

FILED
Court of Appeals
Division II
State of Washington
10/22/2018 8:00 AM

No. 51348-0-II

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

STATE OF WASHINGTON, Respondent

v.

YANCY RAY, Appellant

APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY
THE HONORABLE TIMOTHY ASHCRAFT

BRIEF OF APPELLANT

Marie Trombley
Attorney for Yancy Ray
PO Box 829
Graham, WA 98338

TABLE OF CONTENTS

I.	ASSIGNMENTS OF ERROR.....	1
II.	STATEMENT OF FACTS.....	2
III.	ARGUMENT.....	14
	A. The Evidence Was Insufficient For A Reasonable Finder of Fact To Conclude The Homicide Was Not Justified.....	14
	B. Mr. Ray's Prior Oregon Conviction Cannot Be Counted As A Strike Offense In Washington.....	18
	C. The Trial Court Imposed Legal Financial Obligations On An Indigent Criminal Defendant Which Are No Longer Authorized By Statute.....	26
IV.	CONCLUSION.....	27

TABLE OF AUTHORITIES

Federal Cases

<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970) .	14
<i>North Carolina v. Alford</i> , 400 U.S. 25, 35, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970)	21, 22
<i>United States v. Food & Grocery Bureau</i> , 43 F.Supp. 974 (S.D.Cal. 1942), <i>aff'd</i> , 139 F.2d 973 (9 th Cir. 1943)	21
<i>United States v. Nguyen</i> , 465 F.3d 1128 (9 th Cir.2006).....	21

Washington State Cases

<i>In re Cross</i> , 178 Wn.2d 519, 309 P.3d 1186 (2013).....	22
<i>In re Pers. Restraint of Fleming</i> , 129 Wn.2d 529, 919 P.2d 66 (1996)	26
<i>State v. Acosta</i> , 101 Wn.2d 612, 683 P.2d 1069 (1984)	15
<i>State v. Baeza</i> , 100 Wn.2d 487, 670 P.2d 646 (1983)	14
<i>State v. Camara</i> , 113 Wn.2d 631, 781 P.2d 483 (1989).....	15
<i>State v. Cayenne</i> , 139 Wn. App. 114, 158 P.3d 623 (2007).....	26
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	18
<i>State v. George</i> , 161 Wn. App. 86, 249 P.3d 202 (2011).....	15
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	14
<i>State v. Heath</i> , 168 Wn. App. 894, 279 P.3d 458 (2012).....	22
<i>State v. Hickman</i> , 135 Wn.2d 97, 954 P.2d 900 (1998).....	17
<i>State v. Janes</i> , 121 Wn.2d 220, 850 P.2d 495 (1993).....	15
<i>State v. McIntyre</i> , 112 Wn. App. 478, 49 P.3d 151 (2002)	1, 20
<i>State v. Newton</i> , 87 Wn.2d 363, 552 P.2d 682 (1976)	22, 24
<i>State v. Olson</i> , 180 Wn.2d 468, 325 P.3d 187 (2014).....	24
<i>State v. Paulson</i> , 131 Wn. App. 579, 128 P.3d 133 (2006).....	26

<i>State v. Ramirez</i> , 426 P.3d 714 2018 WL 4499761 (September 20, 2018).....	27
<i>State v. Thiefault</i> , 160 Wn.2d 409, 158 P.3d 580 (2007).....	18
<i>State v. Wanrow</i> , 88 Wn.2d 221, 559 P.2d 548 (1977)	15

Statutes

RCW 10.101.010.....	27
RCW 10.101.013.....	27
RCW 36.18.020.....	26, 27
RCW 9.94A.030	18
RCW 9.94A.525	18
RCW 9A.16.050	15
RCW 9A.32.050	14
RCW 9A.56.190	1, 20
RCW 9A.56.210	1, 19

Other Authorities

<i>Capps v. Cupp</i> , 68 Or. App. 327, 681 P.2d 158 (1984).....	23, 24
CrR 4.2.....	22
House Bill 1783	26, 27
Laws of 1975.....	19, 20
Laws of 2018.....	27
O.R.S. § 135.335. (1973 c. 836 § 159).....	23
O.R.S. § 135.395.....	23
O.R.S. § 164.395 (1971 c. 743 § 148).....	19

I. ASSIGNMENTS OF ERROR

- A. The Evidence Was Insufficient For A Reasonable Finder of Fact To Conclude The Homicide Was Not Justified.
- B. The Trial Court Erred When It Entered Conclusion of Law X: "That The Defendant's 1993 Oregon Conviction for Robbery in the Third Degree Is Legally And Factually Comparable to Washington's Robbery in the Second Degree Statute At The Time, RCWs 9A.56.190 and 9A.56.210, and Pursuant To *State v. McIntyre*, 112 Wash.App. 478 (2002)." CP 779.
- C. The Trial Court Erred In Imposing A Persistent Offender Life Without The Possibility of Parole Sentence.
- D. The Trial Court Imposed Legal Financial Obligations On An Indigent Criminal Defendant Which Are No Longer Authorized By Statute.

