

53214-6

53214-6

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NO. 53214-6-I

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

STATE OF WASHINGTON

Respondent

v.

GAYLON LEE THIEFAULT

Appellant.

2004 JUN 15 AM 10:37

COURT OF APPEALS
STATE OF WASHINGTON
FILED
JUN 15 2004

BRIEF OF RESPONDENT

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I. ISSUES

1. Did the trial court err when it found the defendant's prior convictions were facially valid?

3. Is the defendant precluded from arguing his constitutional rights were violated when the judge determined his prior criminal history under the law of the case doctrine where he has argued that issue in a prior appeal of his sentence and it has not been erroneously decided by the court?

2. Should the fact of prior convictions been determined by a jury?

II. STATEMENT OF THE CASE

The Defendant, Gaylon Theifault, was charged by amended information with Indecent Liberties, Count I, and Attempted Second Degree Rape, Count II. 3 RP ____ (Amended information, sub. 28). He was convicted of both counts by jury verdict. 3 RP ____ (Verdict Form Count 1, sub 50), 3 RP ____ (Verdict Form Count II, sub. 51). At sentencing the State asked the court to compare the elements of the defendant's prior out of state convictions for Attempted Robbery from Montana with the elements of Second Degree Robbery in Washington and a Federal Rape conviction with the elements of Second Degree Rape in Washington. The State asserted those

offenses were comparable, and therefore constituted two prior strikes resulting in the defendant's status as a persistent offender RP 21. Defense counsel concurred, stating "your honor, unfortunately I don't believe the court has any discretion about the sentence here." RP 24. The court determined the convictions related to the defendant. It then found the elements of the Attempted Robbery conviction and the Rape conviction were comparable to Second Degree Robbery and Second Degree Rape respectively. The court found the defendant was a persistent offender and sentenced the defendant to life in prison without the possibility of parole. RP 27-30, 1 CP 42.

The defendant appealed his conviction arguing convictions for both offenses violated double jeopardy. The Court of Appeals found the two convictions violated double jeopardy, reversed the conviction for Indecent Liberties and remanded for re-sentencing. The court further rejected the defendant's argument that his Fifth and Sixth Amendment rights were violated when he was found a persistent offender without proof beyond a reasonable doubt or by jury trial. See *State v. Thieffault*, no. 49028-1-I, unpublished opinion filed May 5, 2003.

At re-sentencing the defendant argued his Montana Attempted Robbery conviction and his Federal Rape conviction could not be used to determine he was a persistent offender because they were not facially valid. Defense counsel pointed out the Judgments in both the Montana and Federal convictions did not contain the defendant's signature. From that fact he argued there was no evidence he was present when he was sentenced. He further argued there was no evidence the defendant was represented by counsel. RP 38. The court reviewed the documents submitted by the State on the Montana Attempted Robbery charge, the Burglary charge, and the Federal Rape charge. The court noted the two Montana judgments contained the following language:

The defendant was arraigned on the 14th day of March, 1984, and advised of the nature of the charges against him, of the maximum sentence in the case of a plea or verdict of guilty, of his right to a jury trial, or his right to counsel, either retained by the defendant or appointed by the court if the defendant were indigent, of the time prescribed by the statute to enter a plea and his right to secure bail to release him from custody. The defendant was provided with a true copy of the information filed against him. The defendant was thereafter represented by Charles H. Recht, and on the 14th of March 1984, entered a plea a guilty to the above crimes.

RP 41-42.

The court also noted the face of the Federal rape conviction indicated the defendant was represented by counsel. RP 42. Based on the forgoing information the court determined the convictions for both the Attempted Robbery and the Rape charges were facially valid. The court then re-sentenced the defendant life imprisonment as a persistent offender. RP 43-45.

III. ARGUMENT

A. THE MONTANA AND FEDERAL CONVICTIONS WERE FACIALLY VALID.

At the time of sentencing the State must prove prior convictions by a preponderance of the evidence. State v. Payne, 117 Wn. App. 99, 105, 69 P.3d 889 (2003) review denied, 150 Wn.2d 1028, 82 P.3d 242 (2004). The State has no duty to prove the constitutional validity of a prior conviction. State v. Ammons, 105 Wn.2d 175, 187, 713 P.2d 719 (1986). A defendant's prior conviction may be considered when determining the defendant's sentence range unless it has previously been declared invalid or if it is invalid on its face. Ammons, 105 Wn.2d at 187-88. These rules apply when the court sentences the defendant as a persistent offender pursuant to RCW 9.94A.570. State v. Manussier, 129 Wn.2d 652, 921 P.2d 473 (1996) cert. denied, 520 U.S. 1201, 117 S.Ct. 1563, 137 L.Ed.2d 709 (1997).

