. Ford, 137 Wn.2d 472, 483, 973 P.2d 452 (1999).

To classify an out-of-state conviction, the court must compare the elements of the foreign offense to the elements of potentially comparable Washington crimes. Ford, 137 Wn.2d at 479, citing State v. Morley, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). If the elements are identical, the foreign conviction counts toward the offender score as if it were the Washington offense. In re Pers. Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005). If the elements are not identical or if the Washington statute defines the offense more narrowly than does the foreign statute, the trial court may look to the record of the out-of-state conviction to determine whether the defendant's conduct would have violated the comparable Washington statute. Ford, 137 Wn.2d at 479, citing Morley, 134 Wn.2d at 606.

According to the documentation submitted by the state, Woody was convicted of 5 counts of drug trafficking under Ohio Revised Code 2925.03(A)(1) in 1993. In 1992, when the offenses were alleged to have been committed (as per the indictment), the statute provided, in relevant part:

(A) No person shall knowingly do any of the following:

(1) Sell *or offer to sell* a controlled substance in an amount less than the minimum bulk amount[.]

...
(C) If the drug involved is any compound, mixture, preparation, or substance included in schedule I, with the exception of marijuana, or in schedule II, whoever violates this section is guilty of aggravated trafficking.

(1) Where the offender has violated division (A)(1) of this section, aggravated trafficking is a felony of the third degree[.]

...
(E) If the drug involved is marijuana, whoever violates this section is guilty of trafficking in marijuana.

(1) Where the offender has violated division (A)(1) of this section, trafficking in marijuana is a felony of the fourth degree[.]

R.C. 2925.03 (1992) (emphasis added); 1992 Ohio Laws File 226 (H.B. 591).

Under R.C. 2925.01(E) (1991), "bulk amount" was defined as:

(1) An amount equal to or exceeding ten grams or twenty-five unit doses of a compound, mixture, preparation, or substance which is, or which contains any amount of, a schedule I opiate or opium derivative, or cocaine;

...
(3) An amount equal to or exceeding two hundred grams of marihuana, or an amount equal to or exceeding ten grams of the resin contained in marihuana or of any extraction or preparation of the resin contained in marihuana, or equal to or exceeding two grams of the resin contained in

marihuana in a liquid concentrate, liquid extract, or liquid distillate form[.]

R.C. 2925.01; 1991 Ohio Laws File 107 (H.B. 322).

The Ohio trafficking statute is essentially the same today, except that it does not refer to a “minimum bulk amount.” R.C. 2925.03.

The most comparable statute in Washington in 1992 (and today) is RCW 69.50.401, which provided:

(a) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

(1) Any person who violates this subsection with respect to:

(i) a controlled substance classified in Schedule I or II which is a narcotic drug, is guilty of a crime and upon conviction may be imprisoned for not more than ten years[.]

In 1992, marijuana was classified as a Schedule I drug, and cocaine was classified as a schedule II drug. RCW 69.50.204(d)(13) (1992); RCW 69.50.206(a)(4), (5) (1992); Laws of 1971, Ex. Sess., ch. 308, § 69.50.204, .206. For present purposes, these statutes are essentially the same today. RCW 69.50.401; RCW 69.50.204; RCW 69.50.206.

While Ohio's 1992 trafficking statute appears narrower in that it appeared to require some "bulk amount" element, the Ohio statute is broader in the sense that it sweeps within its prohibition mere offers to sell drugs. R.C. 2925.03 (A)(1).

Significantly, in a Ohio prosecution for offering to sell a controlled substance, the state is not required to prove that a controlled substance was, in fact, sold, or even that a controlled substance existed; rather, the state is merely required to prove that an offer was made to sell a controlled substance. State v. Bazy, 86 Ohio App.3d 546, 548, 621 N.E.2d 604 (1993); see also State v. Scott, 69 Ohio St.2d 439 (1982) ("the proscribed conduct is offering *to sell* a controlled substance, not offering the controlled substance.") (emphasis in original).

The same cannot be said of the comparable Washington statute, which makes it a crime for any person "to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance." RCW 69.50.401 (emphasis added). In 1992 (as similarly defined today), "deliver" or "delivery" meant "the actual, constructive, or attempted transfer from one person to another of a controlled substance, where or not there is an agency relationship."

RCW 69.50.101(f) (1992); Laws of 1971, Ex. Sess., ch. 308; Laws of 1990, ch. 248, § 1; RCW 69.50.101(f).

Whereas the conduct proscribed in Washington is offering the controlled substance itself, the conduct proscribed in Ohio is merely making the offer, regardless of whether any drugs actually exist. The legal elements are therefore not comparable.

Other than documentation parroting the language of the Ohio statute, the state offered no proof regarding Woody's actual conduct. Consequently, it is not possible to tell from the record whether Woody's conduct would have violated the comparable Washington statute. The court therefore erred in including the foreign offenses in Woody's offender score. Ford, 137 Wn.2d at 479, citing Morley, 134 Wn.2d at 606.

Finally, it should be noted that although defense counsel did not challenge the comparability of the Ohio convictions, Woody is not prohibited from raising the challenge at this juncture.

A defendant is not deemed to have affirmatively acknowledged comparability based on his failure, at the sentencing hearing, to dispute the fact of the out-of-state conviction or the State's inclusion of it in his criminal history. State v. Jackson, 129 Wn. App. 95, 106, 117 P.3d 1182 (2005), review denied, 156

Wn.2d 1029 (2006); State v. Lucero, 168 Wn.2d 785, 788, 230 P.3d 165 (2010). Agreement with the ultimate sentencing recommendation is likewise not an affirmative acknowledgement. State v. Mendoza, 165 Wn.2d 913, 928, 205 P.3d 113 (2009). Following these authorities, defense counsel's recommendation for a sentence within the standard range – as calculated by the state – did not constitute an affirmative acknowledgement of comparability.

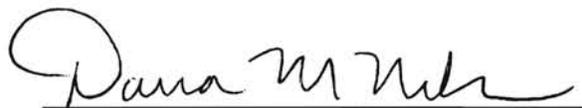
D. CONCLUSION

The state's failure to prove comparability is an error that may be raised for the first time on appeal. Ford, 137 Wn.2d at 484–85. Without a comparability analysis, the out-of-state convictions may not be used to increase Woody's offender score. This Court should reverse and remand for a new sentencing hearing. Mendoza, 165 Wn.2d at 930.

Dated this 18th day of October, 2012

Respectfully submitted

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

STATE OF WASHINGTON)	
)	
Respondent,)	
)	
vs.)	COA NO. 68643-7-1
)	
LEONARD WOODY,)	
)	
Appellant.)	

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 18TH DAY OF OCTOBER, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

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STATE OF WASHINGTON
SUPERIOR COURT
OCT 18 PM 4:32

SIGNED IN SEATTLE WASHINGTON, THIS 18TH DAY OF OCTOBER, 2012.

x Patrick Mayovsky