

NO. 34790-3-II

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GLENN,

Appellant.

FILED  
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DIVISION II  
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STATE OF WASHINGTON  
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ORIGINAL

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 04-1-01457-1

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED December 8, 2006, Port Orchard, WA  
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the trial court erred in calculating Glenn's offender score when the State met its burden of producing evidence of some kind bearing minimum indicia of reliability that supported the convictions at issue by filing the certified court dockets in support of Glenn's misdemeanor convictions?

2. Whether the trial court erred in rejecting Glenn's claims that the prior convictions were facially invalid when the documents did not affirmatively show a constitutional violation, but rather, were silent on the issue?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Michael Glenn was charged by amended information filed in Kitsap County Superior Court with four counts of vehicular assault and one count of bail jumping. CP 11. Following a jury trial, Glenn was found guilty of three counts of vehicular assault and one count of bail jumping. CP 47. Glenn received a standard range sentence, and this appeal followed. CP 98.

### **B. FACTS**

At sentencing, the trial court found that Glenn's standard range for the vehicular assault counts (based on an offender score of "9") was 51 to 68 months. RP 4/28 at 10, CP 98. The offender score was based, in part, on

Glenn's three prior 1994 convictions for theft in the second degree. CP 98.<sup>1</sup> The State argued that these theft convictions did not "wash out" because Glenn had not spent "five consecutive years in the community without committing any crime that subsequently results in a conviction. CP at 56-57, citing RCW 9.94A.525. Specifically, the State alleged that Glenn was convicted of DWLS in the second degree and negligent driving in 1996, and was convicted of possession of marijuana in January of 2001. CP 56.

In support of this claim, the State provided certified copies of the judgment and sentences from Glenn's theft convictions, as well as the certified court dockets from the misdemeanor cases, as the judgment and sentences from those cases were no longer available. CP 58. The copies of the misdemeanor court dockets were originally filed as Clerk's Papers 71 through 75. The certifications, however, were found on the back of the documents numbered 72 and 75. The Kitsap County Superior Court Clerk did not send copies of the back sides of these documents, so the State has filed a supplemental designation of clerk's papers asking the clerk to send copies of the certifications found on the back of each docket. State's Supplemental Designation of Clerk's Papers.

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<sup>1</sup> The State has also filed a supplemental designation of clerk's papers regarding the Judgment and Sentence for the theft convictions.

At his sentencing hearing, Glenn conceded the existence of the theft in the second degree convictions, and conceded that if the misdemeanor convictions were valid, then the theft convictions would not “wash out.” RP 4/28 at 7-8. Glenn, however, argued that the misdemeanor convictions were invalid on their face because the record was silent on whether Glenn was represented by counsel on the misdemeanor convictions. RP 4/28 at 4-5, CP 76.

The trial court held that the misdemeanor convictions were valid on their face and that it was not appropriate for the court to engage in a “collateral inquiry” regarding the misdemeanor offenses. RP 4/28 at 9-10. The trial court also found that Glenn’s offender score for the vehicular assault counts was a “9,” and that his offender score for the bail jump was a “7.” RP 4/28 at 10. The trial court then imposed a standard range sentence. CP 98. This appeal followed.

### III. ARGUMENT

**A. THE TRIAL COURT DID NOT ERR IN CALCULATING GLENN'S OFFENDER SCORE BECAUSE THE STATE MET ITS BURDEN OF PRODUCING EVIDENCE OF SOME KIND BEARING MINIMUM INDICIA OF RELIABILITY THAT SUPPORTED THE CONVICTIONS AT ISSUE WHEN IT FILED THE CERTIFIED COURT DOCKETS IN SUPPORT OF GLENN'S MISDEMEANOR CONVICTIONS.**

Glenn argues that the state did not prove the existence of the misdemeanor convictions by a preponderance of the evidence. This claim is without merit because the State met its burden of producing "evidence of some kind" bearing "minimum indicia of reliability" that supported the convictions in question.

A sentencing court's calculation of the offender score is reviewed de novo. *State v. Roche*, 75 Wn. App. 500, 513, 878 P.2d 497 (1994).

