

FILED
Court of Appeals
Division III
State of Washington
6/27/2018 10:03 AM
35456-3-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MAXWELL JONES, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

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

INDEX

I. SUMMARY OF ARGUMENT..... 1

II. ISSUES PRESENTED 1

III. STATEMENT OF THE CASE 2

IV. ARGUMENT 6

 Standard of review. 6

 A. THE EVIDENCE PROVIDED BY THE DEFENDANT IN THE TRIAL COURT WAS INSUFFICIENT TO ESTABLISH A CONSTITUTIONAL INFIRMITY REGARDING THE INCLUSION OF HIS PRIOR 2003 FELONY CONVICTIONS IN HIS OFFENDER SCORE FOR THE FIRST-DEGREE ROBBERY. 8

 1. Federal rule regarding “uncounseled” convictions at a federal sentencing. 8

 2. Valid waiver. 12

 3. The defendant’s collateral attack on his four 2003 convictions, claiming he was unrepresented, is without support in the record. 13

 B. THE NINTH CIRCUIT’S OPINION DID NOT INVALIDATE THE DEFENDANT’S PRIOR CONVICTIONS, BUT RATHER HELD THE CONVICTIONS COULD NOT BE INCLUDED IN A 2014 FEDERAL SENTENCING. THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION HAS NO APPLICATION TO THE PRESENT SENTENCING FOR FIRST DEGREE ROBBERY. 17

V. CONCLUSION 22

TABLE OF AUTHORITIES

WASHINGTON CASES

<i>Home Ins. Co. of New York v. N. Pac. Ry. Co.</i> , 18 Wn.2d 798, 140 P.2d 507 (1943).....	18
<i>In re Benn</i> , 134 Wn.2d 868, 952 P.2d 116 (1998).....	17
<i>In re Det. of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999).....	12
<i>In re Grisby</i> , 121 Wn.2d 419, 853 P.2d 901 (1993)	17
<i>In re Williams</i> , 111 Wn.2d 353, 759 P.2d 436 (1988).....	11, 12, 14
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn. App. 710, 225 P.3d 266 (2009), <i>review denied</i> , 168 Wn.2d 1041 (2010).....	18
<i>Schuster v. Prestige Senior Mgmt., L.L.C.</i> , 193 Wn. App. 616, 376 P.3d 412 (2016).....	18
<i>State v. Ammons</i> , 105 Wn.2d 175, 713 P.2d 719, <i>amended</i> 718 P.2d 796 (1986)	passim
<i>State v. Bembry</i> , 46 Wn. App. 288, 730 P.2d 115 (1986).....	10
<i>State v. Berry</i> , 141 Wn.2d 121, 5 P.3d 658 (2000).....	17
<i>State v. Booker</i> , 143 Wn. App. 138, 176 P.3d 620 (2008).....	13
<i>State v. Bush</i> , 102 Wn. App. 372, 9 P.3d 219 (2000)	17
<i>State v. Gimarelli</i> , 105 Wn. App. 370, 20 P.3d 430, <i>review denied</i> , 144 Wn.2d 1014 (2001).....	11, 13
<i>State v. Glasmann</i> , 183 Wn.2d 117, 349 P.3d 829 (2015).....	17
<i>State v. Hanna</i> , 123 Wn.2d 704, 871 P.2d 135 (1994)	17
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996)	6
<i>State v. Holsworth</i> , 93 Wn.2d 148, 607 P.2d 845 (1980)	9

