

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

STATE OF WASHINGTON,  
Respondent,  
v.  
THOMAS HOPSON,  
Appellant.

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STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT  
OF PIERCE COUNTY

The Honorable Rosanne Buckner

APPELLANT'S OPENING BRIEF

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**TABLE OF CONTENTS**

A. ASSIGNMENT OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 2

D. ARGUMENT ..... 3

THE SUPERIOR COURT ERRED IN CALCULATING  
MR. HOPSON’S OFFENDER SCORE WHEN IT  
INCLUDED WISCONSIN CONVICTIONS FOR  
BURGLARY AND BAIL JUMPING THAT WERE  
OBTAINED UNDER FOREIGN STATUTES DEFINING  
THE OFFENSES MORE BROADLY THAN THE  
WASHINGTON CRIMES. .... 3

1. The State is required to prove the defendant’s criminal  
history. .... 3

2. The inclusion of foreign convictions in a defendant’s  
offender score is subject to statutory requirements of comparability  
and constitutional constraints of due process ..... 4

3. The State failed to prove that the burglary and bail jumping  
convictions from Wisconsin, which were obtained under broader  
foreign statutes, involved facts that would amount to guilt in  
Washington. .... 6

a. *The burglary was not proved to be factually comparable to  
a Washington felony offense.* ..... 6

b. *The bail jumping conviction was not shown to be  
comparable to a Washington felony offense* ..... 10

E. CONCLUSION. .... 13

## TABLE OF AUTHORITIES

### WASHINGTON CASES

<u>State v. Bunting</u> , 115 Wn. App. 135, 61 P.3d 375 (2003) . . . . .	9,10
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999). . . . .	3,4,13
<u>State v. Jackson</u> , 129 Wn. App. 95, 117 P.3d 1182 (2005), <u>review denied</u> , 156 Wn.2d 1029 (2006) . . . . .	5
<u>In re Personal Restraint of Lavery</u> , 154 Wn.2d 249, 111 P.3d 837 (2005) . . . . .	4,5,6,7,9
<u>State v. Morley</u> , 134 Wn.2d 588, 952 P.2d 167 (1998). . . . .	4
<u>State v. Pope</u> , 100 Wn. App. 624, 999 P.2d 51 (2000). . . . .	11
<u>State v. Smith</u> , 150 Wn.2d 135, 143, 75 P.3d 934 (2003) . . . . .	12
<u>State v. Stockwell</u> , 129 Wn. App. 230, 118 P.3d 395 (2005) . . . . .	4
<u>State v. Tili</u> , 148 Wn.2d 350, 60 P.3d 1192 (2003) . . . . .	3
<u>State v. Williams</u> , 162 Wn.2d 177, 170 P.3d 30 (2007). . . . .	11
<u>In re Pers. Restraint of Williams</u> , 111 Wn.2d 353, 759 P.2d 436 (1988) . . . . .	5

### WISCONSIN CASES

<u>State ex rel. Jacobus v. State</u> , 208 Wis. 2d 39, 559 N.W.2d 900, 905 (1997) . . . . .	12
--	----

### WISCONSIN STATUTES

Wis. Stat. § 943.10 . . . . .	7
Wis. Stat. § 946.49 . . . . .	10,11

### WASHINGTON STATUTES

RCW 9A.52.030 . . . . .	8
-------------------------	---

RCW 9A.52.025 ..... 8  
RCW 9A.52.100 ..... 9  
RCW 9A.76.170 ..... 10,11  
RCW 9.94A.525(3).. . . . . 3,4

UNITED STATES SUPREME COURT CASES

Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L.Ed.2d  
205 (2005) ..... 5

## **A. ASSIGNMENTS OF ERROR**

1. In Mr. Hopson's trial in Pierce County Superior Court, the sentencing court improperly determined his criminal history for purposes of sentencing.

2. The defendant must be resentenced without inclusion of the erroneously calculated convictions.

## **B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. At sentencing following Thomas Hopson's jury trial, his offender score was erroneously calculated to include certain foreign convictions obtained under criminal statutes that defined the offenses in question more broadly than they are defined in Washington. Was the State required to prove the factual comparability of the foreign convictions?

2. Was there inadequate proof before the sentencing court to conclude that the defendant's actual foreign conduct would amount to guilt under the Washington definitions of the offenses in question?

3. Where Mr. Hopson's counsel objected to the inclusion of the foreign convictions, must the challenged convictions be excluded from the defendant's criminal history upon resentencing?

