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Court of Appeals
Division III
State of Washington
9/12/2018 1:43 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36004-1-III

STATE OF WASHINGTON, Respondent,

v.

JULIAN CAMERON LESTER, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Police observed Julian Lester in the driver's seat of a car parked off the roadway on the shoulder, attempting to get it started. Lester was obviously impaired and admitted to consuming several alcoholic beverages while attempting to repair his vehicle. In his trial for being in physical control of a motor vehicle while under the influence, trial counsel inexplicably failed to pursue a viable legal defense that Lester was safely off the roadway. Trial counsel also failed to object to inadmissible hearsay testimony that Lester's companion intended to follow him home in another car, introduced for its truth and without a limiting instruction. Because there is no strategic justification for these deficiencies, Lester should receive a new trial.

Before trial, the court considered whether Lester's statements to police during the investigation and after his arrest were admissible in a CrR 3.5 hearing. Evidence taken at the hearing established that after Lester was arrested and advised of his rights at the police station, he invoked his right to counsel and spoke with an attorney by phone. Nevertheless, police thereafter proceeded to re-advise him of his *Miranda* rights, obtain a signed waiver, and interrogate him with questions set forth in a form DUI arrest questionnaire. The trial court held Lester's responses were admissible, and they were used against him at trial.

A jury convicted Lester of felony physical control of a motor vehicle. At sentencing, Lester challenged the inclusion of a theft conviction in his offender score because the prior conviction was constitutionally invalid on its face when the guilty plea statement failed to correctly apprise him of the essential elements of the charge. The score also incorrectly included one point for a prior deferred prosecution that Lester completed successfully, which does not constitute a “serious traffic offense” under RCW 9.94A.030(45). Accordingly, Lester’s score should have been a “6,” with a standard range term of 33-43 months. Because his sentence of 60 months exceeds the maximum term and the court made no finding of exigent circumstances justifying an exceptional sentence, resentencing is required.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Lester’s trial counsel was ineffective for failing to request an instruction on the “safely off the roadway” defense.

ASSIGNMENT OF ERROR NO. 2: Lester’s trial counsel was ineffective for failing to object to the admission of inadmissible hearsay and failing to request a limiting instruction.

ASSIGNMENT OF ERROR NO. 3: The trial court erred in admitting Lester's pretrial DUI interview statements made after he invoked his right to counsel.

ASSIGNMENT OF ERROR NO. 4: Lester's offender score is miscalculated.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether any strategic reason existed to decline to request a "safely off the roadway" instruction.

ISSUE NO. 2: Whether any strategic reason exists not to object to admission, as substantive evidence of the truth of the matter asserted, of prior statements introduced to impeach a witness.

ISSUE NO. 3: Whether a DUI arrestee who is informed of his *Miranda* rights and chooses to confer with an attorney has invoked his right to counsel.

ISSUE NO. 4: Whether statements made in a standard DUI arrest interview administered after the arrestee has invoked and conferred with counsel but without counsel's presence are admissible.

ISSUE NO. 5: Whether a prior conviction is constitutionally invalid on its face when the statement on plea of guilty omits an essential element of the charge.

ISSUE NO. 6: Whether a successfully completed deferred prosecution counts as a point in the offender score when a successful deferred prosecution is a “prior offense” under RCW 46.61.5055(xiv), and thus elevates the charge to a felony offense, but is not a “serious traffic offense” under RCW 9.94A.030(45) for purposes of calculating the offender score?

IV. STATEMENT OF THE CASE

On an evening in February, several law enforcement officers were driving toward Pullman when they saw a vehicle parked off the side of the road with another pulled in front facing it. RP 44-45. The car was about a foot away from the fog line on the shoulder, not in the lane of travel. RP 45, 49, 59. Julian Lester was in the driver’s seat, and the car was idling. RP 46. Another individual, Ryan Benson, was there with him. RP 47. Police immediately observed that Lester’s speech was slurred and he smelled of intoxicants. RP 47, 54, 74.