ISSUES RELATED TO ASSIGNMENTS OF ERROR

- A. A claim of self-defense against a charge of homicide, requires the state to disprove self-defense beyond a reasonable doubt. Did the state disprove beyond a reasonable doubt that Mr. Ray acted in self-defense?

- B. A no contest plea requires a factual basis to be included in an offender score calculation. Where the plea statement provides no factual basis, and there is no oral or written record showing the material on which the trial court relied, is the conviction insufficient to sustain a persistent offender sentence?
- C. Must the legal financial obligations be stricken from Mr. Ray's judgment and sentence as they are no longer authorized by statute?

II. STATEMENT OF FACTS

On the evening of September 3, 2016, Yancy Ray shot and killed Hyson Sabb. RP 2696. Pierce County prosecutors charged him with murder in the second degree and unlawful possession of a firearm in the first degree. CP 1-2. The prosecutor filed a Persistent Offender Notice. CP 13. Mr. Ray raised a self-defense claim and the matter proceeded to a jury trial. CP 17.

Trial Testimony

On August 1, 2016, Yancy Ray bought a quarter pound of marijuana from Mr. Sabb at the very good price of 350 dollars. RP 2382-83. He paid 120 dollars that day and owed the remainder. RP

2383. Between August 1st and September 3rd, Mr. Ray tried to find Mr. Sabb so he could repay him. However, by September 3rd Mr. Ray had not found Mr. Sabb nor paid the debt. RP 2389, 2487.

Around 9:30 p.m. on September 3rd, Mr. Ray was on his way to a work party. He stopped off at the home of "ATL"¹ to buy pills for the party. RP 2386-87. People bought and used drugs at ATL's home. RP 773, 818, 2419.

When he arrived, ATL was not there so Mr. Ray waited for about five minutes. RP 2634. He saw two other people and heard four others in the back of the house. RP 2388. As he prepared to leave Mr. Sabb arrived. RP 2388. Angry that Mr. Ray had not paid him the remaining 230 dollars, Mr. Sabb was aggressive, intimidating, and agitated. RP 2411, 2413. The interaction lasted between three to four minutes. RP 2413.

Eboni Peterson, who was at the house, interjected herself into the conversation. RP 2412. Ms. Peterson talked loudly, flung her arms, and moved around. RP 2412. Annoyed by her interference, Mr. Ray cursed at her, which further angered Mr. Sabb. RP 2412.

¹ "ATL" was the nickname for Horace Smith. RP 1531.

Mr. Ray reported he said several times he would get the money and return with it. RP 2413. A neighbor reported hearing Mr. Ray say, "I got this. I know how to fix it. I'll be back." RP 746. As he walked to his car, he heard Mr. Sabb say he would show him "how he deal with people that play with his money or his shit." RP 2639.

He also heard Mr. Sabb say, "Eboni, get my thing out of the trunk." RP 2414. Mr. Ray believed Mr. Sabb was referring to his gun. RP 2414. Mr. Sabb kept his guns in the car trunk. RP 1488. Others, who were nearby, also heard Mr. Sabb tell Ms. Peterson to get his gun. RP 1446,1654. Ms. Peterson said she ran to Mr. Sabb's car, and his girlfriend got a gun case from the trunk and handed it to Ms. Peterson. RP 1446. Ms. Peterson said she brought the box to Mr. Sabb. RP 1446.

Mr. Sabb's girlfriend, Adrienne Fuqua, contradicted Ms. Peterson's testimony. She told police she and Ms. Peterson had gone to the store together. When they returned, Ms. Peterson went into ATL's house to take a shower while she remained alone for 35 to 40 minutes in Mr. Sabb's car trying to get her phone to work. RP 1988, 2482.

She said Ms. Peterson came out to the car and told her to move the car closer to ATL's home because Mr. Sabb wanted his

gun. RP 1991, 2060. She moved the car closer, popped the trunk, and Mr. Sabb came to the car himself and took a gun from the trunk. RP 1991. Ms. Fuqua said the gun she saw was a semi-automatic, with a slide on top for a scope. RP 1992, 2068-69.

