

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

IN RE THE PERSONAL RESTRAINT PETITION OF:

MICHAEL LAR,

PETITIONER.

**REPLY IN SUPPORT OF
PERSONAL RESTRAINT PETITION**

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A. INTRODUCTION

Without objection from trial or appellate counsel, Mr. Lar “struck out” and his life sentence was affirmed on appeal despite the fact that Lar’s sentence is premised on prior federal bank robbery convictions which caselaw unambiguously holds do not constitute “strikes.”

In re PRP of Lavery, 154 Wash.2d 249, 111 P.3d 837 (2005), holds that federal bank robbery is not legally comparable to a strike because the former crime requires only a general intent to take property, not the intent to steal required under Washington law. The Washington Supreme Court’s recent decision in *State v. Olsen*, ___ Wn.2d ___, 2014 WL 1942102 (2014), reiterated that only facts clearly admitted or proven can be considered while conducting comparability analysis. For a prior bank robbery conviction obtained by a guilty plea to be “factually” comparable to a strike, a defendant must have clearly admitted at the time of the prior conviction that he took property and that he did so with the intent to permanently deprive.

In its *Response*, the State argues that this Court should review the facts alleged and infer that Lar intended to steal when he committed the bank robberies. However, while Lar admitted he took property, he did not admit he intended to steal when he pleaded guilty because it was not a required element under federal law. While it may be “inconceivable to the State that any other intent, or a lack of the specific intent to steal the

money, could be found by a court,” the law precludes a current sentencing court from making that finding. Instead, the finding must have been made at the time of the guilty plea.

Mr. Lar, like Mr. Lavery before him, is not a persistent offender.

B. ARGUMENT

- 1A. MR. LAR IS NOT A PERSISTENT OFFENDER BECAUSE HIS FEDERAL BANK ROBBERY CONVICTIONS ARE NOT COMPARABLE TO A WASHINGTON “MOST SERIOUS OFFENSE.”
- 1B. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING COMPARABILITY.
- 1C. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT CHALLENGING COMPARABILITY.

In its *Response* to Lar’s two ineffectiveness claims, the State concedes that “Lar’s attorneys’ performances were deficient for failing to inform Lar about *Lavery* and argue that Lar’s prior federal bank robbery convictions were not most serious offenses.” *Response*, p. 14.

The State’s concession is appropriate, especially considering that *Lavery* was controlling precedent at the time of Lar’s sentencing and his appeal.

However, the State then argues that Lar was not prejudiced because it is possible to construe the facts admitted by Lar when he pleaded guilty to include the intent to permanently deprive. The State argues: “Lar’s intent is established by the facts he admitted to, even if Lar did not use the

magic words and state specifically that he went into the banks with the specific intent to steal. It is inconceivable to the State that any other intent, or a lack of the specific intent to steal the money, could be found by a court.” *Response*, p. 11.

While it might be “inconceivable to the State” that any reviewing court today would decide that Lar did not intend to permanently deprive the banks of the money taken, the point is that the law does not allow a reviewing court to make that determination for the first time. Instead, the element must have been admitted at the time of the guilty plea. Here, it was not. The charging documents in both cases required only an unlawful taking of money, which Lar admitted.

Since *Lavery*, Lar is not aware of a single published Washington case holding that federal bank robbery is factually comparable to robbery or any other “strike” offense. As noted previously, intent to steal is the equivalent to specific intent to deprive the victim of his or her property permanently. *State v. Sublett*, 176 Wash.2d 58, 88, 292 P.3d 715 (2012) (citing *Lavery*, 154 Wash.2d at 255).

When a defendant pleads guilty in federal court, it is well understood that a valid plea of guilty represents an admission to the material elements of the crime. *McCarthy v. United States*, 394 U.S. 459, 466 (1969).

A Washington court conducting comparability review may consider only facts that were admitted, stipulated to, or proved beyond a reasonable

doubt. *Lavery*, 154 Wash.2d at 258. As a result, while it was possible to conclude that Lavery intended to steal when he committed bank robbery, it was improper for a reviewing court to make that determination.

State v. Olsen, __ Wn.2d __, 2014 WL 1942102 (2014), has reinforced that comparability review only applies elements admitted or found at the time of the plea/conviction. *Olsen* rejected a challenge that Washington's comparability law ran afoul of the Sixth Amendment, and specifically the United States Supreme Court's holding in *Descamps v. United States*, 133 S.Ct. 2276 (2013). *Olsen* concluded that the federal framework is consistent with the *Lavery* framework, which limits our consideration of facts that might have supported a prior conviction to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant.

