

FILED
COURT OF APPEALS
DIVISION II

No. 38611-9

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STATE OF WASHINGTON

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

STATE OF WASHINGTON,
Respondent,

v.

JERALD DAVENPORT
Appellant.

REPLY BRIEF

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PM 7-30-09

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A. INTRODUCTION

The issue in this case is whether Mr. Davenport's Oregon robbery conviction is legally and factually comparable to a Washington "most serious offense" or "strike."

Davenport's Oregon indictment alleged that he did "use or threaten the immediate use of physical force" upon another while in the "course of committing theft of property" with the "intent of overcoming resistance" to the taking of the property, and that Davenport was "aided" by "other persons actually present." In his guilty plea (to Count I only), Davenport admitted that he "helped another person steal money from a store clerk. The other person pretended he had a gun."

Oregon's definition of robbery is broader than its Washington counter-part. Thus, the crimes are not legally comparable. Davenport's guilty plea did not factually eliminate those differences. For that reason the conviction is not factually comparable to a robbery, or any other most serious offense.

In short, because it was possible for Davenport to be convicted under Oregon law for actions that would not constitute a crime (or at least a "most serious offense") under Washington law, the conviction is not comparable.

B. ARGUMENT

1. Legal Comparability

Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense.

At the time of Davenport’s Oregon second degree robbery, the Washington crime of robbery required: (1) the unlawful taking (2) of personal property (3) from the person of another or in his presence (4) against his will (5) by the use or threatened use of immediate force, violence or fear of injury to the person or his property or the person or property of anyone. RCW 9A.56.190.

The contemporaneous Oregon third degree robbery statute required that in the course of committing or attempting to commit theft, the person used or threatened the immediate use of physical force upon another with the intent of (a) preventing or overcoming resistance to the taking of the property or to retention thereof immediately after the taking; or (b) compelling the owner of such property or another person to deliver the property or to engage in other conduct which might aid in the commission of the theft. ORS 164.395. Third degree robbery is elevated to second

degree robbery in Oregon required one of two “aggravating factors.” Thus, a perpetrator of second degree robbery must (a) represent by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon, *or* (b) be aided by another person actually present. ORS 164.405. In this case, only the *second* element was charged. A recent comprehensive discussion of the Oregon law on robbery can be found in *State v. White*, 346 Or. 275, __ P.3d __ (2009).

There are several differences in the two state’s legal definitions of robbery. Oregon permits a conviction for robbery if the person commits *or attempts* to commit a theft. ORS 164.395. Washington requires a completed theft. In addition, unlike Washington law, ORS 164.405 incorporates all of the types of thefts listed in ORS 164.015, including theft by deception, theft of lost or mislaid property; or theft of property delivered by mistake.

Washington does not elevate a robbery to a higher degree based on accomplice liability. Thus, Oregon’s crime of second degree robbery is not legally comparable to Washington’s first degree robbery because being aided by another person present is not sufficient to elevate a robbery in Washington from second to first degree robbery.

In its *Response*, the State utterly failed to contest any of these differences. Instead, the State simply cited to *State v. McIntyre*, 112 Wn.

App. 478, 49 P.3d 151 (2002), and argues that this Court has already decided that the crimes are legally comparable. However, the *McIntrye* court failed to consider any of the differences described above. *Compare In re Restraint Petition of Crawford*, __ Wn. App. __, 209 P.3d 507 (2009) (Kentucky crime not comparable to Washington most serious offense due to differences in elements).

The more recent opinion in *State v. Johnson*, __ Wn. App. __, 208 P.3d 1265 (2009), which also finds Oregon robbery legally comparable also fails to take into account any of the differences described above.

In addition, neither *McIntrye* nor *Johnson* engages in any examination the available defenses permitted under the statute. *See In re Lavery*, 154 Wn.2d 249, 257-58, 111 P.3d 837 (2005) (comparison of available defenses is integral part of both legal and factual comparability review).