Ms. Fuqua handed to Mr. Sabb the gloves he always wore when he used a gun. RP 1992-93. She saw him put the gloves on. Mr. Sabb walked back toward the house and she could no longer see him. RP 2059. Black gloves were later found balled up on the porch side of the house. RP 1869.

Mr. Ray drove to his home to get money to repay Mr. Sabb. RP 2414. He estimated it took about 5 minutes to return. RP 2418. Between 9:50 p.m. and 9:54 p.m., Mr. Ray was on his cell phone talking to his brother. RP 1811-12, 2737. The call ended when he arrived at ATL's home. RP 2737.

Because he knew Mr. Sabb had killed someone, and that Mr. Sabb and his friends had beaten someone for scratching Mr. Sabb's car, he feared what Mr. Sabb might do to him. RP 2389, 2474, 2489-90. He took his .38 Smith and Wesson gun from the car console and put it in his right rear pocket. RP 2420-21. He turned the engine off, left the keys inside the car, and closed the car door behind him. RP 2418, 2421. Mr. Ray drove a Lexus. RP 2388.

Although the only one to report this, another witness, Ms. Jones testified she saw Mr. Sabb and Ms. Peterson arguing and trading threats with a man who was a passenger in a suburban vehicle². RP 1666-67. She testified that Mr. Sabb was angry and “kind of was the one really starting it...”. RP 1671. After the initial confrontation she said Mr. Sabb showed her his gun and wanted her to go buy bullets for it. She declined. RP 1665. She reported they stayed in the house for several more minutes. RP 1674. She said the man came right up to the porch with his gun pointed at her and Mr. Sabb. RP 1676,1678.

She later contradicted her recitation, stating instead that she and Mr. Sabb had both walked down the porch stairs. RP 1947. She conceded that as a meth user, she might have been “smoked out” on the day of the shooting. RP 1947. Mr. Ray testified he had never met or seen Ms. Jones until she appeared in the courtroom. RP 2704.

Mr. Ray walked to the front porch of ATL’s house. RP 2421. When Mr. Sabb opened the door, he told him he did not have all the money. RP 2663. Without hesitation Mr. Sabb punched Mr. Ray

² She did not recognize Mr. Ray’s Lexus as having been parked in front of ATL’s house. RP 1670, 1948.

in the face, causing him to fall down the steps backward. The punch knocked Mr. Ray's eyeglasses to the ground. He landed near the U-Haul in the driveway. RP 2423, 2664. Stunned, Mr. Ray opened his eyes to find Mr. Sabb standing over him trying to get money from his front pocket. RP 2424. Mr. Ray was flat on the ground as he struggled with Mr. Sabb. RP 2424. Mr. Ray heard people yell, "Get him, get him, get him." RP 2426-27, 2684.

Mr. Sabb continuously kicked Mr. Ray as Mr. Ray tried to scoot away from him. RP 2424. Mr. Sabb grabbed Mr. Ray's shirt as Mr. Ray turned his body away from him. RP 2674. Police later found a shirt button in the grass near Mr. Ray's eye glasses. RP 928. Mr. Sabb continued to kick and punch Mr. Ray. RP 2425, 2675. The jury saw photos of Mr. Ray's face, arm, elbow, hands, and side which showed the injuries he sustained from the beating³. RP 2227, 2502, Exh. 324-331.

To defend himself Mr. Ray kicked at Mr. Sabb and landed a kick forceful enough to cause Mr. Sabb to go backwards. RP 2676. Mr. Ray scrambled to his feet and ran toward his car. RP 2425, 2428, 2682.

³ Mr. Ray was counseled to photograph his injuries by an attorney. Some of the photos were taken that night, and others at an attorney's office on September 21, 2016. RP 2503.

Mr. Sabb called Mr. Ray a motherfucker, and immediately, Mr. Ray heard gunshots. RP 2427, 2687. Police reported hearing gunshots at about 9:57 p.m., three minutes after Mr. Ray had ended a call with his brother. RP 584.

As he ran away he felt a bullet whiz by him. RP 2428. Mr. Sabb chased him, firing his gun. RP 2691. Police later found a bullet fragment near Mr. Ray's car, saw damage to the rear passenger quarter panel on the driver's side, and concluded that a bullet had struck his car. RP 1763, 1845, 2268.

Mr. Ray could not see because his glasses were on the ground somewhere, but he grabbed for his own gun. RP 2430. Mr. Sabb pointed the gun at Mr. Ray's face. RP 2431. The gun did not fire. RP 2697. In the split second that Mr. Sabb's gun jammed, Mr. Ray fired one shot at him. RP 2431. Mr. Sabb stumbled backwards. RP 2698. Police later found a gun with a jammed casing in the bushes near the house. RP 1068, 1870-71.

