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Division II
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Court of Appeals No. 49894-4-II

In the
Court of Appeals for the State of Washington
Division Two

In re the Personal Restraint Petition of:

RAYMOND MAYFIELD WILLIAMS, JR.,

Petitioner

PETITIONER'S SUPPLEMENTAL BRIEF

Cowlitz County Superior Court No. 08-1-00735-6

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PETITIONER'S SUPPLEMENTAL BRIEF

In response to this court's November 15, 2017 Order Directing Supplemental Briefing ("Order"), petitioner here addresses the question "whether the prior 1997 conviction can be collaterally attacked in the above matter and the reasons therefor, as well as the standards of review the court should apply."

INTRODUCTION

Technically, in this present PRP matter, the collateral attack is *not* against "the prior 1997 conviction," as stated in this court's Order. Rather, the PRP in the present case attacks the October 15, 2008 sentencing order. While it may seem that the PRP in effect attacks the 1997 conviction, it is more correctly to be viewed as an attack on the 2008 court's improper use of the 1997 conviction.

On October 15, 2008 the Superior Court of Washington for Cowlitz County entered its Felony Judgment and Sentence (PRP, App. A), and in sentencing Mr. Williams, the court pointed to the July 8, 1997 first degree burglary conviction (PRP, App. F) as one of two "prior offenses that require the defendant to be sentenced as a Persistent Offender." (*See* PRF, App. A, p. 3, fourth paragraph ("The following prior offenses require that the defendant be sentenced as a Persistent Offender (RCW 9.94A.570): BURG 1 1997, AND BURG 1 2004").) The court in 2008 thereupon "found the defendant to be a Persistent Offender," giving life without parole. (*Id.*, p. 6.)

ARGUMENT

1. **The Knippling Case.** In *State v. Knippling* (2007) 141 Wn. App. 50, 168 P.3d 426, the State contended before the Supreme Court of Washington that

the appellate court had erred in affirming the trial court's determination that the State had failed to prove that one of defendant's prior convictions counted as a strike for purposes of persistent offender status. The appellate court had disagreed, finding that the State had not met its burden of showing that defendant was convicted as an "offender" at the time of the prior conviction in question because there had been no evidence in the record that the superior court had jurisdiction over the defendant. This was critical because to classify defendant as an "offender," the State had to show either that the defendant had been convicted of an automatic decline charge or that the juvenile court had after conducting a declination hearing declined jurisdiction. The juvenile court had jurisdiction over the second degree robbery charge and there was no evidence before the sentencing judge indicating that a declination hearing had occurred. By failing to establish the existence of a declination hearing in juvenile court, the State could not show that defendant was convicted as an "offender" under Wash. Rev. Code § 9.94A.030(37)(a)(ii). Therefore, defendant could not be sentenced as a persistent offender.

As with defendant Knippling in the 2005 sentencing in the *Knippling* case, so with Williams in the present case. In *Knippling* the defendant was "not challenging the constitutional validity of the 1999 conviction" but "[i]nstead, Knippling present[ed] a statutory challenge to the use of the 1999 conviction for sentencing purposes." *State v. Knippling*, 166 Wn.2d 93, at 103. Said the *Knippling* court:

The State's burden, as required by the [Persistent Offender Accountability Act], is to establish that Knippling is a three-time

“offender” in order to sentence him to life without release. *See* RCW 9.94A.030(37)(a)(ii). This burden is related to but distinct from an affirmative duty to prove the constitutional validity of prior convictions.

State v. Knippling, 166 Wn.2d 93, 103-104.

