

NO. 36725-4-II
Clark County No. 07-1-00059-3

STATE OF WASHINGTON,

Respondent,

vs.

STEVEN LAMONT HARRIS

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

I. THE STATE DID NOT MEET ITS BURDEN OF PROVING PRIOR CONVICTIONS FROM LOUISIANA AND THE TRIAL COURT ERRED IN INCLUDING THEM IN MR. HARRIS' OFFENDER SCORE.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

I. THE TRIAL COURT ERRED IN FINDING THE STATE HAD MET ITS BURDEN OF PROOF IN PROVING THE EXISTENCE OF PRIOR CONVICTIONS FROM LOUISIANA WHERE THE JUDGMENT AND SENTENCE DOCUMENTS WERE NOT CERTIFIED.

C. STATEMENT OF THE CASE

Steven Lamont Harris pled guilty to Theft in the First Degree as charged by the Clark County Prosecuting Attorney. CP 59-71. A sentencing hearing was held in which Mr. Harris challenged the inclusion of out-of-state convictions in his offender score. Report of Proceedings. Mr. Harris challenged the inclusion of the following convictions in his offender score: three counts of Theft over \$500 from October 15, 1997 from Louisiana; one count of Issuing Worthless Checks Over \$500 from October 15, 1997 from Louisiana; and one count of Grand Theft Over \$500/Embezzlement from October 18, 2006 from California on the grounds that the evidence of those convictions was not admissible (the Louisiana convictions, not the California one) and that they were not comparable to Washington felonies. CP 2, RP 17-18, 22-27. He did not

challenge the inclusion of a conviction for Distribution of Cocaine from Louisiana on the grounds of comparability, but did challenge the admissibility of the judgment and sentence. RP 27.

Mr. Harris challenged the admissibility of each of the Louisiana convictions on the ground that they were not properly certified. CP 57, RP 17-27. Each of the judgments and sentences from Louisiana bore a stamp saying “A True Extract,” with a line immediately below it for the signature of the clerk of the court, and the words “DY. CLERK 22nd JUD. DIST. COURT ST. TAMMANY PARISH, LA.” CP 17, 24, 31, 36, 42. The trial court ruled the evidence of the convictions was admissible. RP 18-19. Each of the Louisiana convictions was included in the offender score, and Mr. Harris was given a standard range sentence with a point total of 5. CP 78. This timely appeal followed. CP 90.

D. ARGUMENT

I. THE TRIAL COURT ERRED IN FINDING THE STATE HAD MET ITS BURDEN OF PROOF IN PROVING THE EXISTENCE OF PRIOR CONVICTIONS FROM LOUISIANA WHERE THE JUDGMENT AND SENTENCE DOCUMENTS WERE NOT CERTIFIED.

The State is required to prove the existence of a prior conviction by a preponderance of the evidence. *State v. Rivers*, 130 Wn.App. 689, 699, 128 P.3d 608 (2005). The reviewing court reviews the sentencing court’s calculation of the offender score de novo. *Id.* “To establish the existence

of a conviction, a certified copy of the judgment and sentence is the best evidence. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. In that case, comparable documents of record or trial transcripts may suffice.” *Rivers* at 699, citing *State v. Lopez*, 147 Wn.2d 515, 519, 55 P.3d 609 (2002); and *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999).

In *Rivers*, the State sought to have the defendant sentenced as a persistent offender under the POAA, yet failed to produce any court certified documentation of his prior conviction for Robbery in the Second Degree. *Rivers* at 701. Instead, the State produced certified copies of other judgments and sentences showing the robbery conviction as a prior conviction, as well as a packet of Department of Corrections documents certified by a records custodian of the Washington State Patrol showing the robbery conviction. *Rivers* at 702-703. The Court of Appeals, in reversing *Rivers*’ sentence, held that neither method of proof satisfied the State’s burden.

