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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 33215-2-III

STATE OF WASHINGTON, Appellant,

v.

ROBERT RUSSELL ELLISON, Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The trial court correctly dismissed the charge of failing to register as a sex offender when, as a defense to the element of a prior sex offense conviction, Ellison established that his juvenile disposition for rape was void due to lack of jurisdiction, and his subsequent conviction for communicating with a minor for immoral purposes was elevated to a felony based upon the void rape disposition. Because the State would have been unable to establish proof of an essential element of the charge of failing to register at trial, the order of dismissal was properly entered.

II. RESPONSES TO ASSIGNMENTS OF ERROR

RESPONSE TO ASSIGNMENT OF ERROR 1: The trial court did not err in permitting Ellison to present a fact-specific challenge to the constitutional validity of his prior convictions in a subsequent prosecution.

RESPONSE TO ASSIGNMENT OF ERROR 2: The trial court did not err in considering the facts establishing the constitutional invalidity of the predicate offenses.

RESPONSE TO ASSIGNMENT OF ERROR 3: The trial court did not err in applying the standard set forth in *State v. Summers* and *State v. Swindell* in considering Ellison's challenge to the predicate offenses.

RESPONSE TO ASSIGNMENT OF ERROR 4: The trial court did not err in determining that the failure to conduct a capacity hearing deprived the juvenile court of jurisdiction to enter the disposition order in Ellison's prior disposition.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Is the challenge to the constitutional validity of a predicate conviction proffered as evidence of guilt of a present charge an improper collateral attack on the prior conviction? NO.

ISSUE 2: Is the defendant permitted to demonstrate facts and circumstances surrounding the challenged conviction to establish constitutional infirmity? YES.

ISSUE 3: Is the juvenile disposition void for lack of jurisdiction under *State v. Golden* when the defendant was 11 years old when the crime was committed and the trial court failed to conduct a capacity hearing before entering the disposition order? YES.

ISSUE 4: Is the prior sex offense that was predicated upon the void juvenile disposition facially invalid? YES.

ISSUE 5: Is the prior sex offense that was predicated upon the void juvenile disposition constitutionally invalid under the *Summers* standard? YES.

ISSUE 6: Do *State v. Holsworth* and its progeny establish a defense to a charge requiring proof of a prior conviction when the defendant can present a fact-specific claim showing the prior conviction was constitutionally invalid? YES.

IV. STATEMENT OF THE CASE

Respondent Ellison accepts the State's statement of the facts and procedure relevant to the issues on review.

V. ARGUMENT

The existence of a prior conviction requiring registration is an essential element of the charge of failing to register as a sex offender, which the State must prove beyond a reasonable doubt. RCW 9A.44.130; *State v. Howe*, 151 Wn. App. 338, 343, 212 P.3d 565 (2009). Here, the trial court correctly concluded that Ellison's juvenile adjudication for a sex offense allegedly committed when he was 11 years old was void because the trial court lacked jurisdiction to enter a disposition order without first conducting a capacity hearing. Further, because Ellison's adjudication for communication with a minor for immoral purposes was elevated to a

felony based upon the void juvenile disposition order, that conviction was constitutionally invalid. As a result, the trial court correctly concluded the State would be unable to present sufficient evidence to meet its burden at trial. There was no error in entering the order of dismissal.

A. The State fails to demonstrate that Ellison must establish facial constitutional invalidity because challenging the present use of a prior conviction to establish an essential element is not a collateral attack.

Multiple cases have squarely rejected the argument the State proffers in the present case – that challenging the State's present use of a defective prior conviction constitutes an improper collateral attack. In *State v. Carpenter*, 117 Wn. App. 673, 72 P.3d 784 (2003), the Court of Appeals considered whether a defendant could challenge the adult court's jurisdiction to enter judgment on a charge without conducting a decline hearing as a defense to a sentence under the Persistent Offender Accountability Act. The *Carpenter* court disagreed that the challenge constituted an improper collateral attack "because it is directed to the present use of a prior conviction to prove that Carpenter is a persistent offender." *Id.* at 678.

In *State v. Knippling*, 141 Wn. App. 50, 58, 168 P.3d 426 (2007), the Court of Appeals reaffirmed its reasoning in *Carpenter* and rejected the State's reliance on *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, *amended*, 718 P.2d 796 (1986). The *Knippling* court held that in the absence of a declination or waiver from juvenile court establishing the adult court's jurisdiction, the State failed to meet its burden to prove the existence of a prior conviction. 141 Wn. App. at 58.