Mr. Ray ran to the back of the U-Haul to get to his car. RP 2431-32. He threw his gun into the car on top of a bag of marijuana in the passenger seat. RP 2699. Police later found Mr. Ray's blood on the center console and the outside of the driver's side door. RP 989, 1264.

He could not find his car keys. RP 2491-92. Police found the keys stuffed between the console and the driver's seat. RP 985. Afraid because he heard raised voices near the bushes by the house, Mr. Ray got out of the car and ran. RP 2492. Confused and afraid, Mr. Ray left his gun in the car and ran down the street. RP 2493, 2702. A neighbor of ATL gave Mr. Ray a ride to a Wal-Mart parking lot. RP 1173. Mr. Sabb passed away that evening. RP 2014-2015.

One witness reported hearing a number of people yelling after the gunfire. RP 2453-54. A neighbor reported that between three and five minutes after the sound of gunfire she saw people scatter from the area around ATL's house. RP 750-51, 764.

Mr. Ray's cell phone records indicated that at 10:05 p.m. he telephoned his wife. RP 1826. At 10:38 p.m. he called the law offices of Smith & White, at 10:40 p.m. he called CJ Bail Bonds, and at 10:47 p.m. he called another law office. RP 1820-21. Mr. Ray did not want to turn himself in without an attorney. However, because it was a holiday, he could not get representation for a few days. RP 2505. He feared if he were arrested, he would be booked into the Pierce County jail and assaulted by Mr. Sabb's friends. RP 2492.

The following morning, police found a 9 mm Sig Sauer semi-automatic gun underneath a bush on the south side of the residence. RP 1068, 1076. It had a casing lodged in the gun slide and seven live rounds inside the magazine⁴. RP 1071-72. Police found 5 shell casings at the scene. RP 1079-1080. The shell casings were 9 mm Luger. RP 1072, 1081.

Testing on the gun handle, grip, ammunition and casings provided no latent fingerprints. RP 1075,1083, 1085. 1094. However, the crime lab developed a male DNA profile from the firearm, which did not match Mr. Ray or Mr. Sabb. RP 1268. The 9mm was not tested for DNA biological fluid (blood, semen or saliva) because it did not appear to be a bodily fluid. RP 1268. For the ammunition and casings, there was a mixture of multiple DNA profiles. RP 1271.

Police found a .22 caliber handgun in a gun box on the porch. RP 928. The handgun had been reported as stolen. RP 1925. There was a fanny pack next to the gun case. Police did not look inside of the fanny pack to see if there were bullets or magazines in it. RP 1923.

⁴ The magazine holds 15 rounds of ammunition. RP 1079.

Accompanied by his attorney, Mr. Ray turned himself in on September 21st at the Pierce County Sheriff's Department. RP 2323, 2518. Prior to turning himself in, Mr. Ray had gone to Portland, Oregon after receiving phone calls from a caller who threatened to shoot him on sight. RP 2728. He was further warned by other friends that, "...they're looking for you pretty tough, bro." RP 2728. He determined he would "lay low" for a couple of weeks and let things quiet down. RP 2732. A detective testified that she had conversations with witnesses, admonishing them they should let the police "have a shot at it before the street tried to execute some kind of justice." RP 2279. Someone fired bullets into ATL's home within a few days after ATL spoke with police. RP 2329-2330. When Mr. Ray was booked into Pierce County jail Mr. Sabb's friends who were there assaulted him. RP 2492.

A jury convicted Mr. Ray on both counts. CP 551,553.

Sentencing Hearing

At the sentencing hearing, the state provided copies of convictions from Oregon that served as the predicate convictions for a Persistent Offender life sentence. The state contended that Mr. Ray had two strikes offenses based on no contest pleas for a manslaughter 1 conviction in Oregon in 1984, shortly after he had

turned 18, and a robbery third degree conviction in Oregon in 1993.
CP 621, 682.

The 1993 indictment charged a robbery second degree:

COUNT 1
ROBBERY IN THE SECOND DEGREE

The said defendants, on or about August 21, 1993, in the County of Multnomah, State of Oregon, did unlawfully and knowingly use and threaten the immediate use of physical force upon Eric C. Sheldon, being aided by each other, actually present, while in the course of attempting to commit theft of property, to-wit: lawful currency of the United States of America, with the intent of preventing and overcoming resistance to the said defendants' taking of the said property, contrary to the Statutes in such cases made and provided and against the peace and dignity of the State of Oregon,

Dated at Portland, Oregon, in the county aforesaid on August 30, 1993.