A conviction is invalid on its face if it shows a constitutional infirmity without further elaboration. State v. Gimarelli, 105 Wn. App. 370, 375, 20 P.3d 430 (2001). “[F]or the conviction to be constitutionally invalid on its face, the conviction must affirmatively show that the defendant’s rights were violated.’ Gimarelli, 105 Wn. App. at 375.

When applying this standard the court will not go behind the conviction to determine whether it is valid on its face. For example, the court found a prior out of state conviction that was included in the defendant’s offender score was facially valid, even though it did not affirmatively show that the defendant was advised of all of his constitutional rights at the time he pled guilty in State v. Bembry, 46 Wn. App. 288, 291-92, 730 P.2d 115 (1986). The defendant’s testimony that he was not advised of those rights at the plea hearing on the prior conviction was irrelevant. Bembry, 46 Wn. App. at 291. Further, where it was alleged certain constitutional safeguards were not provided, but the plea form did not show those safeguards were not provided, the court found the conviction valid on its face. Ammons, 105 Wn.2d at 189.

Similarly, where the judgment and sentence informed the defendant he would be on community placement “for the period of

time provided by law”, the fact the defendant later testified that he was not informed he would be on community placement for two years did not render the conviction invalid. In re Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002).

The defendant argues the judgments in the two prior convictions used to establish his status as a persistent offender were invalid on their faces because they did not show that counsel was present or that the defendant waived the presence of counsel. Brief of Appellant at 14-15. The defendant’s argument ignores the facts and the logical conclusions to be drawn from them.

A judgment is the best evidence of a prior conviction. State v. Ford, 137 Wn.2d 472, 480, 937 P.2d 452 (1999). It is not the conviction itself, however. The conviction occurs when there is an adjudication of guilt and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty. RCW 9.94A.030. The information provided the court plainly shows the defendant was represented by counsel at the time he was convicted.

The Montana conviction states that on March 14, 1984 the defendant was advised of his rights, was thereafter represented by Charles H. Recht, and then the defendant pled guilty. 2 CP 62. The defendant later appeared and was sentenced. It is clear from this

language that his attorney, Mr. Recht, was there when the defendant pled guilty on March 14, 1984 as well as on April 5th, 1984 when he was sentenced “Thereafter” is defined as “from a specified time onward; from thereon.” American Heritage Dictionary of the English Language, 1335 (New College Edition, 1978). To represent someone means to “stand in his place; to speak or act with authority on behalf of such person; to supply his place; to act as his substitute or agent.” Black’s Law Dictionary, 1169 (5th ed 1979). Because an attorney cannot speak on behalf of his client if he is not present, the logical conclusion from the language of the judgment was that Mr. Recht, as the defendant’s attorney, was present and represented the defendant at the plea and sentencing on March 14 and April 4, 1984 respectively. Thus the judgment does affirmatively state the defendant was not only represented, but counsel was present at the plea and sentencing. The defendant’s argument that something more was required in order to establish that counsel was present and representing the defendant at his sentencing is not supported by the court’s decision in Ammons, which holds that such affirmative evidence is not required to determine the constitutional validity of the sentence.

Similarly, the argument that the federal conviction is invalid on its face because it did not state defense counsel was present when the defendant was sentenced does not provide support for the defendant's position that conviction should not have been used when determining his status as a persistent offender. First, the plea agreement indicates the defendant and his attorney Michael Nance, entered into the plea agreement. 2 CP 89-91. That document was signed by both the defendant and Mr. Nance on July 12, 1993. Three days later, on July 15, 1993, the defendant was sentenced. Mr. Nance was listed as the defendant's attorney on the Judgment. 2 CP 92. A common sense analysis of these facts is that Mr. Nance was there, representing the defendant at the plea and at sentencing.

