

FILED

Mar 16, 2016

Court of Appeals

Division III

State of Washington NO. 33420-1-III

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

STATE OF WASHINGTON,

Respondent,

v.

STEPHEN HYRNIAK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KLICKITAT COUNTY

The Honorable Brian Altman, Judge

REPLY BRIEF OF APPELLANT

DAVID B. KOCH
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 E Madison Street
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ARGUMENT IN REPLY</u>	1
HYRNIAK'S 1983 OREGON ARSON CONVICTIONS ARE NOT COMPARABLE TO A COUNTABLE WASHINGTON FELONY.....	1
1. <u>Legal Comparability</u>	2
2. <u>Factual Comparability</u>	4
B. <u>CONCLUSION</u>	7

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

In re Personal Restraint of Lavery
154 Wn.2d 249, 111 P.3d 837 (2005) 4

State v. Morley
134 Wn.2d 588, 952 P.2d 167 (1998) 4

State v. Olsen
180 Wn.2d 468, 325 P.3d 187 (2014) 5

FEDERAL CASES

Descamps v. United States
___ U.S. ___, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) 5

RULES, STATUTES AND OTHER AUTHORITIES

ORS 161.085..... 3

ORS 164.305..... 3

RCW 9A.04.110 3

RCW 9A.48.020 5

A. ARGUMENT IN REPLY

HYRNIAK'S 1983 OREGON ARSON CONVICTIONS ARE NOT COMPARABLE TO A COUNTABLE WASHINGTON FELONY

As discussed in the opening brief, although Hyrniak has now served his entire sentence, the next time he is convicted of a felony criminal offense, he will once again face the improper use of his Oregon convictions. And if the next sentencing judge erroneously counts the convictions in his offender score – as the judge did this time – Hyrniak may once again serve the entirety of a short sentence or too much of a longer sentence before he can have the matter corrected on appeal.

In response, the State argues that review of the issue now serves no purpose because “an offender score is calculated at every conviction. A ruling in this case would only serve as an advisory opinion for a future court to factor in making a determination regarding the defendant’s score” Brief of Respondent, at 3-4. But it is safe to assume that, if this Court finds that Hyrniak’s Oregon offenses are not comparable, the State will no longer seek to use them at future sentencings. It is also safe to assume that, even if the State tried, the next sentencing court would follow this Court’s decision.

At sentencing in this case, the court mistakenly found the Oregon convictions comparable to a countable Washington offense, which led to an improper calculation of Hyrniak's offender score. Moreover, this is a mistake that could easily be repeated in the future, resulting in an excessive sentence. Both parties have thoroughly briefed the comparability issue. These are good reasons to decide the issue now.

1. Legal Comparability

Returning to the merits of the issue, as discussed in the opening brief, the Oregon arson statute is broader because (1) it covers "protected property," a term that includes a more expansive range of property than simply a dwelling and (2) the Washington statute includes a malice requirement not found under Oregon law. Thus, the two crimes are not legally comparable. See Brief of Appellant, at 4-6.

In response, the State argues the statutes are substantially similar in their elements because "protected property" would include a dwelling and because the "malice" requirement in Washington "coincides with" the intentional act required under Oregon law. See Brief of Respondent, at 6-7. This is incorrect.

Whether a dwelling would qualify as a protected location under Oregon law is not the proper inquiry. The relevant inquiry is whether the Oregon conviction can be proved based on a broader set of circumstances. And clearly it can because the Oregon statute applies to “any structure, place or thing customarily occupied by people” and even prohibits setting fire to public buildings and forestland. See ORS 164.305(1).

Moreover, the State cites to nothing for its contention that Oregon’s requirement of “intentional damage” is the same as Washington’s malice requirement. Under Oregon law:

“Intentionally” or “with intent,” when used with respect to a result or to conduct described by a statute defining an offense, means that a person acts with a conscious objective to cause the result or to engage in the conduct so described.

ORS 161.085(7). In contrast, under Washington law:

“Malice” and “maliciously” shall import an evil intent, wish, or design to vex, annoy, or injure another person. Malice may be inferred from an act done in willful disregard of the rights of another, or an act wrongfully done without just cause or excuse, or an act or omission of duty betraying a willful disregard of social duty.

RCW 9A.04.110(12).

Thus, while a malicious act, i.e., one intended to vex, annoy, or injure another person, is necessarily an intentional act, the

converse is not true. An intentional act (including an intentionally set fire) is not necessarily a malicious act. The Washington arson statute is broader in this regard.

