

NO. 35693-7-II

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

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STATE OF WASHINGTON

Respondent,

v.

STEVEN E. PINK,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF GRAYS HARBOR COUNTY

Before The Honorable David Foscue, Judge

REPLY BRIEF OF APPELLANT

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Peter B. Tiller, WSBA No. 20835  
Of Attorneys for Appellant

The Tiller Law Firm  
Corner of Rock and Pine  
P. O. Box 58  
Centralia, WA 98531  
(360) 736-930

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**A. STATEMENT OF THE CASE**

The facts of this case are fully set forth in the Appellant's Opening Brief.

**B. ARGUMENT**

**1. THE LAW OF THE CASE DOCTRINE SHOULD NOT PRELUDE PINK FROM CHALLENGING THE COMPARABILITY OF THE OREGON OFFENSE IN THIS APPEAL.**

In the Brief of Respondent, the State argues that the issue of the same criminal conduct and the comparability of the Oregon offenses have previously been raised on appeal and can not be raised under the 'law of the case' doctrine. Brief of Respondent at 3-7.

During resentencing on November 30 and December 1, 2006, Pink argued the following issues:

1. Whether the status of a defendant on community custody at the time of the commission of an offense is a question of fact that must be found by a jury,
2. Whether the deadly weapon enhancements may be imposed consecutively,
3. Whether the two counts constitute the same criminal conduct, and

4. Whether Pink's second degree robbery conviction in Oregon is comparable to the first degree robbery statute in Washington. Report of Proceedings [RP] at 13-20.

In its Brief of Respondent, the State argues that the issue of the Oregon conviction for second degree robbery had been previously addressed by this Court in its unpublished opinion dated September 23, 2003. Respondent's Brief at 2. The State also argues that the issue of same criminal conduct was previously presented to the Court, and that the Court found that the charges were not the same criminal conduct. Respondent's Brief at 3.

Pink submits that he is not precluded from presenting argument as to issues presented at resentencing under the 'law of the case' doctrine.

In its ruling of September 23, 2003, this Court noted that it had remanded the issue whether Pink's Oregon conviction should have been calculated in his offender score and that trial court determined that it properly included Pink's prior Oregon robbery conviction in his offender score because the Oregon second degree robbery conviction was comparable to Washington's first degree robbery.

We remanded the matter to the trial court to determine whether (1) the facts supported the marital privilege and (2) Pink's Oregon conviction was properly counted in his offender score.

On remand the trial court specifically noted that, according to Lash, Pink married her to provide himself with an alibi. Lash had previously married Patrick McFadden on April 6, 1998, and filed a petition for dissolution of the marriage on January 6, 1999. The marriage was dissolved on May 7, 1999. The trial court found that Lash married Pink while still married to McFadden. The court concluded that there was no basis to assert marital privilege and that the marriage between Pink and Lash was void *ab initio*.

Also on remand, the trial court found that it had properly included Pink's prior Oregon robbery conviction in his offender score because the Oregon second degree robbery conviction was comparable to Washington's first degree robbery.

*State v. Pink*, 2003 Wn. App. LEXIS 2128, at 16-17 (2007).

Pink raised the issue at resentencing, arguing that the robbery conviction should not have been included in his offender score.

The prosecution bears the burden of proving the existence and comparability of a defendant's out-of-state convictions. *In re Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2006); *State v. Lopez*, 147 Wn.2d 515, 521-33, 55 P.3d 609 (2002); *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). RCW 9.94A.525(3) provides, "Out-of-state convictions for offenses shall be classified according to comparable definitions and sentences provided by Washington . . . ." To determine if an out-of-state conviction is comparable to a Washington offense, a sentencing

court must first compare the elements of the foreign conviction to the elements of Washington crimes in effect at the time of the offense. *In re Lavery*, 154 Wn.2d 249, 111 P.3d 837 (2005); *State v. Russell*, 104 Wn. App. 422, 443, 16 P.3d 664 (2001).

If the out-of-state statute is not substantially similar to or prohibits a broader range of conduct than the proposed Washington counterpart, the court determines whether the offenses are factually comparable. *Lavery*, 154 Wn.2d at 255-56. In assessing factual comparability, the sentencing court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction in Washington. *Id.* at 255. However, because a defendant has a Sixth Amendment right to a jury determination of facts necessary to increase punishment beyond the standard range, this factual examination is limited to facts admitted, stipulated to, or proved to a jury beyond a reasonable doubt. *Id.*, at 258.

The State contends that Pink cannot raise comparability now because this was evidently addressed in his first appeal. *See generally, State v. Worl*, 129 Wn.2d 416, 918 P.2d 905 (1996) (stating that the "law of the case" doctrine restricts review of issues raised in a second appeal, with limited exceptions). However, under the circumstances presented in this case the

application of the “law of the case” should be rejected.

The “law of the case” doctrine is discretionary. This Court’s prior decision merely remanded the case for entry of findings does not appear to address the issue of comparability on the merits. This Court should decline to apply the “law of the case” to comport with the discretionary nature of the doctrine. *See, e.g., State v. Trask*, 98 Wn. App. 690, 695, 990 P.2d 976 (2000) (“The law of the case doctrine does not apply to matters we did not explicitly or implicitly consider, and it is highly discretionary with respect to matters that we did consider”) (citations omitted); *State v. Gutierrez*, 92 Wn. App. 343, 348, 961 P.2d 974 (1998) (the State had authority to amend the information on remand and was not barred by the law of the case doctrine).

### **C. CONCLUSION**

For the foregoing reasons, and for the reasons contained in the Opening Brief of Appellant, Pink’s case should be remanded to the trial court for resentencing in accordance with the arguments contained herein.

DATED: September 26, 2007.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835  
Of Attorneys for Appellant

**CERTIFICATE**

I certify that I mailed a copy of the foregoing Reply Brief of Appellant, postage pre-paid on September 26, 2007, at the Centralia, Washington post office addressed as follows:

Mr. Gerald R. Fuller  
Deputy Prosecuting Attorney  
Grays Harbor County Prosecutor's Office  
102 Broadway Ave. W., Room 102  
Montesano, WA 98563-3621

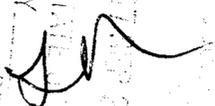
Mr. David Ponzoha  
Clerk of the Court  
WA State Court of Appeals  
950 Broadway, Ste.300  
Tacoma, WA 98402-4454

Mr. Steven E. Pink  
DOC #277511, 5-D-22  
Washington State Penitentiary  
1313 N. 13<sup>th</sup> Avenue  
Walla Walla, WA 99362

Dated: September 26, 2007.



PETER B. TILLER, WSBA NO. 20835

BY:   
STATE OF WASHINGTON  
CLERK OF COURT  
SEP 27 PM 2:13  
TACOMA, WA