CP 643. Mr. Ray pleaded no contest to robbery in the third degree.

The plea did not contain a statement of facts.

14. I know that the sentence is up to the Court to decide. The District Attorney may provide reports or other information if requested by the Court. I understand that the District Attorney will make the following recommendation to the Court about my sentence or about other pending charges. This recommendation is (X) is not () made pursuant to ORS 135.432(2): PLEAD TO ROB III (LTD CLT)
DISMISS WILL NOT INDICT CONVENIENCE STORE
ROBBERY # PVB 93-73365

RECOMMEND: GB C-5 11-12mo PEN CONCURRENT TO PV III V.

15-A. I plead Guilty because, in Multnomah County, Oregon, I did the following: AND AFFLUIDE.

15-B. I plead No Contest because (A) I understand that a jury or judge could find me guilty of the charge(s), so I prefer to accept the plea offer (defendant's initials: RA), of (B): ALL 14 ABOVE

CP 646.

The manslaughter no contest plea contained the following set of facts:

14. I plead ~~NO CONTEST~~ ^{NO CONTEST} "GUILTY" on the basis of the fact that in Multnomah County, Oregon, (write in facts - This state's and dates) I, unlawfully aided the Co-DEFENDANT - Eddie Horton to commit a robbery of the decedent - Leslie Walker - during the course of which he killed her with a firearm which I had reason to know he possessed. ~~at the time.~~ ^{These facts would be established by the state's evidence.} This state's evidence would show

CP 638.

The court disagreed with defense counsel's argument that the lack of a statement of facts for the robbery third degree conviction and the statement of facts for the 1986 manslaughter conviction actually corresponded with a first-degree murder rather than a manslaughter offense, should preclude use of the two prior convictions. RP 2932. The court imposed a sentence of life without the possibility of parole. RP 2932. The court included legal financial obligations of a \$200 criminal filing fee and a \$100 DNA database fee. CP 755. The court signed an order of indigency. CP 767-769. Mr. Ray filed a timely notice of appeal. CP 766.

III. ARGUMENT

A. The Evidence Was Insufficient For A Reasonable Finder of Fact To Conclude The Homicide Was Not Justified.

Due process rights, guaranteed under both the Washington Constitution and the United States Constitution, require the state to prove every element of a crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed. 368 (1970); *State v. Baeza*, 100 Wn.2d 487, 670 P.2d 646 (1983).

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the state, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). Sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal. *Baeza*, 100 Wn.2d at 488.

A person is guilty of murder in the second degree, when without premeditation, he acts with intent to cause the death of another, and that individual dies as a result. RCW 9A.32.050.

Where a claim of self-defense is made, the absence of self-defense becomes another element of the offense which the state

must disprove beyond a reasonable doubt. *State v. Acosta*, 101 Wn.2d 612, 615-16, 683 P.2d 1069 (1984) (abrogated on other grounds by *State v. Camara*, 113 Wn.2d 631, 781 P.2d 483 (1989)).

A self-defense claim is rooted in the right of every citizen to reasonably defend himself against an unwarranted attack. *State v. Janes*, 121 Wn.2d 220, 237, 850 P.2d 495 (1993). A homicide is lawful when an individual reasonably believes that (1) another intends to commit a felony or to inflict great personal injury on him, (2) and there is an imminent danger of it being accomplished. RCW 9A.16.050.

It is well settled that a jury need not find actual imminent harm. Rather, it may find self-defense based on the defendant's subjective, reasonable belief of imminent harm from the victim. *Janes*, 121 Wn.2d at 238-239. The jury should determine the reasonableness of the defendant's belief based on the facts and surrounding circumstances as they appeared to the defendant at the time. *State v. George*, 161 Wn. App. 86, 249 P.3d 202 (2011); *State v. Wanrow*, 88 Wn.2d 221, 235-36, 559 P.2d 548 (1977).

The state's theory was that Mr. Ray walked up to the porch with his gun pointed and shot Mr. Sabb. The evidence does not support that theory but supports Mr. Ray's claim of self defense.

Mr. Ray not only testified that Mr. Sabb beat him with his hands and feet but produced photographs which showed the resultant bruising to his face, arms, elbow, and side. Mr. Ray's eyeglasses and shirt button, knocked off in the beating, were found in the grass in front of the house. Mr. Ray's blood was on the outside driver's side door and smeared inside his car on the center console. Mr. Sabb physically attacked and injured Mr. Ray sometime between 9:54 p.m. and 9:57 p.m.