2. Factual Comparability

For factual comparability, the State quotes In re Personal Restraint of Lavery, 154 Wn.2d 249, 111 P.3d 837 (2005), as follows: “The sentencing court may ‘look at the defendant’s conduct, as evidenced by the indictment or information, to determine if the conduct itself would have violated a comparable Washington statute.’ In Re Lavery, 154 Wn.2d at 255.” Brief of Respondent, at 7.

But the Lavery court followed this statement with a warning:

However, “[w]hile it may be necessary to look into the record of a foreign conviction to determine its comparability to a Washington offense, the elements of the charged crime must remain the cornerstone of the comparison. Facts or allegations contained in the record, if not directly related to the elements of the charged crime, may not have been sufficiently proven in the trial.”

Lavery, 154 Wn.2d at 255 (quoting State v. Morley, 134 Wn.2d 588, 952 P.2d 167 (1998)). Indeed, as Hyrniak pointed out in his opening brief, where the foreign statute prohibits a broader range of conduct, the accused may not have had an incentive to prove he

did not commit the narrower offense and it may be impossible to declare the foreign conviction comparable. See Brief of Appellant, at 4 (citing Descamps v. United States, ___ U.S. ___, 133 S. Ct. 2276, 2288-2289, 186 L. Ed. 2d 438 (2013); State v. Olsen, 180 Wn.2d 468, 473-474, 325 P.3d 187 (2014); Lavery, 154 Wn.2d at 257-258)).

While it is apparent from the indictment that Hyrniak was charged with arson in connection with the destruction of his own home, the State has not produced the jury instructions, a transcript, or anything else establishing that Oregon prosecutors proved beyond a reasonable doubt that the structure satisfied the definition of a “dwelling” as that word is defined in Washington. Moreover, even if Oregon prosecutors proved a dwelling, there is certainly no indication the jury found that Hyrniak acted maliciously, since maliciousness is not an element of proof in Oregon and Hyrniak would have had no incentive to disprove such an element.

Finally, the State argues that evidence from the 1983 Oregon trial would also have satisfied RCW 9A.48.020(1)(d), which indicates a person is guilty of arson in the first degree if he knowingly and maliciously “[c]auses a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.”

Brief of Respondent, at 9. The State cites to the “proof of loss” statement addressed to Hyrniak’s insurer and incorporated into the indictment in connection with the third Oregon charge for which Hyrniak was indicted in 1982 – forgery. See CP 66-78.

A fatal flaw with this argument is that it is not even clear Hyrniak was ultimately tried for this offense, much less convicted. The Oregon sentencing order does not mention a forgery conviction. See CP 65 (merely indicating Hyrniak sentenced on two arson counts). Thus, there is no proof an Oregon jury even considered Hyrniak’s insurance claim in 1983 or the “proof of loss” statement. Nor is there proof Hyrniak had any incentive to challenge the document or the intent behind it. It is therefore improper to look to this document to establish factual comparability with a Washington felony.

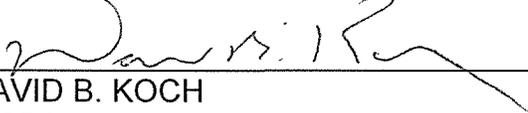
B. CONCLUSION

Hyrniak respectfully asks this Court to find that his Oregon convictions do not count in his Washington offender score.

DATED this 16th day of March, 2016.

Respectfully Submitted,

NIELSEN, BROMAN & KOCH, PLLC.



DAVID B. KOCH
WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

ERIC J. NIELSEN
ERIC BROMAN
DAVID B. KOCH
CHRISTOPHER H. GIBSON

OFFICE MANAGER
JOHN SLOANE

LAW OFFICES OF
NIELSEN, BROMAN & KOCH, P.L.L.C.
1908 E MADISON ST.
SEATTLE, WASHINGTON 98122
Voice (206) 623-2373 · Fax (206) 623-2488
WWW.NWATTORNEY.NET

LEGAL ASSISTANT
JAMILAH BAKER

DANA M. NELSON
JENNIFER M. WINKLER
CASEY GRANNIS
JENNIFER J. SWEIGERT
JARED B. STEED
KEVIN A. MARCH
MARY T. SWIFT
OF COUNSEL
K. CAROLYN RAMAMURTI

State v. Stephen Hyrniak

No. 33420-1-III

Certificate of Service

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 16th day of March, 2016, I caused a true and correct copy of the **Reply Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

Klickitat County Prosecutor
paappeals@klickitatcounty.org

Stephen Hyrniak
P.O. Box 821
Goldendale, WA 98620

Signed in Seattle, Washington this 16th day of March, 2016.

x  _____