When asked what he was doing, Lester told the police that he was working on his van to try to get it started and had changed the battery. RP

47, 55. The car had just started when the officers came by. RP 48. One of the officers turned off the car during the contact and when he tried to restart it later, it clicked and would not restart. RP 49. Lester freely admitted that he had been drinking but denied that he had driven the car and told police he had intended to get it started so that a friend in town would be able to drive it away. RP 54-55, 57-58, 74.

Ryan Benson confirmed that he had driven Lester out to the van and to the automotive store to buy a battery for Lester to install. RP 63. He confirmed that it took a long time to get the van started, but it fired up right as the police were driving by. RP 64. Benson said that he waited for Lester to see if he would need a ride back, and they had not planned what to do with Lester's car because they didn't know if they would be able to get it started. RP 65. He told police he assumed he would follow Lester back to town once it was started. RP 66.

The police arrested Lester for physical control of a motor vehicle and took him to the jail. RP 81. After being advised of his *Miranda* rights, Lester requested an attorney and spoke with one. RP 22-23, CP 28. The officer then reinitiated the conversation by advising Lester of his *Miranda* rights again and then conducted a DUI interview. RP 23, 24. Lester submitted to a breath test, which resulted in readings of .133 and

.134 breath alcohol concentration. RP 133. A friend of Lester's later recovered his van and confirmed that it had a defective ignition switch that made it difficult to start. RP 142.

The State charged Lester with physical control of a motor vehicle with three or more prior offenses within 10 years, a felony offense. CP 6-7. Before trial, the court considered the admissibility of Lester's answers to the DUI interview, holding:

And he Mirandized him three times and – I find that his statements were – that you've offered were made voluntarily, freely and upon – And after – one time he talked to an attorney on the phone and he Mirandized him again, then he – made some more statements. So, the statements – will be admitted.

RP 35. It entered findings of fact and fact and conclusions of law in support of the ruling. CP 82.

During trial, when Benson testified that he and Lester had not made a plan past getting the van started, the State introduced his out of court statements to police to impeach him. As related by a law enforcement witness and shown on the officer's body camera footage introduced for that purpose, Benson told police at the scene that they had a specific plan for him to follow Lester back to town to make sure the van continued running. RP 68-70. Although the statements were hearsay and

inadmissible to prove the truth of the matter asserted, Lester's attorney did not object to their admission or request a limiting instruction requiring the jury to consider them only for impeachment of Benson's credibility and not as substantive evidence. Later, in its closing argument, the State argued that Benson's statements proved that Lester was in physical control of the van. RP 158, 165-66.

At trial, the defense called no witnesses and requested only definitional instructions. RP 144, CP 43-47. Despite the uncontroverted evidence that Lester's van was parked on the shoulder of the road throughout the contact with police, trial counsel did not request an instruction on the "safely off the roadway" defense established under RCW 46.61.504(2). The jury voted to convict, and in a bifurcated trial, found he had three prior convictions for DUI. RP 172, 204; CP 67-68.

At sentencing, the State contended Lester's offender score was "8" based on several prior convictions and a successfully completed deferred prosecution. CP 73. The deferred prosecution was not one of the predicate offenses used to establish the present charge as a felony. RP 183, CP 71. Over a defense objection, the completed deferred prosecution was included in the score. RP 218. Lester also objected to the inclusion of a prior theft conviction when the statement on plea of guilty did not

correctly set forth the elements of the offense. RP 215. The court accepted the score of “8” and sentenced Lester to the high end term of 60 months. CP 88, 89.

Lester now appeals and has been found indigent for that purpose. CP 98, 100.

V. ARGUMENT

A new trial is required. Lester failed to receive effective representation when his attorney inexplicably failed to pursue a viable defense to the charge and also failed to object to the admission of inadmissible, and damaging, substantive evidence. Moreover, his Fifth Amendment rights were violated when the court allowed the State to introduce statements he made in a DUI interview after invoking his right to an attorney. In the alternative, the case should be remanded for resentencing to correct the offender score.

