

NO. 77693-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DAN STOCKWELL,

Appellant.

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

The Honorable M. Karlynn Haberly, Judge

SUPPLEMENTAL BRIEF OF PETITIONER

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A. ISSUE PRESENTED IN SUPPLEMENTAL BRIEF

Where Petitioner's prior conviction for first degree statutory rape is not legally comparable to the present crime of first degree rape of a child, and factual comparability was not proven to a jury beyond a reasonable doubt, must the determination that Petitioner is a persistent offender and the sentence of life without the possibility of early release be reversed?

B. STATEMENT OF THE CASE¹

Dan Stockwell was convicted of first degree and attempted first degree child molestation committed against family or household members. CP 35-36; RCW 9A.44.083; RCW 9A.28.020(1). Following the convictions, the state urged the court to sentence Stockwell to life without parole under the "two strikes" provision of the Persistent Offender Accountability Act.² CP 77. It argued that Stockwell's 1986 conviction for first degree statutory rape, while not an offense enumerated in the two strikes provision, is comparable to a conviction for first degree rape of a child, which is listed in the statute. 6RP³ 664.

¹ Relevant portions of the Statement of the Case presented in the Petition for Review are restated here for ease of reference.

² RCW 9.94A.030(32)(b); RCW 9.94A.570.

³ The Verbatim Report of Proceedings is contained in six volumes, designated as follows: 1RP—3/17, 18, and 23/04; 2RP—3/26/04; 3RP—4/20, 21, and 22/04; 4RP—4/23/04; 5RP—4/29 and 30/04; 6RP—6/18/04.

The sentencing court determined that the definition of statutory rape was broader than the definition of rape of a child, because the latter offense requires proof that the victim was not married to the perpetrator, an element not included in statutory rape.⁴ 6RP 671. The court noted that the judgment and sentence from the prior conviction indicated that Stockwell was 35 years old at the time of the conviction. In addition, the probable cause affidavit alleged that the victim was eight years old and that she was the daughter of Stockwell's girlfriend. Based on this circumstantial evidence, the court found that Stockwell had not been married to the victim of his 1986 statutory rape conviction. 6RP 671.

Relying on that finding of fact, the court ruled that Stockwell's prior conviction is comparable to a conviction for first degree rape of a child. Thus, the conviction constitutes a strike under the two strikes provision of the persistent offender statute. 6RP 672. In accordance with its findings, the court imposed two sentences of life in prison without the possibility of early release. 6RP 676-77; CP 84.

On appeal Stockwell argued that the court's reliance on judicially determined facts to support imposition of a sentence beyond the standard range violated his Sixth Amendment right to a jury trial. Because his prior conviction was not legally comparable to a two strikes offense, and

⁴ Compare RCW 9A.44.073 with Former RCW 9A.44.070(1).

because the court's determination that it was factually comparable required the court to enter findings of fact which were neither admitted nor proved in convicting Stockwell of that offense, Stockwell's POAA sentences must be reversed. See Brief of Appellant, § C.1. Division Two affirmed, however, holding that Stockwell's 1986 statutory rape conviction was legally comparable to first degree rape of a child. State v. Stockwell, 129 Wn. App. 230, 235, 118 P.3d 395 (2005).

C. SUPPLEMENTAL ARGUMENT

STOCKWELL'S PRIOR CONVICTION IS NEITHER LEGALLY NOR FACTUALLY COMPARABLE TO A TWO STRIKES OFFENSE, AND HIS SENTENCE UNDER THE POAA MUST BE REVERSED.