At sentencing, the State bears the burden of proving prior convictions by a preponderance of evidence. *State v. Blunt*, 118 Wn. App. 1, 7-8, 71 P.3d 657 (Div II 2003), *citing State v. Cabrera*, 73 Wn. App. 165, 168, 868 P.2d 179 (1994), *and State v. Ammons*, 105 Wn.2d 175, 185, 713 P.2d 719 (1986)(noting the preponderance standard set by RCW 9.94A.110 (recodified as RCW 9.94A.500 by Laws of 2001, ch. 10, § 6)). To meet this burden, the State must first produce "evidence of some kind" bearing "minimum indicia

of reliability" that supports the alleged criminal history. *Blunt*, 118 Wn. App. at 8, *citing State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). Due process only prohibits 'a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.' *State v. Ford*, 137 Wn.2d 472, 481, 973 P.2d 452 (1999). Information is 'false or unreliable' if it lacks "some minimal indicia of reliability beyond mere allegation." *Ford*, 137 Wn.2d at 481. (*quoting United States v. Ibarra*, 737 F.2d 825, 827 (9th Cir. 1984)).

Although the best evidence of a prior conviction is a certified copy of the judgment, "other comparable documents of record" may be used, and the State may introduce any document of record or transcripts of prior proceedings to meet its burden. *Blunt*, 118 Wn. App. at 8, *citing State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999) (The "best evidence of a prior conviction is a certified copy of the judgment," but "other comparable documents of record or transcripts of prior proceedings" may be used). *See also State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987), *aff'd*. 112 Wn.2d 419, 771 P.2d 739 (1989) ("State may introduce any document of record or transcripts of prior proceedings to meet its burden."), *State v. McCorkle*, 88 Wn. App. 485, 945 P.2d 736 (1997)(While the best evidence of a prior conviction is a

certified copy of a judgment, “the State may introduce other documents of record in a prior proceeding to establish the defendant's criminal history.”).

In *State v. Blunt*, for instance, the State submitted a "Lewis County District Court Docket" computer printout that indicated that the defendant had been found guilty of "Driving While Intoxicated" in order to prove a 1990 Lewis County DUI conviction. *Blunt*, 118 Wn. App. at 5. The docket printouts were used because court files for older cases like the DUI at issue were destroyed after five years. *Blunt*, 118 Wn. App. at 5. The court held that the State's evidence bore the "minimum indicia of reliability" necessary to prove the prior DUI. *Blunt*, 118 Wn. App. at 8-9.

Similarly, in *State v. Vickers*, the Washington Supreme Court held that a prior conviction was sufficiently proven when the State filed a certified copy of a docket sheet showing a guilty plea. *State v. Vickers*, 148 Wn.2d 91, 119-21, 59 P.3d 58 (2002).

In the present case, the State submitted certified copies of the Judgment and Sentences from Glenn’s prior felony convictions. In addition, as Judgment and Sentences for Mr. Glenn’s misdemeanor convictions were no longer available, the State submitted certified court dockets showing the relevant charges and findings of guilty for each of these charges. As outlined

above, these documents bore the “minimum indicia of reliability” necessary to support the trial court use of these prior convictions at sentencing.<sup>2</sup>

Glenn incorrectly claims that the court dockets submitted by the State were not certified. App.’s Br. at 5. Glenn’s confusion in this respect likely stems from the fact that the certification for each of the misdemeanor dockets was found on the back of each docket, and the Kitsap County Superior Court Clerk did not initially include a copy of the back side of the dockets in the Clerk’s Papers. The State has submitted a supplemental designation of clerk’s papers requesting the clerk to submit a copy of the back side of the relevant documents, which shows the certification.<sup>3</sup> For this reason, Glenn’s argument (based on the assertion that the documents were not certified) is without merit.

In the present case, the State produced "other comparable documents of record;" namely the certified dockets, and these documents were sufficient "evidence of some kind" bearing "minimum indicia of reliability" that supports "the alleged criminal history." *Blunt*, 118 Wn. App. at 8, *citing State v. Ford*, 137 Wn.2d 472, 480-81, 973 P.2d 452 (1999). The State,

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<sup>2</sup> Glenn did not argue below that the misdemeanor convictions did not exist; rather, he admitted that he had entered guilty pleas to the offenses. See CP 80-82. Glenn’s argument below was that the misdemeanor convictions were constitutionally invalid. See CP 76-79.

<sup>3</sup> The fact that the documents were certified is further demonstrated by the fact that the State’s claim below that the documents were certified was never contested and Glenn never alleged below that the documents were not certified.

therefore, met its burden with respect to the misdemeanor convictions, and the trial court did not err in calculating Glenn's offender score.