<i>State v. Jasper</i> , 174 Wn.2d 96, 271 P.3d 876 (2012)	14
<i>State v. Johnston</i> , 17 Wn. App. 486, 564 P.2d 1159, review denied, 89 Wn.2d 1007 (1977).....	17
<i>State v. Jones</i> , 198 Wn. App. 1058 (2017) (unpublished)	2, 3
<i>State v. Lord</i> , 161 Wn.2d 276, 165 P.3d 1251 (2007)	7
<i>State v. Madsen</i> , 168 Wn.2d 496, 229 P.3d 714 (2010)	12
<i>State v. Martinez</i> , 161 Wn. App. 436, 253 P.3d 445 (2011), review denied, 172 Wn.2d 1011 (2011).....	7
<i>State v. Modica</i> , 136 Wn. App. 434, 149 P.3d 446 (2006), affirmed, 164 Wn.2d 83 (2008).....	12
<i>State v. Powell</i> , 126 Wn.2d 244, 893 P.2d 615 (1995).....	7
<i>State v. Sisouvanh</i> , 175 Wn.2d 607, 290 P.3d 942 (2012).....	15
<i>State v. Slert</i> , 181 Wn.2d 598, 334 P.3d 1088 (2014).....	14
<i>State v. Smith</i> , 144 Wn. App. 860, 184 P.3d 666 (2008)	7
<i>State v. Williams</i> , 132 Wn.2d 248, 937 P.2d 1052 (1997).....	21
<i>State v. Zavala-Reynoso</i> , 127 Wn. App. 119, 110 P.3d 827 (2005).....	7

FEDERAL CASES

<i>Burgett v. Texas</i> , 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967)	8, 9
<i>United States v. Fazande</i> , 487 F.3d 307 (5th Cir. 2007)	19
<i>United States v. Guthrie</i> , 931 F.2d 564 (9th Cir. 1991).....	20
<i>United States v. Jakobetz</i> , 955 F.2d 786 (2d Cir.), cert. denied, 506 U.S. 834 (1992).....	20
<i>United States v. Jones</i> , 415 F.3d 256 (2d Cir. 2005)	21

United States v. Jones, 653 F. App'x 861 (9th Cir. 2016)
(unpublished) 4

United States v. Jones, 715 F. App'x 618 (9th Cir. 2017)
(unpublished) 4, 5

United States v. McGlocklin, 8 F.3d 1037 (6th Cir. 1993) 20

STATUTES

Full Faith and Credit Act, 28 U.S.C. § 1738 19

RCW 10.73.090 7

RCW 9.94A.030..... 8

RULES

CrR 7.8..... 7

I. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion when it denied the defendant's CrR 7.8. The defendant does not specify how the four prior 2003 convictions were "uncounseled" or provide any documentation showing that he did not waive his right to an attorney regarding his four 2003 Spokane County felony convictions. In short, he produces no evidence to support his assertion. The defendant's bald assertions lack probative evidentiary value. Furthermore, the defendant fails to establish or provide any authority that the Full Faith and Credit Clause has any application to the present case.

II. ISSUES PRESENTED

1. Did the trial court abuse its discretion when it denied the defendant relief under CrR 7.8, finding the defendant's prior 2003 Spokane County felony convictions were not invalid on their face?

2. Did the trial court abuse its discretion when it denied defendant's claim where the record below was incomplete with respect to the defendant's claim?

3. Was the lower court bound by a Ninth Circuit's opinion finding the defendant's prior 2003 Spokane County convictions were "unconstitutionally invalid," in a *federal* sentencing, which was based on a stipulation and concession by the government that the defendant's prior

2003 felony convictions should not be considered by the district court for a 2014 federal sentencing because the prior 2003 convictions were “uncounseled”?

III. STATEMENT OF THE CASE

The defendant originally appealed his sentence following a bench trial at which he was convicted of first degree robbery.¹ On appeal, the defendant alleged his offender score was miscalculated and he received ineffective assistance at sentencing. *State v. Jones*, 198 Wn. App. 1058 (2017) (unpublished). Regarding the sentencing, this Court observed:

Mr. Jones’s counsel signed [the statement of criminal history], but noted above his signature that Mr. Jones refused to sign it because he believed the conspiracy to possess a controlled substance conviction from June 27, 2012, was a misdemeanor rather than a felony. The trial court located the guilty plea for that crime and concluded it was a felony. Defense counsel raised no other challenges to the statement of criminal history.

Based on the statement of criminal history, the State calculated Mr. Jones’s offender score at a 9+ (12 to be exact). The court then asked: “Are you disputing that he’s a 9-plus?” Report of Proceedings (RP) at 204. Defense counsel responded: “No, Your Honor.” *Id.* The trial court found the standard range for first degree robbery based on an offender score of 9+ was 129 to 171 months, and sentenced him to 171 months.

Id.

