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24864-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

TUCERO A. KNIPPLING, RESPONDENT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

HONORABLE JEROME J. LEVEQUE

BRIEF OF APPELLANT

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I.

ASSIGNMENTS OF ERROR

(1) The trial court erred in excluding defendant's 1999 second degree robbery conviction from the offender score.

(2) The trial court erred in failing to sentence defendant as a persistent offender.

(3) The trial court erred in filing a "letter" on May 24, 2006.¹

(4) The trial court erred in entering findings in its May 24 letter, particularly the following:

On April 7, 1999, the State filed an amended information charging Mr. Knippling with one count of Second Degree Robbery, a crime not subject to automatic decline.

The Honorable James M. Murphy presided over Mr. Knippling's April 7, 1999 guilty plea in the adult court. Mr. Knippling's case was never remanded to the juvenile division of the Spokane County Superior Court for a declination hearing. Judge Murphy did not hold a declination hearing prior to entering the judgment and sentence in Mr. Knippling's case.

There is no evidence in the record that Mr. Knippling made a knowing, intelligent, and voluntary waiver of juvenile jurisdiction before entering his plea of guilty to Second Degree Robbery in the adult division of the Spokane County Superior Court on cause # 99-1-00305-6.

¹ A copy of the document, CP 117-118, is attached as Appendix A.

(5) The trial court erred in entering conclusions in its May 24 letter.

II.

ISSUES PRESENTED

(1) Is a judgment and sentence invalid on its face because it does not specify whether or not the Juvenile Court declined jurisdiction to Superior Court?

(2) Where a court finds a prior decision was entered by a court lacking jurisdiction, can the court ignore governing precedent and invalidate the decision without remanding for a declination hearing?

III.

STATEMENT OF THE CASE

Defendant/respondent Tucero Knippling was charged in the Spokane County Superior Court with ten felony counts primarily involving conspiracy, burglary and robbery. CP 1-3, 16-19. The charges arose out of two home invasions and an attempted home break-in incident. CP 4-14. The prosecution notified the defendant that it was seeking to sentence him as a persistent offender. CP 15. The matter was assigned to jury trial before the Honorable Jerome Leveque. CP 35.

The jury convicted the defendant on all but one count, including several “most serious” offenses. CP 20-31, 35. The prosecutor sought to sentence defendant as a persistent offender based on prior convictions for second degree robbery in 1999 and second degree assault in 2002. CP 42-74. Defendant contended that the robbery conviction was invalid on its face because he was 16 at the time and was never declined to adult court from juvenile court. CP 38-41, 75-78.

The parties argued their respective positions to Judge Leveque at sentencing. RP 1 *et seq.* The prosecutor contended that whether or not the matter was properly declined to adult court was not an issue that could be determined from the face of the judgment and sentence form. Defendant’s remedy, if true, was to seek to set aside the 1999 conviction in a separate proceeding. RP 15-17, 24. Defense counsel insisted that a decline ruling would have to appear in the judgment form. RP 19-24.

Judge Leveque indicated that he had reviewed the 1999 file and that there was no written order declining jurisdiction to adult court. RP 26. Calling it a “bitter pill,” he thus concluded that the judgment was invalid on its face for lack of jurisdiction. RP 26. Defendant was thus to be sentenced under the guidelines. RP 26-27. Decrying the defendant’s crimes as “cruel, unfeeling, and absolutely just hard to understand,” Judge

Leveque imposed concurrent standard range sentences. RP 38-40; CP 81-97.

The State promptly appealed the sentence to this court. CP 98-116. Defendant did not appeal or cross appeal from the convictions. Many months after this appeal was filed, Judge Leveque filed a letter that includes findings and conclusions related to the sentencing. CP 117-118.

IV.

ARGUMENT

A. THE TRIAL COURT IMPROPERLY ENTERED FINDINGS AND CONCLUSIONS IN ITS MAY 24 LETTER.

The initial matter concerns the trial court's belated effort to enter more findings and reasoning behind its ruling. The letter should be rejected as it was unnecessary, untimely, and relied upon the wrong source of information. Any findings are not supported by an appropriate record.

