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**Apr 11, 2012**  
Court of Appeals  
Division III  
State of Washington

29966-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

COREY J. WILLIAMS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. The court erred in including Mr. Williams's 2002 Alaska theft conviction in calculating his offender score.

B. ISSUES

1. Is a foreign criminal theft statute that does not include an express element of intent comparable to a Washington criminal theft statute that requires a specific intent to deprive another of property?
2. Is a 2002 conviction under a foreign statute comparable to a conviction under a Washington statute which was first enacted in 2007?

C. STATEMENT OF THE CASE

A jury found Corey Williams guilty of two counts of delivery of a controlled substance, committed on August 1 and August 5, 2009, and one count of forgery committed on August 13, 2009. (CP 12) At the first sentencing hearing, defense counsel challenged the State's claim that a prior conviction for vehicle theft, allegedly committed in Alaska in 2001, should be included in calculating Mr. Williams's offender score. (RP 9) He then conceded that including the Alaska conviction was harmless

because Mr. Williams's offender score would be at least three, even without the prior Alaska conviction, as Mr. Williams was on community custody at the time he committed the current offenses. (RP 12) The court decided, however, that it was necessary to make an accurate determination of the correct offender score, and continued the sentencing hearing. (RP 13)

Prior to the next hearing, defense counsel submitted a letter to the court indicating that the Alaska statute was not comparable to any Washington felony offense. (CP 25) Counsel also advised the court that Mr. Williams had been released from community custody prior to the commission of the current offenses, but inexplicably conceded that the correct offender score would still be three points. (CP 25)

At the continued sentencing hearing, defense counsel again contended the Alaska conviction should not be included in calculating the offender score but that the standard range sentence based on the offender score of three remained correct. (RP 21-22) The court entered judgment and sentence with an offender score of three, predicated on Mr. Williams's Alaska conviction for a 2001 vehicle theft, commission of the current offenses while on community placement, and each of the two current offenses. (CP 13, 15)

In November, 2010, apparently in response to a *pro se* motion filed by Mr. Williams<sup>1</sup>, the State conceded that Mr. Williams was not on community custody at the time of the current offenses, but argued that the Alaska offense of vehicle theft, AS 11.46.360(a)(1), was comparable to Washington's offense of taking a motor vehicle, RCW 9A.56.075. (CP 24, 28, 31) In response, Mr. Williams pointed out that the State had failed to present any evidence of the Alaska conviction and the court had failed to affirmatively determine whether the Alaska offense was comparable to any Washington crime. (CP 35-37)

In May 2011, the State filed a certified copy of the 2002 Alaska judgment. (Supp CP 174-185)

In July, 2011 the court entered an order finding that Mr. Williams had a prior Alaska conviction for first degree vehicle theft under Alaska Statute 11.46.360 and that the elements of the Alaska offense were comparable to the crime of Theft of a Motor Vehicle, RCW 9A.56.065. (CP 172-73) The court concluded Mr. Williams's offender score was correctly calculated as a "3", effectively denying Mr. Williams's motions for resentencing. (CP 173)

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<sup>1</sup> The original motion does not appear in the court file.

D. ARGUMENT

1. THE ELEMENTS OF THE ALASKA STATUTE ARE NOT LEGALLY COMPARABLE TO THE ELEMENTS OF THE WASHINGTON STATUTE.

In order to include out-of-state convictions in an offender score, the foreign offenses must be comparable to a Washington offense. *State v. Larkins*, 147 Wn. App. 858, 862-63, 199 P.3d 441 (2008). Offenses are legally comparable if the elements of the crimes are the same. *In re Pers. Restraint of Crawford*, 150 Wn. App. 787, 793-94, 209 P.3d 507 (2009). In Washington, “[a] person is guilty of theft of a motor vehicle if he or she commits theft of a motor vehicle.” RCW 9A.56.065(1). “Theft” means “[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services.” RCW 9A.56.020(1)(a).

The statute pursuant to which Mr. Williams was convicted in 2002 provides:

- (a) A person commits the crime of vehicle theft in the first degree if, having no right to do so or any reasonable ground to believe the person has such a right, the person drives, tows away, or takes
  - (1) the car, truck, motorcycle, motor home, bus, aircraft, or watercraft of another;
  - ...

AS 11.46.360.

Washington's statute expressly requires a specific intent: the intent to deprive another of property of services. *See State v. Crittenden*, 146 Wn. App. 361, 189 P.3d 849, *review denied* 165 Wn.2d 1042, 205 P.3d 132 (2008). The Alaska statute contains no express mental element whatsoever. Even assuming the Alaska theft statute implies a general intent element, a foreign conviction is not legally comparable to a Washington crime where the foreign crime is a general intent crime and the Washington crime requires specific intent. *In re Personal Restraint of Lavery*, 154 Wn.2d 249, 255-56, 111 P.3d 837 (2005).

The court erred in including the Alaska conviction in calculating Mr. Williams's offender score. *See* RCW 9.94A.525(3).

2. A 2002 ALASKA CONVICTION CANNOT BE INCLUDED IN AN OFFENDER SCORE CALCULATION BASED ON COMPARABILITY TO A WASHINGTON OFFENSE ENACTED IN 2007.

In determining legal comparability, "the elements of the out-of-state crime must be compared to the elements of Washington criminal statutes in effect when the foreign crime was committed." *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998); *State v. McCorkle*, 88 Wn. App. 485, 945 P.2d 736, *affirmed* 137 Wn.2d 490, 973 P.2d 461 (1997). While the State claims that RCW 9A.56.065 is comparable to the

Alaska statute, the Washington statute was enacted in 2007, and thus was not in effect when Mr. Williams committed the Alaska offense in 2001. Laws of 2007, ch 199 § 2.

#### E. CONCLUSION

The offenses defined in Alaska and Washington statutes are not comparable, nor was the Washington statute in effect at the time Mr. Williams committed the offense of which he was convicted by an Alaska court in 2002. The prior conviction was erroneously included in calculating Mr. Williams's offender score.

The matter should be remanded to superior court for resentencing based on a properly calculated offender score.

Dated this 11th day of April, 2012.

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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29966-0-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
COREY J. WILLIAMS,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on April 11, 2012, I served a copy of the Appellant's Brief in this matter by email on the attorney for the respondent, receipt confirmed, pursuant to the parties' agreement:

Terry J. Bloor  
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I certify under penalty of perjury under the laws of the State of Washington that on April 11, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on April 11, 2012.

  
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