- A. Lester’s counsel was ineffective for failing, without strategic justification, to pursue a “safely off the roadway” defense and oppose inadmissible hearsay.

A criminal defendant has the right to effective assistance of counsel. U.S. Const. Amend. VI; Wash. Const. art. I, § 22; *Strickland v.*

Washington, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). “To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense.” *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009), *reversed on other grounds*, 171 Wn.2d 17 (2011).

Where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel’s performance, such performance falls “below an objective standard of reasonableness” and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Although trial counsel’s performance is presumed to be effective, a defendant can rebut the presumption that performance was reasonable by demonstrating that there is no legitimate tactic or strategy justifying the performance. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009); *Reichenbach*, 153 Wn.2d at 130.

Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

1. Trial counsel was ineffective for failing to request a "safely off the roadway" defense instruction when the facts supported it.

It is an affirmative defense to the charge of physical control of a motor vehicle that the defendant, before being pursued by police, has moved the vehicle safely off the roadway. RCW 46.61.504(2); *City of Spokane v. Beck*, 130 Wn. App. 481, 486, 123 P.3d 854 (2005), review denied, 157 Wn.2d 1022 (2006); *State v. Votava*, 149 Wn.2d 178, 182, 66 P.3d 1050 (2003). The defense does not require proof that the defendant personally drove the vehicle, but only that it is off the roadway by his choice. See *Votava*, 149 Wn.2d at 184. "Once the person [in actual physical control of a vehicle] is safely off the roadway he is no longer posing a threat to the public." *Id.* at 185 (quoting *State v. Day*, 96 Wn.2d 646, 649 n. 4, 638 P.2d 546 (1981)). Whether the defendant is in the driver's seat or the vehicle is running does not preclude the defense. See *id.* at 181; *Beck*, 130 Wn. App. at 484.

Failing to request an instruction on a defense can constitute ineffective assistance of counsel. *See, e.g., State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) (conviction reversed for failure to request “reasonable belief” affirmative defense instruction); *In re Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) (conviction reversed for failure to investigate the statutes under which defendant is charged such that affirmative defense is overlooked). This burden is met when the trial court likely would have given the instruction if it had been requested. *See In re Cross*, 180 Wn.2d 664, 719, 327 P.3d 660 (2014). A defendant has a right to have the jury instructed on affirmative defenses if warranted by the evidence. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997).

Here, the undisputed evidence established that Lester’s van was off the roadway, parked on the shoulder about a foot off the fog line. *See* RCW 46.04.500 (“‘Roadway’ means that portion of a highway improved, designed, or ordinarily used for vehicular travel, **exclusive of the sidewalk or shoulder . . .**”) (emphasis added). It was not apparently obstructing traffic or presenting a hazard to passing traffic. Without question, these circumstances were sufficient to establish the “safely off the roadway” defense, and the instruction, if requested, should have been

given. No conceivable reason exists to forego an apparently viable defense and argument for acquittal.

Moreover, the error was prejudicial because a properly instructed jury should have acquitted under these facts. In *Beck*, independently considering the evidence presented, the Court of Appeals determined that insufficient evidence supported the conviction when no reasonable jury would have failed to find that the “safely off the roadway” defense had been proven. 130 Wn. App. at 483. There, the defendant was asleep in the driver’s seat inside a running car that was taking up two parking spaces in a convenience store parking lot. *Id.* at 484. The *Beck* court concluded that even viewed in the light most favorable to the city, the evidence was insufficient for a jury to conclude that the defendant was not safely off the roadway. *Id.*

In all material respects, the present case is indistinguishable from *Beck*. It was undisputed that Lester’s vehicle was entirely on the shoulder of the road, outside of the roadway by at least one foot. Under *Beck*, this evidence is insufficient to convict, and no reasonable jury could have failed to acquit.