### **C. STATEMENT OF THE CASE**

Thomas Hopson was charged by an amended information filed in Pierce County Superior Court with residential burglary pursuant to RCW 9A.52.025, and second degree theft pursuant to RCW 9A.56.020(1)(a). CP 5-6. According to the affidavit of probable cause, Larry Stearns of Tacoma claimed that his apartment had been burglarized, and that a Sony Playstation videogame console was taken from the inside residence.

Witnesses allegedly stated that they had seen Mr. Hopson leaving the apartment with the item, and it was later pawned at Pawn X-Change on South Tacoma Way. CP 3-4. At trial, the complainant testified that the Playstation was purchased for him by his mother from Costco, and the court admitted evidence of a copy of a check made out to Costco for \$730 for purchase of the item. 1/23/08RP at 46-49; 1/28/08RP at 151; State's exhibit 1.

At sentencing, Mr. Hopson disputed the State's calculation of his offender scores on the burglary and theft offenses. 3/28/08RP at 184. Specifically, Mr. Hopson argued that the inclusion in his criminal history of a 1999 conviction for "bail jumping," and a 1996 conviction for "burglary," both convictions allegedly from Wisconsin,

was erroneous because the foreign convictions were not comparable to Washington crimes. 3/28/08RP at 184-86. The court agreed with the State's determination of the defendant's criminal history and sentenced Mr. Hopson to 57 and 14 month terms of incarceration on the convictions, sentences representing the top of the standard range. CP 45-56. Mr. Hopson timely appealed. CP 59.

#### **D. ARGUMENT**

**THE SUPERIOR COURT ERRED IN CALCULATING MR. HOPSON'S OFFENDER SCORE WHEN IT INCLUDED WISCONSIN CONVICTIONS FOR BURGLARY AND BAIL JUMPING THAT WERE OBTAINED UNDER FOREIGN STATUTES DEFINING THE OFFENSES MORE BROADLY THAN THE WASHINGTON CRIMES.**

**1. The State is required to prove the defendant's criminal history.** Under the Sentencing Reform Act (SRA) (Chapter 9.94A RCW), the sentencing court calculates the defendant's offender score based on his criminal history in order to determine the standard sentencing range. RCW 9.94A.525(3); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). On appeal, the Court of Appeals reviews a challenge to the sentencing court's offender score calculation de novo. State v. Tili, 148 Wn.2d

350, 358, 60 P.3d 1192 (2003).

**2. The inclusion of foreign convictions in a defendant's offender score is subject to statutory requirements of comparability and constitutional constraints of due process.**

The State failed to prove the comparability of Mr. Hopson's Wisconsin convictions for burglary and bail jumping. Where the State alleges that a defendant's criminal history contains out-of-state felony convictions, the SRA requires the State to score those convictions "according to the comparable offense definitions and sentences provided by Washington law." RCW 9.94A.525(3); Ford, 137 Wn.2d at 479. To determine whether a foreign conviction is comparable to a Washington offense, the court must compare the elements of the out-of-state offense with 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 may be included, without more. State v. Stockwell, 129 Wn. App. 230, 234, 118 P.3d 395 (2005) (citing Morley, at 606); In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005).

However, if the foreign statute is different or broader than the

Washington statute, the sentencing court must look to the defendant's actual conduct in committing the foreign crime. State v. Jackson, 129 Wn. App. 95, 104, 117 P.3d 1182 (2005), review denied, 156 Wn.2d 1029 (2006); Lavery, 154 Wn.2d at 258. This is a factual question that the State must prove. State v. Stockwell, 129 Wn. App. at 234. Although facts at sentencing need not be proved beyond a reasonable doubt, fundamental principles of due process prohibit 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." Ford, 137 Wn.2d at 481.

The SRA expressly places this burden on the State because it is "inconsistent with the principles underlying our system of justice to sentence a person on the basis of crimes that the State either could not or chose not to prove."

Ford, 137 Wn.2d at 480 (quoting In re Pers. Restraint of Williams, 111 Wn.2d 353, 357, 759 P.2d 436 (1988)). Where a foreign statute is broader, and the defendant did not plead guilty in the prior proceeding to facts that would amount to the offense in Washington, comparability would require the trial court to find new facts that were never subjected to any of the traditional due process safeguards. Shepard v. United States, 544 U.S. 13, 24-26, 125 S.