The Persistent Offender Accountability Act requires the sentencing judge to impose a sentence of life without parole, regardless of the standard range based on the jury's verdict, if the defendant is found to be a persistent offender. RCW 9.94A.570. Under the "two strikes" provision of that statute, a persistent offender is an offender who has previously been convicted of one of a list of qualifying sex offenses.⁵ RCW

⁵ Under the "two strikes" provision of the POAA, a persistent offender is an offender who
(b) (i) Has been convicted of: (A) Rape in the first degree, rape of a child in the first degree, child molestation in the first degree, rape in the second degree, rape of a child in the second degree, or indecent liberties by forcible compulsion; (B) any of the following offenses with a finding of sexual motivation: Murder in the first degree, murder in the second degree, homicide by abuse, kidnapping in the first degree, kidnapping in the second degree, assault in the first degree, assault in the second degree, assault of a child in the

9.94A.030(32)(b)(i). Convictions for offenses which are comparable to the enumerated offenses also count as strikes. RCW 9.94A.030(32)(b)(ii).

Stockwell was convicted in 1986 of first degree statutory rape under Former RCW 9A.44.070(1). First degree statutory rape is not an enumerated two strikes offense. Both the trial court and the Court of Appeals determined, however, that Stockwell's prior conviction was comparable to first degree rape of a child, an offense listed in the two strikes statute. The sentencing court's determination was based on a factual finding it made after examining the probable cause affidavit, while the Court of Appeals determined that the offenses were legally comparable. The sentencing court imposed a POAA sentence, and the Court of Appeals affirmed.

This Court has established a two part test for determining whether prior offenses which are not enumerated in the two strikes statute are comparable to strike offenses. In re Personal Restraint of Lavery, 154 Wn.2d 249, 255, 111 P.3d 837 (2005) (citing State v. Morley, 134 Wn.2d

first degree, or burglary in the first degree; or (C) an attempt to commit any crime listed in this subsection (32)(b)(i); and

(ii) Has, before the commission of the offense under (b)(i) of this subsection, been convicted as an offender on at least one occasion, whether in this state or elsewhere, of an offense listed in (b)(i) of this subsection or any federal or out-of-state offense or offense under prior Washington law that is comparable to the offenses listed in (b)(i) of this subsection.

RCW 9.94A.030(32)(b).

588, 605-06, 952 P.2d 167 (1998)). Under the first prong of the test, the court must compare the elements of the crimes to determine if the offenses are legally comparable. *Id.* In cases where the elements of the prior offense are not substantially similar to a strike offense, or the prior statute prohibits a broader range of conduct, the court determines whether the offenses are factually comparable. *Id.* at 255-56. Under this second prong of the comparability test, the sentencing court may look at the facts underlying the prior conviction to determine if the defendant's conduct would have resulted in a conviction for the strike offense. *Id.* at 255. Because the defendant has a Sixth Amendment right to a jury determination of the facts necessary to increase punishment beyond the standard range, however, this factual examination is limited to facts admitted, stipulated to, or proven beyond a reasonable doubt. *Id.* at 258.

1. **Stockwell's prior conviction is not legally comparable to a two strikes offense.**

Stockwell was convicted under Former RCW 9A.44.070(1), which required proof that the defendant was over 13 years of age and engaged in sexual intercourse with another person who was less than 11 years old. The Court of Appeals held that this conviction was legally comparable to a conviction for first degree rape of a child. *Stockwell*, 129 Wn. App. at 235. Under RCW 9A.44.073, a person is guilty of first degree rape of a

child “when the person has sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim.”

An examination of the elements, as required under the first prong of the comparability test⁶, establishes that the rape of a child statute requires proof of non-marriage, while the statutory rape statute did not. In finding the offenses legally comparable, the Court of Appeals held that non-marriage is an implied element under former RCW 9A.44.070(1). Stockwell, 129 Wn. App. at 235(citing State v. Bailey, 52 Wn. App. 42, 47, 757 P.2d 541 (1988)).

Contrary to the Court of Appeals’ holding, this Court has specifically determined that first degree statutory rape contains different elements than first degree rape of a child. In re Personal Restraint of Thompson, 141 Wn.2d 712, 722, 10 P.3d 380 (2000). In Thompson, the petitioner pled guilty to one count of first degree rape of a child, committed between January 1985 and December 1986. The statute creating that offense was not enacted until 1988, however. 141 Wn.2d at 716; RCW 9A.44.073. The resulting Judgment and Sentence was therefore invalid on its face. 141 Wn.2d at 719.