Mr. Sabb threatened Mr. Ray and Mr. Ray had every reason to believe he would carry out the threats. Mr. Ray heard Mr. Sabb yell he would show him "how he deal with people that play with his money or his shit." He heard Mr. Sabb yell for someone to get him his "thing" out of the car trunk. Mr. Sabb kept his guns in the trunk of his car. Mr. Sabb used gloves when he touched guns. His partner, Ms. Fuqua, watched him put on his gloves just before the shooting. No fingerprints were on the 9mm Sig Sauer left under the bushes, or the ammunition. Mr. Ray did not wear gloves. Mr. Sabb did. The weapon was not tested for blood because it did not appear

to be bodily fluids, yet clearly Mr. Ray was bleeding sufficiently enough that he left blood on and in his car.

Police found bullet casings in the yard. If, as the state asserts, Mr. Ray had walked up to the house, pointed a gun and fired it when Mr. Sabb came onto the porch, there is no explanation for why casings were found all about the yard. The shooting resulted from Mr. Sabb chasing Mr. Ray around the yard firing his own 9mm Sig Sauer. The Sig Sauer was found in the bushes. Mr. Ray did not pass by the bushes on the run to his car.

The state did not produce sufficient evidence to prove beyond a reasonable doubt that, under the circumstances, and knowing what he knew about Mr. Sabb, Mr. Ray did not act in self-defense. Where the reviewing Court finds insufficient evidence to prove an element of a crime, reversal is required. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). Retrial following reversal for insufficient evidence is prohibited, and dismissal is the remedy. *Id.*

B. Mr. Ray's Prior Oregon Conviction Cannot Be Counted As A Strike Offense In Washington.

1. Standard of Review

An appellate court conducts a *de novo* review of a sentencing court's decision to consider a prior conviction as a strike under the Persistent Offender Accountability Act (POAA). *State v. Thiefauld*, 160 Wn.2d 409, 414, 158 P.3d 580 (2007).

Out of state convictions for offenses are classified according to the comparable offense definitions and sentences provided by Washington law. RCW 9.94A.525(3). Convictions from other jurisdictions count as strikes if they are comparable to Washington's most serious offenses. RCW 9.94A.030(37)(a)(ii).

It is the state's burden to prove an out of state conviction is comparable to a Washington offense by a preponderance of the evidence. *State v. Ford*, 137 Wn.2d 472, 479-480, 973 P.2d 452 (1999). Comparability may be shown either by demonstrating legal comparability, meaning the elements of the crimes are legally identical, or factual comparability, meaning the conduct underlying the out-of-state crime would have violated a comparable Washington statute. *Id.*

The State of Oregon charged Mr. Ray by indictment with robbery in the second degree in 1993. Robbery in the second degree was defined:

- (1) A person commits the crime of robbery in the second degree if the person violates ORS 164.395 and the person
 - a. Represents by word or conduct that the person is armed with what purports to be a dangerous or deadly weapon; or
 - b. Is aided by another person actually present.
- (2) Robbery in the second degree is a Class B felony.

ORS 164.405 (1971 c.743 § 149)

Under Oregon law, robbery in the third degree is defined as:

- (1) A person commits the crime of robbery in the third degree if in the course of committing or attempting to commit theft the person uses or threatens the immediate use of physical force upon another person 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.
- (2) Robbery in the third degree is a Class C felony.

O.R.S. § 164.395 (1971 c. 743 § 148).

Under Washington law, robbery in the second degree is defined as robbery. (RCW 9A.56.210; Enacted by Laws of 1975, 1st

Ex.Sess., ch.260, § 9A.56.210). A person commits robbery when he (1) unlawfully takes personal property from the person of another (2) against his will by the use or threatened use of immediate force, violence, or fear of injury to that person or his property or the person or property of anyone (3) such fear or force must be used to obtain or retain possession of the property, or to prevent or overcome resistance to the taking; in either of which cases the degree of force is immaterial (4) such taking constitutes robbery whenever it appears that, although the taking was fully completed without the knowledge of the person from whom taken, such knowledge was prevented by the use of force or fear. RCW 9A.56.190 (Enacted by Laws of 1975, 1st Ex.Sess., ch.260, § 9A.56.190).

The elements of robbery third degree in Oregon are legally comparable to the elements of robbery second degree in Washington. *State v. McIntyre*, 112 Wn. App. 478, 49 P.3d 151 (2002).