Ct. 1254, 161 L.Ed.2d 205 (2005); Lavery, 154 Wn.2d at 257-58.

Therefore, in the context of foreign convictions under broader offense definitions,

any attempt to examine the underlying facts of a foreign conviction, facts that were neither admitted or stipulated to, nor proved to the finder of fact beyond a reasonable doubt in the foreign conviction, proves problematic. Where the statutory elements of a foreign conviction are broader than those under a similar Washington statute, the foreign conviction cannot truly be said to be comparable.

Lavery, 154 Wn.2d at 258. Lavery thus held that the defendant's prior federal robbery conviction was not comparable to Washington robbery where Lavery had "neither admitted nor stipulated to facts which established specific intent" to deprive, and such intent was necessary for the offense of Washington robbery. Lavery, at 258.

**3. The State failed to prove that the burglary and bail jumping convictions from Wisconsin, which were obtained under broader foreign statutes, involved facts that would amount to guilt in Washington.**

*(a). The burglary was not proved to be factually comparable to a Washington felony offense.*

With regard to the conviction for burglary, the trial court ruled that it would include the burglary conviction in Mr. Hopson's

offender score because it had ruled during trial that the offense was admissible to impeach his testimony under ER 609. 3/28/08RP at 191. The trial court had ruled that evidence of the conviction would be admissible under that evidence rule based on a conclusion that burglary committed with intent to steal was a crime of dishonesty. 1/22/08RP at 7-8.

However, the inquiry for purposes of sentencing is plainly a different one. Where a foreign conviction was obtained by plea, the sentencing court may consider facts conceded by the defendant in his foreign guilty plea, but not facts not admitted by the defendant in that plea, where the foreign statute is broader than Washington's. Lavery, 154 Wn.2d at 258. Where the conviction followed a trial, the trial court cannot look beyond the facts "proved to the finder of fact beyond a reasonable doubt." Lavery, 154 Wn.2d at 258. According to the State's statement of the defendant's criminal history, Mr. Hopson was convicted of "BURG BLDG." CP 43. The Wisconsin burglary statute, Wis. Stat. § 943.10, provides as follows:

(1m) Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a

felony in such place is guilty of a Class F felony:

- (a) Any building or dwelling; or
- (b) An enclosed railroad car; or
- (c) An enclosed portion of any ship or vessel; or
- (d) A locked enclosed cargo portion of a truck or trailer; or
- (e) A motor home or other motorized type of home or a trailer home, whether or not any person is living in any such home; or
- (f) A room within any of the above.

Washington's burglary statutes are narrower. The crime defined at RCW 9A.52.030 (Burglary in the second degree) is committed under the following circumstances:

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

And under RCW 9A.52.025, residential burglary is committed under the following elements:

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.

First, Wisconsin's statute plainly allows a determination of guilt based on unlawful entry with intent to commit any felony, while Washington requires that the person enter or remain "with intent to commit a crime against a person or property." This latter restriction

in the Washington definition of the offense renders the Wisconsin statute more broad. In addition, Wisconsin's burglary statute encompasses entry into structures or places that would constitute offenses in Washington that are mere misdemeanors. See, e.g., RCW 9A.52.100 (vehicle prowling in the second degree). Absent a reliable statement of the admitted or proved factual circumstances of the defendant's Wisconsin crime, it could not be included in Mr. Hopson's offender score. Lavery, 154 Wn.2d at 258. As Hopson's counsel argued below, the foreign offense is not comparable. 3/28/08RP at 184-86.

Although even less is known here about the Wisconsin offense than was known about the foreign conviction in State v. Bunting, 115 Wn. App. 135, 140-41, 61 P.3d 375 (2003), that case is analogous. There, a defendant's prior offense was proffered in the form of his plea of guilty to armed robbery in Illinois under a statute broader than Washington's. State v. Bunting, 115 Wn. App. at 135. The Court ruled it would be improper to rely on the facts alleged in the Illinois complaint and the "official statement of facts" (similar to the affidavit of probable cause) to establish the element of specific intent to deprive that was necessary to make the offense

comparable to armed robbery in Washington, because the allegations in these documents had not been proven or conceded by the defendant. State v. Bunting, 115 Wn. App. at 143.

In the present case, the State failed to show how the Wisconsin conviction was obtained, much less provide documentation of facts found or admitted by the defendant.