Even if the standard of proof were different, and the State were required to prove the validity of the convictions beyond a reasonable doubt, as it did for prosecutions under the former habitual offender statute, the Montana and Federal judgments would pass muster. Where an attorney was listed as representing the defendant on either the judgment or on some other document related to the judgment introduced to prove the prior conviction, it has been held there is sufficient proof the defendant was

represented at all critical stages of the prosecution. For example, the file jacket listing counsel for the defendant was sufficient proof of representation even though the judgment did not list counsel in State v. Alexander, 10 Wn. App. 942, 946, 521 P.2d 57 (1974) and State v. Brezillac, 19 Wn. App. 11, 15-16, 573 P.2d 1343 (1978). The court came to the same conclusion where other records listing counsel were introduced in State v. Tribble, 26 Wn. App. 367, 374, 613 P.2d 173, review denied, 94 Wn.2d 1024 (1980). Certainly if the fact an attorney was listed as representing the defendants in Alexander, Brezillac, and Tribble was sufficient to prove beyond a reasonable doubt that the defendant was represented by counsel, the information on the face of the defendant's plea paperwork and judgments is sufficient to show the convictions are valid.

The defendant's prior convictions do not present the same facts as the cases the defendant relies upon to support his conclusion that the convictions are invalid for lack of legal representation. In one case the judgment and sentence made no mention of an attorney representing the defendant, nor did it indicate that the defendant waived an attorney. State v. Marsh, 47 Wn. App. 291, 292, 734 P.2d 545 (1987). In another case the judgment affirmatively stated the defendant was proceeding pro se,

and there was no further information that the defendant had waived his right to be represented by an attorney. Burgett v. Texas, 389 U.S. 109, 88 S.Ct. 258, 19 L.Ed.2d 319 (1967). Both the Montana and Federal convictions in question here clearly state the defendant was represented by counsel at the plea and sentencing, and neither indicate the defendant was pro se. Because Marsh and Burgett do not present the same facts as the convictions that the court considered here, they provide no basis on which to find the defendant's prior convictions were constitutionally invalid on their faces.

B. THE JUDGMENT FROM THE DEFENDANT'S REVOCATION OF THE SUSPENDED SENTENCE IMPOSED ON THE ROBBERY ORDER IS NOT RELEVANT

1. The Judgment Is Equivalent To A Sentence Modification Order And Does Not Represent A New Conviction That Would Count Toward The Defendant's Status As A Persistent Offender.

Finally, the defendant suggests that the probation revocation order in 1987 from the 1984 Montana conviction has some significance to the determination of his status as a persistent offender. He provides no analysis or authority as to why the probation hearing should have any part in the determination of his status as a persistent offender. A probation revocation order is not

a prior conviction. It is not relevant to the determination of the defendant's status as a persistent offender.

Only certain prior "convictions" are considered for purposes of determining persistent offender status. RCW 9.94A.030 (32). A "[c]onviction" means an adjudication of guilty pursuant to Titles 10 or 13 RCW and includes a verdict of guilty, a finding of guilty, and acceptance of a plea of guilty." RCW 9.94A.030. Under both the adult and juvenile sentencing schemes, the punishment imposed in the original judgment and sentence may be modified in case of a failure to comply with the terms of the original judgment and sentence. RCW 9.94A.634, RCW 13.40.200. It does not result in any new conviction. The defendant was already punished in 1984 when he was found guilty of Attempted Robbery and sentenced to a suspended sentence. The fact that his suspended sentence was later revoked does not mean he was later convicted of an eligible offense.

2. The Judgment Modifying The Defendant's Attempted Robbery Conviction Does Establish The Defendant Was Represented By Counsel.

Even if the probation revocation order did have some meaning to the issue presented here, it does indicate without further elaboration that the defendant was represented by counsel.

The face of the document states the defendant appeared on March 11, 1987 with counsel, Attorney George H. Corn, and admitted to the violations. This is sufficient proof the defendant was represented by counsel on the date that the court sentenced the defendant for the violation approximately one month later. See Alexander, supra, Brezillac, supra, and Tribble, supra.

C. WHETHER THE DEFENDANT WAS ENTITLED TO HAVE HIS PRIOR CONVICTIONS DETERMINED BY A JURY BEYOND A REASONABLE DOUBT IS AN ISSUE THAT IS PRECLUDED BY THE LAW OF THE CASE DOCTRINE.

