

FILED
Court of Appeals
Division III
State of Washington
9/4/2018 8:00 AM

NO. 35456-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

MAXWELL DELVON JONES,

Appellant.

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

The Honorable James M. Triplet

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY.

1. MR. JONES IS ENTITLED TO RELIEF FROM JUDGMENT UNDER CrR 7.8 BECAUSE HE PRESENTED SUFFICIENT EVIDENCE TO ESTABLISH THAT HIS OFFENDER SCORE FOR THE FIRST-DEGREE ROBBERY WAS IMPERMISSIBLY BASED ON CONSTITUTIONALLY INFIRM PRIOR CONVICTIONS.

The State argues that Mr. Jones did not produce sufficient evidence to show that the prior convictions at issue are constitutionally invalid. Brief of Respondent 13. Indeed, the State asserts that Mr. Jones produced no evidence to support his argument that his prior convictions at issue may not properly be included in his offender score for the first-degree robbery. Brief of Respondent at 1, 13. Despite this assertion, throughout its Respondent's brief the State discusses the evidence Mr. Jones offered in support of his CrR 7.8 motion, as the Appellant did in its brief, including the judgments of the 2003 convictions at issue, as well as other key information from these cases where Mr. Jones has pleaded guilty when not represented by counsel. CP 108-09; CP 113; CP 114-145 (Attachments 1-3).

The Appellant maintains, and the record reflects that Mr. Jones did present sufficient evidence supporting his position at the CrR 7.8 hearing. CP 108-09; CP 113; CP 114-145 (Attachments 1-

3). Mr. Jones argues that the evidence presented was sufficient under the standards imposed by caselaw. Appellant's Opening Brief at 8-9. There were three judgments that had been offered to establish four of Jones' prior convictions, none of the judgments indicated the presence of an attorney representing Mr. Jones nor a waiver of counsel, as such they are facially invalid and could not be properly used when sentencing Jones. *Id.* Under the standard in *Ammons*, this was sufficient evidence for the court to reach the re-sentencing issue Jones raised in his CrR 7.8 motion.¹

2. NO EVIDENCE OF "WAIVER".

Despite the State's argument titled "Valid Waiver" no evidence of waiver was offered or discussed in this matter. Brief of Respondent at 12. Clearly, this is not a case of "valid waiver" as the State suggests. However, included in the evidence presented at the CrR 7.8 hearing was evidence that Mr. Jones' defense counsel had withdrawn. CP 108. In fact, the "Valid Waiver" section of the State's brief is only a paragraph and does not cite to anywhere in the record where a waiver took place. The section implies at some point a "valid waiver" took place, but offers nothing

¹ *State v. Ammons*, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

to support this assertion. The title "Valid Waiver" appears designed to confuse what should be a relatively straightforward issue: whether the trial court erred by ruling that Mr. Jones CrR 7.8 motion had to be transferred to the Court of Appeals as a PRP.

The record contains no reference to any waiver of counsel by Mr. Jones. However, the record does show that defense counsel presented evidence in support of Mr. Jones' CrR 7.8 motion to show that the 2003 convictions at issue were constitutionally infirm and could not be used. CP 108-09; CP 113; CP 114-145 (Attachments 1-3).

3. THE STATE'S RELIANCE ON *GIMARELLI* IS MISPLACED.

The State cites *State v. Gimarelli*, 105 Wn. App. 370 (2001), the Division Two Court of Appeals case, for the proposition that, "[a]n assertion at sentencing that the defendant was not afforded his right to counsel or waived his right to counsel cannot create a facial invalidity." *Citing Gimarelli*, 105 Wn. App. at 375. Brief of Respondent at 13. As discussed below, *Gimarelli* simply does not stand for this proposition. That State's position is not supported anywhere in the text of the *Gimarelli* case. Instead, the *Gimarelli* decision is not in conflict with the arguments Mr. Jones' made in his

Appellant's Opening brief, and it also relies on the same caselaw as Jones, particularly the *Ammons* case. *Citing State v. Ammons*, 105 Wash.2d 175, 187, 713 P.2d 719, 718 P.2d 796, *cert. denied*, 479 U.S. 930, 107 S.Ct. 398, 93 L.Ed.2d 351 (1986).