The initial problem is with the timing of this letter – filed four months after the appeal was taken. As has been noted in the context of late, but *required*, findings, the entry of findings well after an appeal has been taken looks bad because of the potential of tailoring the findings to affect the appeal. *E.g.*, State v. Head, 136 Wn.2d 619, 624-625,

964 P.2d 1187 (1998). If that appearance problem exists in cases in which the trial court must enter findings, how much worse is that problem in a situation, such as this case, where findings are not required by any court rule or case law? While undoubtedly a trial judge can enter findings on any issue on which he or she has ruled, entering gratuitous findings four months after an appeal has been taken is certainly questionable.

Another problem with the findings is the source of the information. The trial court apparently went through the 1999 court file to make its determination. This is a dubious action. *See State v. Mail*, 121 Wn.2d 707, 854 P.2d 1042 (1993) [questioning whether trial judge could review file of prior felony conviction]. It also is an incomplete action. The guilty plea hearing was never transcribed. Without reviewing that hearing, Judge Leveque had no basis for finding that “there is no evidence in the record” that defendant waived juvenile court jurisdiction. He may very well have done so in a colloquy before Judge Murphy. We simply do not know. That finding is clearly erroneous as it is based on an incomplete review of the “record.”

Finally, the findings are clearly erroneous because there was no indication that any juvenile court records were ever reviewed. A finding, after review, that no juvenile court record of any declination hearing existed would be a meaningful finding. A failure to look at the primary source

precludes any meaningful determination on this topic. One simply can not say that the juvenile court did not decline jurisdiction unless one first checks with the juvenile court. That was never done.

The letter's findings should be stricken and/or disregarded as they were untimely and based on an incomplete review of the record.

B. THE 1999 JUDGMENT AND SENTENCE FORM
IS NOT FACIALLY INVALID.

The issue in this case is whether a judgment form must affirmatively state its jurisdictional authority. There is no such requirement and cases involving analogous protections show that the trial court erred in finding the 1999 judgment invalid on its face. A silent judgment form is not an invalid one. Defendant's remedy is to file a separate proceeding attacking the 1999 judgment if he so desires.

The basic principle was decided in the first case construing the Sentencing Reform Act (SRA), State v. Ammons, 105 Wn.2d 175, 184, 713 P.2d 719, 718 P.2d 796, *cert. denied* 479 U.S. 930 (1986). The State does not have to show the constitutional validity of prior convictions used to establish the defendant's sentence. Rather, the only limitations are that a prior conviction which was previously determined to have been unconstitutionally obtained or which is constitutionally invalid **on its face** cannot be considered when determining the offender score of a defendant.

Id. at 187. The Ammons opinion went on to say that if a defendant wished to challenge the use of a prior conviction, he or she could either collaterally attack the conviction in the court where it was entered or file a personal restraint petition under RAP 16.3. Id. at 188.

The Court elaborated on its holding. Constitutionally invalid on its face means "a conviction which without further elaboration evidences infirmities of a constitutional magnitude." Id. This is a very narrow definition. An example comes from the case of appellant Garrett in Ammons. Garrett argued that his prior guilty plea convictions did not reflect that constitutional safeguards, including being told that he had the right to remain silent, were provided. Id. at 189. The court held his challenges could not be decided merely by looking at the guilty plea form and it rejected the claim that the prior conviction was invalid on its face. Id. Such is the case here – the judgment form is silent on the question of jurisdiction. That does not mean that the court lacked jurisdiction. Superior Court has jurisdiction over all felony crimes committed in the State of Washington. RCW 2.08.010. The fact that the juvenile division has exclusive jurisdiction on *most* crimes committed by minors is not dispositive since there are exceptions to that exclusivity, including cases can be transferred to the adult side via the declination process. RCW 13.04.030(1)(e); RCW 13.40.110.

The arguments presented by defendant in this appeal are "further elaborations." According to Ammons, further elaborations cannot be used to show that a prior conviction is constitutionally invalid on its face. The conviction in and of itself must show evidence of infirmities of a constitutional magnitude. Here, defendant's 1999 robbery conviction does not on its face evince constitutional problems. His challenge could only be brought in a collateral attack.