In his first appeal the defendant argued that by finding he was a persistent offender without proof beyond a reasonable doubt or trial by jury, the trial court violated the Fifth and Sixth Amendments to the United States Constitution. The court rejected the argument. See *State v. Thiefault*, no. 49028-1-I, p. 8 n. 7. The law of the case doctrine prohibits this issue from being argued again.

Where there has been a determination of the applicable law in a prior appeal the law of the case doctrine generally would prevent again deciding the same legal issues in a subsequent appeal. State v. Clark, 143 Wn.2d 731, 745, 24 P.3d 1006, cert. denied, 534 U.S. 1000, 122 S.Ct. 475, 151 L.Ed.2d 389 (2001).

The exception to the rule applies when the holding of the prior appeal is clearly erroneous and the application of the doctrine would result in a manifest injustice. Clark, 143 Wn.2d at 754, Folsom v. Spokane, 111 Wn.2d 256,264, 759 P.2d 1196 (1988). This rule is codified in RAP 2.5(c)(2) that states “[t]he appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.”

In the defendant’s first appeal of his sentence on the same conviction the court relied on State v. Wheeler, 145 Wn.2d 116, 34 P.3d 799 (2001) to reject the defendant’s claim he was entitled to a jury trial determination of his prior convictions. Wheeler held the defendant was not entitled to have a jury determine beyond a reasonable doubt his prior convictions in a persistent offender proceeding. Wheeler 145 Wn.2d at 124. The Supreme Court subsequently reaffirmed that decision in State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). Because it is clear the Court of Appeals in the defendant’s first appeal did not erroneously apply the law, and the defendant has not given the court any new information or

argument that would distinguish this case from Wheeler or Smith, the law of the case doctrine precludes review of this issue.

D. JUDICIAL DETERMINATION OF THE DEFENDANT'S PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE SATISFIES DUE PROCESS.

1. There Is No Due Process Violation When A Judge Determines The Defendant's Criminal History By A Preponderance Of The Evidence.

The Supreme Court has ruled there is no due process violation when a judge determines the defendant's prior criminal history by a preponderance of the evidence. State v. Thorne, 129 Wn.2d 736, 782-83, 921 P.2d 514 (1996), State v. Rivers, 129 Wn.2d 697, 712, 921 P.2d 495 (1996), State v. Manussier, 129 Wn.2d 652, 682, 921 P.2d 495 (1996) cert. denied, 520 U.S. 1021, 117 S.Ct. 1563, 130 L.Ed.2d 709 (1997). The defendant's due process rights are not violated when the judge determines his prior convictions and the fact that the defendant is the one listed in those convictions by a preponderance of the evidence. Thorne, 129 Wn.2d at 782-83.

The defendant cites Ammons, supra for the assertion that the preponderance of the evidence standard meets constitutional requirements when a sentence is imposed within the statutory maximum, but that standard does not apply when the sentencing

enhancement results in a sentence which exceeds the statutory maximum available for the crime. Brief of Appellant at 21, n. 4. The defendant relies on a portion of the Ammons case that states “[w]e recognize that in some proceedings we have required that the State prove the existence of prior convictions beyond a reasonable doubt when a sentence beyond the statutory maximum or a mandatory additional sentence could be imposed.” Ammons, 105 Wn.2d at 185-86. With one exception the cases relied upon to support this proposition involve facts which enhance the culpability of the offense and not recidivism. This is a significant difference which the courts have made when determining whether a jury verdict is required to enhance the sentence for a particular crime. See section C. 2. infra. The one exception concerned the habitual offender statute. The Washington Supreme Court has distinguished the Persistent Offender Accountability Act (POAA) from the former habitual offender statute because it was part of the Sentencing Reform Act (SRA), and not a reenactment of the former habitual offender statute. Thorne, 129 Wn.2d 777-78. That portion of the Ammons decision went on to state the determination of prior convictions was most analogous to the former parole board’s determination of criminal activity in a parole revocation hearing

where the preponderance of the evidence standard was constitutionally sufficient. Ammons, 105 Wn.2d 186. Thus, under the SRA, prior criminal history is not required to be proved beyond a reasonable doubt to increase a defendant's sentence.