*(b). The bail jumping conviction was not shown to be comparable to a Washington felony offense.*

Regarding the Wisconsin bail jumping conviction, the prosecutor noted that although the Wisconsin bail jumping statute is broader than Washington's, the crime was "still a felony." 3/28/08RP at 189-90. This is not the precise analysis. Defense counsel noted that Wisconsin's bail jumping statute, Wis. Stat. § 946.49, criminalizes conduct under that offense that is not bail jumping in Washington, including the completion of a positive drug test while under conditions of release. 3/28/08RP at 185.

This argument noted one of the many differences between the crime in Washington and the broader Wisconsin definition. In Washington, bail jumping is defined in RCW 9A.76.170 as follows:

Any person having been released by court order or admitted to bail with knowledge of the requirement of

a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170. The elements of bail jumping in this State are that the defendant: (1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required. State v. Pope, 100 Wn. App. 624, 627, 999 P.2d 51 (2000). Notably, first, in Washington, to be convicted of bail jumping, a defendant must be charged with a particular underlying crime. State v. Williams, 162 Wn.2d 177, 170 P.3d 30 (2007). No such element was required to be proved or admitted under the defendant's alleged Wisconsin conviction.

Additionally, Wisconsin's definition of bail jumping is far broader in other ways. Wisconsin Statute 946.49(1) defines the crime in relevant part as follows:

Whoever, having been released from custody under ch. 969, intentionally fails to comply with the terms of his or her bond . . . [is guilty of a misdemeanor or felony].

(Emphasis added.) Wis. Stat. § 946.49. The State of Wisconsin

can convict an individual under § 946.49 by proving (1) that the person has been released from custody on bail, and (2) that he or she intentionally failed to comply with the terms of the bail bond. See State ex rel. Jacobus v. State, 208 Wis. 2d 39, 53-54, 559 N.W.2d 900, 905 (1997); Wis J I-Criminal 1795. The crime in that State is used to impose certain behavior conditions of release; thus for example, prohibiting a defendant from consuming alcohol as a condition of his or her release bond is in accord with the purposes of the “bail jumping” law. Jacobus v. State, 208 Wis. 2d at 53-54. In Washington, as noted, bail jumping is far more narrowly defined. The defendant’s alleged Wisconsin bail jumping conviction was not comparable.

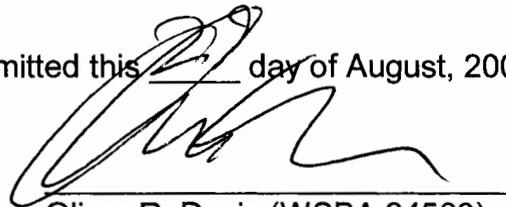
Where foreign convictions were obtained under criminal statutes broader than Washington’s, some proof of the defendant’s actual conduct is required. State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003) . For all of the above reasons, absent that proof that Mr. Hopson’s actual Wisconsin conduct amounted to felony offenses in Washington, the sentencing court in this case lacked authority to increase his sentence based on the alleged prior crimes of burglary and bail jumping from Wisconsin.

If the erroneous inclusion of out-of-state convictions results in an unlawful sentence, and the defendant fully argued the disputed issues to the sentencing court, the Court of Appeals will hold the State to the existing record, excise the unlawful portion of the sentence, and remand for resentencing without allowing further evidence to be adduced. Ford, 137 Wn.2d at 485. Mr. Hopson's sentence must be reversed and the case remanded for resentencing based on a lowered offender score.

#### **E. CONCLUSION**

Mr. Hopson respectfully requests this Court remand his case for resentencing without inclusion of the challenged Wisconsin convictions.

Respectfully submitted this 29 day of August, 2008.



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Washington Appellate Project - 91052  
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NO. 37540-1-II

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**CERTIFICATE OF SERVICE**

I, MARIA ARRANZA RILEY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

ON THE 2<sup>ND</sup> DAY OF SEPTEMBER, 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **VERBATIM REPORT OF PROCEEDINGS FILED IN THIS APPEAL** (DATE(S) OF PROCEEDINGS: 1/17/08, 1/23/08, 1/24/08 & 3/28/08) TO BE SENT TO THE APPELLANT AT THE ADDRESS STATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS HOPSON  
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**SIGNED** IN SEATTLE, WASHINGTON THIS 2<sup>ND</sup> DAY OF SEPTEMBER, 2008.

x \_\_\_\_\_  
[Signature]

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cc: PIERCE COUNTY PROSECUTING ATTORNEY

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