In light of the above analysis, a strict interpretation of this court’s November 15, 2017 Order is that it properly should invite the parties to brief the question whether petitioner in this present PRP can collaterally attack the October 15, 2008 finding, made by the Superior Court of Washington for Cowlitz County in its Felony Judgment and Sentence, that Mr. Williams is a three-time “offender” based, in part, on the existence of the earlier, 1997, conviction for burglary in the first degree. This reformulation of the question presented by this court’s November 15, 2017 Order is justified by what the *Knippling* court says regarding the State’s contention in that case (which is similar to what the State contends in its Response to PRP here):

The State contends that *Knippling* cannot dispute the 1999 conviction at his persistent offender sentencing because doing so amounts to an improper collateral attack on that conviction. This argument also fails. We reach that conclusion because *Knippling*’s objection to the use of that conviction is not a collateral attack. Rather, his arguments are directed at the present use of a prior conviction to establish his current status as a persistent offender. *See State v. Carpenter*, 117 Wn. App. 673, 678, 72 P.3d 784 (2003) (objecting to a prior conviction in a POAA sentencing proceeding is not a collateral attack).

State v. Knippling, 166 Wn.2d 93, 102-103.

As for the *ratio decidendi* in *Knippling*, leading to the conclusion there that “[b]y failing to establish the existence of a declination hearing in juvenile court, the State could not show that defendant was convicted as an ‘offender’

under Wash. Rev. Code § 9.94A.030(37)(a)(ii),”¹ the *Knippling* court reasoned as follows:

The State urges this court to ignore the declination requirement, asserting that an absence of information in the judgment form does not affirmatively mean that Knippling’s conviction does not exist for sentencing purposes under the POAA. That argument fails because Washington courts have long held that in imposing a sentence, the facts relied upon by the trial court “‘*must have some basis in the record.*’” [*State v.*] *Ford*, 137 Wn.2d [472] at 482 (quoting *State v. Bresolin*, 13 Wn. App. 386, 396, 534 P.2d 1394 (1975)). The [Sentencing Reform Act] places the burden of proving prior strikes “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)). If the juvenile court declined jurisdiction in 1999, the State should have been able to produce the record because all juvenile court declination decisions are to be in writing. See RCW 13.40.110(3). If there is no record of the declination hearing, we can presume that no such hearing occurred. See *State v. Golden*, 112 Wn. App. 68, 80, 47 P.3d 587 (2002).

In sum, the juvenile court had jurisdiction over the second degree robbery charge and there was no evidence before the sentencing judge in 2005 indicating that a declination hearing occurred. By failing to establish the existence of a declination hearing in juvenile court, the State cannot show that Knippling was convicted as an “offender” in 1999. Therefore, we agree with the Court of Appeals and the trial court that Knippling cannot be sentenced as a persistent offender because he was not “convicted as an *offender* on at least two separate occasions” prior to the 2005 sentencing. RCW 9.94A.030(37)(a)(ii) (emphasis added).

State v. Knippling, 166 Wn.2d 93, 102 (italics in original, emphasizing that the facts relied upon by the trial court “*must have some basis in the record.*”)

In the present case, the record is crystal clear: the Juvenile Court Order of May 19, 1997 either contradicts itself if it is read to say that a declination hearing was held or it is wholly consistent with itself if it is read to say what it actually

¹ *State v. Knippling*, 166 Wn.2d 93, 96.

says—namely, (1) that a declination hearing was *waived*; (2) that declination occurred nonetheless (albeit without a hearing); and (3) that no *Kent* findings were stated on the record. In short, the State necessarily fails in this present case to establish the holding of a declination *hearing* in juvenile court in 1997 because there is no record of the declination *hearing* and therefore this court necessarily “can presume that no such hearing occurred.” See *State v. Golden*, 112 Wn. App. 68, 80 (2002).

Here is what the May 19, 1997 Juvenile Court Order states (with reference to the *waiver* preceded here by insertion of a bracketed “[1]” and with reference to the declination here preceded by a bracketed “[2]”):

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,)	
)	
Plaintiff,)	No. 978601-4
vs.)	ORDER
)	to Decline Raymond Williams
Raymond Williams)	to Adult Court Jurisdiction
Defendant.)	

IT IS HEREBY ORDERED that the Respondent [*sic*] having been charged with Burglary in the First Degree 9A.52 020(1)(a) and two counts of Theft of a Firearm RCW 9A.56.300, [1] hereby waives his right to a decline hearing pursuant to RCW 13.40.110, and jurisdiction for the above named Respondent shall be transferred to Superior Court.