Similarly, in *State v. Holsworth*, 93 Wn.2d 148, 159-60, 607 P.2d 845 (1980), the Washington Supreme Court held that a challenge to the State's use of a prior conviction obtained by an involuntary guilty plea in a habitual criminal proceeding is not a collateral attack because the challenge is to the present use of a prior conviction to establish an essential element of the charge, not a collateral challenge to set aside the prior conviction. This same rationale has been applied by the Washington Supreme Court to challenges to predicate convictions required to sustain convictions for unlawfully possessing a firearm. *State v. Swindell*, 93 Wn.2d 192, 196, 607 P.2d 852 (1980); *State v. Summers*, 120 Wn.2d 801, 809-10, 846 P.2d 490 (1993).

Overwhelming authority thus rejects the State's argument that challenging a predicate prior conviction requires that the prior conviction

be facially invalid. Indeed, all three cases stand for the proposition that challenging the validity of a prior conviction used to establish an essential element in a present case is not a collateral attack at all.

B. The trial court correctly applied *State v. Golden* and *State v. Carpenter* to hold that a jurisdictional defect in a predicate offense is a valid defense to a subsequent prosecution.

The State's argument entirely overlooks the jurisdictional defect in Ellison's predicate juvenile adjudication. Lack of jurisdiction renders the judgment void *ab initio*. *Wesley v. Schneckloth*, 55 Wn.2d 90, 93, 346 P.2d 658 (1959). It is well established that a void order can be collaterally attacked at any time. *City of Seattle v. May*, 171 Wn.2d 847, 852, 256 P.3d 1161 (2011); *State v. Murdock*, 18 Wn. App. 294, 296, 567 P.2d 267 (1977). There was no error in concluding that the juvenile disposition was void under the facts presented here, regardless of whether the challenge is treated as a collateral attack or a defense to an essential element of a present charge.

At common law, and as subsequently recognized by statute, children are presumed to be incapable of committing criminal acts. *State v. J.P.S.*, 135 Wn.2d 34, 37, 954 P.2d 894 (1998). RCW 9A.04.050, first adopted in 1975, establishes a rebuttable presumption of incapacity for

criminal activity for children between the ages of 8 and 12. To rebut the presumption, the State has the burden to present clear and convincing evidence that the child has the capacity to understand the nature of the criminal act and know the act is wrong. *State v. Ramer*, 151 Wn.2d 106, 114, 86 P.3d 132 (2004). This burden is heightened in the case of sex crimes because it is difficult to determine whether a young child understand prohibitions on sexual conduct with other children. *Id.* at 115 (*citing J.P.S.*, 135 Wn.2d at 38). Here, Ellison was charged with a sex offense beginning at the time he was 11 years old. Accordingly, the State was required to prove his capacity by clear and convincing evidence to proceed, but failed to do so.

The failure to establish Ellison's capacity before proceeding with the adjudication renders the disposition order void for lack of jurisdiction. Jurisdiction exists as to three components: (1) subject matter, (2) parties, and (3) power to render the particular judgment. *State v. Golden*, 112 Wn. App. 68, 73, 47 P.3d 587 (2002) (*citing State v. Werner*, 129 Wn.2d 485, 493, 918 P.2d 916 (1996)). In *Golden*, the Court of Appeals held that the failure to conduct a capacity determination as to a 10 year old child deprived the court of its authority to act and limited the court's jurisdiction to conduct a capacity hearing, and nothing more. 112 Wn. App. at 77. Consequently, the disposition order was invalid on its face. *Id.*

The *Golden* court's reasoning is directly applicable to the present case. Because Ellison was less than 12 years old at the time the crime was alleged to have occurred, the trial court's jurisdiction was limited to determining his capacity to commit a crime. Because the trial court lacked authority to enter a disposition order without first conducting a capacity hearing, it lacked complete jurisdiction over the matter, rendering the disposition order void. And the State has presented no authority that would preclude a collateral attack on a void judgment.

C. Ellison's conviction for communicating with a minor for immoral purposes is constitutionally invalid and properly subject to challenge.

