

FILED
JUNE 11, 2015
Court of Appeals
Division III
State of Washington

33215-2 - III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

ROBERT RUSSELL ELLISON, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF APPELLANT

LAWRENCE H. HASKELL
Prosecuting Attorney

Brian C. O'Brien
Senior Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. APPELLANT’S ASSIGNMENTS OF ERROR 1

II. ISSUES PRESENTED 2

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 5

 A. IN A PROSECUTION FOR FAILURE TO REGISTER AS A SEX OFFENDER, THE DEFENDANT MAY NOT COLLATERALLY ATTACK THE LEGALITY OF HIS OR HER PREDICATE OFFENSE. WHILE THE PREDICATE CONVICTION MUST BE FACIALLY VALID, THE STATE IS NOT REQUIRED TO PROVE THE DEFENDANT WAS REQUIRED TO REGISTER PURSUANT TO A CONSTITUTIONALLY VALID CONVICTION.....5

 B. IN A PROSECUTION FOR FAILURE TO REGISTER AS A SEX OFFENDER, A DEFENDANT MAY NOT COLLATERALLY CHALLENGE THE USE OF A PREDICATE OFFENSE WHERE SUCH CHALLENGE IS BASED UPON NON-CONSTITUTIONAL EVIDENTIARY OR FACTUAL ISSUES REQUIRING AN EXAMINATION OF THE TOTAL RECORD IN THE PREDICATE OFFENSE12

V. CONCLUSION 14

TABLE OF AUTHORITIES

WASHINGTON CASES

In re the Personal Restraint Petition of Meyer,
142 Wn.2d 608, 16 P.3d 563 (2001)..... 9

State v. Ammons, 105 Wn.2d 175, 713 P.2d 719,
amended, 105 Wn.2d 175, 718 P.2d 796 (1986) 6, 7, 10

State v. Downing, 122 Wn. App. 185, 93 P.3d 900 (2004)..... 8

State v. Gonzales, 103 Wn.2d 564, 693 P.2d 119 (1985)..... 6, 7

State v. McNallie 64 Wn. App. 101, 823 P.2d 1122 (1992)..... 10

State v. McNallie, 120 Wn.2d 925, 846 P.2d 1358 (1993)..... 10

State v. Snyder, 40 Wn. App. 338, 698 P.2d 597 (1985) 8

State v. Summers, 120 Wn.2d 801, 846 P.2d 490 (1993)..... 5, 6

State v. Swindell, 93 Wn.2d 192, 607 P.2d 852 (1980)..... 5, 6

State v. Ward, 123 Wn.2d 488, 869 P.2d 1062 (1994) 9

OTHER SOURCES

In re Watford, 186 Cal. App. 4th 684, 112 Cal. Rptr. 3d 522 (2010)..... 11

State v. G.L., 420 N.J. Super. 158, 19 A.3d 1017 (App. Div. 2011) 11

I. APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court erred by holding that a valid predicate sex offense conviction is an essential element of the crime of failure to register as a sex offender, to the extent that this holding extends to matters beyond the facial validity of the predicate offense and allows an attack on the underlying facts of, or constitutionality of, the predicate offense. Conclusion of law 1.
2. The trial court erred by holding a defendant may challenge the use of a predicate conviction factually, when any attack, if authorized, requires the attack be based on the constitutionality of the predicate offense. Conclusion of law 2.
3. The trial court erred by holding that once the defendant calls attention to an error in the predicate conviction, then the burden switches to the State to prove the conviction is valid, because if the predicate offense is facially valid, it is not subject to attack, and, if it is subject to attack, the error must be of a constitutional nature, not just "error." Conclusion of law 3.
4. The trial court erred by holding that proof of a capacity hearing was necessary to prove the predicate offenses in this case, and that the rape of a child adjudications are invalid because the State failed to prove a capacity hearing occurred. Conclusion of law 4, 5, 6, 7, and 8.

5. The trial court erred by holding that the communication with a minor for immoral purposes adjudication was invalid because it was aggravated to a felony based upon the rape of a child adjudications. Conclusion of law 9.

II. ISSUES PRESENTED

1. In a prosecution for failure to register, is the State required to prove the defendant was required to register pursuant to a constitutionally valid predicate conviction?
2. In a prosecution for failure to register as a sex offender, may a defendant collaterally challenge the use of a predicate offense where such challenge is based upon non-constitutional evidentiary or factual issues requiring an examination and review of the total record underlying the predicate offense?