The State's reliance on *Gimarelli* here is misplaced. *Gimarelli* involves a separate issue, whether it was proper to use a prior out-of-state conviction to enhance the defendant's sentence. *Gimarelli* does cite the basic rule in *Ammons* that the State need not prove the constitutionality of prior convictions before it may use those convictions as part of a defendant's criminal history. *Gimarelli*, 105 Wn. App. at 374. *Citing State v. Ammons*, 105 Wash.2d at 187. *Gimarelli* notes, "An exception to the rule is if another court has determined that the prior conviction was unconstitutional and thus could not be used for sentencing purposes, the State must prove the constitutionality of that conviction before it may use the conviction in the present case. *Gimarelli*, 105 Wn. App. at 375. *Citing State v. Burton*, 92 Wn. App. 114, 117, 960 P.2d 480 (1998), *rev. denied*, 137 Wash.2d 1017, 978 P.2d 1100 (1999).

"Otherwise, as long as the conviction is constitutionally valid on its face, the State may use the conviction as part of the defendant's criminal history." *Gimarelli*, 105 Wn. App. at 375 (*citing*

Ammons, 105 Wash.2d at 187–88, 713 P.2d 719). “For a conviction to be constitutionally invalid on its face, the conviction must show constitutional infirmities on its face, without further elaboration.” *Id.*, *citing Ammons*, 105 Wash.2d at 188, 713 P.2d 719. The face of the conviction includes any plea agreement, but it excludes other items such as jury instructions. *Id.*, *citing Thompson*, 141 Wash.2d at 718, 10 P.3d 380 (*citing Ammons*, 105 Wash.2d at 189, 713 P.2d 719).

Gimarelli points out the *Ammons* and *Bembry* cases as examples where facial invalidity is not shown, because the claims could not be determined facially, since the *Ammons* claim of invalidity rested on jury instructions and the claim of invalidity in *Bembry* relied on the defendant’s testimony on the issue. The defendant in *Gimarelli* had similarly sought to use a jury verdict form to show constitutional infirmity of the out-of-state conviction at issue; the State’s position was that the Judgment & Sentence was sufficient to show the prior conviction’s facially validity. The holding in *Gimarelli* does not affect the holding in *Ammons*, does not stand for the proposition the State relies on it for, and does not conflict with Mr. Jones’ argument on appeal that he is entitled to relief from judgment because he presented sufficient evidence to show that

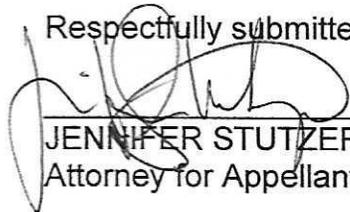
his offender score was impermissibly based on prior convictions that were constitutionally invalid.

B. CONCLUSION.

Mr. Jones respectfully asks this Court to reverse the trial court's order and remand for re-sentencing. As argued in the Appellant's Opening Brief, Mr. Jones presented sufficient evidence of constitutional infirmity regarding the relevant 2003 convictions. Thus, his CrR 7.8 motion to be re-sentenced without inclusion of these convictions was appropriately brought, and therefore remand to the trial court is appropriate.

DATED this 31st day of August, 2018.

Respectfully submitted,



JENNIFER STUTZER (38994)
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 35456-3-III
)	
MAXWELL DELVON JONES,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

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[X] MAXWELL JONES Register Number: 11203-085 USP Atwater U.S. Penitentiary P.O. Box 019001 Atwater, CA 95301	(X) () ()	U.S. MAIL HAND DELIVERY EMAIL

SIGNED IN SEATTLE, WASHINGTON THIS 31ST DAY OF AUGUST, 2018.

X  _____

STUTZER LAW PLLC

August 31, 2018 - 5:02 PM

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