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Court of Appeals
Division III
State of Washington

No. 33420-1-III

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

STATE OF WASHINGTON,
Respondent,

v.

STEPHEN HYRNIAK,
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KLICKITAT COUNTY, STATE OF WASHINGTON
Superior Court No. 14-1-00063-6

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The issue is moot on appeal because no effective relief can be granted under the facts of this case.
2. The trial court properly ruled that the prior Oregon conviction for Arson in the First Degree was comparable to a Washington felony, and included in the defendant's offender score.

B. STATEMENT OF THE CASE

On April 24, 2014, the defendant was approached by police officers as he is leaving a grocery store. The police were called to the store by a clerk inside the store after observing concerning behavior from the defendant, and concerns that he had been driving under the influence of alcohol. (VRP 34-35). Upon contact with the defendant, the police officer could smell an odor of alcohol and observed red, watery, bloodshot eyes. (VRP 36). The defendant immediately became argumentative, and stated that he was going to walk home.

The officer informed the defendant that he was not free to leave, and the defendant still attempted to leave. (VRP 37). The defendant became aggressive towards the officer, and the officer noticed knives on the waistband of the defendant. (VRP 37).

Once the defendant became aggressive, the officer decided to place the defendant under arrest for driving under the influence, due to the witness

statements provided by the clerk. (VRP 38). Even after the officer informed the defendant that he was under arrest, the defendant still attempted to get in the passenger side of his vehicle. (VRP 40). At this time, the officer drew his taser. (VRP 40). The defendant continued to resist being taken into custody, by walking around his vehicle in circles, and taking an aggressive fighting stance with the officer. The officer continued to tell him to get on the ground. (VRP 40).

The defendant continued to be uncooperative, and the officer deployed the taser into the back of the defendant. (VRP 41). The defendant ripped the probes out of his back, and continued to be uncooperative. The officer deploys his taser a second time. (VRP 41). The defendant took off running after being tased a second time, and the officer gave chase (VRP 41). At some point during the foot chase, the defendant stops running, turns toward the officer who is coming at him, and attempts to punch him. (VRP 41). The officer blocks the punch, and takes the defendant to the ground, and cuffs him behind his back. (VRP 43).

The defendant is charged with Assault in the Third Degree: Law Enforcement Officer and Resisting Arrest. (CP 1-2). The defendant is found guilty after a jury trial on both counts. (CP 45-46).

At sentencing, the defense contests his offender score including a 1983 Oregon convictions for Arson in the First Degree (VRP 100). The state submitted the indictment and sentencing order from the 1983 convictions at

sentencing. (CP 65-71).

The court concluded that the Oregon convictions were equivalent to a Washington felony. (VRP 105). The defendant was sentenced to 8 months for the charge of Assault in the Third degree, and 90 days for the resisting arrest, sentences to run concurrently. (VRP 107-108).

The defendant filed this appeal (CP 49).

C. ARGUMENT

1. The issue is moot on appeal because no effective relief can be granted.

The basis for this appeal is whether or not the offender score was calculated correctly, arguing that an Oregon conviction was incorrectly included in his offender score. The only remedy for incorrect offender is to remand for re-sentencing.

The defendant has served his entire sentence. Even if he was remanded for re-sentencing, he could only be re-sentenced to less time. This is no relief, as the defendant has already served the entire length of the longer sentence.

The appellant agrees that this issue is moot.(Brief of Appellant 8). A case is moot when the reviewing court can not grant any effective relief. *Hart v. Dept. of Social and Health Servs.*, 111 Wn.2d 445, 447, 759 P. 2d 1206 (1988). Further reviewing this issue could not solve any future issue

regarding the offender score. An offender score is calculated at every conviction. A ruling in this case would olny serve as an advisory opinion for a future court to factor in making a determination regarding the defendant's offender score in a hypothetical, yet to be committed crime.

The defendant has served his sentence and has been released from confinement. There is no effective relief that can be granted under the facts of this case.

2. The court did not err when it ruled that the defendant's prior conviction for Arson in the First Degree from Oregon was comparable and therefore included in his offender score.

The Supreme Court has adopted a two-prong test to determine whether a foreign convction is comparable to a Washington offense and counts as part of the offender score. *In Re Lavery*, 154 Wn.2d 249, 111 P.3d 837(2005).

The first part of the test is to determine if the foreign conviction is legally comparable. Legally comparable is an examination of the elements. *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007). If the conviction is not legally comparable, then the court examines the conviction to see if it is factually comparable. A factual comparison would be to examine if the conduct in the foreign conviction would have violated a Washington statute. *In Re Lavery*, 154 Wn.2d at 255.

A. The Oregon conviction is legally comparable

First, the sentencing court examines the elements and determines whether the out-of-state offenses are substantially similar to the elements of the Washington offense. *State v. Thiefault*, 160 Wn.2d at 415.

ORS § 164.325 states:

1. A person commits the crime of arson in the first degree if:

    a. By starting a fire or causing an explosion, the personally intentionally damage:

        A. Protected property of another;
        B. Any property, whether the property of the person of the property of another person, and such act recklessly places another person in danger of physical injury or protected property of another in danger of damage; or
        C. Any property, whether the property of the person or the property of another person, and recklessly causes serious physical injury to a firefighter or peace officer acting in the line of duty relating to the fire; or

    b. By knowingly engaging in the manufacture of methamphetamine, the person causes fire or causes an explosion that damages property described in paragraph (a) of this subsection.