**B. THE TRIAL COURT DID NOT ERR IN REJECTING GLENN'S CLAIMS THAT THE PRIOR CONVICTIONS WERE FACIALLY INVALID BECAUSE THE DOCUMENTS DID NOT AFFIRMATIVELY SHOW A CONSTITUTIONAL VIOLATION, BUT RATHER, WERE SILENT ON THE ISSUE.**

Glenn next claims that the court dockets were facially invalid because they did not indicate either the presence of a defense attorney or a waiver. This claim is without merit because the fact that the documents did not indicate on their face whether or not Glenn was represented by counsel does not make the conviction facially invalid; rather, to be facially invalid the conviction must affirmatively show that Glenn's rights were violated rather than merely being silent on the issue.

This argument is without merit, as the pending sentencing hearing is not the proper forum for the Defendant to collaterally attack his prior convictions; rather, he is obligated to appeal those specific convictions or bring a personal restraint petition. With respect to the pending sentencing, the State has met its burden with regard to the convictions at issue, and they should be utilized in calculating the Defendant's offender score.

When enhancing a sentence with prior convictions under the Sentencing Reform Act, the State must prove the prior convictions by a preponderance of the evidence. *State v. Gimarelli*, 105 Wn. App. 370, 374, 20 P.3d 430 (2001)(citing *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999)), review denied, 144 Wn.2d 1014, 31 P.3d 1185 (2001).

In *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, 718 P.2d 796, cert. denied, 479 U.S. 930 (1986), the defendants challenged the use of prior convictions at sentencing when the convictions did not show, inter alia, that constitutional safeguards were provided or that a defendant was aware of his right to remain silent, failed to set forth the elements of the crime, and failed to set forth the consequences of pleading guilty. *Ammons*, 105 Wn.2d at 189.

The Washington State Supreme Court held that that the “state does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding.” *Ammons*, 105 Wn.2d at 187-88. The *Ammons*, court, however, did state that a conviction which is “constitutionally invalid on its face” may not be considered. *Ammons*, 105 Wn.2d at 188. The court then went on to state that “constitutionally invalid on its face” means a “conviction which without further elaboration evidences infirmities of a constitutional magnitude.” *Ammons*, 105 Wn.2d at 188. As the court noted,

To require the state to prove the constitutional validity of prior convictions before they could be used would turn the sentencing proceeding into an appellate review of all prior convictions. The defendant has no right to contest a prior conviction at a subsequent sentencing. To allow an attack at that point would unduly and unjustifiably overburden the sentencing court. The defendant has available, more appropriate arenas for the determination of the constitutional validity of a prior conviction. The defendant must use established avenues of challenge provided for post-conviction relief. A defendant who is successful through these avenues can be resentenced without the unconstitutional conviction being considered.

*Ammons*, 105 Wn.2d at 188. The court further explained that,

If an inmate wishes to challenge the use of the prior conviction, the remedy is to seek a judicial determination that the conviction cannot constitutionally be used as a basis for setting a minimum term. The inmate may either collaterally attack the conviction in the state or federal court where it was entered or file a personal restraint petition pursuant to RAP 16.3 et seq. in the appropriate division of the Court of Appeals or in the Supreme Court. In the latter situation, the petitioner will be required to demonstrate that he or she is being unlawfully restrained because of the unconstitutional present use by the Parole Board of an involuntary guilty plea in setting the mandatory minimum term of confinement.

*Ammons*, 105 Wn.2d at 188, *citing In re Bush*, 26 Wn. App. 486, 497, 616 P.2d 666 (1980), *affirmed*, 95 Wn.2d 551, 627 P.2d 953 (1981).

The *Ammons* court, therefore, held that the defendants' challenges to the use of their prior convictions was misplaced, and that they were asking the court to allow collateral attacks on the constitutional validity of prior convictions. *Ammons*, 105 Wn.2d at 189. Although the defendants

may have had legitimate challenges, those concerns could not be determined facially, and the defendants' proper recourse, therefore, was to the appellate courts. *Ammons*, 105 Wn.2d at 189.

After *Ammons*, other courts have reached the same result, and have held that a conviction need not show that a defendant's rights were not violated; rather, for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant's rights were violated. See, *State v. Gimarelli*, 105 Wn. App. 370, 375, 20 P.3d 430 (2001), citing *Ammons*, 105 Wn.2d at 189 ("The reason the defect must be apparent on the face of the conviction is because if a defendant were able to present evidence of defects in his or her convictions, it would turn the sentencing proceedings into an appellate review of all prior convictions.") This result is consistent with the long held presumption that a judge performs his or her functions regularly, properly and without bias or prejudice. *Barbee Mill Co. v. State*, 43 Wn.2d 353, 261 P.2d 418 (1953).