Mr. Ray's petition to enter plea was a plea of no contest to Robbery in the Third Degree, as a lesser included offense. CP 645. So, although the crimes are legally comparable, the issue is whether there was a factual basis for the no contest plea to robbery

third degree, sufficient to warrant inclusion of the conviction to sustain a Persistent Offender sentence of life without the possibility of parole.

2. The Lack Of Record Of A Factual Basis For The Oregon Robbery Conviction Bars Its Inclusion As A Prior Offense To Sustain A Persistent Offender Sentence.

A no contest plea is a "special creature under law" because it is a plea "by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty." *United States v. Nguyen*, 465 F.3d 1128, 1130 (9th Cir.2006); *North Carolina v. Alford*, 400 U.S. 25, 35, 91 S. Ct. 160, 27 L.Ed.2d 162 (1970).

In *Alford*, the Court observed that some courts treat a no contest plea as "in effect, a plea of guilty" while other courts treat it as a "query directed to the court to determine the defendant's guilt." *Alford*, 400 U.S. at 35 n. 8 (quoting *United States v. Food & Grocery Bureau*, 43 F.Supp. 974, 979 (S.D.Cal. 1942), *aff'd*, 139 F.2d 973 (9th Cir. 1943)). The *Alford* Court concluded "As a result, it is impossible to state precisely what a defendant does admit when

he enters a ["no contest"] plea in a way that will consistently fit all the cases." *Alford*, 400 U.S. at 35, n. 8.

Washington does not recognize a plea of no contest. *State v. Heath*, 168 Wn. App. 894, 279 P.3d 458 (2012); CrR 4.2(a) ("A defendant may plead not guilty, not guilty by reason of insanity, or guilty"). And, no Washington statute explicitly approves of an *Alford* plea.

However, Washington courts acknowledge that a trial court may accept an otherwise voluntary plea of guilt, even if the defendant claims innocence, where there is "in the record strong evidence of the defendant's guilt and his plea represents 'a voluntary and intelligent choice among the alternative courses of action open to (him).'" *State v. Newton*, 87 Wn.2d 363, 372, 552 P.2d 682 (1976).

For a Washington court to accept an *Alford* plea it must be made (1) voluntarily, (2) competently, (3) with an understanding of the nature of the charge and consequences of the plea, and (4) the judge is satisfied there is a factual basis for the plea. *In re Cross*, 178 Wn.2d 519, 521, 309 P.3d 1186 (2013).

Oregon law allows for three types of pleadings to an indictment: guilty, not guilty, and no contest. A defendant may plead

no contest only with the consent of the court. Such a plea shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration. O.R.S. § 135.335. (1973 c. 836 § 159).

Oregon law mandates the court must find a factual basis for the no contest plea. O.R.S. § 135.395. This requirement of a factual basis is illustrated in *Capps v. Cupp*, 68 Or. App. 327, 681 P.2d 158 (1984). There, the petitioner claimed his no contest plea was not made knowingly, willingly, or intelligently, and should be reversed because it was unconstitutional. *Id.* at 330.

The Court summarized the facts: the petitioner made a written plea petition acknowledging he had struck a certain individual, the plea was freely and voluntarily given, he understood the matters alleged in the indictment and the plea petition, the trial court could impose the same punishment as if he had pleaded not guilty but was convicted, and he knew the maximum penalties. *Id.* In open court the petitioner acknowledged the trial court would arrive at a judgment based on the police reports and the judge specifically asked if it were true that he based his plea on "having struck Avery Bliss." The petitioner answered in the affirmative and

"Only then did the trial court accept the plea of no contest." *Id.* at 330.

None of the safeguards found in *Capps* are present in this case. The written no contest plea neither admits or stipulates to facts, nor were they proven beyond a reasonable doubt. Unlike Mr. Ray's 1986 plea petition, the portion for recitation of the facts of the crime is left blank. The state produced no transcript or any written finding by the Oregon trial court of the basis for the plea acceptance. And there is no amended indictment to substantiate a factual basis for the charges.

In *State v. Olson*, the Court concluded that the federal framework of analysis for analyzing foreign convictions under the federal Armed Career Criminal Act (ACCA) was consistent with the Washington framework found in *In Re Personal Restraint of Lavery*, the Court's consideration of facts that might have supported a prior conviction is limited to only those facts that were clearly charged and then clearly proved beyond a reasonable doubt to a jury or admitted by the defendant. *State v. Olson*, 180 Wn.2d 468, 325 P.3d 187 (2014).