The State contends that the trial court erred in dismissing the failure to register charge because (1) the State is not required to prove a constitutionally valid prior conviction as an essential element, and (2) even if the State were so obligated, the predicate offenses were constitutionally valid. The State is mistaken on both points. Because Washington courts have required proof of a constitutionally valid prior conviction when the fact of the prior conviction is an essential element of the charge, Ellison may challenge the constitutional validity of the predicate offense as a defense to the charge of failing to register. The

juvenile disposition, as discussed above, is void *ab initio* and properly subject to collateral attack. The conviction for communicating with a minor for immoral purposes is constitutionally invalid because it was predicated upon the void adjudication, rendering Ellison's guilty plea involuntary.

Prior convictions that are constitutionally invalid may not be used to support guilt for another offense. *Burgett v. Texas*, 389 U.S. 109, 115, 88 S. Ct. 258, 19 L.Ed.2d 319 (1967). Due process principles, while not precluding the defendant from carrying some burden to overcome the presumption of regularity of the prior judgment, nevertheless limit the State's ability to rely on prior convictions that lack suffer from constitutional infirmity. *See Parke v. Raley*, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L.Ed.2d 391 (1992). Washington cases have applied these principles consistently. *See generally Summers*, 120 Wn.2d 801 (permitting challenge to constitutionality of predicate conviction for manslaughter even when Court of Appeals had previously affirmed judgment on appeal); *Swindell*, 93 Wn.2d 192 (requiring State to prove constitutionality of predicate conviction beyond a reasonable doubt once a defendant calls attention to alleged unconstitutionality).

The State relies upon dicta in *State v. Gonzales*, 103 Wn.2d 564, 693 P.2d 119 (1985) and *Ammons*, 105 Wn.2d 175, to argue that *Summers* and *Swindell* are the minority rule. To the contrary, Washington cases have consistently allowed constitutional challenges to predicate convictions as a defense to a new charge when the new charge requires proof of the predicate conviction as an element, for the reasons stated in *Burgett* – use of a constitutionally invalid prior conviction renews the original deprivation of a constitutional right. 389 U.S. at 115. *Gonzales*, which established an exception to the rule for convictions for escape, is distinguishable because a conviction is not an essential element in an escape charge – detention pursuant to conviction must be shown. Moreover, substantial public policy reasons support requiring individuals who are detained pursuant to a conviction to challenge their convictions through lawful channels, rather than establishing an incentive for detainees to risk life and limb in the hopes of obtaining recourse in a subsequent criminal proceeding.

Moreover, the *Gonzales* Court's attempt to distinguish *Swindell* on the grounds that possessing a firearm is a constitutional right while escaping from custody is misguided – "[i]f there is a collateral constitutional issue at all, it is the right to liberty absent a constitutionally valid conviction of a crime." 103 Wn.2d at 569-70 (Williams, C.J.,

concurring). Moreover, the *Gonzales* analysis fails to similarly reconcile the cases allowing challenges to predicate convictions used to establish habitual offender status for purposes of increasing mandatory minimum sentencing. *See State v. Chervenell,* 99 Wn.2d 309, 662 P.2d 836 (1983); *Holsworth*, 93 Wn.2d 148. There is no constitutional right to a particular sentence that justifies applying the *Gonzales* Court's reasoning to the challenges allowed in those cases.

Similarly, *Ammons* establishes an exception to the rule that the constitutional validity of prior convictions can be challenged in a subsequent proceeding. In holding that the SRA does not require the State to prove that prior convictions are constitutionally valid[1] before including them in an offender score, the *Ammons* Court noted the burden that would be imposed on the sentencing process. 105 Wn.2d at 188 ("To allow an attack [at a subsequent sentencing] would unduly and unjustifiably overburden the sentencing court."). This rationale simply does not apply to the present case, where both judicial economy and fundamental fairness are served by avoiding new convictions that rest upon prior invalid ones, rather than requiring multiple actions to collaterally challenge and vacate

[1] Notably, the *Ammons* Court reaffirmed the rule that a conviction that is constitutionally invalid on its face may not be included in the offender score under *Burgett*. 105 Wn.2d at 187-88.

the predicate offenses after suffering the consequences of the new conviction.

Under the due process principles articulated in *Burgett* and followed in Washington, where the fact of a prior conviction is an essential element of a new charge, the constitutional sufficiency of the prior conviction is a recognized defense to the new charge so long as the defense can raise a colorable, fact-specific claim of constitutional error. *Summers*, 120 Wn.2d at 812. Contrary to the State's bare assertion, review of the facts of the underlying conviction has always been permitted in evaluating whether the prior conviction passes constitutional muster. In *Summers*, for example, the court allowed the defendant to challenge a predicate conviction based upon erroneous jury instructions on self-defense. *See generally* 120 Wn.2d 801. *Swindell* permitted the predicate offense to be challenged based upon an improper communication between the prosecuting attorney and the defendant. *See generally* 93 Wn.2d 192. Indeed, to the extent *Ammons* limits this rule, it continues to permit challenges to convictions that are facially void. 105 Wn.2d at 187-88.