More recent case law confirms that narrow approach. In re PRP of Hemenway, 147 Wn.2d 529, 55 P.3d 615 (2002), involved a challenge to a guilty plea on the basis that the plea statement form did not advise the defendant of a mandatory two year term of community placement. The court rejected the challenge, finding that the judgment and sentence form did not reflect any infirmities. "The question is not, however, whether the plea documents are facially invalid, but whether the judgment and sentence is invalid on its face. The plea documents are relevant only where they may disclose invalidity in the judgment and sentence. Here, they do not." Id. at 533 (footnote omitted). A similar result was reached in In re PRP of Turay, 150 Wn.2d 71, 741 P.3d 1194 (2003). There the charging document in a sexually violent predator proceeding allegedly lacked a required element. The court found that the judgment was not invalid on its face due to an alleged defect in the charging document. Id. at

82. Related documents can only be considered if they show a deficiency in the face of the judgment form itself. Id. In other words, defects in collateral documents do not make a judgment invalid on its face. Those documents may explain an error in the judgment form, but error found in the collateral documents does not invalidate the judgment itself.

Similarly here, an absence of information in a judgment form does not affirmatively mean something was lacking. Review of the 1999 court file was itself a prohibited “further elaboration,” and an ineffectual one to boot since it was incomplete. The trial court erred in concluding, from a silent document, that the document was invalid on its face.

Only by looking at multiple records outside the judgment and sentence could a determination be made concerning whether or not the adult side had jurisdiction in the 1999 case. Even if a complete review had been conducted, it would have been unavailing. Proper review was limited to the face of the judgment form. That document does not show any defects. The trial court erred in finding the 1999 judgment invalid.

C. THE TRIAL COURT IMPOSED THE WRONG REMEDY.

Even if the trial court had correctly determined that the 1999 conviction was entered by a court lacking jurisdiction, its remedy of invalidating the conviction was erroneous. Even a court considering a collateral attack on the 1999 conviction could not do that. A court that was properly entertaining a collateral attack would have to remand for a declination hearing. The trial court erred here in invalidating the conviction.

The governing authority was a case considered by Judge Leveque at sentencing. In re PRP of Dalluge, 152 Wn.2d 772, 100 P.3d 279 (2004). There the defendant, a minor, had been charged in “adult” court with first degree rape. The charges were later amended to lesser offenses and defendant was convicted by a jury of third degree rape in adult court. There was no declination of juvenile court jurisdiction over the amended lesser charge. Id. at 776. Defendant subsequently brought a PRP claiming that the trial court lacked jurisdiction to hear the amended charge. A majority of the court agreed and found that the adult court should have remanded to the juvenile division for a declination hearing once the charge was amended. Id. at 785. The court then reviewed its prior decisions concerning remedy. The majority concluded:

We conclude that where the defendant has since turned 18, the appropriate remedy for a trial court's failure to remand to juvenile court is to remand for a de novo hearing on whether declination would have been appropriate. If declination would have been appropriate, then the conviction stands, but if not, the defendant is entitled to a new trial.

Id. at 786-787.

If the trial court had been hearing a collateral attack on the 1999 conviction, it could have ordered the remand for the declination hearing if it had found lack of jurisdiction. It had no authority to invalidate the conviction. Most certainly Judge Leveque in sentencing the current offenses had no authority to invalidate the 1999 conviction.

This is not some academic quibble over procedures. By failing to follow the Ammons directive to file a collateral attack, defendant obtained an undeserved windfall that even Judge Leveque found to be a "bitter pill" in light of defendant's past history and current ruthlessness. If this matter had gone to declination hearing it very likely would have resulted in declination given the plea agreement. The conviction would still stand and defendant would have received the persistent offender sentence he so well deserves. At the very least, the State deserved that opportunity in this action.

The trial court's remedy was incorrect. For that reason, too, this matter must be remanded for a new sentencing hearing.

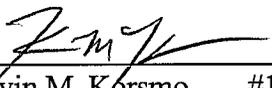
V.

CONCLUSION

For the reasons stated, the matter should be remanded for re-sentencing as a persistent offender. Alternatively, the sentencing could be stayed pending the outcome of any properly filed collateral attack.