III. STATEMENT OF THE CASE

Defendant Ellison was charged by information in the Spokane County Superior Court with failure to register as a sex offender between October 3, 2013, and November 15, 2013, having two predicate offenses as set forth below. Information, CP 1.

Defendant's initial or first conviction requiring registration as a sex offender arose from his negotiated guilty plea to two counts of rape of a child in the first degree in juvenile court on August 3, 1995. Plea, CP 28-31; Juvenile

Disposition Order, CP 21-25. He was 13 years old at the time of the plea. (Date of birth 07/01/82). The information in that case alleged Mr. Ellison engaged in sexual intercourse between July 1, 1993, and May 25, 1995, with eight year old C.L. and eight year old P.J. CP 39. Victim P.J.'s grandmother, Ms. Jednyak, informed the court that Mr. Ellison's acts were going on for almost two years without any adult noticing. Transcript of sentencing, p. 13, CP 66. The record reflected a thorough, counseled guilty plea hearing. CP 42-50. The defendant was 11 and 12 years of age during the course of the charged conduct, which covered almost two years. The record did not establish that a competency hearing was conducted.

The second predicate offense occurred on October 21, 1999, when at the age of 17, the defendant committed the offense of communication with a minor for immoral purposes in violation of RCW 9.68A. 090.¹ Information, CP 75; guilty plea, CP 76-79. Defendant was 17 years of age when he entered his plea to this charge. This negotiated plea was entered in exchange for the State's agreement not to file additional charges. CP 78. The information in that matter alleged Mr. Ellison had been previously convicted of rape of a child in the first degree.

¹ Communication with a Minor for Immoral Purposes, whether a felony or a gross misdemeanor, is a sex offense under RCW 9A.44.128 and requires registration under RCW 9A.44.130.

The defendant was also convicted of failure to register as a sex offender in 2000, 2001, 2002, 2003, 2005, 2007, 2009, and 2011. CP 4, CP 88.

Prior to trial on the instant failure to register case, the defendant filed a motion to dismiss the failure to register as a sex offender charge, alleging that both predicate offenses were “invalid.” CP 10-86. The State responded, arguing that the State is not required to prove the constitutional validity of a predicate offense in a failure to register case, that the predicate offense was not invalid, and that in any event, the second predicate offense required registration separately from the first predicate offense. CP 87-91.

The superior court dismissed the case, holding that the 1995 rape of a child adjudications were invalid because the State failed to carry its burden of proving a capacity hearing had occurred. The court held that the later 1999 communication with a minor predicate was invalid because it was aggravated to a felony based upon the invalid 1995 rape of a child adjudications. The court held that it was not finding that any constitutional error occurred in the predicate offenses, but that the error was statutory. RP 6, lines 17-22; RP 7, lines 8-9.

IV. ARGUMENT

- A. IN A PROSECUTION FOR FAILURE TO REGISTER AS A SEX OFFENDER, THE DEFENDANT MAY NOT COLLATERALLY ATTACK THE LEGALITY OF HIS OR HER PREDICATE OFFENSE. WHILE THE PREDICATE CONVICTION MUST BE FACIALLY VALID, THE STATE IS NOT REQUIRED TO PROVE THE DEFENDANT WAS REQUIRED TO REGISTER PURSUANT TO A CONSTITUTIONALLY VALID CONVICTION.

No Washington case requires the State to prove the constitutional validity of a predicate sex offense in a failure to register prosecution, especially where 20 years have transpired between the predicate offense and the present case.² Moreover, no case allows a non-constitutional statutory or evidentiary challenge to a predicate offense.

In the present case, the court relied on *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980), and *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993), for support of its position that a proof of a valid predicate offense is an essential element of the crime of failure to register as a sex offender. CP 118-19. *Swindell* and *Summers* establish two rules that apply in any prosecution for violation of the Uniform Firearms Act. First, a defendant may raise a defense to such an unlawful possession of a firearm (UPFA) prosecution by alleging the *constitutional* invalidity of a predicate conviction, and second, upon doing

² The State is required to prove that there is a facially valid predicate conviction, and that the predicate conviction belongs to the defendant being tried.

so, the State must prove beyond a reasonable doubt that the predicate conviction is *constitutionally* sound. *Swindell*, 93 Wn.2d at 197. In raising this defense, the defendant bears the initial burden of offering a colorable, fact-specific argument supporting the claim of constitutional error in the prior conviction. Only after the defendant has made this initial showing does the State's burden arise. *Summers*, 120 Wn.2d at 812.