The applicable defenses available in Washington differ from those under Oregon law. For example, the defense of duress in Oregon requires the use or threatened use of force that overcomes earnest resistance. ORS 161.270. Washington law requires only a threat that creates an apprehension of death or serious injury. RCW 9A.16.060. Thus, the defense of duress is broader in Washington than in Oregon.

In addition, although Oregon recognizes insanity, in Oregon an

insanity verdict is “guilty, but insane.” ORS 161.295. Thus, the statute removes the primary incentive that exists under Washington law accompanying an insanity defense: acquittal. *See e.g.*, Slobogin, C., *The Guilty But Mentally Ill Verdict: An Idea Whose Time Should Not Have Come*; George Washington Law Review, March/May, 1985.

Further, the Oregon insanity statute excludes any mental illness that is characterized as a “personality disorder” as forming the basis for an insanity finding. “Personality disorders” include “paranoid personality disorder,” “schizoid” and “schizotypal personality disorders” and “borderline personality disorders,” all of which can cause serious cognitive and perceptual disorders that may form the basis for an insanity finding. However, Oregon law precludes an insanity finding even where a psychiatrist concludes one of these mental illnesses prevented the offender from knowing right from wrong or appreciating the nature and quality of her acts.

2. Factual Comparability

The question then becomes whether Davenport’s Oregon conviction is *factually* comparable to a second-degree robbery in Washington.

First, Davenport’s guilty plea does not negate the possibility that defenses available in Washington, but not in Oregon—like duress or

insanity. Thus, it is not factually comparable because Davenport did not admit facts that would have negated the available Washington defenses. *See Lavery*, 154 Wn.2d at 258 (“Lavery had no motivation in the earlier conviction to pursue defenses that would have been available to him under Washington's robbery statute but were unavailable in the federal prosecution. Furthermore, Lavery neither admitted nor stipulated to facts which established specific intent in the federal prosecution, and specific intent was not proved beyond a reasonable doubt in the 1991 federal robbery conviction.”).

And, at the risk of repetition, Davenport’s guilty plea statement also does not establish that the other person’s possession of the gun constituted a threat to overcome resistance to a theft; does not admit any immediacy to any threatened use of force; and does not explain how he “stole” the money from the clerk. For example, it does not eliminate the possibility of “stealing” it by deception. Many retail thefts are accomplished by deceptions—true thefts, but not robberies.

Finally, the crimes may not be comparable because Oregon does not provide the right to a unanimous jury. Although this issue has been previously rejected (because the United States Supreme Court has not recognized the federal constitutional right to a unanimous jury), the issue

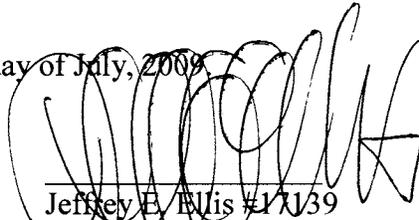
is back before that Court in its October 2009 Term. *See Bowen v. Oregon*, SCOTUS No. 08-1117.

Thus, this Court should reverse and remand for a new sentencing hearing. At that hearing, Davenport should be sentenced to a “standard range” sentence. He is not a persistent offender.

C. CONCLUSION

Based on the above, this Court should vacate the judgment and remand this case to Clark County Superior Court for a new sentencing hearing with instructions to sentence Mr. Davenport to a standard range sentence.

DATED this 29th day of July, 2009



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CERTIFICATE OF SERVICE

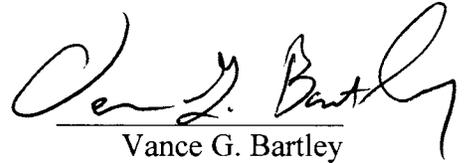
I, Vance G. Bartley, Paralegal for the Law Offices of Ellis, Holmes & Witchley, PLLC, certify that on July 30, 2009 I served the parties listed below with a copy of *Petitioner's Reply Brief* as follows:

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