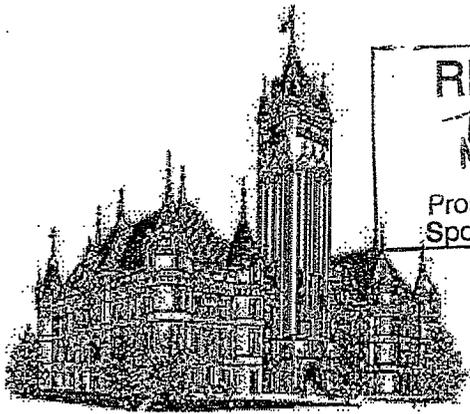
Respectfully submitted this 5 day of January, 2007.

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APPENDIX A



Superior Court of the State of Washington
for the County of Spokane

RECEIVED
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STATE OF WASHINGTON VS KNIPLING, TUCERO A.
No. 2005-01-01739-3

Dear Counsel:

On November 15, 2005, Tucero Knippling was found guilty in the present matter by jury verdict of several most serious offenses. Mr. Knippling was found guilty of two counts of Conspiracy to Commit First Degree Burglary; two counts of First Degree Burglary; and three counts of Second Degree Robbery.

A sentencing hearing was held on December 15, 2005. The State asked the Court to sentence Mr. Knippling to a life sentence without the possibility of release as a persistent offender.

The State's understanding of Mr. Knippling's criminal history indicated that he had a 1999 conviction for Second Degree Robbery and a 2002 conviction for Second Degree Assault.

Mr. Knippling was sixteen-years-old when he pled guilty in the adult division of Spokane County Superior Court to Second Degree Robbery on April 7, 1999, cause # 99-1-00305-6.

On February 22, 1999, the State filed the original information under cause #99-1-00305-6 in the adult division of the Spokane Superior Court charging Mr. Knippling with First Degree Robbery.

The charge of First Degree Robbery automatically subjected Mr. Knippling to the jurisdiction of the adult court under the automatic decline statute, RCW 13.04.030(1)(e)(v).

On April 7, 1999, the State filed an amended information charging Mr. Knippling with one count of Second Degree Robbery, a crime not subject to automatic decline.

The Honorable James M. Murphy presided over Mr. Knippling's April 7, 1999 guilty plea in the adult court. Mr. Knippling's case was never remanded to the juvenile division of the Spokane County Superior Court for a declination hearing. Judge Murphy did not hold a declination hearing prior to entering the judgment and sentence in Mr. Knippling's case.

There is no evidence in the record that Mr. Knippling made a knowing, intelligent, and voluntary waiver of juvenile jurisdiction before entering his plea of guilty to Second Degree Robbery in the adult division of the Spokane County Superior Court on cause # 99-1-00305-6.

As a result, the Court concludes the following:

Mr. Knippling's 1999 Second Degree Robbery conviction under Cause #99-1-00305-6 is invalid because the adult division of the Spokane County Superior Court lacked competent jurisdiction over the case. The adult court did not retain jurisdiction after the State amended the charge to an offense not subject to automatic decline. State v. Mora, 138 Wn.2d 43 (1999). Furthermore, the adult court did not remand the case to the juvenile court for a declination hearing and Mr. Knippling did not make a knowing, intelligent and voluntary waiver of juvenile court jurisdiction. Therefore, the adult court lacked competent jurisdiction over the case and Mr. Knippling's 1999 conviction for Second Degree Robbery under cause #99-1-00305-6 is invalid.

Mr. Knippling does not qualify as a "persistent offender" because his 1999 Second Degree Robbery conviction under cause #99-1-00305-6 is invalid. For purposes of sentencing in the present matter, Mr. Knippling has one prior conviction for a most serious offense, a 2002 Second Degree Assault conviction. Therefore, Mr. Knippling does not qualify as a "persistent offender" and the law does not authorize a life sentence without the possibility of release.

Mr. Knippling is not barred from challenging the validity of his 1999 Second Degree Robbery conviction for purposes of sentencing in the present matter. The 1999 Second Degree Robbery conviction is invalid on its face and was not rendered by a court of competent jurisdiction; therefore, Mr. Knippling's challenge does not constitute an impermissible collateral attack on a prior conviction.

Sincerely,



Jerome J. Leveque
Superior Court Judge

jjl/ksm