Probable cause has been established for the above enumerated charges.

Pursuant to *State v. Holland* adopting *US v. Kent* 383 U.S 541 (1966), court finds that Respondent [*sic*] shall be [2] Declined to Adult Superior Court. Respondent to be held in Adult Thurston County Jail for further proceedings on this matter.

DATED: 5/19/97

/s/
JUDGE

PRESENTED BY:

/s/

APPROVED BY:

/s/

hearing” and does not even refer to a hearing; rather, it asserts that Mr. Williams “*waived my right to the hearing.*” (See PRP, App. H, p. 4, lines 1-2, emphasis added.) And Appendix E, likewise, is silent about any declination hearing having been held. And in its RPRP the State repeatedly thereafter refers to “the decline hearing” (see third-to-last line on p. 2 of the RPRP, fourth and eighth lines of the argument on p. 3 of the RPRP, etc.), and yet never cites any other document in support of the notion that there was evidence before the sentencing judge in 2008 “indicating that a declination hearing [had in 1997] occurred.” *State v. Knippling*, 166 Wn.2d 93, 102. Here quoting from *State v. Knippling*, 166 Wn.2d 93, 102 but substituting Mr. Williams’ name for Mr. Knippling’s and changing the years of the comparable proceedings in the two cases from the years in Mr. Knippling’s cases to those in Mr. Williams’ cases, we can say here as was said in *Kippling*:

By failing to establish the existence of a declination *hearing* in juvenile court, the State cannot show that [Mr. Williams] was convicted as an ‘offender’ in 199[7]. Therefore, [the Supreme Court of Washington may well] agree with [this present] Court of Appeals . . . that [Williams could not properly have been] sentenced as a persistent offender because he was not “convicted as an *offender* on at least two separate occasions” prior to the 200[8] sentencing. RCW 9.94A.030(37)(a)(ii) (emphasis added).

State v. Knippling, 166 Wn.2d 93, 102.

Here the State argues in its RPRP that the burden of proof rests on Mr. Williams to prove “that he was not warned of the consequences of intelligent waiver.” (RPRP at pp. 12-13.) However, the burden of proof is on *the State*, to show that Mr. Williams was convicted as an “offender” at the time of the 1997 conviction based on *evidence in the record* that the superior court had jurisdiction over the defendant, *evidence in the record* that establishes the existence of a declination

hearing in juvenile court in 1997. *State v. Knippling*, 166 Wn.2d 93, 102.

The court imposing on Mr. Williams the life-without-parole sentence in 2008 cannot possibly have relied on a transcript or recording of any declination hearing held in 1997 for not only was such transcript or recording of any declination hearing (if held) not available in 2016 (*see* PRP at App. G), it was not available in 2008. RCW 13.50.010 - 13.50.270.³ That is one reason why “If the juvenile court declined jurisdiction in 199[7], the State should have been able to produce the record *because all juvenile court declination decisions are to be in writing*. See RCW 13.40.110(3).” *State v. Knippling*, 166 Wn.2d 93, 102. And “[i]f there is no record of the declination hearing, we can presume that no such hearing occurred. See *State v. Golden*, 112 Wn. App. 68, 80, 47 P.3d 587 (2002).” *State v. Knippling*, 166 Wn.2d 93, 102.

In its RPRP, the State points to the Notice of Hearing (PRP App. D) as supposed evidence that the hearing actually was held. *See* RPRP at pp. 9-10, n. 5 (“Williams states in his brief that there is no evidence that a decline hearing actually occurred. Petitioner’s Motion [PRP] at 7. To the contrary, there is a notice that the decline hearing was scheduled for May 19, 1997, Petitioner’s Appendix D, in addition to an order declining jurisdiction dated May 19. Petitioner’s Appendix E. Based on these documents, it seems clear that a decline hearing did actually

³ *See also* County Clerks and Superior Court Records Retention Schedule (1983, 1993, 2001, 2006-2007, 2009, 2014) available at https://www.sos.wa.gov/_assets/archives/RecordsManagement/County%20Clerks%20and%20Superior%20Court%20Records%20RS%20ver%207.0.pdf and Juvenile Courts and Services Records Retention Schedule available at https://www.sos.wa.gov/_assets/archives/RecordsManagement/Juvenile%20Cts%20and%20Services%20ver%201.0%20Revocation%20Guide.pdf

occur.”). No. The documents merely say what they say: a decline hearing was *scheduled* (App. D) and Mr. Williams *waived* the hearing (App. E).