In *Descamps*, the Court held a prior California burglary could not be used to increase a defendant's sentence because the California burglary statute is broader than generic burglary: it does not require breaking and entering. *Descamps*, 133 S.Ct. at 2293. The Court emphasized, "[w]hether *Descamps* *did* break and enter makes no difference." *Id.* at 2286. "A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense." *Id.* at 2289; *accord Lavery*, 154 Wn.2d at 257 ("Where the foreign statute is broader than Washington's ... there may have been no incentive for the accused to have attempted to prove that he

did not commit the narrower offense”). Because a conviction for generic burglary requires proof of an element that does not exist in the California burglary statute, the prior California burglary could not be counted. *Descamps*, 133 S.Ct. at 2293.

Previous decisions illustrate. In *State v. Ortega*, 120 Wash.App. 165, 84 P.3d 935 (2004), Division Three held the State failed to prove that a Texas conviction for indecency with a child was comparable to a Washington conviction for first-degree child molestation. *Ortega*, 120 Wn. App. at 167. Washington's statute required proof that the child was under 12 years old, while Texas law required only proof that the child was under 17 years old. *Id.* at 172-73. The State presented a presentence report and letters from the Texas victim, her mother, and a county official all stating that the victim was 10 years old at the time of the crime, and also presented the indictment and judgment. *Id.* at 173-74. But the Court of Appeals held the trial court properly refused to consider that evidence, because “the Texas crime as charged was not clearly comparable to first degree child molestation.” *Id.* at 174.

In another case, Division One held a prior Illinois robbery conviction was improperly counted as a “strike” in Washington. *State v. Bunting*, 115 Wn. App. 135, 61 P.3d 375 (2003). Robbery in Washington requires proof of specific intent to deprive, but robbery in Illinois is broader: it requires only proof of general intent. *Id.* at 141. The State had presented evidence

of the defendant's underlying conduct in Illinois, including an “Official Statement of Facts,” which alleged specific intent to deprive: “Defendant displayed a small caliber revolver and demanded victim's money.” *Id.* at 142. But the Court of Appeals held this document could not be considered because it contained allegations that were irrelevant to the elements of the crime and therefore were never proven at trial or admitted by the defendant. *Id.* “Because [the defendant] pled guilty to armed robbery, the only acts he conceded were *the elements of the crime* stated in the indictment.” *Id.* at 143. The court held the Illinois conviction could not be used to increase the sentence to life without parole. *Id.* at 143.

The same result follows in this case. This Court should reverse and remand for resentencing.

2. LAR’S CONVICTION FOR KIDNAPPING MERGES WITH HIS ROBBERY CONVICTION.

The State argues that the robbery was independent, not incidental to the kidnapping: “The use or threatened use of a person as a hostage or human shield creates its own, significant and separate danger from the attempted robbery. Also, a person can attempt to commit robbery without taking hostages or using a human shield in their escape. Lar also kidnapped Ms. Weitz to use her in an attempt to lure Ms. Mejia-Tellez into the bank. This again, is not incidental to the attempted robbery.” *Response*, p. 25.

However, the State describes actions in order to facilitate a robbery.

Lar used Weitz as a “shield” and in order to lure Mejia-Tellez in order to commit the robbery. The fact that he might have been able to commit the crime without doing so makes no legal difference. The question is whether his actions had a separate purpose or were in order to facilitate the commission of the robbery. Importantly, the State points to no actions by Lar that are unrelated to the commission of the robbery. The crimes merge.

3. MR. LAR WAS DENIED EFFECTIVE ASSISTANCE DURING THE PLEA BARGAINING PROCESS WHERE HE ADVISED LAR TO REJECT A PLEA OFFER BASED ON HIS MISTAKEN BELIEF THAT FEDERAL BANK ROBBERY IS A “STRIKE.”

The State disputes the facts relevant to this claim. However, the State did not provide the contents of its case file, only a self-serving declaration. As a result, this Court should remand this claim for a hearing. RAP 16.11.

III. CONCLUSION

Based on the above, this Court should either grant Mr. Lar’s PRP or remand for an evidentiary hearing.

DATED this 30th day of May, 2014.

Respectfully Submitted:

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CERTIFICATE OF SERVICE

I, Jeffrey Ellis certify that on May 26, 2014, I served a copy of Mr. Lar's reply brief on opposing counsel by sending it electronically to Teresa L Bryant at the Lewis County Prosecutor.

Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

May 26, 2014//Portland, OR

/s/Jeffrey Ellis

ALSEPT & ELLIS LAW OFFICE

May 26, 2014 - 7:35 AM

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