Because the outcome likely would have been different had trial counsel proffered the “safely off the roadway” defense, the unreasonable

failure to do so was prejudicial. Lester's case should be dismissed for insufficient evidence, or at a minimum, remanded for a new trial.

2. Trial counsel was ineffective for failing to object to the admission of Benson's statements to police without requiring that they be limited to impeachment.

Benson's statements to police at the scene about whether Lester was going to drive the van after getting it started were hearsay, and presumptively inadmissible. ER 801(c) ("Hearsay" is a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted."); ER 802 ("Hearsay is not admissible except as provided by these rules, by other court rules, or by statute."). They were unsworn, and therefore do not fall within the non-hearsay exception established under ER 801(d)(1). Accordingly, they were inadmissible as substantive evidence. *State v. Sua*, 115 Wn. App. 29, 49, 60 P.3d 1234 (2003).

Furthermore, when prior inconsistent statements are offered for impeachment, they must cast doubt on the declarant's credibility without regard to the truth of the matters asserted. *State v. Allen S.*, 98 Wn. App. 452, 467, 989 P.2d 1222 (1999), *review denied*, 140 Wn.2d 1022 (2000). In recognition of the difficulty the jury may have in distinguishing

between impeachment and substantive evidence, counsel must request a limiting instruction when the evidence is admissible only for a limited purpose. *See State v. Hancock*, 109 Wn.2d 760, 766-67, 748 P.2d 611 (1988).

While failures to object that consist of strategy or trial tactics do not constitute deficient performance, when the court cannot discern a legitimate reason not to object to damaging and prejudicial evidence, deficient performance is shown. *Hendrickson*, 129 Wn.2d at 77-78. Failure to object is prejudicial when the trial court would have ruled the evidence inadmissible. *State v. McLean*, 178 Wn. App. 236, 248, 313 P.3d 1181 (2013).

Here, Benson's statement to police was not admissible as substantive evidence that Lester intended to drive the van away. At best, it was admissible only to evaluate the credibility of his trial testimony that he and Lester had not formed a specific plan in the event they were able to get the van started and he just assumed he would follow the van back into town. As such, an instruction that the jury could not consider the statement as proof that Lester had a plan to drive the van after getting it started, if requested, should have been given, and an objection to the use of the statement as substantive evidence should have been sustained.

Moreover, the error was prejudicial because the statement allowed the jury to infer that Lester had physical control of the van because he intended to drive it away. Indeed, the State repeatedly made this argument in closing. No reasonable strategic justification exists to fail to object and limit the State's use of damaging testimony to those purposes for which it could lawfully be admitted. Because the evidence would have been limited if requested, and because the evidence likely influenced the jury's verdict, a new trial is required.

B. The trial court erred in admitting Lester's DUI interview statements after he requested and spoke to an attorney.

Before initiating a custodial interrogation of a suspect, police must warn the suspect that he has the right to remain silent and the right to have an attorney present during questioning. *Miranda v. Arizona*, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).¹ If the accused requests counsel, the interrogation may not continue until an attorney is present. *Id.* at 474. This rule arises due to the "inherently compelling pressures which work to undermine the individual's will to resist and

¹ This right arises under both the Fifth Amendment to the U.S. Constitution and article I, § 9 of the Washington Constitution. *See State v. Radcliffe*, 164 Wn.2d 900, 905, 194 P.3d 250 (2008).

compel him to speak where he would not otherwise due so freely.” *Id.* at 467.

If, in the course of a custodial interrogation, a suspect requests counsel, the interrogation must cease until an attorney is present. *Edwards v. Arizona*, 451 U. S. 477, 101 S. Ct. 1880, 38 L.Ed.2d 378 (1981); *Miranda*, 384 U.S. at 474; *State v. Robtoy*, 98 Wn.2d 30, 35, 653 P.2d 284 (1982), *overruled on other grounds by Davis v. U.S.*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994). This rule prevents police “from badgering a defendant into waiving previously asserted *Miranda* rights.” *Davis*, 512 U.S. at 458 (*quoting Michigan v. Harvey*, 494 U.S. 344, 350, 110 S. Ct. 1176, 108 L. Ed. 2d 293 (1990)). Any subsequent waiver resulting from police-initiated conversation is presumed invalid. *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 115 L. Ed. 2d 158 (1991) (*citing Michigan v. Jackson*, 475 U.S. 625, 106 S. Ct. 1404, 89 L. Ed. 2d 631 (1986)).