In *Newton*, the Washington Supreme Court held that the factual basis for a guilty plea may come from any source the court

finds reliable: admission of defendant, affidavits by the prosecutor, a presentence report, a prosecutor's statement. The Court held that whatever material relied upon by a trial court must be made a part of the record. *Newton*, 87 Wn.2d at 370. Even if a defendant wanted to plead guilty, but refused to admit guilt, the court could nevertheless accept a guilty plea if the factual basis for the plea could be established. *Id.* at 371.

3. The Trial Court Erred When It Imposed
The Persistent Offender Sentence Using
The Prior Robbery Conviction As A
Predicate Conviction.

The conviction in this case lacks any of the indicia of a factual basis for acceptance of the plea. The state bears the burden to produce sufficient evidence for the trial court to consider a prior conviction as part of the offender score. The record is silent for the basis for the no contest plea, Mr. Ray did not stipulate to any facts, and the matter was not proved to a jury beyond a reasonable doubt. Mr. Ray respectfully asks this Court to reverse his sentence and remand for resentencing within the standard range.

C. The Trial Court Imposed Legal Financial Obligations
On An Indigent Criminal Defendant Which Are No
Longer Authorized By Statute.

Sentencing courts may impose only statutorily authorized sentences. *State v. Paulson*, 131 Wn. App. 579, 588, 128 P.3d 133 (2006). A sentencing court does not have authority to sentence an offender beyond that authorized by the legislature. *In re Pers. Restraint of Fleming*, 129 Wn.2d 529, 533, 919 P.2d 66 (1996). When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered. *State v. Cayenne*, 139 Wn. App. 114, 118, 158 P.3d 623 (2007).

The trial court imposed a \$100 DNA Database fee and a \$200 criminal filing fee as part of Mr. Ray's judgment and sentence. CP 755.

House Bill 1783 amended the criminal filing fee statute on March 27, 2018. Under the former criminal filing fee statute, upon a conviction, an adult defendant in a criminal case was liable for a \$200 fee. Former RCW 36.18.020(2)(h). The current statute prohibits a court from imposing this fee on a defendant who is

indigent as defined in RCW 10.101.010(3)(a) through (c). RCW 36.18.020(2)(h).

Our State Supreme Court held that House Bill 1783 applied on appeal to invalidate a \$200 criminal filing fee imposed on an indigent defendant. *State v. Ramirez*, 426 P.3d 714 2018 WL 4499761 (September 20, 2018). RCW 10.101.013(3)(d) defines "indigent" as a person unable to pay the anticipated cost of counsel for the matter before the court. Here, the trial court signed an order of indigency for Mr. Ray to pursue his appeal, and thus meets the requirement of indigency. The criminal filing fee should be stricken.

House Bill 1783 also establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction. Laws of 2018 ch. 269 §§ 1, 7, 18. Mr. Ray has two prior Washington state convictions. CP 754. He is exempt from the DNA database fee, and the fee should be stricken from his judgment and sentence.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Ray asks this Court to reverse his conviction and dismiss with prejudice. In the alternative, he asks the Court to reverse his sentence and

remand with instruction for a resentencing within the standard range. The criminal filing fee and DNA database fee should be stricken as they are no longer authorized by law.

Respectfully submitted this 22nd day of October 2018.

A handwritten signature in black ink that reads "Marie Trombley". The signature is written in a cursive style and is contained within a thin black rectangular border.

Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

CERTIFICATE OF SERVICE

I, Marie Trombley, do hereby certify under penalty of perjury under the laws of the State of Washington, that on October 22, 2018, I mailed to the following US Postal Service first class mail, the postage prepaid, or electronically served, by prior agreement between the parties, a true and correct copy of the Appellant's Opening Brief to the following: Pierce County Prosecuting Attorney at pcpatcecf@co.pierce.wa.us and to Yancy Ray/DOC#762825, Washington State Penitentiary, 1313 N. 13th Ave, Walla Walla, WA 99362.



Marie Trombley
WSBA 41410
PO Box 829
Graham, WA 98338

MARIE TROMBLEY

October 19, 2018 - 7:31 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51348-0
Appellate Court Case Title: State of Washington, Respondent v. Yancy Ray, Appellant
Superior Court Case Number: 16-1-03560-6

The following documents have been uploaded:

- 513480_Briefs_20181019193035D2724415_1122.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Yancy RAY 513480 AOB.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@co.pierce.wa.us

Comments:

Sender Name: Marie Trombley - Email: marietrombley@comcast.net
Address:
PO BOX 829
GRAHAM, WA, 98338-0829
Phone: 253-445-7920

Note: The Filing Id is 20181019193035D2724415