¹ The facts, in part, are taken from this Court’s unpublished decision in *State v. Jones*, 198 Wn. App. 1058 (2017).

In the defendant's prior appeal, he alleged in a SAG that "the Ninth Circuit found four of his prior state criminal convictions unconstitutional, and that the trial court in the instant matter improperly included those unconstitutional convictions in his offender score." *Id.* This Court held that issue involved factual allegations outside the record and that the defendant's remedy was to seek relief by personal restraint petition. This Court ultimately held that the defendant's offender score was properly calculated to be a "12" and that the defendant failed to establish an error occurred and that he was prejudiced by his lawyer's failure to object to the offender score calculation. The mandate was issued on June 19, 2017.

On July 11, 2017, the defendant, through counsel, brought a CrR 7.8 motion in the Spokane County Superior Court alleging that his prior 2003 Spokane County convictions (hereinafter "2003 convictions") for attempted second degree assault, two counts of conspiracy to deliver a controlled substance - methamphetamine, and a second degree possession of stolen property, resolved through a 2003 plea bargain, were "uncounseled" and should not have been included when calculating his offender score in the current first degree robbery conviction. CP 108.

At the time of the CrR 7.8 motion, the defendant relied on and attached to his motion:

- a 2006 sentencing memorandum (CP 160-70), which was authored by an Assistant United States Attorney, stipulating that the defendant's prior 2003 convictions were "uncounseled" and should not be admissible in an *unidentified* federal sentencing;²
- prior judgments and sentences for the 2003 convictions (CP 115-53); and
- an opinion by the Ninth Circuit finding that the district court erred when it considered the defendant's "constitutionally infirm prior [2003] convictions" when sentencing the defendant on the federal felon in possession of a firearm convictions. CP 155-58. *See United States v. Jones*, 715 F. App'x 618 (9th Cir. 2017) (second appeal).

Regarding the second Ninth Circuit's unpublished opinion, *Jones*, 715 F. App'x 618, without discussion or explanation, the Ninth Circuit found the prior "uncounseled" 2003 Spokane County convictions constitutionally infirm; however, it affirmed the sentence:

[o]ur review of the sentencing transcript [for the 2014 federal felon in possession of a firearm conviction] indicates that the district court placed significant weight on Jones's history of serious criminal conduct. Lastly, the district court justified its sentence on factors unrelated to Jones's criminal history, including the seriousness of his offense conduct. For these reasons, Jones has not shown "a reasonable probability

² The face sheet of the Assistant United States Attorney's sentencing memorandum stated it was filed on February 1, 2006, under federal case number CR-05-0067-JLQ. Apparently, the sentencing memorandum was unrelated to the defendant's 2014 federal felon in possession of a firearm conviction discussed below, and as recognized by the Ninth Circuit in *United States v. Jones*, 653 F. App'x 861, 862 (9th Cir. 2016) (unpublished).

that he would have received a different sentence” but for the district court’s plain error.

Id. at 621.

In the present case, following a hearing, the Honorable James Triplett denied the defendant’s CrR 7.8 motion stating:

Well, I’m looking at the decision from the Ninth Circuit in United States of America versus Maxwell Delvon Jones, aka Money, 14-30257. And one of the issues on appeal was No. 4. It said, “At sentencing, the district court relied on three 2003 Washington state court convictions for which Jones had pled guilty pro se in calculating Jones’s base offense level and criminal history category.”

“In a prior, unrelated felony prosecution of Jones, the government conceded that Jones’s uncounseled 2003 convictions were constitutionally invalid.”

“In its supplemental brief and at oral argument in this case, the government again conceded the invalidity of the 2003 convictions. We therefore vacate Jones’s sentence and remand for resentencing. On remand, the district court may not use the three uncounseled 2003 state convictions to calculate Jones’s base offense level or criminal history category.”

And again, so there’s no analysis there. It was basically an agreement. I still have this language by my court, my Supreme Court of Washington, that says that I am not to allow a challenge to the constitutionality of a conviction at a subsequent sentencing; that the proper procedure is to have those challenged, I think, through a PRP; and if in fact the court agrees that those should be vacated, then I can resentence Mr. Jones.