With regard to the court-certified judgments and sentence documents of other convictions which reflected the robbery conviction in the criminal history, the *Rivers* Court admonished that such evidence will only satisfy the State’s burden of proof where the defendant does not

challenge the State's computation of his criminal history. *Rivers* at 702. In cases where the defendant challenges the use of these documents, as *Rivers* did and as Mr. Nelson did here, "...the State must present additional evidence to carry its burden of proving the convictions by a preponderance of the evidence." *Rivers* at 702.

With regard to the packet from the Department of Corrections containing documents certified by a WSP records custodian, the *Rivers* Court noted that the copy of the robbery judgment and sentence contained in the packet was not, contrary to the State's insistence, court-certified. *Rivers* at 703. The certification to which the State referred was not affixed to the photocopy of the judgment and sentence. *Id.* The *Rivers* Court, citing to *State v. Murdock*, 91 Wn.2d 336, 339-40, 588 P.2d 1143 (1979), cautioned that in order for a document to be court-certified, it must be "certified by the court *with the seal of the court annexed* as required by RCW 5.44.010." *Rivers* at 702, citing *Murdock* at 339-40. The *Rivers* Court rejected the State's assertion that it was permitted to prove the existence of a prior conviction with documents that did not comply with RCW 5.44.040 (requiring that public records to be used as evidence be duly certified by their respective officers under their respective seals). Records not complying with RCW 5.44.040 may be used to prove only the identity of the defendant, not the existence of a prior conviction. *Rivers* at

705. The *Rivers* Court was also troubled by the State's failure to either obtain a properly certified judgment and sentence or explain why it was unable to do so. *Rivers* at 705. The *Rivers* Court concluded "[t]he lack of a court-certified copy of the judgment and sentence for the second degree robbery conviction is fatal to the State's claim that it bore its burden of proof." *Rivers* at 703.

These documents contain no court-certification. There is no seal of the court annexed as required by RCW 5.44.010 and 040, either in ink or in the form of an embossed impression as required by RCW 5.44.130. *Rivers* at 703. The Louisiana documents state merely that they are a "true extract" and bear the signature of an unknown person above a stamp (not a seal) of a district court clerk. This "certification" is not a court certification. Because Mr. Harris specifically objected to the use of these documents to prove the existence of these convictions, the State was required to do more to meet its burden of proof. These documents are insufficient as a means of proving the existence of these alleged prior convictions and the sentencing court erred in considering them. Without proof of these convictions, the State was unable to prove that Mr. Harris had an offender score of five and it was error for the sentencing court to include these convictions in Mr. Harris' offender score.

On remand, the State should not be given a second opportunity to prove these alleged convictions. The State was put on notice that Mr. Harris objected to the court's consideration of these alleged convictions, and they were specifically informed as to the basis for the objection: That these were not a court-certified judgments and sentences. The State must be held to the existing record on remand. *Ford* at 485, citing *State v. McCorkle*, 88 Wn.App. 485, 500, 945 P.2d 736 (1997).

E. CONCLUSION

Mr. Harris' case should be remanded for resentencing with instructions to the trial court to excise the Louisiana prior convictions from his offender score.

RESPECTFULLY SUBMITTED this 19th day of March, 2008.


ANNE M. CRUSER, WSBA# 27944
Attorney for Mr. Harris

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

STATE OF WASHINGTON,)	Court of Appeals No. 36725-4-II
)	Clark County No. 07-1-00059-3
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
STEVEN LAMONT HARRIS,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 19th day of March 2008, affiant placed a properly stamped envelope in the mails of the United States addressed to:

Arthur Curtis
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AND

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Court of Appeals, Division II
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Mr. Steven Harris
DOC #310023
Larch Corrections Center
15314 N.E. Dole Valley Rd.
Yacolt, WA 98675-9531

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. HARRIS)
- (3) AFFIDAVIT OF MAILING

Dated this 19th day of March, 2008



ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: March 19, 2008, Kalama, WA

Signature: Anne M. Cruser