Similarly, in *State v. Bembry*, 46 Wn. App. 288, 730 P.2d 115 (1986), the defendant objected to the use of a prior conviction and argued that the conviction was constitutionally invalid because the documents before the court failed to show that he was informed of his rights, understood the elements of the charged crime, or understood the maximum sentence that could have been imposed. *Bembry*, 46 Wn. App. at 288-89. The defendant

also testified at the sentencing that at the time of the prior conviction he had not been informed of his right to remain silent and did not know the elements of the charged crime. *Bembry*, 46 Wn. App. at 289. The court however, cited *Ammons* and held that the defendant's assertions did not render the prior conviction invalid on its face. *Bembry*, 46 Wn. App. at 290-91. Rather, the defendant's recourse was to the "established avenues ... for post-conviction relief." *Bembry*, 46 Wn. App. at 291, citing *Ammons*, 105 Wn.2d at 188.

The Court also reached a similar conclusion in *State v. Binder*, 106 Wn.2d 417, 418, 721 P.2d 967 (1986). In *Binder*, the defendant challenged the constitutional validity of his prior convictions at the sentencing hearing, and defense counsel made an offer of proof stating that the defendant would testify that he had not been specifically advised of his constitutional rights before entering any of the prior guilty pleas. *Binder*, 106 Wn.2d at 418. Citing *Ammons*, the court rejected the defendant's claims and affirmed the trial court's holding that the state had proven the prior convictions by a preponderance of the evidence. *Binder*, 106 Wn.2d at 419.

More recently, in *State v. Vickers*, 148 Wn.2d 91, 59 P.3d 58 (2002), the defendant challenged the use of an out-of-state conviction at his sentencing and argued that the State was required to prove beyond a reasonable doubt that his prior conviction based on a guilty plea was

knowingly and voluntarily made. *Vickers*, 148 Wn.2d at 119. In support of the conviction, the State had provided a “signed docket sheet” from a Massachusetts court indicating that the defendant had plead guilty to assault and battery. *Vickers*, 148 Wn.2d at 120. The court held that the defendant’s arguments were without merit, and held that “beyond a reasonable doubt” standard did not apply; rather, the court was only to decide whether the State had shown by a preponderance of the evidence that the “convictions exist.” *Vickers*, 148 Wn.2d at 120, citing *Ammons*, 105 Wn.2d at 185; *State v. Wheeler*, 145 Wn.2d 116, 121, 34 P.3d 799 (2001); *State v. Lopez*, 147 Wn.2d 515, 522, 55 P.3d 609 (2002) (the State must prove a defendant’s criminal history by a preponderance of the evidence to sentence him as a persistent offender). The court then held that, “In this case the signed docket sheets submitted as evidence of the Petitioner’s prior conviction supported the fact of his conviction,” and that the docket sheet satisfied the preponderance of the evidence standard in establishing the fact of his prior conviction. *Vickers*, 148 Wn.2d at 120-21, 122.

Finally, one court of appeals decision has previously held that when a judgment and sentence did not reflect representation by counsel or waiver, such a conviction is facially invalid and could not be used unless the State established by other documents that counsel was present or was waived. *State v. Marsh*, 47 Wn. App. 291, 734 P.2d 545 (1987). The *Marsh* decision on

this point, however, is no longer good law, as The Washington Supreme Court specifically disagreed with the *Marsh* opinion, and held that, “To the extent that Marsh holds or suggest that the State must prove the constitutional validity of prior convictions at a sentencing hearing, it contravenes our previous holding in *Ammons*.” *State v. Williams*, 111 Wn.2d 353, 368, 759 P.2d 436 (1988).

Glenn also cites to *Burgett v. Texas*, 389 U.S. 109, 885 S.Ct. 258, 19L.Ed. 2d 319 (1967) for the proposition that the dockets were facially invalid because they did not state that Glenn was represented by counsel. App.s Br. at 6-7. To the extent that *Burgett* stands for such a proposition, it is no longer good law. In *Parke v. Raley*, 506 U.S. 20, 31, 113 S.Ct. 517, 524, 121 L.Ed.2d 391 (1992), the United States Supreme Court addressed *Burgett*, and stated that *Burgett* did not stand for the proposition that a prior conviction is presumptively void if a waiver of a constitutional right did not appear on the face of the record. The Supreme Court stated that,

At the time the prior conviction at issue in *Burgett* was entered, state criminal defendants' federal constitutional right to counsel had not yet been recognized, and so it was reasonable to presume that the defendant had not waived a right he did not possess.