Now, it's also my understanding that if I took out those three convictions that he would still, at least for the foreseeable future, be serving his sentence on this matter; so I guess one thing that would be a major concern for me -- is prejudice to Mr. Jones -- may not be there, but guess my choice is do I follow an uncontested and basically agreed issue in a U.S. appellate matter or do I follow the rule of law by my Supreme Court in Washington?

And I guess my point is it would've been nice if the federal courts would've maybe said why they weren't following the Ammons decision, except I think the easy answer is it just wasn't a contested issue so they didn't feel they had to address that issue. I'm going to sign an order that says pursuant to the rationale of State versus Ammons, it's improper for the sentencing court to review prior convictions in other matters to determine their constitutional validity at my sentencing and that that needs to be handled through a PRP action, and that appears to be following the procedural requirements that have been set forth by the Washington Supreme Court.

RP 28-30 (7/11/17); *see also* CP 187-88 (written order).

IV. ARGUMENT

The defendant appeals the trial court's denial of his CrR 7.8 motion. He argues the court erred when it denied his CrR 7.8 motion challenging the inclusion of the four 2003 felonies in his offender score, when sentencing him for the first-degree robbery. He claimed in the lower court that the 2003 convictions were "uncounseled."

Standard of review.

A trial court has jurisdiction under CrR 7.8 to correct an erroneous sentence. *State v. Hardesty*, 129 Wn.2d 303, 315, 915 P.2d 1080 (1996).

This Court reviews a trial court’s ruling on a CrR 7.8 motion for abuse of discretion. *State v. Martinez*, 161 Wn. App. 436, 440, 253 P.3d 445 (2011), *review denied*, 172 Wn.2d 1011 (2011); *State v. Zavala-Reynoso*, 127 Wn. App. 119, 122, 110 P.3d 827 (2005). Under this standard, the trial court’s decision will not be reversed unless it was manifestly unreasonable or based on untenable grounds or reasons. *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). A trial court also abuses its discretion if it bases its ruling on an erroneous view of the law. *State v. Lord*, 161 Wn.2d 276, 284, 165 P.3d 1251 (2007).

CrR 7.8 permits a trial court to grant relief from a judgment for mistake, void judgment, or any other reason justifying relief from the operation of the judgment. CrR 7.8(b)(1), (4), (5). In addition, a CrR 7.8 motion to vacate a judgment is a collateral attack. RCW 10.73.090(2). Such motions must be made within a “reasonable time” and are subject to the one-year time limitation in RCW 10.73.090(1), for collaterally attacking a judgment and sentence. CrR 7.8(b).³

³ Under CrR 7.8(c)(2), the trial court “shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the [trial] court determines that the motion is not barred by RCW 10.73.090 [one year time bar] and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.” *See State v. Smith*, 144 Wn. App. 860, 863, 184 P.3d 666 (2008).

A. THE EVIDENCE PROVIDED BY THE DEFENDANT IN THE TRIAL COURT WAS INSUFFICIENT TO ESTABLISH A CONSTITUTIONAL INFIRMITY REGARDING THE INCLUSION OF HIS PRIOR 2003 FELONY CONVICTIONS IN HIS OFFENDER SCORE FOR THE FIRST-DEGREE ROBBERY.

A defendant's criminal history consists of his or her "prior convictions ... whether in this state, in federal court, or elsewhere." RCW 9.94A.030(11). In that regard, a prior conviction that is constitutionally invalid on its face may not be considered in a sentencing proceeding. *State v. Ammons*, 105 Wn.2d 175, 187-88, 713 P.2d 719, *amended* 718 P.2d 796 (1986). A conviction is constitutionally invalid on its face if, without further elaboration, it evidences infirmities of a constitutional magnitude. *Id.* at 188.

1. Federal rule regarding "uncounseled" convictions at a federal sentencing.

In *Burgett v. Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967), the Supreme Court held that Texas could not use four prior convictions to prosecute a defendant under the Texas recidivism statute. The records of the earlier convictions established that Burgett was not represented by a lawyer. Despite Burgett failing to directly or collaterally attack the earlier convictions, the Supreme Court characterized the

convictions as “constitutionality infirm” and “void.” *Id.* at 114-15. The Court reasoned:

To permit a conviction obtained in violation of *Gideon v. Wainwright* [372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963)] to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right.