Invocation of the right to counsel “requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.” *Davis*, 512 U.S. at 459 (*quoting McNeil*, 501 U.S. at 178). However, mere reference to an attorney does not require cessation of questioning; the request for counsel must be

unambiguous. *Davis*, 512 U.S. at 459. To meet this standard, the accused “must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Id.*

Unlike invocation of the right to silence, invocation of the right to counsel raises a presumption that he is unable to proceed without the assistance of an attorney. *Arizona v. Roberson*, 486 U.S. 675, 683, 108 S. Ct. 2093, 100 L. Ed. 2d 704 (1988). Thus, although police may allow time to pass, issue new warnings, and interrogate a suspect about an unrelated matter after the suspect has invoked his right to silence, the same rule does not apply to the invocation of counsel. *Id.* Once a suspect has invoked the right to have an attorney present, the interrogation must cease and any response to subsequent questioning, even following an advisement of rights, does not constitute a valid waiver of the Fifth Amendment right. *Edwards*, 451 U.S. at 484. Only if the suspect “initiates further communication, exchanges, or conversations with the police” may the interrogation resume. *Id.* at 484-85.

Statements admitted improperly after a valid invocation are reviewed for harmless error. *State v. Reuben*, 62 Wn. App. 620, 626, 814 P.2d 1177, *review denied*, 118 Wn.2d 1006 (1991) (*citing Arizona v.*

Fulminante, 499 U.S. 279, 292, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991)). Because Washington courts apply the “overwhelming untainted evidence” standard of harmless error, the court must evaluate only the untainted evidence to determine if it is so overwhelming it necessarily leads to a finding of guilty. *Reuben*, 62 Wn. App. at 627 (citing *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). This error is presumed to be prejudicial, and the State bears the burden of proving it harmless. *State v. Nysta*, 168 Wn. App. 30, 43, 275 P.3d 1162 (2012), *review denied*, 177 Wn.2d 1008 (2013). If there is any reasonable chance that the use of the evidence was necessary to reach a guilty verdict, the conviction will be reversed. *Id.*

Findings of fact entered after a CrR 3.5 hearing are reviewed for substantial evidence. *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). A trial court’s conclusions of law following a CrR 3.5 hearing are reviewed *de novo*. *State v. Pierce*, 169 Wn. App. 533, 544, 280 P.3d 1158, *review denied*, 175 Wn.2d 1025 (2012).

Here, the findings comport with the trial officer’s testimony that after advising Lester of his *Miranda* rights, Lester signed a waiver form but requested, and did, speak to an attorney, before the officer began the DUI arrest interview. CP 28, 82; RP 23. This was an unambiguous

invocation and exercise of the right to counsel. Under *Edwards*, the interrogation was required to cease.

Rather than “scrupulously honoring” Lester’s invocation of the right to counsel, the arresting officer proceeded to immediately re-issue *Miranda* warnings and conducted the DUI interview without an attorney present, where he obtained multiple incriminating statements from Lester about his physical condition, drinking and drug use, activities that day, and his belief that he would have been impaired had he tried to drive away. CP 26; RP 22-24. The statements were then used against Lester at trial. RP 82-84.

Because this process falls short of the requirements of *Edwards* to immediately terminate questioning unless the arrestee initiates further contact, the trial court erred in determining that the DUI interview responses were admissible. The ruling placed Lester’s admission of impairment squarely in front of the jury for consideration. The State cannot show there was no reasonable chance that the jury relied on Lester’s admission in reaching the verdict. Accordingly, the error requires reversal and remand for a new trial.