⁶ See Morely, 134 Wn.2d at 605-06.

Even though the crime to which Thompson pled guilty was not in existence during the relevant time, the state argued that Thompson should nonetheless be held to the plea agreement because he stipulated to conduct which would have supported a conviction under the Former RCW 9A.44.070 (first degree statutory rape) as well as under RCW 9A.44.073 (first degree rape of a child). Id. at 721-22. This Court rejected that argument. It found that if Thompson were thought to be guilty of first degree statutory rape, then his plea was not knowing and voluntary, because he was not informed of the requisite elements of that offense.

One of the elements of first degree statutory rape is that the victim be less than 11 years old (former RCW 9A.44.070); for first degree rape of a child the victim must be less than 12 years old. Also, the earlier statute requires the perpetrator to be over 13 years of age, whereas the later statute says instead that the perpetrator must be at least 24 months older than the victim and not married to the victim. Former RCW 9A.44.070; RCW 9A.44.073.

Id. at 722. Thus, Thompson's plea to first degree rape of a child would not support holding Thompson responsible for first degree statutory rape because "he would not have been properly informed of the elements of that crime." Id.

Although this Court did not directly address whether non-marriage was an implied element of first degree statutory rape, it is clear from Thompson that the statutory elements are not substantially similar. The two offenses are not legally comparable, because the child rape statute

includes non-marriage as an element, while the statutory rape statute does not.

The Court of Appeals' conclusion that non-marriage is an implied element of first degree statutory rape is contrary to this Court's decision in Thompson and cannot stand. Moreover, the court's decision requires reversal because it disregards applicable rules of statutory construction.

When interpreting a criminal statute, a court must give it a literal and strict interpretation. The court assumes that the Legislature means exactly what it says and will not add language the Legislature has chosen not to include. State v. Delgado, 148 Wn.2d 723, 727, 63 P.3d 792 (2003). The Legislature did not include non-marriage as an element of first degree statutory rape. It is clear, however, that the Legislature was aware that non-marriage could be relevant in statutory rape cases, because it included that element when defining both second degree and third degree statutory rape. Former RCW 9A.44.080⁷; Former RCW 9A.44.090⁸; State v. Hodgson, 44 Wn. App. 592, 599-600, 722 P.2d 1336

⁷ Former RCW 9A.44.080 provided: "Statutory Rape in the second degree. (1) A person over sixteen years of age is guilty of statutory rape in the second degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is eleven years of age or older but less than fourteen years old."

⁸ Former RCW 9A.44.090 provided: "Statutory rape in the third degree. (1) A person over eighteen years of age is guilty of statutory rape in the third degree when such person engages in sexual intercourse with another person, not married to the perpetrator, who is fourteen years of age or older but less than sixteen years old."

(1986). Since the Legislature knew how to include non-marriage as an element when it intended to do so, the absence of that element from the first degree statutory rape statute is presumed intentional. See Delgado, 148 Wn.2d at 729 (noting that inclusion of comparability clause in three strikes provision indicated that omission of a similar clause from the former two strikes provision was intentional).

The elements of first degree statutory rape are not substantially similar to the elements of first degree rape of a child. Since the former statutory rape statute prohibited a broader range of conduct, Stockwell's conviction of that offense is not legally comparable to a conviction for first degree rape of a child. See Lavery, 154 Wn.2d at 256.

2. **Stockwell's prior conviction is not factually comparable to a two strikes offense.**

The Sixth Amendment guarantee to a jury trial includes the right to have any fact "which increases the penalty for a crime beyond the prescribed statutory maximum" submitted to a jury and proved beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000). The only exception to this rule is that "the fact of a prior conviction" does not require a jury determination. See Apprendi, 530 U.S. at 490; State v. Smith, 150 Wn.2d 135, 143, 75 P.3d 934 (2003).