Id. at 115 (internal citations omitted).

Similarly, in *State v. Holsworth*, 93 Wn.2d 148, 159, 607 P.2d 845 (1980), our high court addressed the circumstances under which a defendant may challenge the validity of an earlier conviction, and, on a challenge, which party holds the burden of proving the validity or invalidity of the earlier conviction, involving habitual offenders. The Court ultimately held in a habitual criminal proceeding, the State has the burden of proving the prior conviction beyond a reasonable doubt once the defendant places the validity of the conviction at issue; accordingly, it is the State’s burden to prove the prior conviction was constitutionally valid and a presumption that the defendant was not properly represented or that he did not waive his right to counsel is proper in that context. *See Id.* at 160 (1980).

Later, in *Ammons, supra*, the defendants challenged the Sentencing Reform Act (SRA) on various constitutional grounds. They argued that,

under the due process clause, the SRA should require the State to prove a prior conviction is constitutionally valid beyond a reasonable doubt before including the conviction in an offender score. In its review of the due process contention, the Court noted:

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, and (2) a proceeding to establish the crime of felon in possession of a firearm, in which the prior conviction was an essential element.

105 Wn.2d at 187 (internal citations omitted). The Court also noted that it refused to apply such a requirement in other situations, including use of a prior conviction for impeachment and use of a prior conviction to establish a minimum term. *Id.* at 187.

“[T]he State does not have the affirmative burden of proving the constitutional validity of a prior conviction before it can be used in a sentencing proceeding.” *Id.* at 187-88. For a conviction to be constitutionally invalid on its face, the conviction must show constitutional infirmities on its face, without further elaboration. *Id.* at 188. The face of the conviction includes any plea agreement, but it excludes other items such as jury instructions. *Id.* at 189. In that regard, a defendant may not impeach the conviction by offering testimony that his or her rights were violated. *State v. Bembry*, 46 Wn. App. 288, 291-92, 730 P.2d 115 (1986).

“The conviction need not show that a defendant’s rights were not violated; rather, for the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant’s rights were violated.” *State v. Gimarelli*, 105 Wn. App. 370, 375, 20 P.3d 430, *review denied*, 144 Wn.2d 1014 (2001). The requirement that the alleged defect be apparent on the face of the conviction is necessary to avoid turning sentencing proceedings into appellate review of all prior convictions. *Id.* at 375.

Here, the prior 2003 felony convictions were relevant to the defendant’s offender score; they were not elements of the substantive offenses or evidence in a persistent offender criminal proceeding, and, therefore, it was the defendant’s burden to establish his 2003 convictions were constitutionally invalid on their face. *Ammons*, 105 Wn.2d at 187; *see also In re Williams*, 111 Wn.2d 353, 367, 759 P.2d 436 (1988) (emphasizing that “the [SRA] recognizes and relies upon the fundamental distinction between the more rigid procedural protections necessary in using a prior conviction to prove an element of a crime or of habitual criminal status on the one hand, and in using a prior conviction to help determine a presumptive standard sentence range on the other”). The *Williams* court overruled *State v. Marsh*, 47 Wn. App. 291, 734 P.2d 545 (1987), which erroneously held that when a judgment and sentence do not reflect

representation by counsel or waiver, the conviction is facially invalid and cannot be used to establish a defendant's criminal history unless the State establishes by other documents the presence or waiver of counsel. *In re Williams*, 111 Wn.2d at 368.

2. Valid waiver.

The State and federal constitutions guarantee a criminal defendant both a right to counsel and the right to self-representation. *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010). However, the right to self-representation is not self-executing. *State v. Modica*, 136 Wn. App. 434, 441, 149 P.3d 446 (2006), *affirmed*, 164 Wn.2d 83 (2008). "A criminal defendant who desires to waive the right to counsel and proceed pro se must make an affirmative demand, and the demand must be unequivocal in the context of the record as a whole." *Id.* A court must indulge in "every reasonable presumption" against a defendant's waiver of the right to counsel. *In re Det. of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999). An appellate court reviews the trial court's decision to grant the defendant's motion to proceed pro se for an abuse of discretion. *Modica*, 136 Wn. App. at 442.