- C. Lester's offender score was miscalculated because the prior successful deferred prosecution is not a "serious traffic offense" and the theft adjudication is constitutionally invalid on its face.

The court of appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999). When a court imposes a sentence based on a miscalculated offender score, it acts without statutory authority. *In re Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Remand is required when the offender score has been miscalculated. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

1. The court erred in including one point for Lester's prior case adjudicated successfully as a deferred prosecution because it was not one of the predicate offenses that elevated Lester's conviction to a felony, and a successful deferred prosecution is not a "serious traffic offense" under the SRA.

The court accepted the State's contention that Lester's prior deferred prosecution, which resulted in dismissal of a DUI charge, counted as one point in his offender score. CP 73, 80 (identifying 2004 Whitman

County case no. C-7350 as subject to order deferring prosecution), 88 (including 2004 Whitman County case in criminal history). But the State did not rely upon the deferred prosecution as a predicate offense to elevate Lester's conviction to a felony. CP 71 (Trial exhibit list does not include Whitman County offense). And a completed deferred prosecution, while a "prior offense" for purposes of elevating the crime to a felony under RCW 46.61.5055(14)(xiv), is not a "serious traffic offense" under RCW 9.94A.030(45). Accordingly, it was error to include the deferred prosecution in Lester's offender score.

In scoring a felony DUI, two statutory provisions apply. RCW 9.94A.525(2)(e) provides that all predicate crimes for the offense are included in the offender score. But Lester's deferred prosecution was not proffered as a predicate offense elevating his charge to a felony; rather, the State relied upon other convictions in Lester's history. Accordingly, this section does not authorize the inclusion of the deferred prosecution in the offender score.

Alternatively, RCW 9.94A.525(11), which applies to all felony traffic convictions, calls for the inclusion of one point for each serious traffic offense committed as an adult. A "serious traffic offense" is defined under RCW 9.94A.030(45) as DUI, physical control, reckless

driving, or hit-and-run an attended vehicle, or equivalent convictions from other jurisdictions. But a successfully completed deferred prosecution is not a DUI conviction; it results in a dismissal of the charge. RCW 10.05.120(1).

Accordingly, neither applicable provisions of the SRA apply in this case to Lester's 2004 deferred prosecution. In its briefing to the trial court, the State argued that the deferred prosecution is a prior offense under *City of Kent v. Jenkins*, 99 Wn. App. 287, 992 P.2d 1045, review denied, 141 Wn.2d 1007 (2000). CP 76. But *Jenkins* does not support the State's position because it does not address the calculation of the offender score for felony DUI under the SRA. Rather, *Jenkins* holds that a successfully completed deferred prosecution is a "prior offense" under RCW 46.61.5055 and can therefore be used to impose enhanced punishment, up to and including elevating the charge to a felony depending upon the number of prior offenses. 99 Wn. App. at 290-91; RCW 46.61.5055(4). Thus, *Jenkins* stands for the proposition that a deferred prosecution can be used as a predicate offense to elevate the crime to a felony. But calculating the punishment resulting from the felony conviction is a function of the SRA, and the SRA does not provide for a deferred prosecution to be included in the score unless it was used as one of the predicate offenses. See RCW 46.61.5055(4) (a person who has

three or more prior offenses within ten years “shall be punished under chapter 9.94A. RCW”).

Accordingly, the prior deferred prosecution should not have been included in Lester’s offender score. Resentencing is required.

2. The court erred in scoring Lester’s prior adjudication for first degree theft when the conviction is constitutionally invalid on its face.

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 suffer from constitutional infirmity. *See Parke v. Raley*, 506 U.S. 20, 27, 113 S. Ct. 517, 121 L. Ed. 2d 391 (1992).