The Ammons decision did not address the circumstances under the POAA where a persistent offender could be sentenced to more than that statutory maximum of the offense if he were to be convicted of a class B felony that qualified as a most serious offense. Its reference to other cases in which the court required a jury to decide beyond a reasonable doubt facts specific to the case that enhanced the seriousness of the offense, and thereby the seriousness of the penalty, does not require the same procedure when a defendant's sentence is enhanced due to recidivism. Thorne, 129 Wn.2d 782-83.

2. The United States Supreme Courts Decisions In Apprendi And Ring Do Not Require That Prior Criminal History Be Determined By A Jury Beyond A Reasonable Doubt.

The defendant argues two United States Supreme Court cases decided after Thorne, Mannussier, and Rivers now dictate a different result. The defendant first relies on Apprendi v. New Jersey, 530 U.S. 446, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). Apprendi held "[o]ther than the fact of a prior conviction, any fact

that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 490. The decision in Apprendi does not require a jury to determine the defendant’s prior convictions beyond a reasonable doubt because the defendant’s prior convictions do not increase the penalty beyond the statutory maximum of attempted second degree rape, and because his prior convictions fall squarely within the exception outlined by the court.

Attempted second degree rape is a class A felony. RCW 9A.44.050, RCW 9A.28.020. The maximum penalty for a class A felony is life imprisonment. RCW 9A.20.021. The defendant was sentenced to life imprisonment. He was not sentenced beyond the maximum as authorized by law. Alternatively, predicating the defendant’s sentence on his prior criminal history fall squarely within the exception outlined in Apprendi. The court’s decision in Apprendi does not provide support for the defendant’s position.

The Washington State Supreme Court has addressed the application of Apprendi to Washington’s POAA in State v. Wheeler, supra. The court found that Apprendi does not dictate the result proffered by the defendant. The court stated, “[n]o court has yet extended Apprendi to hold that sentence enhancements based on

the fact of a prior conviction are unconstitutional. We therefore adhere to our previous holding that such enhancements do not pose a due process problem under the United States Constitution.” Wheeler, 145 Wn.2d at 123-24 (citation omitted). The court refused to overrule Thorne, Manussier, and Rivers. It held the POAA did not require a jury determination of prior convictions beyond a reasonable doubt. Wheeler, 145 Wn.2d at 124.

The defendant also relies upon Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). In Ring a jury convicted the defendant of felony murder. Arizona’s capital sentencing scheme called for a judge to determine whether one of a number of enumerated aggravating factors and mitigating factors existed prior to imposing a death sentence. The aggravating factors included prior criminal history as well as factors specific to the crime for which the defendant had been convicted. Afterwards the judge determined there were two statutory aggravating factors that justified a penalty of death; the defendant acted for pecuniary gain and he acted in a depraved manner. Ring, 536 U.S. at 594-95.¹ The United State Supreme Court, following

¹ The Arizona Supreme Court later overturned the depraved manner finding. Ring 536 U.S. at 596.

Apprendi, overturned the defendant's sentence because the one aggravating factor upheld by the Arizona Supreme Court was not determined by a jury. Ring 536 U.S. at 609.

The defendant here argues the Ring holding extended Apprendi to prior criminal history as well as facts specific to the charged crime. Brief of Appellant at 23. The Ring court limited its analysis to whether the specific aggravating factor found by the Arizona judge, i.e. whether the crime was committed for pecuniary gain, could be decided by a judge, or whether the Sixth Amendment required a jury to make that determination. Ring, 536 U.S. at 597. The defendant specifically did not challenge the court's previous ruling in Almendarez-Torres² that prior criminal history is not a factor that is required to be found by a jury. Ring, 536 U.S. at 598, n. 4. Because the issue in Ring did not encompass prior criminal history, the decision in that case does not affect whether a judge may constitutionally decide the existence of prior criminal history when imposing a penalty of life imprisonment under the POAA.

² Almendarez-Torres v. United States, 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)

The Washington Supreme Court has addressed the application of the Court's decision in Ring to the POAA in State v. Smith, 150 Wn.2d 135, 75 P.3d 934 (2003). The Smith court noted the Ring court did not overrule Almendarez-Torres, and did not address whether prior conviction was a fact that should be determined by a jury rather than a judge when increasing the maximum penalty for an offense. Smith, 150 Wn.2d at 142. Smith reaffirmed that the federal constitution did not require that prior convictions had to be proved to a jury beyond a reasonable doubt. Smith, 150 Wn.2d at 143.