3. The defendant's collateral attack on his four 2003 convictions, claiming he was unrepresented, is without support in the record.

While the sentencing court cannot consider a prior conviction that is constitutionally invalid on its face, an assertion at sentencing that the defendant was not afforded his right to counsel or waived his right to counsel cannot create a facial invalidity. *Gimarelli*, 105 Wn. App. at 375. For example, in *State v. Booker*, 143 Wn. App. 138, 140, 176 P.3d 620 (2008), the State cross-appealed the trial court's exclusion of two prior 2000 Illinois drug convictions, arguing that the sentencing court improperly excluded the convictions from the defendant's offender score calculation because the record was silent about whether the defendant was represented or waived his right to counsel. Division One of this Court reversed the lower court's decision to exclude the two drug convictions because the State proved their existence by a preponderance of the evidence (certified copies of the Order of Sentence and Commitment to the Illinois DOC of the prior convictions, a statement of the conviction/disposition, and the Information) and it did not have to prove that the defendant was represented by counsel in the absence of any facial constitutional invalidity. *Id.* at 142, 147.

Similarly, in *Williams*, the defendant filed a personal restraint petition collaterally attacking his prior convictions as unconstitutional, claiming the prior convictions were "uncounseled" and in violation of the

Sixth Amendment. 111 Wn.2d at 364. Our high court observed that the record was silent as to whether Williams waived counsel or not. *Id.* at 364.

As stated by the Court:

We do not, for example, have an affidavit providing the particulars of the claims of unconstitutionality of any of the prior offenses, or a certified transcript of the record or of the docket for any of these in-state cases, all of which ordinarily are readily available. For example, both the Superior Court Criminal Rules (CrR) and the Criminal Rules For Courts of Limited Jurisdiction (CrRLJ) require that judgments of conviction set forth whether a defendant is represented by a lawyer or has waived representation by a lawyer. Our recent statement in a similar context is apropos here: “naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.”

Id. at 364-65 (internal citations omitted).

In the absence of an adequate record, an appellate court will not infer that a trial judge violated the constitution. *State v. Slett*, 181 Wn.2d 598, 608, 334 P.3d 1088 (2014).

[O]n a partial or incomplete record, the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.

State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012).

In that regard, the party claiming error holds the burden to provide an adequate record to establish error and should attempt to supplement the record when necessary. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012).

Here, although the supporting documents provided by the defendant do not affirmatively show the defendant was represented by counsel or that he waived counsel, they also do not affirmatively establish that he was not represented or that he did not waive his right to counsel. Consequently, the materials do not evidence a constitutional invalidity on their face and the defendant has failed to carry his burden of demonstrating that the challenged prior 2003 convictions are facially invalid. The record before the Court does not contain any documents relating to the 2003 convictions, other than the judgment and sentences, and there is no indication that the convictions “without further elaboration evidence[] infirmities of a constitutional magnitude.” *See Ammons*, 105 Wn.2d at 188. The defendant does not establish through any prior superior court pleadings, transcripts or orders that his 2003 convictions were entered in violation of his right to counsel.

The only documents in support of the defendant’s claim at the CrR 7.8 motion were copies attached to counsel’s motion in the superior court, which included a “United States’ Sentencing Memorandum Re: Defendant’s Prior Uncounseled State Court Convictions.” CP 160-70. In

that document, the Assistant United States Attorney (hereinafter “AUSA”) stipulated that the defendant’s 2003 “uncounseled” Spokane County convictions could not be included in an unidentified sentencing hearing to calculate defendant Jones’ offense level or criminal history under the federal sentencing guidelines. Within the memorandum, the AUSA included parts of a transcript from a November 17, 2003, Spokane County Superior Court scheduling conference, whereby the lower court authorized defense counsel to withdraw. The AUSA also included argument and his summary review of other court records, and determined that the 2003 convictions were not obtained via a valid waiver of counsel.