2. Arson in the first degree is a class A felony.

RCW 9A.48.020 states:

1. A person is guilty of arson in the first degree if he or she knowingly and maliciously:
    a. Causes a fire or explosion which is manifestly dangerous to any human life, including firefighters; or

b. Causes a fire or explosion which damages a dwelling; or
c. Causes a fire or explosion in any building in which there shall be at the time a human who is not a participant in the crime; or
d. Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

2. Arson in the first degree is a class A felony.

These two statutes are substantially similar. Each include a subsection meant to protect the lives of firefighters. Each statute states that the crime must include either a fire or explosion. Each statute has a mens rea element, the Oregon mens rea is intentionally, while the Washington mens rea is knowingly maliciously. Washington defines maliciously as:

> Malice or 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).

When looking at the full definition of malice, it coincides with an intentional action.

Each statute require that it be the living quarters of individuals. While Oregon calls this element "protected property" and Washington calls it a "dwelling," those two are substantially similar in themselves. As the appellant points out, ORS §164.305(1) defines protected property to include "any structure, place or thing customarily occupied by people". RCW

9A.04.110(7) of dwelling is "any building or structure . . . which is used or ordinarily used by people for lodging."

These two statutes are substantially similar. In essence, they require the same elements. The trial Court ruled "I think that it is an equivalent felony. My finding will be that they are close enough . . ." (VRP 105).

B. The Oregon conviction is factually comparable

If this Court does not agree with the trial court's ruling that the two statutes are legally comparable, then the next part of the test would be to determine if the foreign conviction is factually comparable to a Washington felony.

Factual comparability is analyzing whether the defendant's conduct in the underlying Oregon conviction would have violated the comparable Washington statute. *State v. Thiefault*, 160 Wn.2d at 415. 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 Wn2d at 255.

Looking at the copies of previous judgment (CP 66), there is a copy of the sentencing order and indictment regarding the Oregon conviction of Arson. Count I states:

> The said defendant on or about January 18, 1982 in said county, did unlawfully and intentionally damage protected propery, to wit: the dwelling house situated at 454 Dorcas Street, Manzanita, Oregon, the property of Willamette

> Savings of 815 N.W. Davis, Portland, Oregon, by causing an explosion and starting a fire.

Count II states:

> The said defendant on or about January 18, 1982 in said county, did unlawfully and intentionally damage the dwelling house located at 454 Dorcas Street, Manzanita, Oregon, by causing an explosion and starting a fire therein, thereby recklessly placing protected property, to wit: the next adjoining dwelling house situtated at 476 Dorcas Street, Manzanita, Oregon in danger of damage.

Count III charges the defendant with Forgery in the first degree, stating:

> The defendant on or about February 16, 1982 in said county, did unlawfully, with intent to injure and defraud, falsely make and utter a written instrument which evidenced and created a legal right, interest and obligation, which instrument is in words and figures as follows:

and attached the sworn statement in proof of loss, which shows that the defendant filed an insurance claim for the loss of his property which was destroyed in the fire he started. (CP 65-71).

Noticably, the indictments specifically mention the property is a dwelling. This not only clarifies that it isn't only a protected property, but it is a dwelling.

Importantly, when making a determination of if the conviction is factually comparable, it is the conduct that is important, and whether or not the conduct would violate the Washington statute. *In Re Lavery*, 154 Wn.2d at 255. Here, the indictment clearly states the defendant intentionally

damaged the dwelling house at 434 Docras Street, Manzanita Oregon, by causing an explosion and starting a fire. The second count states that the defendant, by intentionally damaging the dwelling house at 434 Dorcas Street, recklessly placed the next adjoining dwelling house situated at 476 Dorcas street, Manzanita, Oregon, in danger of damage.

The indictment also contains the sworn proof of loss statement, for an insurance claim, which the defendant signed. He hand wrote that the damaged building was his principal place of residence, and was commonly known as 434 Dorcas, Manzanita Oregon. The claim was for $185,000.00. The defendant was charged with Forgery in the First Degree for this action.

The conduct of making an insurance claim on a fire he started is important. This conduct would fall under RCW 9A.48.020(1)(d):

> Causes a fire or explosion on property valued at ten thousand dollars or more with intent to collect insurance proceeds.

Further, the action of causing and explosion which started a fire, would fall under RCW 9A.48.020(1)(b):

> knowingly and maliciously causing a fire or explosion which damages a dwelling

The conduct of intentionally causing an explosion which starts a fire for the purposes of making an insurance claim can only be chategorized as malicious. Undoubtedly, this conduct is Arson in the First degree under the Washington statute.

D. CONCLUSION

This appeal is moot and should be dismissed because there is no effective relief that be granted under the facts of this case.

Regardless, the Oregon conviction is both legally and factually comparable to the Washington statute for Arson in the first degree, and should be included in his offender score.

This Court should affirm that the Oregon convictions count in his Washington offender score.

Respectfully submitted this 22nd day of February, 2016.

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COURT OF APPEALS OF WASHINGTON
DIVISION III

STATE OF WASHINGTON **Respondent,** **vs.** **STEPHEN HYRNIAK,** **Appellant**	**NO. 33420-1-III** **Superior Court No. 14-1-00063-6** **CERTIFICATE OF SERVICE**

I, Erika George, declare that on February 22, 2016, I emailed per agreement, a copy of the Brief of the Respondent to:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of February, 2016.

KLICKITAT COUNTY
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