Any determination as to whether a prior offense is factually comparable to a strike offense is limited by this constitutional right. The court may not, in a comparability analysis, rely on facts which were neither admitted, stipulated to, nor proven to a fact finder beyond a reasonable doubt. Lavery, 154 Wn.2d at 258. In fact, where the prior statute prohibits a broader range of conduct than the strike offense, examination of the record for factual comparability may not be possible, because there may have been no incentive for the accused to attempt to prove he did not commit the narrower offense. Thus, where the statutory elements of the prior conviction are broader than those under a similar strike offense, the prior conviction “cannot truly be said to be comparable.” Id. at 257-58.

In Lavery, this Court held that Lavery’s federal conviction for bank robbery was not properly counted as a strike under the POAA. Because the federal statute defined a general intent crime, it proscribed a broader range of conduct than the Washington statute defining second degree robbery, which requires the specific intent to steal. Thus, a person could be convicted of federal bank robbery without having been guilty of second degree robbery in Washington. Id. at 255-56.

The state admitted that the record did not establish the comparability of Lavery’s federal conviction but asked this Court to

remand so that the sentencing court could examine the underlying facts of that conviction and determine whether it was factually comparable to a strike offense. Id. at 257. This Court declined. After examining the holding in Apprendi, it noted that specific intent had been neither admitted by Lavery nor proved beyond a reasonable doubt in the federal conviction. Thus, Lavery's prior conviction was not factually comparable to second degree robbery in Washington and was not a strike under the POAA. Id. at 256-58.

As discussed above, Stockwell's prior conviction was not legally comparable to any offense listed in the two strikes statute. Although first degree statutory rape was closest to the enumerated offense of first degree rape of a child, it precluded a broader range of conduct because the rape of a child statute requires proof that the perpetrator was not married to the victim, while statutory rape did not. Former RCW 9A.44.070(1); RCW 9A.44.073.

Furthermore, the non-marriage element was neither admitted by Stockwell nor proved beyond a reasonable doubt at the time of Stockwell's prior conviction. The information alleged

That DANIEL J. STOCKWELL, in Pierce County, Washington, during the period between February 1, 1985 and March 31, 1985, did unlawfully and feloniously being over the age of 13 years, engage in sexual intercourse with Christina Sawyer, who was less

than 11 years old, contrary to RCW 9A.44.070, and against the peace and dignity of the State of Washington.

CP 62-63. The statement on plea of guilty indicates that Stockwell was pleading guilty to the offense as set forth in the information and further indicated that Stockwell admitted the following facts:

I, Daniel Stockwell, am over 13 years of age, and did have oral sex with Christina Sawyer under 11 years of age. This was in Pierce County in February and early March of 1985. I voluntarily revealed this to my group which [I] entered in February of 1986.

CP 69. These documents contain no admission or stipulation that Stockwell was not married to his victim. Therefore, the statutory rape conviction is not factually comparable to a conviction for first degree rape of a child, and it is not a strike under the POAA. See Lavery, 154 Wn.2d 258.

Stockwell's sentence of life without parole was predicated on the determination that his prior conviction for first degree statutory rape was comparable to the enumerated strike offense of first degree rape of a child. In order to conclude that the offenses were comparable, however, the sentencing court had to evaluate the allegations in the affidavit of probable cause and make an additional finding of fact regarding non-marriage, an element not included in the crime for which Stockwell was convicted. Reliance on this judicially determined fact to impose a sentence under the POAA violated Stockwell's Sixth Amendment right to a jury trial. See

Apprendi, 530 U.S. at 490. The resulting sentence of life without parole must be reversed.

D. CONCLUSION

Stockwell's prior conviction for first degree statutory rape is neither legally nor factually comparable to a conviction for first degree rape of a child. The trial court therefore erred in sentencing him as a persistent offender to life without parole. His sentence must be reversed and the case remanded for imposition of a sentence within the standard range.

DATED this 31st day of May, 2006.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America,
postage prepaid, properly stamped and addressed envelopes containing
copies of the Supplemental Brief of Petitioner in State v. Dan Stockwell,
Supreme Court No. 77693-8, directed to:

Randall Avery Sutton
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I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 31, 2006