At the CrR 7.8 motion, the defendant did not provide the lower court with any *complete* transcripts or documents from the November 17, 2003 scheduling conference, any documentation or transcripts from the subsequent scheduling conferences or hearings, or transcripts from the four 2003 plea sentencing hearings. Accordingly, on the face of the four prior 2003 convictions, they are constitutionally valid and the trial court properly denied the defendant’s motion as there was no evidence presented which supported his claim.

B. THE NINTH CIRCUIT’S OPINION DID NOT INVALIDATE THE DEFENDANT’S PRIOR CONVICTIONS, BUT RATHER HELD THE CONVICTIONS COULD NOT BE INCLUDED IN A 2014 FEDERAL SENTENCING. THE FULL FAITH AND CREDIT CLAUSE OF THE FEDERAL CONSTITUTION HAS NO APPLICATION TO THE PRESENT SENTENCING FOR FIRST DEGREE ROBBERY.

Under the Full Faith and Credit Clause, article IV, section 1, of the United States Constitution, states must recognize a final judgment entered by the court of another state if that court had jurisdiction of the parties and the subject matter. *State v. Bush*, 102 Wn. App. 372, 382-83, 9 P.3d 219 (2000). As a result, the Full Faith and Credit Clause requires that Washington courts recognize the validity of a different state’s criminal convictions. *State v. Berry*, 141 Wn.2d 121, 127, 5 P.3d 658 (2000); *State v. Johnston*, 17 Wn. App. 486, 497, 564 P.2d 1159, *review denied*, 89 Wn.2d 1007 (1977).

With regard to the defendant’s argument that this Court is bound by the Ninth Circuit’s opinion, our high court in *In re Grisby*, 121 Wn.2d 419, 430, 853 P.2d 901 (1993), held that the Ninth Circuit’s constitutional holdings are not binding on our courts. *See also In re Benn*, 134 Wn.2d 868, 937, 952 P.2d 116 (1998) (Ninth Circuit’s constitutional holdings are not binding on Washington courts); *State v. Glasmann*, 183 Wn.2d 117, 124, 349 P.3d 829 (2015) (Ninth Circuit decisions are not binding on our high court); *State v. Hanna*, 123 Wn.2d 704, 718, 871 P.2d 135 (1994) (Johnson,

J., dissenting) (“[w]hile not binding on this court, the Ninth Circuit’s interpretation of federal constitutional law is persuasive authority); *Home Ins. Co. of New York v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943) ([w]hen a federal statute is construed by a United States Court of Appeals, such construction is entitled to great weight with us when the same statute is involved in a case we are considering, but it is not binding on us if we do not deem it logical or sound”). Indeed, this Court has discussed, regarding an arbitration claim, whether it is bound to follow Ninth Circuit decisions when interpreting federal law:

When the lower federal courts are divided on a federal question such as the interpretation of federal statutes and the United States Supreme Court has not resolved the conflict, state courts may decide the question for themselves. Decisions of the federal circuit courts are “entitled to great weight” but are not binding. A state court is not bound by rulings on federal statutory law made by a federal court other than the United States Supreme Court. Lower federal court decisions, however, are persuasive. In the absence of a United States Supreme Court decision, the weight we may give federal circuit and district court interpretations of federal law depends on factors such as uniformity of law and the soundness of the decisions. If the federal courts are split, we may elect to follow those decisions we believe to be better reasoned.

Schuster v. Prestige Senior Mgmt., L.L.C., 193 Wn. App. 616, 629-30, 376 P.3d 412 (2016) (citations omitted); *see also Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 725, 225 P.3d 266 (2009), *review denied*, 168 Wn.2d 1041 (2010) (“[w]e have greater latitude when analyzing

a decision of a federal appellate court, which is entitled to great weight but is not binding if we deem it illogical or unsound”).