These cases and their holdings are limited to firearms cases such as UPFA, and have no application to the present case because of the limitations noted in *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719, 726, *amended*, 105 Wn.2d 175, 718 P.2d 796 (1986); and *State v. Gonzales*, 103 Wn.2d 564, 693 P.2d 119 (1985).

In *Gonzales, supra*, the Court held that in a prosecution for escape, the State is not required to prove the defendant was being detained pursuant to a constitutionally valid conviction. The Court refused “to permit defendants charged with escape to challenge the legality of their confinement at the escape trial.” *Id.* at 567. In distinguishing the few extant cases requiring proof of a constitutionally valid predicate conviction, the Court explained:

The statute involved in *Gore* and *Swindell* forbade exercise of a constitutionally protected right based on a person's criminal history. RCW 9.41.040 prohibits a person convicted of a crime of violence from owning, possessing or controlling a pistol. The ability of the individual citizen to bear arms, although subject to reasonable regulation by the State, *State v. Krantz*, 24 Wn.2d 350, 353, 164 P.2d 453 (1945), is

unquestionably a constitutionally protected right. *State v. Rupe*, 101 Wn.2d 664, 706, 683 P.2d 571 (1984); Const. art. 1, § 24. The first degree escape statute, however, impinges upon no constitutionally protected rights. No constitutional right of escape could exist under even the most innovative interpretation of the state or federal constitution.

Gonzales, 103 Wn.2d at 567.

Our State Supreme Court's reluctance to expand the limited constitutional predicate proof rule beyond felon in possession of firearms cases was noted in *State v. Ammons*, 105 Wn.2d 175, *certiorari denied* 479 U.S. 1930 (1986):

In only two situations has this court held that the state, before using a prior conviction, had to affirmatively show its constitutional validity: (1) a proceeding to establish a status of habitual criminal or habitual traffic offender, *State v. Chervenell*, 99 Wn.2d 309, 312, 662 P.2d 836 (1983); *State v. Holsworth*, 93 Wn.2d 148, 157, 607 P.2d 845 (1980); *State v. Ponce*, 93 Wn.2d 533, 611 P.2d 407 (1980); and (2) a proceeding to establish the crime of felon in possession of a firearm. *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980); *State v. Gore*, 101 Wn.2d 481, 681 P.2d 227, 39 A.L.R.4th 975 (1984), in which the prior conviction was an essential element.

We have refused to apply such a requirement in other situations. See *State v. Gonzales*, *supra* (use of prior conviction in prosecution for escape); *State v. Williams*, 98 Wn.2d 428, 656 P.2d 477 (1982); *State v. Thompson*, 95 Wn.2d 888, 632 P.2d 50 (1981) (use of prior conviction for impeachment purposes); *In re Bush*, 26 Wn. App. 486, 616 P.2d 666 (1980), *aff'd* 95 Wn.2d 551, 627 P.2d 953 (1981) (use of prior conviction to establish minimum term).

State v. Ammons, 105 Wn.2d at 187.³

³ Washington appears to be in the minority in permitting collateral constitutional attacks on a predicate felony in a firearm cases. See *Lewis v.*

The reasoning of the *Gonzales* Court applies with equal force in the instant case. Because no constitutionally protected right – similar to the right to bear arms - is implicated by the failure to register requirement, the offender must register and *continue to register* unless and until he satisfies the reporting statute and his duty *ends*, or *until* he has successfully attacked his offenses requiring registration, perhaps through personal restraint petition. *See, State v. Snyder*, 40 Wn. App. 338, 698 P.2d 597, 598 (1985) (“Perhaps defendants’ confinement on their original charges could have been attacked by personal restraint petition, or on direct appeal from those convictions, but the orderly administration of criminal justice requires that such judgments be treated as valid until a court with jurisdiction rules otherwise.” *Id.* at 339, emphasis added); and *see, State v. Downing*, 122 Wn. App. 185, 93 P.3d 900 (2004)

United States, 445 U.S. 55, 65, 100 S. Ct. 915, 921, 63 L. Ed. 2d 198 (1980) (“We therefore hold that § 1202(a)(1) prohibits a felon from possessing a firearm despite the fact that the predicate felony may be subject to collateral attack on constitutional grounds.”); *Clark v. State*, 739 P.2d 777, 780-81 (Alaska Ct. App. 1987) (noting that “[t]he majority of the state courts appear to follow the result which the court reached in *Lewis*. *See Reynolds v. State*, 18 Ark.App. 193, 712 S.W.2d 329 (1986); *People v. Harty*, 173 Cal.App.3d 493, 219 Cal.Rptr. 85 (1985); *State v. Williams*, 392 So.2d 448 (La.1980); *People v. Cornish*, 104 Misc.2d 72, 427 N.Y.S.2d 564 (N.Y.App.Div.1980); *Small v. State*, 623 P.2d 1200 (Wyo.1981); (cannot raise collateral attack on prior conviction as defense to felon in possession charge”).