The State does not have an affirmative duty to demonstrate the constitutional validity of prior convictions before including them in an offender score calculation. *State v. Ammons*, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). However, a prior conviction that is constitutionally

invalid on its face may not be considered. *Id.* at 187-88; *State v. Blair*, ___ Wn.2d ___, 421 P.3d 937, 941 (2018).

A judgment and sentence is facially invalid when it evidences the invalidity without further elaboration. *Blair*, 421 P.3d at 942. Legal documents associated with the conviction may be considered in evaluating whether the judgment and sentence is facially invalid. *See In re Stoudmire*, 141 Wn.2d 342, 354, 5 P.3d 1240 (2000) (considering information setting forth charges and alleged dates of commission in determining that the charges were brought after the statute of limitations had expired, rendering the judgment and sentence facially invalid); *In re Thompson*, 141 Wn.2d 712, 719, 10 P.3d 380 (2000) (considering documents signed as part of plea agreement that showed the petitioner was charged with an offense that was not a crime until two years after the commission of the offense); *see also In re Coats*, 173 Wn.2d 123, 139-40, 267 P.3d 324 (2011) (describing cases in which Washington courts have looked beyond four corners of judgment and sentence and considered various related documents, including the charging document, in determining whether the judgment and sentence is facially invalid due to legal error).

Here, the theft conviction was constitutionally invalid on its face because the guilty plea statement facially demonstrates that Lester was misinformed of the elements of first degree theft, omitting the mental state element. Unlike prior challenges where the misadvisement was not apparent on the face of the guilty plea but required testimony from the defendant, here the invalidity is apparent on the face of the document. *See, e.g., State v. Bembry*, 46 Wn. App. 288, 290-91, 730 P.2d 115 (1986).

As a matter of due process, a defendant must be apprised of the nature of the offense, including the acts and state of mind constituting a crime, to enter a knowing, intelligent, and voluntary guilty plea. *State v. Osborne*, 102 Wn.2d 87, 92-93, 684 P.2d 683 (1984). Here, in a conviction for first degree theft, the elements were set forth as “possession of property with a value in excess of \$1,500; possession is without authority or permission.” RP 215; Ex. 20. But the elements of first degree theft are to wrongfully obtain or exert unauthorized control over another’s property valued at over \$1,500 with intent to deprive the owner of the property. RCW 9A.56.030; *State v. Shriner*, 101 Wn.2d 576, 579, 681 P.2d 237 (1984). Thus, the advisement of the elements failed to include the requisite mental state, as required under *Osborne*.

Consequently, the conviction is facially invalid for constitutional reasons – the guilty plea was not knowing, intelligent, and voluntary, and was inconsistent with requirements of due process. The conviction should not have been included in Lester’s offender score, and the case should be remanded for resentencing.

D. If Lester does not prevail on appeal, appellate costs should not be imposed.

Pursuant to this court’s General Court Order dated June 10, 2016 and RAP 14.2, appellate costs should not be imposed herein. Lester’s report as to continued indigency is filed contemporaneously with this brief. He was previously found indigent for appeal, and the presumption of indigency continues throughout. RAP 15.2(f). He has fully complied with the General Order and remains unable to pay, having no assets, income from public benefits that are not subject to attachment by creditors, and substantial debt. *See City of Richland v. Wakefield*, 186 Wn.2d 596, 607-09, 380 P.3d 459 (2016) (where a defendant’s only income is from Social Security benefits, a court order to pay costs may not be enforced.). A cost award is, therefore, inappropriate.

VI. CONCLUSION

For the foregoing reasons, Lester respectfully requests that the court REVERSE his conviction for felony physical control and REMAND the case for a new trial or for resentencing.

RESPECTFULLY SUBMITTED this 12 day of September,
2018.

A handwritten signature in blue ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE 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 12 day of September, 2018 in Walla Walla, Washington.



Andrea Burkhart

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September 12, 2018 - 1:43 PM

Transmittal Information

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Appellate Court Case Title: State of Washington v. Julian Cameron Lester
Superior Court Case Number: 18-1-00038-1

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