Likewise, the “full faith and credit” and “collateral estoppel” claims have no application to a Washington court’s determination of whether prior offenses are constitutionally sound, notwithstanding that a federal appellate has determined a prior state conviction cannot be used in a federal sentencing, based upon a constitutional infirmity. Instructive are federal appeals court decisions which have held that “the principles that underlie the Full Faith and Credit Act are simply not implicated when a federal court endeavors to determine how a particular state criminal proceeding is to be treated, as a matter of federal law, for the purpose of sentencing the defendant for a distinct and unrelated federal crime.” *United States v. Fazande*, 487 F.3d 307, 308-09 (5th Cir. 2007) (per curiam). As stated by the Sixth Circuit when discussing the Full Faith and Credit Act:⁴

⁴ The federal Full Faith and Credit Act, 28 U.S.C. § 1738, implements the U.S. Constitution’s Full Faith and Credit Clause. The statute states:

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists,

A defendant's successful challenge to a prior conviction at a federal sentencing hearing involving a subsequent federal crime would result only in precluding the use of that conviction in determining the appropriate sentence for the crime at issue. *The state conviction is not invalidated. Any determination made by the sentencing court regarding the use of that prior conviction for sentencing purposes would have no preclusive effect on any other court that may in the future have reason to consider that conviction's validity in an unrelated proceeding.*

United States v. McGlocklin, 8 F.3d 1037, 1042 (6th Cir. 1993) (emphasis added), *overruled on other grounds*, *Custis v. United States*, 511 U.S. 485, 114 S.Ct. 1732, 128 L.Ed.2d 517 (1994); *see also United States v. Jakobetz*, 955 F.2d 786, 805 (2d Cir.), *cert. denied*, 506 U.S. 834 (1992) (“[w]hile defendants may always present the sentencing court with evidence that another court has ruled their prior convictions invalid and hence unsuitable for consideration as part of the criminal history score at sentencing, the court also retains discretion to determine whether a defendant may mount an initial challenge to the validity of such convictions”); *United States v. Guthrie*, 931 F.2d 564, 571 (9th Cir. 1991) (“[d]octrines such as Full Faith

together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

and Credit, ... and related jurisdictional principles, are inapplicable ... where the issue is the role of prior state convictions in a federal sentencing scheme”); *United States v. Jones*, 415 F.3d 256, 265 (2d Cir. 2005) (“[t]he principles of federalism and comity embodied in the full faith and credit statute are not endangered when a sentencing court, not questioning the propriety of the state’s determination in any way, interprets how to apply New York’s youthful offender adjudications to a Guidelines analysis”). Accordingly, this Court should reject the argument that the Full Faith and Credit Act prohibited the trial court from considering the defendant’s 2003 convictions for sentencing purposes.

Similarly, the concept of “collateral estoppel” has no application here because the State was not a party to prior federal sentencing or to the Ninth Circuit’s determination that the prior Spokane County convictions could not be used in the federal sentencing. The party asserting collateral estoppel bears the burden of proof and, in pertinent part, “the party against whom the plea of collateral estoppel is asserted must have been a party or in privity with a party to the prior litigation.” *State v. Williams*, 132 Wn.2d 248, 254, 937 P.2d 1052 (1997). The State was not a party to the 2014 federal sentencing.

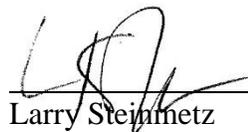
Importantly, in the present case, the Ninth Circuit did not invalidate the prior convictions. It only summarily determined that the prior convictions could not be used in the federal sentencing for a federal felon in a possession charge. The Full Faith and Credit Clause argument has no application to the present case and the defendant has not provided any authority to the contrary.

V. CONCLUSION

For the reasons stated herein, the State requests this Court affirm the judgment and sentence.

Dated this 27 day of June, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

MAXWELL DELVON JONES,

Appellant.

NO. 35456-3-III

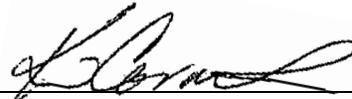
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on June 27, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Jennifer Stutzer
jennifer@stutzerlaw.com

6/27/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

June 27, 2018 - 10:03 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35456-3
Appellate Court Case Title: State of Washington v. Maxwell Delvon Jones
Superior Court Case Number: 13-1-01269-4

The following documents have been uploaded:

- 354563_Briefs_20180627100217D3197764_1514.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Jones Maxwell - 354563 - Resp Br - LDS.pdf

A copy of the uploaded files will be sent to:

- bobrien@spokanecounty.org
- jennifer@stutzerlaw.com
- jenstutzer@yahoo.com

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scpaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20180627100217D3197764