(defendant was subject to conviction for bail jumping, even though all underlying unlawful issuance of bank checks charges were dismissed).

As to the sex offender registration requirement, our State Supreme Court found no due process violation existed in the duty to register, because the duty “does not alter the standard of punishment,” - registration was merely a collateral consequence of the plea. *State v. Ward*, 123 Wn.2d 488, 513-14, 869 P.2d 1062 (1994). Nor does the physical act of registration create an affirmative disability or restraint. *Ward*, 123 Wn.2d at 500-501. Collecting information about sex offenders or their DNA in order to aid community law enforcement does not restrain sex offenders in any way. *Id.* (citations omitted). Sex offenders are free to move within their community or from one community to another, provided they comply with the statute's registration requirements. *Id.*

Our Supreme Court has concluded that the sex offender registration and disclosure requirements are “essentially procedural statutes” and no substantive liberty interest arises from them. *In re Personal Restraint Petition of Meyer*, 142 Wn.2d 608, 619, 16 P.3d 563 (2001). Moreover, “[r]egistration alone imposes burdens of little, if any, significance.” *Ward*, 123 Wn.2d at 501. Therefore, the rationale of *Gonzales* prohibiting collateral attacks in escape cases should apply to cases requiring proof of a prior sexual offense - thereby

prohibiting collateral post-offense-date pre-trial attacks on the predicated sex offense.

The closest Washington case addressing this type of issue is *State v. McNallie*, 64 Wn. App. 101, 104-106, 823 P.2d 1122 (1992); which held that the habitual criminal/felon in possession rule did not apply to a communication with a minor case where the matter was elevated to a felony because of a prior sex offense conviction. The court noted the limiting language expressed in *Ammons*, 105 Wn.2d 175, and held that the conviction need only be facially valid. *McNallie*, 64 Wn. App. at 106. Therefore, McNallie could not attack his 1977 conviction on the constitutional basis that he was not informed of his right to remain silent if he went to trial. *Id.*

The Supreme Court accepted review and held that the record from McNallie's 1977 plea established a knowing and voluntary waiver of his right to remain silent, and therefore the Court need not determine the issue of whether proof of a constitutional sufficient predicate offense is necessary in sex cases. *State v. McNallie*, 120 Wn.2d 925, 934-35, 846 P.2d 1358 (1993).

Cases from other jurisdictions addressing this issue are few. Our sister state, California, has held that the registration requirement of the California Sex Offender Registration Act applies based upon the fact of conviction, even if the conviction is later determined to have been invalid, so long as the person

stands convicted of a sex offense and has a legal duty to register. *In re Watford*, 186 Cal. App. 4th 684, 112 Cal. Rptr.3d 522 (2010).

The appellate court for New Jersey followed the reasoning in *Watford, supra*, and held that Defendant was not entitled, pursuant to doctrine of fundamental fairness, to vacation of subsequent convictions for failing to register as a sex offender, even though defendant's underlying juvenile delinquency adjudication for sexual assault had been vacated on grounds that defendant's plea to the underlying offense had been invalid. The defendant's requirement to register could not be retroactively annulled because of vacation of underlying offense. *State v. G.L.*, 420 N.J. Super. 158, 19 A.3d 1017 (App. Div. 2011).

In *G.L., supra*, the court also noted the registration requirement to which defendant was subject is, along with community notification, a basic component of Megan's Law and was not retributive in nature.

Nothing in the statute suggests that the requirement of registration should be retroactively annulled because a plea to a crime subject to Megan's act is later withdrawn. Thus, as in *Watford* and *Lewis*, no legal basis for vacating defendant's convictions for failure to register exists.

State v. G.L., 420 N.J. Super. at 163-66.

- B. IN A PROSECUTION FOR FAILURE TO REGISTER AS A SEX OFFENDER, A DEFENDANT MAY NOT COLLATERALLY CHALLENGE THE USE OF A PREDICATE OFFENSE WHERE SUCH CHALLENGE IS BASED UPON NON-CONSTITUTIONAL EVIDENTIARY OR FACTUAL ISSUES REQUIRING AN EXAMINATION OF THE TOTAL RECORD IN THE PREDICATE OFFENSE.