3. The Washington State Constitution Does Not Require That Prior Convictions Must Be Determined By A Jury Beyond A Reasonable Doubt.

The defendant argues the State Constitution guarantees a defendant the right to have an information alleging grounds for a sentence enhancement and right to a jury determination beyond a reasonable doubt. Brief of appellant at 23-24. The defendant does not engage in a Gunwall analysis. State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). The failure to perform that analysis precludes review under the State Constitution. State v. Mierz, 127 Wn.2d 460, 473, 901 P.2d 286 (1995).

Instead of performing the requisite Gunwall analysis, the defendant relies on State v. Furth, 5 Wn.2d 1, 1045 P.2d 925 (1940). The Supreme Court has disapproved Furth to the extent it held the defendant had a state constitutional right to a jury trial in the determination of prior convictions in a habitual offender proceeding. Smith, 150 Wn.2d at 146.

The defense in Smith did conduct a Gunwall analysis on the issue presented by the defendant here. Smith held that the Washington constitution does not include a right to a jury determination of prior convictions at sentencing. Smith, 150 Wn.2d at 156. The trial court properly determined the defendant's prior criminal history.

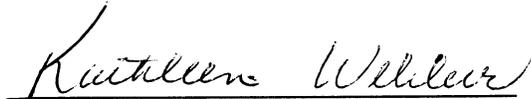
E. THE JUDGEMENT REFLECTS A SCRIVNER'S ERROR THAT CAN BE CORRECTED.

The State concedes the judgment and sentence reflect two scrivener's errors identified by the defendant. Accordingly the matter may be returned to the Superior Court for correction of those errors. State v. Moten, 95 Wn. App. 972, 976 P.2d 1286 (1999). The State by separate motion requests the Court grant the Superior Court authority to correct the judgment and sentence pursuant to RAP 7.2(b)and (e) and RAP 9.10.

IV. CONCLUSION

For the forgoing reasons the State requests the Court affirm the sentence imposed by the Trial Court. Further, the State requests the Court grant the Trial Court leave to correct the scrivener's errors regarding the name of the defendant's Montana conviction and the date of the defendant's Federal conviction.

Respectfully submitted on June 14, 2004.



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June 14, 2004

Richard D. Johnson, Court Administrator/Clerk
The Court of Appeals - Division I
One Union Square
600 University Street
Seattle, WA 98101-4170

Re: STATE OF WASHINGTON v. GAYLON L. THIEFAULT
COURT OF APPEALS NO. 53214-6-I

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

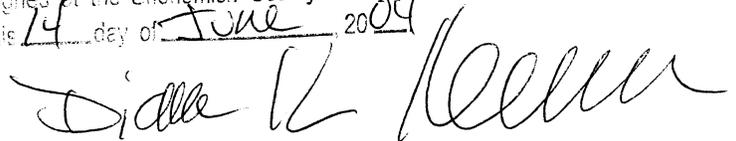


KATHLEEN WEBBER
Deputy Prosecuting Attorney

cc: Washington Appellate Project
Attorney(s) for Appellant

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2004 JUN 15 AM 10:37

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.
I certify under penalty of perjury under the laws of the State of Washington that this is true.
Signed at the Snohomish County Prosecutor's Office
this 14 day of June, 2004



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

THE STATE OF WASHINGTON,

Respondent,

v.

GAYLON L. THEIFALT,

Appellant.

No. 53214-6-I

AFFIDAVIT OF MAILING

2004 JUN 15 AM 10:37

COURT OF APPEALS
DIVISION I
SEATTLE, WA
FILED

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 14 day of June, 2004, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

WASHINGTON APPELLATE PROJECT
THE COBB BUILDING
1305 FOURTH AVENUE, SUITE 802
SEATTLE, WA 98101

THE COURT OF APPEALS - DIVISION I
ONE UNION SQUARE BUILDING
600 UNIVERSITY STREET
SEATTLE, WA 98101-4170

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 14 day of June, 2004.

A handwritten signature in cursive script, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH
Appellate Secretary