In the present case, under either standard, the conviction for communication with a minor for immoral purposes was invalid. The documents, on their face, establish that the felony conviction triggering

Ellison's registration requirement was predicated on the void prior sex offense. Because that prior offense was void, the State lacked sufficient evidence to convict. This is precisely the situation that was presented in *State v. Gore*, where the court observed that the Fourteenth Amendment's due process clause requires sufficient evidence supporting the conviction. 101 Wn.2d 481, 488, 681 P.2d 227 (1984) (*quoting State v. White,* 31 Wn. App. 655, 666, 644 P.2d 693 (1982)). In *Gore*, the predicate conviction was reversed on appeal after the defendant had been convicted of the subsequent offense. Consequently, the *Gore* Court held:

> Similarly, the petitioner here should not be made, in a subsequent prosecution, to suffer the consequences of a conviction based on insufficient evidence. We therefore agree with petitioner that his conviction for violating RCW 9.41.040, being predicated on an invalid conviction, must be reversed.

101 Wn.2d at 488.

As in *Gore*, Ellison's felony conviction for communicating with a minor for immoral purposes was predicated upon the prior sex conviction on the face of the charging documents and the guilty plea statement. CP 75, 76 (incorporating charging document to establish elements of the offense). Accordingly, as in *Gore*, the conviction was predicated on evidence that was insufficient to establish the charge, contrary to the

Fourteenth Amendment's due process requirements. As in *Gore*, the conviction is facially invalid and the trial court properly so ruled. CP 93.

However, even if the conviction were not invalid on its face, it would still be invalid on consideration of the facts and circumstances of conviction because it reflects a guilty plea that was not knowing, intelligent and voluntary. "A conviction based upon a guilty plea which is not knowing and voluntary is constitutionally invalid." *Chervenell*, 99 Wn.2d at 312 (*citing Boykin v. Alabama*, 395 U.S. 238, 242-43, 89 S. Ct. 1709, 23 L.Ed.2d 274 (1969)). A meaningful investigation sufficient to evaluate the evidence against the accused and the likelihood of conviction is constitutionally required as a matter of effective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010). A trial court violates a defendant's right to due process when it accepts a guilty plea without determining that the defendant understood the law in relation to the facts of the case. *Id.* at 118-19.

In the present case, an investigation into the State's evidence to prove the prior conviction would have revealed the jurisdictional deficiencies that rendered the conviction void. Under *A.N.J.*, trial counsel has a duty to evaluate the State's evidence and the likelihood of conviction in order to adequately advise a defendant on the merits of a plea offer, and

must conduct a sufficient investigation to fulfill this basic function. There is no strategic reason not to investigate the sufficiency of the State's proof of a predicate conviction. Moreover, a defendant whose predicate conviction is void cannot be said to have a knowing and intelligent understanding of how the law relates to the facts of his case if the State's inability to prove an essential element is not conveyed to him.

Because *Holsworth* and its progeny establish that constitutional invalidity is a valid defense against the use of a prior conviction to establish a present offense, the trial court did not err in evaluating the constitutional validity of Ellison's prior offenses under the circumstances present in this case.

VI. CONCLUSION

For the foregoing reasons, the trial court correctly held that Ellison's prior offenses could not be used to establish his guilt in a prosecution for failing to register as a sex offender. The order of dismissal was correctly entered because, absent the void rape disposition and the constitutionally invalid communication with a minor for immoral purposes conviction predicated upon it, the State lacked sufficient evidence to prove all of the essential elements of the charge at trial. Accordingly, the order of dismissal should be AFFIRMED.

RESPECTFULLY SUBMITTED this 10th day of August, 2015.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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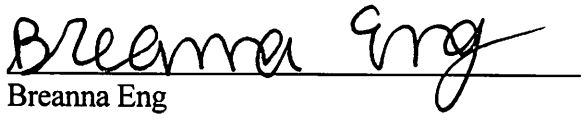
I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 10th day of August, 2015 in Walla Walla, Washington.



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