The trial court erred by holding a defendant may challenge the use of a predicate conviction on factual grounds when any attack, if authorized, requires the attack be on the constitutionality of the predicate offense. Again, the trial court noted that it was not its intention to indicate that any constitutional error occurred in the predicate offenses, that the error was statutory. RP 6, lines 17-22; RP 7, lines 8-9.

In the instant case, the information charging the defendant in the first predicate rape alleged Mr. Ellison (date of birth 07/01/82) engaged in sexual intercourse between July 1, 1993, and May 25, 1995, with eight year old C.L. and 8 year old P.J. CP 39. There is no facial invalidity presented by the information, or by the judgment and sentence. Defendant's attack was based upon statutory and procedural grounds⁴ requiring an examination of the total record in the form that presently exists some twenty years later.

⁴ The trial court found that a hearing pursuant to RCW 9A.04.050 should have been held because the defendant was both eleven and twelve years old for some of the time period covered in the information. At age twelve he is presumed competent and at age eleven he is presumed incompetent. The original trial court did not make a finding regarding whether the events constituted a continuing course of conduct.

Suffice it to say it is only when a defendant presents a colorable, fact-specific argument supporting his claim that *constitutional error* occurred in a predicate conviction - in those limited cases allowing attacks on the predicate offense - that the State is required to prove beyond a reasonable doubt that the conviction reflected in a judgment and sentence is constitutionally valid. No constitutional infirmity was found to exist here. The information was facially valid.⁵ It was sufficient for the State to offer a certified copy of the judgment and sentence. No case allows evidentiary attacks on predicate convictions.

The trial court compounded this error by holding that the second predicate offense was invalid.⁶ This required the court to look beyond the record in the communication with a minor case to the factual record not existing in that case, but in another case some years earlier.⁷ No case extends

⁵ A sentence is facially invalid if we need look no further than the face of the judgment and sentence to answer the challenge. *State v. Lewis*, 141 Wn. App. 367, 394, 166 P.3d 786 (2007), *review denied*, 163 Wn.2d 1030, 185 P.3d 1195 (2008). “[T]he relevant question in a criminal case is whether the judgment and sentence is valid on its face, not whether related documents, such as plea agreements, are valid on their face.” *In re Pers. Restraint of Turay*, 150 Wn.2d 71, 82, 74 P.3d 1194 (2003).

⁶ This plea was a bargained for agreement wherein the State agreed not to file additional charges in exchange for a plea to this offense. CP 78.

⁷ Generally a guilty plea “waives or renders irrelevant” any constitutional defects occurring before its entry, “except those related to the circumstances of the plea or the government’s legal power to prosecute regardless of factual

the limited *Ammons* rule to allow *factual attacks* on circumstances occurring *outside the record* of the predicate offense itself. Again, the defendant was required to register under the facially valid communication with a minor for immoral purposes judgment of 1999.

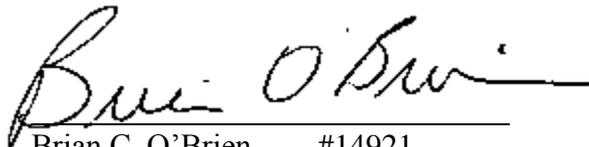
V. CONCLUSION

In a prosecution for failure to register as a sex offender, the defendant may not collaterally attack the legality of his or her predicate offense. While the predicate conviction must be facially valid, the State is not required to prove the defendant was required to register pursuant to a constitutionally valid conviction.

For the reasons stated above, the trial court's dismissal of the failure to register charge should be reversed and the matter remanded to superior court for further proceedings.

Dated this 11th day of June, 2015.

LAWRENCE H. HASKELL
Prosecuting Attorney



Brian C. O'Brien #14921
Deputy Prosecuting Attorney
Attorney for Respondent

guilt.” *In re Pers. Restraint of Bybee*, 142 Wn. App. 260, 268, 175 P.3d 589 (2007).

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

STATE OF WASHINGTON,

Appellant,

v.

ROBERT RUSSELL ELLISON,

Respondent,

NO. 33215-2-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 11, 2015, I e-mailed a copy of the Appellants Brief in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
Andrea@BurkhartandBurkhart.com

and mailed a copy to:

Robert Russell Ellison
1423 N. Wall St, #7
Spokane, WA 99201

6/11/2015

(Date)

Spokane, WA

(Place)

Crystal McNeese

(Signature)