2. The Kent, Saenz, and Bailey Cases. Under Wash. Rev. Code § 13.40.110, a judge must carefully weigh whether declining jurisdiction is in the best interest of the juvenile or the public and enter findings to that effect, even where the party waives the decline hearing and stipulates to transfer to adult court. If the judge is unable to *enter findings* without a hearing, the judge should order a hearing. *State v. Saenz*, 175 Wn. 2d 167, 180-181. Such a hearing was not ordered and the record shows the court entered *no findings*. (See footnote 2 above.) The prosecution bears the burden of proving by a preponderance of the evidence that a prior conviction constitutes a “strike” under the POAA. *Saenz*, 175 Wn.2d at 172; *State v. Bailey*, 179 Wn. App. 433, 439. The burden of establishing criminal history by a preponderance of the evidence, for purposes of determining the offender score at sentencing, lies with the prosecution. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868 n.3, 50 P.3d 618 (2002). “The best evidence of a prior conviction is a certified^[4] copy of the judgment.” *State v. Priest*, 147 Wn. App. 662, 668, 196 P.3d 763 (2008) (quoting *Ford*, 137 Wn.2d at 480). As stated above, “[b]y failing to establish the existence of a declination hearing in juvenile court, the State could not show that defendant was convicted as an ‘offender’ under Wash. Rev. Code § 9.94A.030(37)(a)(ii).” *Knippling*, 166 Wn.2d 93, 96.

⁴ PRP App. F shows a photocopy of the July 8, 1997 Judgment and Sentence relied upon by the sentencing court in 2008 but does not show that it was a certified copy.

Even where the parties stipulate to decline juvenile jurisdiction, the statute still requires the court to enter findings, and the court cannot transfer a case to adult court until it has done so.” *Saenz*, 175 Wn.2d at 179. Jurisdiction cannot be transferred if declination is not in the best interest of the juvenile or the public, despite any agreement between the parties. *Id.* The *Saenz* court explained:

Juvenile court judges are not simply potted palms adorning the courtroom and sitting idly by while the parties stipulate to critically important facts. Instead, these judges enforce a juvenile code, “designed with [juveniles’] special needs and limitations in mind.” *Saenz*, 175 Wn.2d at 179 (alteration in original) (quoting *Dutil v. State*, 93 Wn.2d 84, 94, 606 P.2d 269 (1980)).

State v. Bailey, 179 Wn. App. 433, 442-443 (2014).

3. The Standard of Review. An appellate court reviews *de novo* a trial court’s determination that a convicted defendant’s prior convictions qualify as “strike” offenses for purposes of persistent offender sentencing to life imprisonment without the possibility of parole under the Sentencing Reform Act of 1981 (ch. 9.94A RCW). *State v. Bailey*, 179 Wn. App. 433, 438-439 (2014), citing *State v. Thieffault*, 160 Wn. 2d 409, 414, 158 P.3d 580 (2007). *See also Saenz* at 172.

CONCLUSION

For the foregoing reasons, Mr. Williams respectfully requests that upon *de novo* review, this court should conclude that the 2008 sentencing court’s use of the 1997 conviction was improper and that the collateral attack upon it by the present PRP has merit and justifies granting the PRP’s request that the 2008 sentence be reversed and the case remanded for imposition of sentence as prayed for in the

PRP. Dated: November 29, 2017



COREY EVAN PARKER
Attorney for Petitioner Raymond Mayfield
Williams, Jr.

CERTIFICATE OF SERVICE

I, Corey Evan Parker, certify under penalty of perjury under the laws of the United States and of the State of Washington that on November 29, 2017, I caused to be served the document to which this is attached to the party listed below in the manner shown next to their name:

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