*Parke*, 506 U.S. at 31. The Court concluded, however, that such a presumption is no longer necessary, given the more recent and well established line of cases outlining the constitutional requirements involved in

obtaining a conviction, and given the “presumption of regularity” that attaches to final judgments, even when the question is waiver of constitutional rights. *Parke*, 506 U.S. at 29, citing, *Johnson v. Zerbst*, 304 U.S. 458, 464, 468, 58 S.Ct. 1019, 1023, 1025, 82 L.Ed. 1461 (1938). Thus, while a silent record may not have been sufficient at the time of *Burgett* to establish that certain constitutional protections were utilized, such concerns about the right to counsel are not relevant to convictions obtained in 1994 in the State of Washington. Rather, as recognized in *Parke*, the “presumption of regularity” now applies. The long line of post-*Burgett* Washington cases that are directly on point further supports the conclusion that *Burgett* is not controlling on this issue.

The line of Washington cases that reach a different result than the result in *Burgett* is also consistent with decision from numerous jurisdictions. In *State v. Probst*, 339 Or. 612, 124 P.3d 1237 (2005), for instance, the Oregon Supreme Court noted that after the Supreme Court decided *Parke*, a number of jurisdictions adopted the presumption of regularity for prior convictions used to enhance sentences or as elements of a crime, and, “so far as we can determine, no state has held that applying a presumption of regularity offends any constitutional right of a defendant.” *Probst*, 124 P.3d at 1244, citing, *Harris v. Georgia*, 238 Ga.App. 452, 453, 519 S.E.2d 243 (1999); *Idaho v. Weber*, 140 Idaho 89, 90 P.3d 314 (2004); *Louisiana v.*

*Shelton*, 621 So.2d 769, 779-80 (La.1993); *Massachusetts v. Lopez*, 426 Mass. 657, 664-65, 690 N.E.2d 809 (1998); *Michigan v. Carpentier*, 446 Mich. 19, 37, 521 N.W.2d 195 (1994); *Montana v. Perry*, 283 Mont. 34, 37, 938 P.2d 1325 (1997); *State v. Stafford*, 114 N.C.App. 101, 104, 440 S.E.2d 846 (1994); *Tatum v. Texas*, 846 S.W.2d 324, 327-28 n. 5 (Tex.Crim.App.1993); *James v. Virginia*, 18 Va.App. 746, 752, 446 S.E.2d 900 (1994) (all to that effect). Based on these cases, it is clear that the controlling authority is *Ammons*, and not *Burgett*.

In the present case, just as in *Ammons*, there is nothing from the records of the defendant's prior convictions that affirmatively shows a constitutional violation. The records do not affirmatively show that Glenn was denied his right to counsel, rather, the records are silent on whether he had an attorney or waived this right. The State met its burden by providing the certified docket sheets that established Glenn's prior convictions, and the State was not required to prove the constitutional validity of these prior convictions.

Furthermore, as in the cases mentioned above, Glenn's claims regarding constitutional violations, while potentially valid, did not render the prior conviction invalid on their face. In addition, the sentencing hearing in the present case was not the proper forum in which to address Glenn's concerns; rather, his recourse was to the "established avenues ... for post-

conviction relief” for those prior convictions. *See Bemby*, 46 Wn. App. at 291, *citing Ammons*, 105 Wn.2d at 188. To allow Glenn to raise collateral attacks on his prior convictions at the sentencing hearing in the present case would turn the sentencing proceedings into an appellate review of all prior convictions; a result which the courts have squarely rejected. *See, Gimarelli*, 105 Wn. App. at 375, *citing Ammons*, 105 Wn.2d at 189. In addition, to allow such a collateral attack to take place long after the normal time limits for such collateral attacks has expired would severely prejudice the State, who would be forced to re-litigate issues long since past. As Washington courts have consistently rejected a defendant’s attempts to turn a sentencing hearing into an appellate review of all prior convictions, the trial court did not err in denying such requests in the present case.

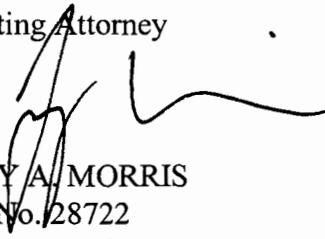
#### IV. CONCLUSION

For the foregoing reasons, Glenn’s conviction and sentence should be affirmed.

DATED December 8, 2006.

Respectfully submitted,

RUSSELL D. HAUGE  
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A handwritten signature in black ink, appearing to read 'J. A. Morris', is written over the printed name of the Deputy Prosecuting Attorney.

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